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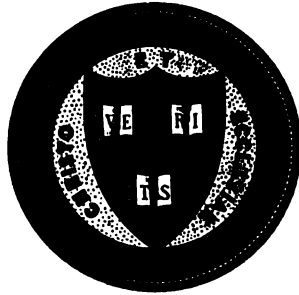
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CENTRAL REPORTER,

VOLUME IV.

July 14 ^c

ALL CASES DETERMINED

IN THE

COURTS OF LAST RESORT,

AS FOLLOWS:

NEW YORK, COURT OF APPEALS.

NEW JERSEY, SUPREME COURT, COURT OF ERRORS AND APPEALS,
COURT OF CHANCERY AND PREROGATIVE COURT.

PENNSYLVANIA, SUPREME COURT.

DELAWARE, SUPERIOR COURT, COURT OF ERRORS AND
APPEALS AND COURT OF CHANCERY.

MARYLAND, COURT OF APPEALS.

DISTRICT OF COLUMBIA, SUPREME COURT.

From September, 1885.

EDMUND H. SMITH,

EDITOR.

ROCHESTER. N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.

1886.

Entered according to Act of Congress, in the year eighteen hundred and eighty-six, by
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ERRATA.

CENTRAL REPORTER, VOLUME 4.

Page 190, right column, line 2 from bottom, strike out "and"; line 7 from bottom, for "Baker," read "Barker."

328, left column, line 21, strike out "v." after *ads.*

452, right column, line 5 from bottom, for "Bk. 24," read "Bk. 28."

491, right column, line 28 from bottom, after "95," insert "Pa."

558, right column, line 9 from bottom, for "us," read "no."

634, left column, line 4, for "1873," read "1872."

656, left column, line 12, for "to," read "by."

788, right column, for "John C. Freeman," read "John B. Green."

884, left column, line 28 from bottom, after "Harbour Board," insert "v. Penhallow."

If the reader will immediately make the above corrections with pen and ink, he will confer a favor. This slip may then be destroyed.

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REFERENCE TABLE

OF ALL CASES

DECIDED IN COURTS OF HIGHEST JURISDICTION

IN
N. Y., N. J., Pa., Del., Md., and D. C.,

SO FAR AS PUBLISHED IN OFFICIAL EDITIONS OF STATE REPORTS,

JANUARY 29, 1887.

BEING A CONTINUATION OF THAT ALREADY PUBLISHED IN VOL. 2, CENTRAL REPORTER.

Reported in CENTRAL REPORTER, Vols. 1-5.

NEW JERSEY REPORTS.			NEW JERSEY REPORTS.		
41 N. J. Eq.	Cent. Rep.		41 N. J. Eq.	Cent. Rep.	
PAGE		PAGE	PAGE		PAGE
511 Adams v. Mahoken, - - -	Vol. 3, 64	556 Dodd v. Wilkinson, Receiver, -	Vol. 5, 100		
512 Alexander, Exr. v. Baugh, Admr., -	Vol. 4, 835	541 Domestic Telegraph & Teleph.			
162 Allen v. Demarest, - - -	Vol. 3, 70	Co. v. Metropolitan Telephone			
147 Arnett, Exr. v. Pinney, - - -	437	& Telog. Co., - - -	Vol. 3, 496		
392 Babblitt v. Day, - - -	Vol. 4, 66	556 Doughtien v. Camden Bldg. &			
656 Barker, Admr. v. Richardson, -	Vol. 3, 692	Loan Assn. (2 cases), - - -	Vol. 3, 827		
169 Barrett v. Barrett, - - -	465	45 Drost v. Corle, Exr., - - -	Vol. 3, 862		
563 Beatty v. Cory Universalist So-		89 Eldridge, Exr. v. Eldridge, - -	344		
cietv, - - -	Vol. 4, 831	93 Endicott v. Endicott, - - -	Vol. 4, 571		
412 Bockett, Exr. v. Zane, - - -	54	470 England's Exrs. v. Beatty Organ			
18 Bergen v. Littell, - - -	Vol. 3, 78	Co., - - -	Vol. 3, 494		
228 Bergen, Tr. v. Porpoise Fishing		189 Essex Chosen Freeholders v.			
Co., - - -	461	Lindeley, - - -	359		
434 Bergholt v. Rockman, - - -	404	16 Fisher v. Fisher, - - -	Vol. 4, 861		
198 Round Brook Nat. F. Ins. Assn.		47 Frost v. Denman, - - -	Vol. 3, 879		
v. Nelson, - - -	Vol. 4, 137	460 Fuller v. Fuller, - - -	Vol. 4, 88		
764 Brokaw, Exr. v. Brokaw, - - -	847	198 Fuller v. Fuller, - - -	Vol. 3, 357		
315 Brokaw v. Exrs. of Brokaw, -	Vol. 3, 365	100 Halstead v. Westervelt, - - -	466		
260 Brueri v. Gallick, - - -	Vol. 4, 862	663 Hand v. Mayor, etc., of Jersey			
545 Buckingham v. Ludlum, - - -	829	City, - - -	Vol. 4, 823		
45 Chamberlain v. Elizabeth Cord-		680 Hayes v. Parker, - - -	Vol. 5, 109		
age Co., - - -	879	592 Heckscher v. Trotter, - - -	330		
651 Chamberlain v. Manning, - - -	821	575 Hendrickson v. Hendrickson, -	Vol. 3, 479		
369 Chancellor v. Traphagen, - - -	Vol. 3, 189	515 Hicks v. Willis, Exrs., - - -	Vol. 4, 834		
498 Chapin v. Wright, - - -	Vol. 4, 59	276 Hill v. Bloom, - - -	Vol. 4, 845		
74 Childs v. Jones, - - -	Vol. 3, 354	57 Horton v. Handvil, - - -	Vol. 3, 98		
382 Chosen Freeholders of Hunter-		297 Hutton's Exrs. v. Hutton, - -	Vol. 3, 216		
don Co. v. Henry, - - -	696	29 Importers & Traders Bank v.			
498 Cleine v. Englebrecht, - - -	Vol. 4, 69	Littell, - - -	Vol. 4, 868		
20 Conklin v. Peoples Bldg. &		348 Inhabs. of North Plainfield v.			
Loan Assn., - - -	Vol. 4, 74	Colthair, - - -	818		
152 Cook v. Chapman, - - -	Vol. 3, 198	284 In Matter of Will of Dietz, - -	837		
69 Cook v. McCall, - - -	Vol. 3, 347	400 In Matter of Perrine, - - -	62		
432 Cozadall v. Grow, - - -	506	422 Kentner v. Kline, - - -	Vol. 3, 400		
63 Demarest v. Vandenberg, - - -	99	273 King v. Rockhill, - - -	Vol. 4, 836		
419 Dey v. Hattaway Printing Tele-		689 Kirkpatrick, Receiver v. McEl-			
graph & Telephone Co., - - -	495	roy, - - -	Vol. 3, 67		
336 Dirigo Tool Co. v. Woodruff, -	Vol. 4, 100	432 Krueger v. Ferry, - - -	Vol. 4, 837		

NEW JERSEY REPORTS.		NEW JERSEY REPORTS.	
41 N. J. Eq.	Cent. Rep.	41 N. J. Eq.	Cent. Rep.
PAGE	PAGE	PAGE	PAGE
664 Landis v. Burk, - - - - -	Vol. 5, 70	407 United R. R. & Canal Cos. v.	
110 Landis v. Landis, - - - - -	Vol. 3, 80	Long Dock Co., - - - - -	Vol. 4, 56
40 Langstroth v. Golding, Exr., -	104	648 Vail v. Jameson, - - - - -	523
464 Leeds v. Gifford, - - - - -	Vol. 4, 148	653 Van Blarcom v. Tuttle's Exrs.,	Vol. 5, 328
167 Lehigh Coal & Nav. Co. v. Cent.		811 Van Deyne v. Shann, - - - - -	118
R. R. Co., of N. J., - - - - -	Vol. 3, 95	55 Van Houten v. Post, - - - - -	Vol. 3, 108
21 Lennig v. Ocean City Asso., -	68	602 Van Winkle v. Armstrong, -	Vol. 4, 53
606 Lennig v. Ocean City Asso., -	Vol. 4, 503	414 Ward, Exr. v. Dodd, - - - - -	96
381 Lénneau v. Summersfield, -	Vol. 3, 505	202 Weigand v. Weigand, - - - - -	Vol. 3, 302
329 Lyon, Exr. v. Rector, etc.,		635 Wilkinson v. Banerle, - - - - -	Vol. 5, 119
Church of Redeemer, - - - - -	478	107 Williams, Receiver, v. Reddy,	Vol. 3, 675
447 McConnell v. Am. Brass Pow-		224 Woodward v. Woodward, -	308
der Mfg. Co., - - - - -	Vol. 4, 73	104 Woolley v. Pemberton, - -	Vol. 3, 89
340 Merzbach v. Combuck, - - -	Vol. 5, 60	382 Wright v. Wright, - - - - -	Vol. 3, 471
1 Mills v. Central R. R. Co. of			
N. J., - - - - -	Vol. 3, 265	47 N. J. Law.	Cent. Rep.
115 Moulighoff v. Sayre, - - - -	Vol. 3, 475	PAGE	PAGE
612 Moore v. Hament, - - - - -	Vol. 4, 511	540 Oadbro v. Fagun, - - - - -	Vol. 4, 820
654 Morehead v. Metrop. Nat. Bank		365 Carey v. Mayor, etc. of Palat-	
of N. Y., - - - - -	Vol. 5, 98	son, - - - - -	Vol. 3, 484
235 Morgan's Exr. v. Morgan's Trus-		500 Clark v. State, - - - - -	Vol. 4, 800
tees, - - - - -	Vol. 4, 904	401 Cotton v. Inhabs. of Twp. of	
211 Mount, Admr. v. Pres. com.,		New Providence, - - - - -	Vol. 2, 444
Manhattan Co., - - - - -	Vol. 3, 352	548 Delaware, L. & W. R. R. Co.	
142 Mutual Life Ins. Co. of N. Y.,		v. Walsh, - - - - -	Vol. 3, 627
v. Cokerfair, - - - - -	458	457 Fifth Ward Savings Bank v.	
88 Naar v. Naar, - - - - -	60	First Nat. Bank, - - - - -	Vol. 1, 408
531 National Bank of Republic v.		493 Fox v. Cronan, - - - - -	Vol. 2, 505
Young, Receiver, - - - - -	Vol. 5, 115	518 Hibernia Underground R. R.	
14 Naundorf, Admr. v. Schau-		Co. v. DeCamp, - - - - -	Vol. 3, 127
mann, - - - - -	Vol. 3, 70	359 Howell v. McDowell, - - - -	Vol. 1, 190
92 Nichols v. Osborn, - - - - -	460	388 Inhabs. of Twp. of Woodbridge	
102 Nixon v. Walter, - - - - -	Vol. 4, 375	v. Hall, - - - - -	448
350 Oakley v. Cook, - - - - -	Vol. 3, 45	363 Lane v. State, - - - - -	195
349 Pemberton v. Pemberton, -	53	418 Lowe v. Wartman, - - - - -	487
816 Pennsylvania R. R. Co. v. Angel,	60	414 Matthews v. Miller, - - - - -	459
519 Phila. & H. R. R. Co. v. Little,		623 Miller v. Hillsborough Mut. As-	
Receiver, - - - - -	57	surance Asso., - - - - -	446
Keim v. Little, Receiver, - - -		849 O'Brien v. Frasier, - - - -	191
663 Porter v. Oaman, - - - - -	51	560 Orange & N. Horse R. R. Co.	
93 Post v. Van Houten, Exr., -	Vol. 3, 215	v. Ward, - - - - -	Vol. 4, 825
417 Pullen v. Pullen, - - - - -	Vol. 4, 73	457 Patterson v. Lippincott, -	Vol. 1, 429
35 Roake v. Am. Telephone &		476 Potts v. Point Pleasant Land	
Telegraph Co., - - - - -	Vol. 3, 73	Co., - - - - -	451
611 Rudderow v. Dudley, - - - -	Vol. 5, 130	428 Seyfert v. Edison, - - - - -	464
382 Kyle v. Kyle, - - - - -	77	473 State, All. City Water Works	
398 Sailer v. Sailer, - - - - -	Vol. 3, 686	Co. v. Smith, Coll., - - - - -	462
190 Schulling v. Schulling, - - -	160	460 State, Decker, Pros. v. Freder-	
115 Schott v. Missionary Society,	370	icks, - - - - -	460
473 Smith v. Hunterdon Co. Mut.		486 State, Dodge, Pros. v. Love,	
F. Ins. Co., - - - - -	492	Coll. Jersey City, - - - - -	485
405 Snyder v. Seeman, - - - - -	Vol. 4, 54	405 State, Edgar, Pros. v. Anness,	453
439 South Branch R. R. Co. v.		479 State, Fitzgerald v. Mayor, etc.	
Parker, - - - - -	63	of New Brunswick, - - - - -	457
437 Spinning v. Spinning, - - - -	55	454 State, Humes, Pros. v. Chosen	
370 Stoy v. Stoy, - - - - -	Vol. 5, 70	Freeholders Camden Co., - - -	430
299 Sullivan v. Horner, Admr., -	Vol. 4, 842	434 State, Howell, Pros. v. Richards,	
231 Swayze's Exr. v. Carter, - -	Vol. 3, 92	Recr. of Taxes, - - - - -	438
347 Taxpayers Protective Asso. v.		440 State, Keenny, Pros. v. Mayor	
Kirkpatrick, - - - - -	Vol. 5, 125	etc. of Jersey City, - - - - -	455
345 Thornton v. Ogden, - - - - -	365	490 State, Semon, Pros. v. Inhabs.	
39 Tichenor, Exr. v. Tichenor, -	Vol. 3, 71	of Trenton, - - - - -	Vol. 4, 80
478 Trotter v. Heckscher, - - - -	677	442 State, Van Giesen, Pros. v.	
229 Trotter v. Lehigh Zinc & Iron		Inhabs. of Bloomfield, - - -	Vol. 1, 442
Co., - - - - -	Vol. 2, 737	401 State, Wood, Pros. v. State of	
565 Trustees Cory Univ. Soc. v.		New Jersey, - - - - -	441
Beatty, - - - - -	Vol. 4, 532		

NEW JERSEY REPORTS.

47 N. J. Law. Cent. Rep.

PAGE	PAGE
429 State, ex rel. Hamford & Hol-	102
Hushead, - - - - -	699
254 State, ex rel. Humsted & Govers., -	694
417 State, ex rel. Dugan & Farrier, -	684
Ymca's Ocean Co., - - - - -	463
391 Wolter & McCormick, - - - - -	189
409 Wild & Mayor, etc. of Paterson, -	

48 N. J. Law. Cent. Rep.

PAGE	PAGE
80 Allen & Wyckoff, - - - - -	Vol. 3, 214
14 Ayres & Pennsylvania R.R. Co., -	Vol. 3, 842
111 Berry & Pennsylvania R.R. Co., -	Vol. 3, 111
22 Blackman & Heilly, - - - - -	Vol. 2, 232
27 O'Gorman & Pollens, - - - - -	254
281 Downer & Todd, - - - - -	Vol. 5, 61
32 Cox & Farmers Mut. Fire As-	Vol. 2, 710
surance Assn., - - - - -	
273 Dewyer & New York, L. E. &	Vol. 5, 70
W. R. R. Co., - - - - -	
121 Edmondson & Mayor, etc. of	Vol. 2, 718
Jersey City, - - - - -	
472 Essex Pub. Road Board & State,	Vol. 4, 823
Speer, - - - - -	
50 Exrs. of Horer & Horer, - - - - -	Vol. 3, 707
27 Freeman & Sayre, - - - - -	268
78 Exr. & Willett, - - - - -	267
22 Kalish & Clark, - - - - -	229
112 Madanty & Carter, - - - - -	708
24 Powe & State, - - - - -	230
228 Read & Riddle, - - - - -	Vol. 4, 819
228 Ringbushville Delaware Bdg. Co.,	829
& Bloom, - - - - -	
110 Somerville & Stewart, - - - - -	Vol. 2, 711
84 Symes & Whittum, - - - - -	215
866 State, Aldridge & Essex Pub.	Vol. 4, 880
Road Board, - - - - -	
Smith, Andrews & Essex Pub.	Vol. 4, 880
Road Board, - - - - -	
118 State, Austin & City Coun. of	Vol. 2, 700
Atlantic City, - - - - -	
140 State Board of Assessors &	Vol. 4, 420
Central R. R. Co. of N. J., -	
& State Board of Assessors, -	Vol. 2, 716
223 State, Conover & Davis, Coll., -	260
363 State, Craig & Mackey, - - - - -	Vol. 5, 66
371 State, Duffy & Britton, - - - - -	97
116 State, Hornby & Com. Comm.	Vol. 3, 102
of Beverly, - - - - -	
80 State, Jackson & City of Cam-	258
den, - - - - -	
161 State, Jailiff & Mayor, etc. of	234
Newark, - - - - -	
372 State, King & Durfee (2 cases), -	Vol. 5, 96
376 State, King & Reid, - - - - -	92
State, McAndrew & Reid, -	
State, Latta & Mayor, etc. of	Vol. 3, 484
Hoboken, - - - - -	
270 State, Little & Bowers, Con-	Vol. 5, 71
troller, - - - - -	
40 State, Parkhurst & Vanderveer, -	Vol. 2, 238
183 State, Sanford & Township	Vol. 3, 688
of Kearny, - - - - -	

N. J. VOL. 1-5.

NEW JERSEY REPORTS.

48 N. J. Law. Cent. Rep.

PAGE	PAGE
20 State, Saunders & Morris, -	Vol. 2, 323
25 State, ex rel. Adams & Haines, -	Vol. 2, 333
35 State, ex rel. Atwater & D., L.	Vol. 2, 736
& W. R. R. Co., - - - - -	
70 State, ex rel. Knight & Chosen	Vol. 3, 869
Freeholders of Ocean Co., -	Vol. 2, 212
57 State, ex rel. Morton & Timken, -	230
95 State, ex rel. Ross & Winsor, -	Vol. 2, 425
67 Stiles & Vandewater, - - - - -	Vol. 3, 78
129 Wild & Davenport, - - - - -	42
950 Yost & State, Burns, - - - - -	

PENNSYLVANIA REPORTS.

113 Pa. Cent. Rep.

PAGE	PAGE
449 Adam's Appeal, - - - - -	Vol. 5, 135
281 Airy Street, In re, - - - - -	Vol. 3, 303
449 Appeal of Adams, - - - - -	Vol. 3, 165
58 Appeal of Baum, - - - - -	Vol. 3, 611
428 Appeal of Corson, Exr., - - - - -	Vol. 4, 297
510 Appeal of Duff, - - - - -	Vol. 3, 187
11 Appeal of Finney, - - - - -	Vol. 2, 594
380 Appeal of Hayes, - - - - -	Vol. 4, 457
119 Appeal of Kelsey, - - - - -	99
46 Appeal of Killpatrick, - - - - -	Vol. 2, 304
621 Appeal of Kroos & Wright, -	Vol. 5, 295
32 Appeal of Lutheran Congrega-	Vol. 3, 269
tion, - - - - -	
601 Appeal of Manderson, - - - - -	Vol. 5, 214
347 Appeal of McCulloch, - - - - -	Vol. 4, 468
103 Appeal of McDavitt, - - - - -	23
459 Appeal of Miller, - - - - -	Vol. 3, 237
29 Appeal of Rasek, - - - - -	Vol. 4, 46
294 Appeal of Reading Fire Ins. &	678
Trust Co., - - - - -	
176 Appeal of Scranton City School	311
District, - - - - -	
379 Appeal of Smith, - - - - -	Vol. 5, 268
88 Baum's Appeal, - - - - -	Vol. 3, 611
200 Beck & Church, Admr., - - - - -	Vol. 4, 257
544 Borough of Carlisle & Brisbane,	508
259 Boyd & Insurance Patrol of	Vol. 3, 233
Phila., - - - - -	
83 Bradford Oil Co. & Blair, - - - - -	Vol. 4, 101
491 Brossman & Lehigh Valley R.	911
R. Co., - - - - -	
423 Buck & Wilson, - - - - -	643
34 Bush & Bender, - - - - -	35
310 Bush & Bralig, - - - - -	889
544 Carlisle & Brisbane, - - - - -	508
477 Central Bank of Pittsburgh &	270
Earley, - - - - -	
70 Cassa & Nimick, - - - - -	Vol. 3, 903
468 City of Erie & Reed, - - - - -	Vol. 4, 487
395 City of Wilkesbarre & Meyers,	320
87 Commonwealth & Balling, - - - - -	Vol. 3, 531
29 Conlyn & Parker, - - - - -	692
52 County of Cumberland & Boyd,	620
360 County of Erie & City of Erie, -	Vol. 4, 305
365 County of Erie & Comrs. of	300
Water Works, - - - - -	
273 County of Lehigh & Schock, - - -	744
489 Corson's Appeal, - - - - -	307
82 Cumberland County & Boyd, - - -	Vol. 3, 820

N. J. VOL. 1-5.

PENNSYLVANIA REPORTS.		PENNSYLVANIA REPORTS.	
113 Pa.	Cent. Rep.	113 Pa.	Cent. Rep.
PAGE	PAGE	PAGE	PAGE
229 Dechart, Controller of Phila. v. Commonwealth, - - -	Vol. 4, 754	631 Manderson's Appeal, - - -	Vol. 5, 314
654 Dreishach, Assignee, v. Mechanics' Nat. Bank, - - -	Vol. 5, 250	408 Mattern v. McDivitt, Admr., - - -	Vol. 4, 696
385 Dieffenhofer v. Eschleman, - - -	Vol. 4, 290	220 Mead v. Conroe, - - -	Vol. 5, 216
510 Dull's Appeal, - - -	Vol. 5, 187	459 Miller's Appeal, - - -	397
19 Eberts v. Thompson, - - -	Vol. 5, 608	517 Miller v. Zufall, - - -	Vol. 4, 400
380 Elkins & Co. v. Susquehanna Mut. Fire Ins. Co., - - -	Vol. 4, 761	247 McCulloch's Appeal, - - -	408
408 Erie v. Reed's Exrs., - - -	487	103 McDavitt's Appeal, - - -	32
360 Erie County v. Erie City, - - -	305	642 McGrew v. Foster, - - -	915
368 Erie County v. Comrs. of Water Works, - - -	300	67 McIntire v. Wing, - - -	Vol. 5, 556
412 Erie City Passenger R. Co. v. Schuster, - - -	919	300 Neslie v. Street Passenger R. Co., - - -	Vol. 4, 639
284 Fenn v. Early, - - -	288	108 Peding v. County of York, - - -	37
292 Fernau v. Butcher, - - -	748	605 Penn Iron Co. (Limited), v. Diller, - - -	691
11 Flaney's Appeal, - - -	Vol. 5, 594	126 Pennsylvania Coal Co. v. Sanderson, - - -	475
242 Friedeborn v. Commonwealth, - - -	Vol. 4, 271	214 Philadelphia & H. R. R. Co. v. Getz, - - -	Vol. 5, 691
431 Godcharles & Co. v. Wigeman, - - -	887	508 Phoenix Iron Co. v. Commonwealth, - - -	629
280 Hayes' Appeal, - - -	457	98 Ranch's Appeal, - - -	Vol. 4, 38
417 Humphrey v. Nat. Bank of Clearfield, - - -	Vol. 5, 133	204 Reading Fire Ins. & Trust Co.'s Appeal, - - -	678
281 In re Airy Street, - - -	Vol. 4, 903	574 Reed v. Fidelity Ins. Trust & Safe Deposit Co., - - -	763
119 Kelsey's Appeal, - - -	39	500 Sager, Guardian, v. Galloway, - - -	581
46 Killpatrick's Appeal, - - -	Vol. 3, 336	178 Scranton City School District's Appeal, - - -	511
621 Koons & Wright's Appeal, - - -	Vol. 5, 359	191 Scranton City v. Silkman, - - -	517
519 Lake Shore & M. S. R. R. Co. v. Rosenzweig, - - -	Vol. 4, 712	326 Seigrist, Admr., v. Schmolts, - - -	Vol. 5, 230
332 Landis v. Evans, - - -	656	115 Sensenig v. Parry, - - -	Vol. 4, 48
591 Lebanon Mut. Ins. Co. v. Hoover, Hughes & Co., - - -	Vol. 5, 211	1 Shaeffer v. Hoffman, - - -	Vol. 3, 555
373 Lehigh County v. Schock, - - -	Vol. 4, 744	579 Smith's Appeal, - - -	Vol. 3, 209
610 Lehigh Valley R. R. Co. v. Brandtweiler, - - -	Vol. 5, 144	209 Sperring v. Laughlin, - - -	
600 Lehigh Valley R. R. Co. v. Griener, - - -	Vol. 4, 898	288 Steel v. Goodwin, - - -	Vol. 4, 639
6 Lowerin, Hall & Co. v. Humboldt Safe Deposit & Trust Co., - - -	Vol. 5, 530	349 Strine v. Foltz & Brubler, - - -	283
256 Luck v. Luck, - - -	Vol. 4, 471	482 Swank v. Phillips, - - -	461
82 Lutheran Congregation's Appeal, - - -	Vol. 5, 269	162 Taylor v. Delaware & Hudson Canal Co., - - -	628
		325 Wilkesbarre v. Meyers, - - -	320
		336 Zurn v. Noedel, - - -	635

C. R., VOLS. 1-5.

TABLE OF CASES REPORTED.

CENTRAL REPORTER, VOL. IV.

A.	B.
Ackerman v. Brounstein (N. Y.) - - 898	Babbitt v. Day (41 N. J. Eq. 392) - - 66
Adams v. Mahnken (40 N. J. Eq. 873) - 835	Bacon, Flint v. (N. Y.) - - 240
Aid Society, Bomberger v. (Pa.) - - 694	Bacot, Alexander v. (41 N. J. Eq. 511) - 885
Aldridge v. Essex Public Road Board (48 N. J. L. 366) - 880	Bajus v. Syracuse, B. & N. Y. R. R. Co. (N. Y.) - 518
Alexander v. Bacot (41 N. J. Eq. 511) - 885	Bald Eagle Valley R. R. Co., Hayes v. (Pa.) - 457
Sumner v. (N. Y.) - - 550	Baldwin v. City of Elizabeth (N. J.) - 325
Allen's Appeals (Pa.) - - 925	Frick, v. (Pa.) - - 676
American Bronze Powder Mfg. Co., McConnell v. (41 N. J. Eq. 447) 72	Baltimore & O. R. R. Co. v. Leapley (Md.) 253
American Dramatic Fund Asso. v. Lett (N. J.) - 402	Bank, Bedford County, Moseby v. (Pa.) 268
American Glucose Co., State v. (N. J.) - 142	Central, of Pittsburgh, v. Earley (Pa.) - 270
American Home Missionary Soc., Riggs v. (N. Y.) - 549	First Nat., v. Kimball (N. J.) - 591
Andrews v. Essex Public Road Board (48 N. J. L. 366) - 880	Prosser v. (N. Y.) - - 398
Rozell v. (N. Y.) - - 209	Hamburg, v. Seidel (Pa.) - - 921
v. Wade (Pa.) - - 689	Importers & Traders Nat., v. Littell (41 N. J. Eq. 29) - 868
Angevine v. Jackson (N. Y.) - - 795	Lancaster County Nat., v. Huver (Pa.) - 672
Appeal of Allen (Pa.) (2 cases) - - 925	Somerset County, v. Veghte (N. J.) 406
Bay (Pa.) - - 481	Union Nat., v. Cannonsburg Iron Co. (Pa.) - - 258, 262
Cambria Iron Co. (Pa.) - - 705	Barnet v. City of Paterson (N. J.) - 248
Church (Pa.) - - 95	Barr, Condon v. (N. J.) - - 557
Fink (Pa.) - - 707	Baum, Hamilton v. (Pa.) - - 708
Fish (Pa.) - - 727	Bay's Appeal (Pa.) - - 281
Franklin (Pa.) - - 822	Beadleston v. Beadleston (N. Y.) - 537
Hoar (Pa.) - - 908	Beard, Murray v. (102 N. Y. 505) - 129
Huntingdon & Broad Top R. R. Co. (Pa.) - 706	Beatty v. Cory Universalist Society (41 N. J. Eq. 563) - 881
Johnson (Pa.) - - 892	Cory Universalist Society v. (41 N. J. Eq. 565) - 832
McCulloch (Pa.) - - 468	Beck v. Church (Pa.) - - 257
Reed (Pa.) - - 909	Beckett v. Zane (41 N. J. Eq. 412) - 54
Riddlesburg Coal & Iron Co. (Pa.) 702	Beckett's Will, Re (N. Y.) - - 881
Sheble (Pa.) - - 667	Beckwith, People v. (N. Y.) - 539
Appleget v. Pownell (N. J.) - - 564	Bedford County Bank, Moseby v. (Pa.) 268
Arensberg, People v. (N. Y.) - - 542	Beekman, Re Will of (N. Y.) - 549
Armstrong, Van Winkle v. (41 N. J. Eq. 402) 58	Belden v. State (N. Y.) - - 180
Arnett v. City of Lambertville (N. J.) - 574	Bender, Bush v. (Pa.) - - 35
Arnold, Tantum v. (N. J.) - - 421	Bergen, Collins v. (N. J.) - - 405
Assurance Co., Western, White v. (Pa.) - 723	Berger, Snyder v. (Pa.) - - 764
Atcheson, Toffey v. (N. J.) - - 863	Berryman v. Little (N. J.) - - 562
Atlantic City, Atlantic City Water Works Co. v. (N. J.) - 841	Blair, Bradford Oil Co. v. (Pa.) - 101
Water Works Co. v. Atlantic City (N. J.) - 841	Blanchard, Conselyea v. (N. Y.) - 372
Auburn Excise Comrs. v. Burtis (N. Y.) - 236	Blarcom v. Delaware, L. & W. R. R. Co. (N. J.) - 565
v. Merchant (N. Y.) - - 354	Blauvelt, Durle v. (N. J.) - - 588
Ayres v. Police Comrs. of Newark (N. J.) 571	Bloom, Hill v. (41 N. J. Eq. 276) - 845

		C.	
Bloom, Rieglesville Del. Bridge Co. v. (48 N. J. L. 368)	890	Cadmus v. Fagan (47 N. J. L. 549)	809
Board of Assessors v. Central R. R. Co. of N. J. (48 N. J. L. 146)	426	Caldwell v. Wall (N. Y.)	778
Board of Fire Comrs. of Jersey City, State, Michaelis v. (N. J.)	884	Cambria Iron Co.'s Appeal (Pa.)	705
License of Trenton, State, Closson v. (N. J.)	88	Camden & A. R. R. Co. v. May's Land- ing & E. H. C. R. R. (N. J.)	801
Public Works of Jersey City, State v. (N. J.)	842	Camden Bldg. & Loan Asso., Doughten v. (41 N. J. Eq. 556)	827
Bomberger v. United Brethren Mut. Aid Society (Pa.)	694	Camden, City of, Mowery v. (N. J.)	566
Borcherling's Exr. v. Trefz (40 N. J. Eq. 502)	887	Camden, State, Devault v. (N. J.)	83
Borda, Heck v. (Pa.)	908	Campbell, La Foy v. (N. J.)	595
Borough of Carlisle v. Brisbane (Pa.)	508	Canal Co., Pennsylvania, v. Township of Shirley (Pa.)	927
Borough Comrs. of Ocean Beach, State, ex rel., v. (N. J.)	85	Cannonsburgh Iron Co. v. Union Nat. Bank (Pa.)	258
Botaford v. Dodge (N. Y.)	240	Union Nat. Bank v. (Pa.)	263
Boundbrook Mut. Fire Ins. Asso. v. Nelson (41 N. J. Eq. 485)	187	Carbon Iron Mfg. Co., Lords v. (N. J.)	853
Bovaird's Appeal (Pa.)	40	Card v. Manhattan R. Co. (N. Y.)	799
Bovaird v. Dick (Pa.)	40, 44	Carlisle, Borough of, v. Brisbane (Pa.)	508
Boyd, Whelen v. (Pa.)	651	Casperson v. Dunn (N. J.)	419
Bradford Oil Co. v. Blair (Pa.)	101	Cattnach, Burr v. (Pa.)	701
Brands v. Craig (N. J.)	568	Central Bank of Pittsburgh v. Earley (Pa.)	270
Brantly, Lockwood v. (N. Y.)	798	Central City Water Works Co., Syracuse Water Co. v. (N. Y.)	898
Breen, Jenks v. (N. J.)	92	Central R. R. Co. of N. J., Jersey City v. (40 N. J. Eq. 417)	827
People, ex rel., v. (N. Y.)	240	State Board of Assessors v. (48 N. J. L. 146)	426
Breinig, Bush v. (Pa.)	889	Chamberlain v. Elizabethport Steam Cord- age Co. (41 N. J. Eq. 48)	870
Brewer v. District of Columbia (D. C.)	621	v. Manning (41 N. J. Eq. 651)	821
Brick, Roddy v. (N. J.)	850	Chapin, People, ex rel., v. (N. Y.)	183
Bridge Co., Hudson River, Mark v. (N. Y.)	208	v. Wright (41 N. J. Eq. 438)	59
Rieglesville Del., v. Bloom (48 N. J. L. 368)	890	Cheesman, Re Contempt of (N. J.)	576
Briesen v. Long Island R. R. Co. (N. Y.)	897	Christie v. McNeal (N. J.)	147
Brietsch, Gable v. (Pa.)	459	Church's Appeal (Pa.)	95
Brisbane, Borough of Carlisle v. (Pa.)	508	Beck v. (Pa.)	257
Brokaw v. Brokaw (41 N. J. Eq. 804)	847	Kelsey v. (Pa.)	99
Brooklyn City R. R. Co., Cumming v. (N. Y.)	898	City of Camden, Mowery v. (N. J.)	566
Brooklyn Comrs., People, ex rel., v. (N. Y.)	548	Elizabeth, Baldwin v. (N. J.)	825
Brooklyn Fire Comrs., People, ex rel., v. (N. Y.)	774	Erie v. Reed (Pa.)	487
Brossman v. Lehigh Valley R. R. Co. (Pa.)	918	Lambertville, State, Arnett v. (N. J.)	574
Brounstein, Ackerman v. (N. Y.)	898	Lancaster, Rinehart v. (Pa.)	504
Sahlein v. (N. Y.)	398	New York, Jex v. (N. Y.)	781
Wile v. (N. Y.)	398	Paterson, Barnett v. (N. J.)	248
Brown v. South Orange (N. J.)	425	State, Reynolds v. (N. J.)	246
Taylor v. (Md.)	848	Philadelphia, Stewart v. (Pa.)	674
Bruere v. Gulick (41 N. J. Eq. 280)	882	Ward v. (Pa.)	662
Bryden, Sheble v. (Pa.)	664	Scranton School District's Appeal (Pa.)	811
Buck v. Henderson (Pa.)	697	v. Silkman (Pa.)	817
v. Wilson (Pa.)	648	Syracuse, Syracuse Water Co. v. (N. Y.)	898
Buckingham v. Ludlum (41 N. J. Eq. 848)	820	Trenton, State, Semon v. (47 N. J. L. 489)	80
Buckins, Griel v. (Pa.)	507	Wilkesbarre v. Meyers (Pa.)	820
Buddenseik, People v. (N. Y.)	787	Civil Service Board of N. Y., People, ex rel., v. (N. Y.)	549
Buffalo, First Nat. Bank, Prosser v. (N. Y.)	898	Clark, Hubbard's Admr. v. (N. J.)	598
Building & Loan Asso., Camden, Doughten v. (41 N. J. Eq. 556)	827	People, ex rel., v. Breen (N. Y.)	240
Burd v. Keyser (N. J.)	245	v. State (47 N. J. L. 556)	806
Burr v. Cattnach (Pa.)	701	Cleine v. Englebrecht (41 N. J. Eq. 498)	69
Burtis, Comrs. of Excise of Auburn v. (N. Y.)	285	Closson v. Board of License of Trenton (N. J.)	88
Bussey, Glenn v. (D. C.)	609	Clute v. Knies (N. Y.)	898
Bush v. Bender (Pa.)	85	Coal Co., Kittaning, Orne v. (Pa.)	737
v. Breinig (Pa.)	889	McIntyre, McIntyre v. (N. Y.)	550
Butcher, Fernan v. (Pa.)	748	Cobham, Sager v. (Pa.)	685
Byrnes, Re (N. Y.)	118		
Fox v. (N. Y.)	549		

Cogswell v. New York, N. H. & Hartford R. R. Co. (N. Y.)	225	Devault v. Mayor of Camden (N. J.)	83
Collins v. Bergen (N. J.)	405	Devlin, Mulcahey v. (N. Y.)	398
State, Savage v. (N. J.)	567	Dewey v. Delaware & H. Canal Co. (N. Y.)	550
Collyer v. Pennsylvania R. R. Co. (N. J.)	568	Dey v. Public Road Board (N. J.)	573
Colthar, Inhab. of North Plainfield v. (41 N. J. Eq. 848)	818	Diamant, Moore v. (41 N. J. Eq. 612)	811
Comer v. Wrisley (N. Y.)	549	Dick's Appeal (Pa.)	44
Commissioner of Patents, Kirk v. (D. C.)	625	Dick v. Bovaird (Pa.)	40, 44
Commissioners of Auburn v. Merchant (N. Y.)	854	Diefenderfer v. Eschleman (Pa.)	290
Brooklyn, People, <i>ex rel.</i> , v. (N. Y.)	548	Dietz, <i>Re Will of</i> (41 N. J. Eq. 284)	837
Excise of Auburn v. Burtis (N. Y.)	235	Diller, Penn Iron Co. v. (Pa.)	691
Commonwealth v. Cook (2 cases) (Pa.)	710	Dinsmore, Post v. (N. Y.)	398
Davis v. (Pa.)	711	District of Columbia, Brewer v. (D. C.)	621
Friedeborn v. (Pa.)	271	Dixon v. Woodward (N. Y.)	208
Kiehl v. (Pa.)	695	Dodd, Ward v. (41 N. J. Eq. 414)	86
Pennsylvania R. R. Co. v. (Pa.)	495, 501	Dodge, Botsford v. (N. Y.)	240
Rhoads v. (Pa.)	725	Halstead v. (N. Y.)	240
<i>ex rel.</i> , Dechert v. (Pa.)	754	Donovan, People, <i>ex rel.</i> , v. Comrs. of Brooklyn (N. Y.)	548
v. Halstead (Pa.)	815	Doughten v. Camden Bldg. & Loan Asso. (41 N. J. Eq. 556)	827
Condon v. Barr (N. J.)	557	Dramatic Fund Asso. v. Lett (N. J.)	402
Conner, <i>Re Accounting of</i> (N. Y.)	550	Drew, Sprague v. (N. J.)	399
Connolly, Commonwealth, <i>ex rel.</i> , v. Halstead (Pa.)	815	Driggs v. Phillips (N. Y.)	287
Conselyea v. Blanchard (N. Y.)	872	Drost v. Corle (41 N. J. Eq. 45)	363
Construction Co., N. Y. & Scranton, Stettaner v. (N. J.)	408	Drumore Township, <i>Re Road in</i> (Pa.)	88
Consumers Gas Co., Jersey City Gaslight Co. v. (40 N. J. Eq. 427)	830	Druse, People v. (N. Y.)	770
Cook, Commonwealth v. (2 cases) (Pa.)	710	Dunkirk, City of, People <i>ex rel.</i> , v. (N. Y.)	548, 549
Cordage Co., Elizabethport Steam, Chamberlain v. (41 N. J. Eq. 48)	870	Dunn, Casperson v. (N. J.)	419
Corle, Drost v. (41 N. J. Eq. 45)	862	Dunster v. Smith (N. J.)	881
Corson's Appeal (Pa.)	807	Durie v. Blauvelt (N. J.)	588
v. Garnier (Pa.)	807	Dwight v. Germania L. Ins. Co. (N. Y.)	529
Cory Universalist Society v. Beatty (41 N. J. Eq. 565)	832	E.	
Beatty v. (41 N. J. Eq. 568)	831	Earley, Central Bank of Pittsburgh v. (Pa.)	270
Coudert v. Coudert (N. J.)	182	Early, Fenn v. (Pa.)	288
County of Erie v. City of Erie (Pa.)	805	Eastwood v. Worrall (N. J.)	91
v. Comrs. of Water Works (Pa.)	800	Eatontown, State, v. Shrewsbury (N. J.)	424
Lehigh v. Schock (Pa.)	744	Electric Light, etc. Co., <i>Re</i> (N. J.)	143
York, Peeling v. (Pa.)	87	Elizabeth, City of, Baldwin v. (N. J.)	325
Craig, State, Brands v. (N. J.)	563	Elizabethport Steam Cordage Co., Chamberlain v. (41 N. J. Eq. 48)	870
Crandall v. Grow (N. J.)	70	Elkins v. Susquehanna Mut. F. Ins. Co. (Pa.)	761
Craven, <i>Re</i> (N. J.)	144	Ellis, Reynolds v. (N. Y.)	232
Crow v. Greene (111 Pa. 637)	278	Elmer, Hewlett v. (N. Y.)	351
Crownover, James v. (Pa.)	287	Emory, Isaac v. (64 Md. 833)	163
Cullmans v. Lindsay (Pa.)	747	Endicott v. Endicott (41 N. J. Eq. 93)	871
Cuming, People, <i>ex rel.</i> , v. Koch (N. Y.)	548	Englebrecht, Gleine v. (41 N. J. Eq. 498)	69
Cumming v. Brooklyn City R. R. Co. (N. Y.)	898	English v. Newell (N. J.)	531
D.		Ennis, Deraismes v. (N. Y.)	550
Davis v. Commonwealth (Pa.)	711	Ensign's Estate, <i>Re</i> (N. Y.)	376
Day, Babbitt v. (41 N. J. Eq. 892)	66	Equitable Co-op. Foundry Co. v. Hersee (N. Y.)	189
Dechert v. Commonwealth, <i>ex rel.</i> (Pa.)	754	Equitable L. Ins. Society, People, <i>ex rel.</i> , v. Chapin (N. Y.)	183
Deffenbaugh v. Harris (Pa.)	464	Erie City, County of Erie v. (Pa.)	805
Delaware & H. Canal Co., Dewey v. (N. Y.)	550	v. Reed (Pa.)	487
Langlois v. (N. Y.)	550	Erie City Passenger R. Co. v. Schuster (Pa.)	919
Taylor v. (Pa.)	628	Erie Commissioners of Water Works, County of Erie v. (Pa.)	300
v. Webster (Pa.)	638	Erie County v. City of Erie (Pa.)	305
Delaware, L. & W. R. R. Co., Blarcom v. (N. J.)	565	v. Comrs. of Water Works (Pa.)	300
Demorest, Hutkoff v. (N. Y.)	773	Eschleman, Diefenderfer v. (Pa.)	290
Denman, Frost v. (41 N. J. Eq. 47)	879	Essex Public Road Board, State, Aldridge v. (48 N. J. L. 866)	830
Department of N. Y., G. A. R., McDonald v. (N. Y.)	549	State, Andrews v. (48 N. J. L. 866)	830
DePeyster, Hone v. (N. Y.)	550	v. State, Speer (48 N. J. L. 872)	829
Deraismes v. Ennis (N. Y.)	550	State, <i>ex rel.</i> , v. Skinkle (N. J.)	560
C. R., v. IV.		Estate of Ensign, <i>Re</i> (N. Y.)	876
		Evans, Landis v. (Pa.)	656
		v. McDermott (N. J.)	559

Everett, Mutual L. Ins. Co. v. (40 N. J. Eq. 345) -	328	Greene, Crow v. (111 Pa. 637) -	378
Excise Comrs. of Auburn v. Burtis (N.Y.) -	285	Greiner v. Hamburger (N. Y.) -	773
v. Merchant (N. Y.) -	854	Lehigh Valley R. R. Co. v. (Pa.) -	898
		Griel v. Buckius (Pa.) -	507
		Groll, Sutton v. (N. J.) -	251
		Grow, Crandall v. (N. J.) -	70
		Gulick, Bruere v. (41 N. J. Eq. 280) -	832

F.

Fagan, Cadmus v. (47 N. J. L. 549) -	809	Hall, McLewee v. (N. Y.) -	868
Fanning, Pottstown Iron Co. v. (Pa.) -	647	v. Whitehall Water Power Co. (N. Y.) -	223
Faure Electric Light & Force Co., Re (N. J.) -	143	Halleck v. Hollingshead (N. J.) -	570
Fay's Admrs. v. Fay (N. J.) -	241	Halstead, Commonwealth, ex rel., v. (Pa.) -	815
Fehr, Graver v. (Pa.) -	492	v. Dodge (N. Y.) -	240
Fenn v. Early (Pa.) -	288	Hamburg Bank v. Seidel (Pa.) -	921
Fernan v. Butcher (Pa.) -	748	Hamburger, Greiner v. (N. Y.) -	773
Ferry, Krueger v. (41 N. J. Eq. 432) -	57	Hamilton v. Baum (Pa.) -	708
Fidelity Ins., Trust & Safe Deposit Co., Reed v. (Pa.) -	768	Hand v. Mayor, etc., of Jersey City (41 N. J. Eq. 663) -	822
Fink's Appeal (Pa.) -	707	Harris, Deffenbaugh v. (Pa.) -	464
Fire Comrs. of Brooklyn, People, ex rel., v. (N. Y.) -	774	Hasbrouck v. Winkler (N. J.) -	250
of Jersey City, State, Michaelis v. (N. J.) -	884	Haske, Ruppert v. (D. C.) -	615
First Nat. Bank v. Kimball (N. J.) -	591	Haskel, Lewis v. (N. J.) -	885
Prosser v. (N. Y.) -	398	Haswell, Vanderzee v. (N. Y.) -	176
Fischer v. Langbein (N. Y.) -	215	Hayes v. Bald Eagle Valley R. R. Co. (Pa.) -	457
Fisher v. Fisher (41 N. J. Eq. 16) -	861	Hays, Thalheimer v. (N. Y.) -	398
Fish's Appeal (Pa.) -	727	Heck v. Borda (Pa.) -	908
Flint v. Bacon (N. Y.) -	240	Heckscher v. Trotter (N. J.) -	77
Flynn v. Walsh (Md.) -	155	Henderson, Buck v. (Pa.) -	697
Foltz, Strine v. (Pa.) -	283	Herdtfelder, Lichtenberg v. (N. Y.) -	387
Foster, McGrew v. (Pa.) -	915	Herkimer County, People, ex rel., Tanner v. (N. Y.) -	398
Foundry Co., Equitable Co-op., v. Hersee (N. Y.) -	189	Hermanns, Neale v. (Md.) -	161
Fox v. Byrnes (N. Y.) -	549	Hersee, Equitable Co-op. Foundry Co. v. (N. Y.) -	189
Franklin's Appeal (Pa.) -	823	Hersey, Lyon v. (100 N. Y. 641) -	126, 884
Friedeborn v. Commonwealth (Pa.) -	271	Hewlett v. Elmer (N. Y.) -	851
Frick's Appeal (Pa.) -	676	Hicks v. Willis (41 N. J. Eq. 515) -	834
Frick v. Baldwin (Pa.) -	676	Hill v. Bloom (41 N. J. Eq. 276) -	845
Frost v. Denman (41 N. J. Eq. 47) -	879	Hillman v. Stanger (N. J.) -	562
v. Frost (N. J.) -	423	Hillyer v. U. S. Trust Co. of N. Y. (N. Y.) -	549
Fuller v. Fuller (41 N. J. Eq. 460) -	88	Hinchliffe v. Shea (N. Y.) -	214
Funk's Admrs. v. Waynesboro' School District (Pa.) -	298	Hoar's Appeal (Pa.) -	908

G.

Gable v. Brietsch (Pa.) -	459	Horner, State, ex rel., v. (N. J.) -	145
Gadsden v. Woodward (N. Y.) -	208	Sullivan v. (41 N. J. Eq. 299) -	842
Gale, Percival v. (N. J.) -	834	Hubbard's Admr. v. Clark (N. J.) -	598
Galloway, Sager v. (Pa.) -	681	Hudson, Polak v. (N. J.) -	565
Gardinier v. New York Central & H. R. R. Co. (N. Y.) -	785	Hudson River Bridge Co., Mark v. (N. Y.) -	203
Gardner, Wyckoff v. (N. J.) -	181	Huffman v. Johns (Pa.) -	658
Garnier, Corson v. (Pa.) -	807	Hulet v. Mutual L. Ins. Co. (Pa.) -	767
Gaskill, Hogan v. (N. J.) -	849	Hulse, Re Estate of (N. Y.) -	549
Gaslight Co., Jersey City, v. Consumers Gas Co. (40 N. J. Eq. 427) -	830	Humphrey v. Irvin (Pa.) -	685
Germania L. Ins. Co., Dwight v. (N. Y.) -	529	Hunt v. Van Derveer (N. J.) -	242
Gerry, Re Accounting of (N. Y.) -	796	Huntingdon & Broad Top R. R. Co.'s Appeal (Pa.) -	706
Gibson v. Lenhart (111 Pa. 624) -	105	Hurlbut v. Hutton (N. J.) -	409
Gifford, Leeds v. (41 N. J. Eq. 464) -	148	Hutkoff v. Demorest (N. Y.) -	773
Gleason v. Smith (N. Y.) -	397	Hutton, Hurlbut v. (N. J.) -	409
Glenn v. Bussey (D. C.) -	609	Whiting v. (N. J.) -	409
Gloucester City, State, Lyons v. (N. J.) -	574	Huwer, Lancaster County Nat. Bank v. (Pa.) -	673
Glucose Co., American, State v. (N. J.) -	142		
Godcharles v. Wigeman (Pa.) -	837		
Goebbel, Haelble v. (N. J.) -	242		
Goodwin, Steel v. (Pa.) -	659		
Gould, Pearman v. (N. J.) -	135		
Graver v. Fehr (Pa.) -	492		

I.

Importers & Traders Nat. Bank v. Littlell (41 N. J. Eq. 29) -	868
---	-----

Inhabitants of North Plainfield v. Colthar (41 N. J. Eq. 848)	818
In Matter of Perrine (N. J.)	62
Will of Dietz (N. J.)	888
Ins. Asso., Boundbrook Mut. Fire, v. Nelson (41 N. J. Eq. 485)	187
Ins. Co., Germania L., Dwight v. (N. Y.)	529
Knickerbocker L., People v. (N. Y.)	788
Lancashire, v. Nill (Pa.)	294
Lebanon Mut., Rife v. (Pa.)	688
Metropolitan Life, Morton v. (N. Y.)	397
Mutual L., v. Everett (40 N. J. Eq. 845)	828
Hulett v. (Pa.)	767
Susquehanna Mut. F., Elkins v. (Pa.)	761
Ins., Trust & Safe Deposit Co., Fidelity, Reed v. (Pa.)	768
Ins. Society, Equitable L., People ex rel., v. Chapin (N. Y.)	188
Ins. & Trust Co., Reading Fire, v. Riegel (Pa.)	678
Iron Co., Cannonsburgh, v. Union Nat. Bank (Pa.)	258
Union Nat. Bank v. (Pa.)	262
Penn., v. Diller (Pa.)	691
Pottstown, Fanning v. (Pa.)	647
Iron & Coal Co., Scranton School Dist. v. (Pa.)	811
Iron Mfg. Co., Carbon, Lord's Exrs. v. (N. J.)	858
Iron & Steel Co., Logan, Moore v. (Pa.)	505
Irvin, Humphrey v. (Pa.)	685
Isaac v. Emory (64 Md. 883)	168

J.

Jackson, Angevine v. (N. Y.)	795
Richardson v. (N. Y.)	549
Jacobs, Nugent v. (N. Y.)	185
Jachne, People v. (N. Y.)	185
James v. Crownover (Pa.)	287
Jameson, Vall v. (41 N. J. Eq. 648)	828
Jenks v. Breen (N. J.)	92
Jerome, People, ex rel., v. Registrar of Arrears (N. Y.)	898
Jersey City v. Central R. R. Co. of N. J. (40 N. J. Eq. 417)	327
Board of Fire Comrs., State, Michaele v. (N. J.)	884
Board of Public Works, State v. (N. J.)	842
First Nat. Bank v. Kimball (N. J.)	591
Gaslight Co. v. Consumers Gas Co. (40 N. J. Eq. 427)	330
Mayor, etc., Hand v. (41 N. J. Eq. 668)	822
Jex v. City of New York (N. Y.)	781
Johns, Huffman v. (Pa.)	658
Johnson's Appeal (Pa.)	892
Johnson v. Myers (N. Y.)	778, 780
Re Petition of (N. Y.)	856

K.

Kaelble v. Goebbel (N. J.)	242
Kamlah, Paterson, N. & N. Y. R. R. Co. v. (N. J.)	417
Karutz, Wehle v. (N. Y.)	897
Kauffman, White v. (Md.)	159
Keep v. Miller (N. J.)	554

Kellogg, Re Accounts of (N. Y.)	550
Kelsey's Appeal (Pa.)	99
Kelsey v. Church (Pa.)	99
Kendall, Manchester v. (N. Y.)	231
Keyser, Burd v. (N. J.)	245
Kiehl v. Commonwealth (Pa.)	686
Kimball, First Nat. Bank v. (N. J.)	591
v. Lee (40 N. J. Eq. 408)	822
King v. Rockhill (41 N. J. Eq. 273)	886
Kirk v. Commissioner of Patents (D. C.)	625
Kirkham, Paddock v. (102 N. Y. 597)	127
Kittaning Coal Co., Orne v. (Pa.)	787
Knickerbocker Life Ins. Co., People v. (N. Y.)	783
Knies, Clute v. (N. Y.)	398
Koch, People, ex rel., v. (N. Y.)	548
Kreischer, Post v. (N. Y.)	219
Krueger v. Ferry (41 N. J. Eq. 432)	57

L.

Lackawanna, Iron. & Coal Co., Scranton School Dist. v. (Pa.)	811
La Foy v. Campbell (N. J.)	595
Lake Shore & M. S. R. R. Co., People, ex rel., v. City of Dunkirk (N. Y.)	543
v. Rosenzweig (Pa.)	712
Lambertville, State, Arnett v. (N. J.)	574
Lancashire Ins. Co. v. Nill (Pa.)	294
Lancaster, City of, Rinehart v. (Pa.)	504
Lancaster County Nat. Bank v. Huver (Pa.)	672
Landis v. Evans (Pa.)	656
Langbein, Fischer v. (N. Y.)	215
Langlois v. Delaware & H. Canal Co. (N. Y.)	550
Lawson, Wheeler v. (N. Y.)	186
Leapley, Baltimore & O. R. R. Co. v. (Md.)	258
Lebanon Mut. Ins. Co., Rife v. (Pa.)	688
Leeds v. Gifford (41 N. J. Eq. 464)	148
Lee, Kimball v. (40 N. J. Eq. 408)	332
Lefferts v. State (N. J.)	883
Lehigh County v. Schock (Pa.)	744
Lehigh Valley R. R. Co., Brossman v. (Pa.)	918
v. Greiner (Pa.)	896
Lenhart, Gibson v. (111 Pa. 624)	105
Lennig v. Ocean City Asso. (41 N. J. Eq. 606)	806
Lerian v. Rohr (Md.)	255
Lett, American Dramatic Fund Asso. v. (N. J.)	402
Levan v. Milholland (Pa.)	906
Lewis v. Haskell (N. J.)	885
Loree v. (N. J.)	244
Lichtenberg v. Herdtfelder (N. Y.)	887
Lindsay, Cullman v. (Pa.)	747
Littell, Importers & Traders Nat. Bank v. (41 N. J. Eq. 29)	868
Little, State, Berryman v. (N. J.)	562
Lockwood v. Brantly (N. Y.)	798
Logan Iron & Steel Co., Moore v. (Pa.)	505
Long v. Stafford (N. Y.)	894
Long Dock Co., United N. J. R. R. & Canal Co. v. (41 N. J. Eq. 407)	56
Long Island R. R. Co., Briesen v. (N. Y.)	897
Stewart v. (102 N. Y. 601)	115
Lord's Exrs. v. Carbon Iron Mfg. Co. (N. J.)	853
Loree v. Lewis (N. J.)	244
Love, Marsh v. (N. J.)	897

Luck v. Luck (Pa.)	471
Ludlum, Buckingham v. (41 N. J. Eq. 348)	820
Lyon v. Hersey (100 N. Y. 641)	126, 884
Lyons v. Gloucester City (N. J.)	574

M.

McAllister, Skinner v. (Pa.)	750
McCall v. Witherbee (N. Y.)	549
McConnell v. Am. Bronze Powder Mfg. Co. (41 N. J. Eq. 447)	72
McCulloch's Appeal (Pa.)	468
McDermott, State, Evans v. (N. J.)	559
McDevitt's Appeal (Pa.)	38
McDivitt, Mattern v. (Pa.)	896
McDonald v. Department of N. Y., G. A. R. (N. Y.)	549
McGrew v. Foster (Pa.)	915
McIntire, <i>Re</i> Estate of (D. C.)	605
McIntyre v. McIntyre Coal Co. (N. Y.)	550
McKean v. McKean (N. J.)	184
McKesson, Wilmerding v. (N. Y.)	525
McLewee v. Hall (N. Y.)	368
McMonigle v. McMonigle (N. J.)	408
McMurtrie, Shannon v. (N. J.)	247
McNeal, State, Christie v. (N. J.)	147
Maguire v. Selden (N. Y.)	879
Mahuken, Adams v. (40 N. J. Eq. 873)	335
Manchester v. Kendall (N. Y.)	231
Manhattan R. Co., Card v. (N. Y.)	799
Solomon v. (N. Y.)	775
Manning, Chamberlain v. (41 N. J. Eq. 651)	821
Manufacturing Co., Am. B. Powder, McConnell v. (41 N. J. Eq. 447)	72
Carbon Iron, Lord's Exrs. v. (N. J.)	863
Marble Co., Whitney, Olive v. (N. Y.)	390
Mark v. Hudson River Bridge Co. (N. Y.)	203
Marsh v. Love (N. J.)	867
Martin, Rowland v. (Pa.)	760
Maryland, Myers v. (Md.)	844
Matawan Comrs. State, <i>ex rel.</i> , v. Horner (N. J.)	145
Mattern v. McDivitt (Pa.)	896
May, North Hudson County R. Co. v. (N. J.)	81
Mayor of Camden, State, Devault v. (N. J.)	83
etc., of Jersey City v. Central R. R. Co. of N. J. (40 N. J. Eq. 417)	827
Hand v. (41 N. J. Eq. 663)	822
etc., of N. Y., Schultze v. (N. Y.)	513
May's Landing & E. H. C. R. R., Camden & A. R. R. Co. v. (N. J.)	801
Measurall v. Pearce (N. J.)	144
Merchant, Comrs. of Excise of Auburn v. (N. Y.)	854
Metropolitan Life Ins. Co., Morton v. (N. Y.)	897
Metropolitan Trust Co. v. Tonawanda Valley & C. R. R. Co. (N. Y.)	864
Mettler, Sergeant v. (N. J.)	861
Meyers, Wilkesbarre v. (Pa.)	320
Michaelis v. Board of Fire Comrs. of Jersey City (N. J.)	884
Millholland, Levan v. (Pa.)	906
Miller, Keep v. (N. J.)	554
Stoke v. (Pa.)	84
v. Zufall (Pa.)	490
Mish, Pennsylvania R. R. Co. v. (Pa.)	276
Mondon, People v. (N. Y.)	357
Montgomery County's Appeal (Pa.)	803
Moore v. Diamant (41 N. J. Eq. 613)	811
v. Logan Iron & Steel Co. (Pa.)	505
Morgan's Exr., v. Morgan's Trustees (41 N. J. Eq. 235)	864
Morrison, Sweet v. (N. Y.)	212
Morton v. Metropolitan Life Ins. Co. (N. Y.)	897
Moseby's Appeal (Pa.)	627
Moseby v. Bedford County Bank (Pa.)	268
Mowery v. City of Camden (N. J.)	566
Mulcahey v. Devlin (N. Y.)	393
Mulford v. Mulford (N. J.)	539
Munroe, Osborne v. (N. J.)	243
Munson v. Syracuse, G. & C. R. Co. (N. Y.)	191
Murray v. Beard (102 N. Y. 505)	129
Mutual L. Ins. Co. v. Everett (40 N. J. Eq. 845)	826
Hulett v. (Pa.)	767
Myers, Johnson v. (N. Y.)	778, 780
v. State (Md.)	844

N.

Neale v. Hermanns (Md.)	161
Nelson, Boundbrook Mut. Fire Ins. Asso. v. (41 N. J. Eq. 485)	137
Todd v. (N. Y.)	549
Neslie v. Second & Third Sts. Passenger R. Co. (Pa.)	699
Newell, English v. (N. J.)	551
New Jersey v. American Glucose Co. (N. J.)	142
Lefferts v. (N. J.)	833
v. Mayor of Camden (N. J.)	83
v. Society for Establishing Manufactures (N. J.)	139
Troutman v. (N. J.)	890
New York v. Arensberg (N. Y.)	543
v. Beckwith (N. Y.)	539
Belden v. (N. Y.)	180
v. Buddensiek (N. Y.)	767
v. Druse (N. Y.)	770
v. Jaehne (N. Y.)	165
Jex v. (N. Y.)	781
v. Mondon (N. Y.)	357
New York Central & H. R. R. R. Co., Gardiner v. (N. Y.)	785
Tracy v. (N. Y.)	549
New York Elevated R. R. Co., Wiedmer v. (N. Y.)	533
New York File & Sharpening Co., <i>Re</i> (N. J.)	144
New York L. E. & W. R. R. Co., People, <i>ex rel.</i> , v. City of Dunkirk (N. Y.)	549
New York, Mayor, etc., Schultze v. (N. Y.)	513
New York Mut. L. Ins. Co. v. Everett (N. J.)	823
Hulett v. (Pa.)	767
New York, N. H. & Hartford R. R. Co., Cogswell v. (N. Y.)	225
New York & S. Construction Co., Stettaner v. (N. J.)	403
Nichols, Webster v. (N. Y.)	549
Nill, Lancashire Ins. Co. v. (Pa.)	204
Nixon v. Walter (41 N. J. Eq. 103)	875
Noedel, Zurn v. (Pa.)	653
North Hudson County R. Co. v. May (N. J.)	81
North Plainsfield, Inhabs. of, v. Colthar (41 N. J. Eq. 349)	813
Nugent v. Jacobs (N. Y.)	163

O.

O'Brien, People v. (N. Y.)	549
Ocean City Asso., Lennig v. (41 N. J. Eq. 606)	808
Ogdensburg & L. C. R. R. Co., Petrie v. (N. Y.)	549
Oil Co., Bradford, Blair v. (Pa.)	101
Olive v. Whitney Marble Co. (N. Y.)	890
Orange & N. Horse R. R. Co. v. Ward (47 N. J. L. 560)	825
Orne v. Kittanning Coal Co. (Pa.)	787
Osborne v. Munroe (N. J.)	248
Ostrander, Weeks v. (N. Y.)	550

P.

Paddock v. Kirkham (102 N. Y. 597)	127
Paige v. Waring (N. Y.)	281
Palmer, Truby v. (Pa.)	925
Parker, South Branch R. R. Co. v. (41 N. J. Eq. 489)	68
Parker's Admr. v. Parker (N. J.)	67
Parry, Sensenig v. (Pa.)	48
Paterson, Barnet v. (N. J.)	248
State, Reynolds v. (N. J.)	246
Paterson, N. & N. Y. R. R. Co. v. Kamlah (N. J.)	417
Pearce, Measurall v. (N. J.)	144
Pearman v. Gould (N. J.)	185
Peck v. Powers (N. Y.)	549
Peeling v. County of York (Pa.)	87
Pemberton, Woolley v. (41 N. J. Eq. 894)	89
Penn Iron Co. v. Diller (Pa.)	691
Pennsylvania v. Cook (Pa.)	710
Davis v. (Pa.)	711
Kiehl v. (Pa.)	695
Rhoads v. (Pa.)	725
Pennsylvania Canal Co. v. Township of Shirley (Pa.)	927
Pennsylvania Coal Co. v. Sanderson (Pa.)	475
Pennsylvania R. R. Co., Collyer v. (N. J.)	568
v. Commonwealth (Pa.)	495, 501
v. Miah (Pa.)	276
Pennsylvania R. R. Co's Appeal (Pa.)	495, 501
People v. Arensberg (N. Y.)	542
v. Beckwith (N. Y.)	539
v. Buddenseik (N. Y.)	787
v. Druse (N. Y.)	770
v. Jaehne (N. Y.)	165
v. Knickerbocker Life Ins. Co. (N. Y.)	788
v. Mondon (N. Y.)	357
v. O'Brien (N. Y.)	549
v. Rome, W. & O. R. R. Co. (N. Y.)	197
ex rel., v. Breen (N. Y.)	240
v. Chapin (N. Y.)	188
v. City of Dunkirk (N. Y.)	548
v. Civil Service Bd. of N. Y. (N. Y.)	549
v. Comrs. of Brooklyn (N. Y.)	548
v. Fire Comrs. of Brooklyn (N. Y.)	774
v. Herkimer County (N. Y.)	398
v. Koch (N. Y.)	548
v. Registrar of Arrears (N. Y.)	398
v. Streeter (N. Y.)	549
v. Townsend (N. Y.)	398
Percival v. Gale (N. J.)	334
Perrine, Re (41 N. J. Eq. 409)	62
Petrie v. Ogdensburg & L. C. R. R. Co. (N. Y.)	549
Philadelphia, Stewart v. (Pa.)	674
C. R., v. IV.	

Philadelphia, Ward v. (Pa.)	662
Phillips, Driggs v. (N. Y.)	287
Swank v. (Pa.)	461
United States v. (D. C.)	617
Pittsburgh Central Bank v. Earley (Pa.)	270
Pittsburgh & State Line R. R. Co.'s Appeal (Pa.)	107
Pittsburgh & State Line R. R. Co. v. Rothschild (Pa.)	107
Pittsburg Junction R. R. Co.'s Appeal (Pa.)	263
Polak v. Hudson (N. J.)	565
Police Comrs. of Newark, State, Ayres v. (N. J.)	571
Poole, Rosenthal v. (Md.)	848
Porter v. White (D. C.)	151
Post v. Dinmore (N. Y.)	398
v. Kreischer (N. Y.)	219
Pottstown Iron Co. v. Fanning (Pa.)	647
Powder Mfg. Co., American Bronze, McConnell v. (41 N. J. Eq. 447)	72
Powers, Peck v. (N. Y.)	549
Pownell, State, Appleget v. (N. J.)	564
Prosser v. First Nat. Bank (N. Y.)	398
Protestant Episcopal Society v. Stevens (N. Y.)	118
Public Road Board, State, Aldridge v. (48 N. J. L. 866)	880
State, Andrews v. (48 N. J. L. 866)	880
State, Dey v. (N. J.)	578
v. State, Spear (48 N. J. L. 872)	829
Pullen v. Pullen (41 N. J. Eq. 417)	71, 72

R.

R. Co., Erie City Passenger, v. Schuster (Pa.)	919
Lake Shore & M. S., v. Rosenzweig (Pa.)	713
Manhattan, Card v. (N. Y.)	799
Solomon v. (N. Y.)	775
North Hudson County, v. May (N. J.)	81
Second & Third Sts. Passenger, Neslie v. (Pa.)	699
Syracuse, Geneva & O., Munson v. (N. Y.)	191
R. R. Co., Bald Eagle Valley, Hayes v. (Pa.)	457
Baltimore & O., v. Leapley (Md.)	258
Brooklyn City, Cumming v. (N. Y.)	396
Camden & A., v. Mays Landing & E. H. C. R. R. Co. (N. J.)	801
Central, of N. J., Jersey City v. (40 N. J. Eq. 417)	837
State Board of Assessors v. (48 N. J. L. 146)	426
Delaware, L. & W., Blarcom v. (N. J.)	565
Lehigh Valley, Brossman v. (Pa.)	918
v. Greiner (Pa.)	398
Long Island, Briesen v. (N. Y.)	397
Stewart v. (102 N. Y. 801)	115
Mays Landing & E. H. C., Camden & A. R. R. Co. v. (N. J.)	801
New York Central & H. R., Gardiner v. (N. Y.)	735
New York Elevated, Wiedmer v. (N. Y.)	538
New York, N. H. & Hartford, Cogswell v. (N. Y.)	225

R. R. Co., Ogdensburg & L. C., <i>Petrie v.</i> (N. Y.) -	549	Riegel, Reading Fire Ins. & Trust Co. v. (Pa.) -	678
Orange & N. Horse, v. Ward (47 N. J. L. 560) -	835	Rieglesville Del. Bridge Co. v. Bloom (48 N. J. L. 368) -	820
Paterson, N. & N. Y., v. Kamiah (N. J.) -	417	Rife v. Lebanon Mut. Ins. Co. (Pa.) -	688
Pennsylvania, Collyer v. (N. J.) -	568	Riggs v. American Home Missionary Soc. (N. Y.) -	549
v. Commonwealth (Pa.) -	495, 501	Rinehart v. City of Lancaster (Pa.) -	504
v. Mish (Pa.) -	276	Ripley, Stubbs v. (N. Y.) -	550
Pittsburgh & State Line, v. Roths- child (Pa.) -	107	Ritchie, Thaw v. (D. C.) -	527
Rome, W. & O., People v. (N. Y.) -	197	Rochester, <i>Re</i> Application of (N. Y.) -	898
South Branch, v. Parker (41 N. J. Eq. 489) -	63	Rockhill, King v. (41 N. J. Eq. 273) -	836
Staten Island Rapid Transit, <i>Re</i> (N. Y.) -	515	Roddy v. Brick (N. J.) -	850
Syracuse, B. & N. Y., Bajus v. (N. Y.) -	518	Rohr, Larian v. (Md.) -	255
Tonawanda Valley & C., Metro- politan Trust Co. v. (N. Y.) -	864	Rome, W. & O. R. R. Co., People v. (N. Y.) -	197
Railroad Tax Cases (N. J.) -	426	Rosa, People, <i>ex rel.</i> , v. Streeter (N. Y.) -	549
R. R. & Canal Co., United N. J., v. Long Dock Co. (41 N. J. Eq. 407) -	56	Rosenthal v. Poole (Md.) -	848
Ranck's Appeal (Pa.) -	46	Rosenzweig, Lake Shore & M. S. R. Co. v. (Pa.) -	712
<i>Re</i> Accounting of Conner (N. Y.) -	550	Rothschild, Pittsburgh & State Line R. R. Co. v. (Pa.) -	107
Accounting of Gerry (N. Y.) -	796	Rowland v. Martin (Pa.) -	760
Accounts of Kellogg (N. Y.) -	550	Rozell v. Andrews (N. Y.) -	209
Application of Rochester (N. Y.) -	898	Ruppert v. Haske (D. C.) -	615
Byrnes (N. Y.) -	113	Ryan, People, <i>ex rel.</i> , v. Civil Service Board of N. Y. (N. Y.) -	549
Contempt of Cheesman (N. J.) -	576		
Craven (N. J.) -	144		
Estate of Ensign (N. Y.) -	876		
Estate of Hulse (N. Y.) -	549		
Estate of McIntire (D. C.) -	605		
Faure Electric Light & Force Co. (N. J.) -	143		
Judicial Settlement of Wood (N. Y.) -	398		
New York File & Sharpening Co. (N. J.) -	144		
Perrine (41 N. J. Eq. 409) -	62		
Petition of Johnson (N. Y.) -	356		
Petition of Swan (N. Y.) -	550		
Road in Drumore Township (Pa.) -	38		
Snyder (N. Y.) -	210		
Staten Island Rapid Transit R. R. Co. (N. Y.) -	515		
Will of Beckett (N. Y.) -	381		
Will of Beekman (N. Y.) -	549		
Will of Dietz (41 N. J. Eq. 284) -	837		
Will of Wilson (N. Y.) -	769		
Wright (N. Y.) -	783		
Read v. Riddle (48 N. J. L. 359) -	819		
Reading v. Reading (N. J.) -	184		
Reading Fire Ins. & Trust Co. v. Riegel (Pa.) -	678		
Read's Appeal (Pa.) -	909		
Reed, City of Erie v. (Pa.) -	487		
v. Fidelity Ins., Trust & Safe De- posit Co. (Pa.) -	768		
Reeser's Appeal (Pa.) -	51		
Reeser v. Reeser (Pa.) -	51		
Registrar of Arrears, People, <i>ex rel.</i> , v. (N. Y.) -	898		
Reynolds v. City of Paterson (N. J.) -	246		
v. Ellis (N. Y.) -	232		
Rhoads v. Commonwealth (Pa.) -	725		
Richardson's Appeal (Pa.) -	633		
Richardson v. Jackson (N. Y.) -	549		
v. Richardson (Pa.) -	633		
Riddle, Read v. (48 N. J. L. 359) -	819		
Riddlesburg Coal & Iron Co.'s Appeal (Pa.) -	702		
		S.	
		Sager v. Cobham (Pa.) -	685
		v. Galloway (Pa.) -	631
		Sahlein v. Brounstein (N. Y.) -	398
		Sanderson, Pennsylvania Coal Co. v. (Pa.) -	475
		Savage v. Collins (N. J.) -	567
		Schock, Lehigh County v. (Pa.) -	744
		School Dist., Waynesboro', Funk's Admrs. v. (Pa.) -	298
		Schultze v. Mayor, etc. of N. Y. (N. Y.) -	518
		Schuster, Erie City Passenger R. Co. v. (Pa.) -	919
		Schwartz v. Weber (N. Y.) -	772
		Scranton v. Silkman (Pa.) -	317
		Scranton School District's Appeal (Pa.) -	311
		Scranton School Dist. v. Lackawanna, I. & Coal Co. (Pa.) -	311
		Second & Third Sta. Passenger R. Co., Neslie v. (Pa.) -	699
		Seeman, Snyder v. (41 N. J. Eq. 405) -	54
		Seidel, Hamburg Bank v. (Pa.) -	921
		Selden, Maguire v. (N. Y.) -	379
		Semon v. City of Trenton (47 N. J. L. 489) -	80
		Sensenig v. Parry (Pa.) -	48
		Sergeant v. Mettler (N. J.) -	861
		Shank v. Simpson (Pa.) -	742
		Shannon v. McMurtrie (N. J.) -	247
		Shea, Hinchliffe v. (N. Y.) -	214
		Sheble's Appeal (Pa.) -	667
		Sheble v. Bryden (Pa.) -	664
		Shirley Township, Pennsylvania Canal Co. v. (Pa.) -	927
		Shrewsbury, State, Inhab. of Eatontown v. (N. J.) -	424
		Silkman, City of Scranton v. (Pa.) -	317
		Simpson, Shank v. (Pa.) -	742
		Skinkle, State, <i>ex rel.</i> , v. (N. J.) -	560
		Skinner v. McAllister (Pa.) -	750
		Smart, Commonwealth, <i>ex rel.</i> , Dechert v. (Pa.) -	754
		Smith, Gleason v. (N. Y.) -	897
		People, <i>ex rel.</i> , v. Fire Comrs. of Brooklyn (N. Y.) -	774

Smith, State, Dunster v. (N. J.)	881
Throop Grain Cleaner Co. v. (N. Y.)	550
United States, ex rel., v. Whitney (4 Mackey, 535)	154
Snyder, Re (N. Y.)	210
Snyder v. Berger (Pa.)	764
v. Seeman (41 N. J. Eq. 405)	54
Society for Establishing Useful Manufactures, State v. (N. J.)	139
Solomon v. Manhattan R. Co. (N. Y.)	775
Somerset County Bank v. Veghte (N. J.)	406
South Branch R. R. Co. v. Parker (41 N. J. Eq. 489)	68
South Orange, State, Brown v. (N. J.)	425
Speer, Essex Public Road Board v. (48 N. J. L. 872)	329
Spinning v. Spinning (41 N. J. Eq. 427)	55
Sprague v. Drew (N. J.)	390
Stafford, Long v. (N. Y.)	394
Stamford Water Co. v. Stanley (N. Y.)	548
Stanger, State, Hillman v. (N. J.)	562
Stanley, Stamford Water Co. v. (N. Y.)	548
State v. American Glucose Co. (N. J.)	142
Belden v. (N. Y.)	180
v. Board of Fire Comrs. of Jersey City (N. J.)	884
v. Board of License of Trenton (N. J.)	88
v. Board of Public Works of Jersey City (N. J.)	342
v. City of Lambertville (N. J.)	574
v. City of Paterson (N. J.)	246
v. City of Trenton (47 N. J. L. 489)	80
Clark v. (47 N. J. L. 556)	306
v. Collins (N. J.)	567
v. Craig (N. J.)	568
Essex Public Road Board v. (48 N. J. L. 872)	329
v. Essex Public Road Board (48 N. J. L. 866)	380
v. Gloucester City (N. J.)	574
Lefferts v. (N. J.)	868
v. Little (N. J.)	562
v. McDermott (N. J.)	559
v. McNeal (N. J.)	147
v. Mayor of Camden (N. J.)	82
Myers v. (Md.)	344
v. Police Comrs. of Newark (N. J.)	571
v. Pownell (N. J.)	564
v. Public Road Board (N. J.)	578
v. Shrewsbury (N. J.)	424
v. Smith (N. J.)	861
v. Society for Establishing Useful Manufactures (N. J.)	139
v. South Orange (N. J.)	425
v. Stanger (N. J.)	562
Troutman v. (N. J.)	390
v. Winkler (N. J.)	250
ex rel., v. Borough Comrs. of Ocean Beach (N. J.)	85
v. Horner (N. J.)	145
v. Skinkle (N. J.)	560
State Board of Assessors v. Central R. R. Co. of N. J. (48 N. J. L. 146)	428
Staten Island Rapid Transit R. R. Co., Re (N. Y.)	515
Steel v. Goodwin (Pa.)	659
Stettaner v. New York & S. Construction Co. (N. J.)	408
Stevens, Protestant Episcopal Society v. (N. Y.)	118
Stewart v. Long Island R. R. Co. (102 N. Y. 601)	115

Stewart v. Philadelphia (Pa.)	674
Stoke v. Miller (Pa.)	34
Streeter, People, ex rel., v. (N. Y.)	549
Strine v. Foltz (Pa.)	233
Stubbs v. Ripley (N. Y.)	550
Sullivan v. Horner (41 N. J. Eq. 299)	842
Summer v. Alexander (N. Y.)	550
Susquehanna Mut. F. Ins. Co., Elkins v. (Pa.)	761
Sutton v. Groll (N. J.)	251
Swan, Re Petition of (N. Y.)	550
Swank v. Phillips (Pa.)	461
Sweet v. Morrison (N. Y.)	212
Syracuse, Syracuse Water Co. v. (N. Y.)	398
Syracuse, B. & N. Y. R. R. Co., Bajus v. (N. Y.)	518
Syracuse, G. & C. R. Co., Munson v. (N. Y.)	191
Syracuse Water Co. v. Central City Water Works Co. (N. Y.)	398
v. Syracuse (N. Y.)	398

T.

Tanner, People, ex rel., v. Herkimer County (N. Y.)	398
Tantum v. Arnold (N. J.)	421
Taylor v. Brown (Md.)	346
v. Delaware & H. Canal Co. (Pa.)	628
v. Wood (N. J.)	138
Thalheimer v. Hays (N. Y.)	398
Thaw v. Ritchie (D. C.)	597
Throop Grain Cleaner Co. v. Smith (N. Y.)	550
Todd v. Nelson (N. Y.)	549
Toffey v. Atcheson (N. J.)	863
Tonawanda Valley & C. R. R. Co., Metropolitan Trust Co. v. (N. Y.)	364
Townsend, People, ex rel., v. (N. Y.)	398
Township of Shirley, Pennsylvania Canal Co. v. (Pa.)	927
Tracy v. N. Y. C. & H. R. R. R. Co. (N. Y.)	549
Trefz, Borchering's Exr. v. (40 N. J. Eq. 502)	337
Trenton, State, Semon, v. (N. J.)	80
Trenton Bd. of License, State, Closson v. (N. J.)	83
Trexler's Appeal (Pa.)	925
Trotter, Heckscher v. (N. J.)	77
Troutman v. State (N. J.)	880
Truby v. Palmer (Pa.)	925
Trust Co., Metropolitan, v. Tonawanda Valley & C. R. R. Co. (N. Y.)	364
Trust Co., U. S., of N. Y., Hillyer v. (N. Y.)	549
Trustees Cory Univ. Society v. Beatty (41 N. J. Eq. 565)	881
Beatty v. (41 N. J. Eq. 563)	880

U.

Union Nat. Bank v. Cannonsburgh Iron Co. (Pa.)	263
Cannonsburgh Iron Co. v. (Pa.)	259
United Brethren Mut. Aid Society, Bomberger v. (Pa.)	694
United N. J. R. R. & Canal Co. v. Long Dock Co. (41 N. J. Eq. 407)	56
United States v. Phillips (D. C.)	617
ex rel., v. Whitney (4 Mackey, 535)	154

U. S. Trust Co. of N. Y., Hillier v. (N. Y.) -	549	White, Porter v. (D. C.) -	151
		v. Western Assurance Co. (Pa.) -	723
V.		Whitehall Water Power Co., Hall v. (N. Y.) -	222
Vail v. Jameson (41 N. J. Eq. 648) -	823	Whiting v. Hutton (N. J.) -	409
Van Derveer, Hunt v. (N. J.) -	242	Whitney, United States, <i>ex rel.</i> , v. (4 Mackey, 585) -	154
Vanderzee v. Haswell (N. Y.) -	176	Whitney Marble Co., Olive v. (N. Y.) -	890
Van Reyren v. Board of Public Works of Jersey City (N. J.) -	842	Wiedmer v. New York Elevated R. R. Co. (N. Y.) -	538
Van Winkle v. Armstrong (41 N. J. Eq. 402) -	53	Wigeman, Godcharles v. (Pa.) -	887
Veghte, Somerset County Bank v. (N. J.) -	406	Wile v. Brounstein (N. Y.) -	308
Voorhis, Westervelt v. (N. J.) -	874	Wilkesbarre v. Meyers (Pa.) -	820
		Will of Beckett, <i>Re</i> (N. Y.) -	881
		Dietz, <i>Re</i> , (41 N. J. Eq. 284) -	887
		Willetts v. Willetts (N. Y.) -	548
		Willis, Hicks v. (41 N. J. Eq. 515) -	884
		Wilmerding v. McKesson (N. Y.) -	525
		Wilson, Buck v. (Pa.) -	643
		<i>Re</i> Will of (N. Y.) -	769
Wade, Andrews v. (Pa.) -	689	Winkler, State, Hasbrouck v. (N. J.) -	250
Wall, Caldwell v. (N. Y.) -	773	Witherbee, McCall v. (N. Y.) -	549
Walsh, Flynn v. (Md.) -	155	Wood, <i>Re</i> Judicial Settlement of (N. Y.) -	398
Walter, Nixon v. (41 N. J. Eq. 108) -	875	Taylor v. (N. J.) -	133
Ward v. Dodd (41 N. J. Eq. 414) -	86	Woodward, Dixon v. (N. Y.) -	208
Orange & N. Horse R. R. Co. v. (47 N. J. L. 560) -	825	Gadsden v. (N. Y.) -	208
v. Philadelphia (Pa.) -	662	Woolley v. Pemberton (41 N. J. Eq. 894) -	89
Waring, Paige v. (N. Y.) -	281	Worrall, Eastwood v. (N. J.) -	91
Water Co. v. Water Works Co. (N. Y.) -	898	Wright, <i>Re</i> (N. Y.) -	788
Water Works Co., Atlantic City, Atlantic City v. (N. J.) -	841	Chapin v. (41 N. J. Eq. 488) -	59
Waynesboro' School Dist., Funk's Admrs. v. (Pa.) -	208	Wrisley, Comer v. (N. Y.) -	549
Weber, Schwartz v. (N. Y.) -	772	Wyckoff v. Gardner (N. J.) -	181
Webster, Delaware & H. Canal Co. v. (Pa.) -	688		
v. Nichols (N. Y.) -	549	Y.	
Weeks v. Ostrander (N. Y.) -	550	Yard, State, <i>ex rel.</i> , v. Borough Comrs. of Ocean Beach (N. J.) -	85
Wehle v. Karutz (N. Y.) -	897	York County, Peeling v. (Pa.) -	87
Weller, People, <i>ex rel.</i> , v. Townsend (N. Y.) -	898		
Western Assurance Co., White v. (Pa.) -	723	Z.	
Westervelt v. Voorhis (N. J.) -	874	Zane, Beckett v. (41 N. J. Eq. 412) -	54
Wheeler v. Lawson (N. Y.) -	186	Zufall, Miller v. (Pa.) -	490
Whelen v. Boyd (Pa.) -	651	Zurn v. Noedel (Pa.) -	653
White v. Kauffman (Md.) -	159		
G. R., v. IV.			

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

(4 CENT. REP.)

A.

Aberdeen R. Co. v. Blaikie, 2 Eq. 1281; 1 McQ. 461.....	197
Ackerman v. Fisher, 57 Pa. 457.....	491
v. Shelp, 3 Halst. 125.....	55
Acton v. Blundel, 12 Mees. & Welsb. 324.....	480
Adair v. Brimmer, 74 N. Y. 539.....	528
Adams v. Beach, 1 Phila. 99.....	118
v. Carroll, 85 Pa. 209.....	598
Ætna Life Ins. Co. v. France, 94 U. S. 562 (Bk. 24, L. ed. 288).....	310
Alexander v. Kerr, 2 Rawle, 83.....	687
Allen v. Allen, 7 Stew. 498.....	868
Allis v. Leonard, 58 N. Y. 288.....	289
American Life Ins. Co. v. Day, 10 Vroom, 89.....	251
American Life & H. Ins. Co. v. Robert- shaw, 26 Pa. 189.....	309
Amerman v. Wiles, 9 C. E. Green, 18.....	808
Ankeny v. Penrose, 18 Pa. 190.....	458
Anon., 1 Salk. 84.....	586
Appar's Admr. v. Hiller, 4 Zab. 808.....	884
Appeal of Scranton School District, <i>In- fra</i> , 311 (Pa.).....	317
Apple v. Crawford Co., 105 Pa. St. 300.....	88
Appleby v. Astor F. Ins. Co., 54 N. Y. 258.....	582, 586
Arctic F. Ins. Co. v. Austin, 69 N. Y. 470.....	584
Armour v. Transatlantic F. Ins. Co., 90 N. Y. 450.....	582, 584
Armstrong v. Lancashire & York R. Co., 44 L. J. Exch. 89.....	511
Arnold's Estate, <i>Re</i> , 83 Beav. 163, 171.....	415
Ashbury R. etc. Co. v. Riche, L. R. 7 H. L. Eng. & Ir. Appa. 658.....	802
Atherton v. Atherton, 2 Pa. 112.....	907
Athol Music Hall Co. v. Carey, 116 Mass. 471.....	611
Atkins v. Bordman, 2 Met. 457.....	252
Atkinson v. Tomlinson, 61 Pa. 284.....	908
Atty-Gen. v. Colney Hatch Lunatic Asy- lum, L. R. 4 Ch. App. 147.....	280
v. Utica Ins. Co., 2 Johns. Ch. 371.....	382
Austin v. Manchester, etc. R. Co., 11 Eng. Law & Eq. 513.....	207
Aylett v. Ashton, 1 Mylne & C. 105.....	558
Ayres v. Carver, 17 How. 59 (58 U. S. bk. 15, L. ed. 179).....	59

B.

Backman v. Chrisman, 28 Pa. 162.....	298
Backhouse v. Bonomi, 9 H. L. Cas. 508.....	860
Bailey v. Cleveland Rolling Mill, 21 Fed. Rep. 159.....	536
v. Mayor, etc., of N. Y., 3 Hill, 581; 2 Denio, 433.....	488

Baird v. Williamson, 15 C. B. N. S. 876.....	481, 859
Baker v. King, 18 Pa. 138.....	492
v. Union Mut. L. Ins. Co., 43 N. Y. 283.....	309
Baldwin v. Flagg, 14 Vroom, 495.....	364
v. Taylor, 10 Stew. 78; 11 Stew. 637.....	596
Ballard v. Ward, 89 Pa. 358.....	491
Ballou v. R. Co., 5 Am. & Eng. R. R. Cas. 480.....	915
Baltimore & P. R. R. Co. v. Fifth Bap- tist Church, 108 U. S. 317 (Bk. 27, L. ed. 739).....	281
Bancroft v. Sterr, 1 W. N. C. 132.....	508
Bank v. Hitz, 1 Mackey, 125.....	617
v. Potius, 10 Watts, 150.....	646
Banta v. Moore, 2 McCart. 97.....	589
Barclay v. Commonwealth, 25 Pa. 503.....	484
v. Wainwright, 86 Pa. 191.....	748
Barker, Matter of, 2 Johns. Ch. 232.....	62
Barruso v. Madan, 2 Johns. 145.....	386
Barry v. N. Y. Cent. R. R. Co., 92 N. Y. 289.....	682
Baskin v. Seechrist, 6 Pa. 154.....	664
Bates v. Conrow, 3 Stock. 137.....	61
Batterman v. Finn, 40 N. Y. 340.....	353
Baulec v. N. Y. & Harlem R. R. Co., 59 N. Y. 366.....	586
Baum v. Dubois, 48 Pa. 260.....	919
Baxter v. Baxter, 62 Me. 540, 543.....	604, 605
Bayonne v. Ford, 14 Vroom, 292.....	809
Beale v. Pa. R. R. Co., 86 Pa. 509.....	800
Beatty v. Cory Universalist Society, 14 Stew. 565; 4 Cent. Rep. 881 (N. J.).....	552, 881, 882
Beaty v. Bordwell, 91 Pa. 438, 440.....	101, 475
Beaufort v. Patrick, 17 Beav. 60.....	418
Beaumont v. Reeve, 8 Adol. & El. 483.....	559
v. Salisbury, 19 Beav. 198.....	118
Bechtel v. Rhoads, 8 Serg. & R. 333.....	492
Bedford v. Terhune, 80 N. Y. 453, 457.....	119
Beecher v. Conradt, 11 How. Pr. 181.....	589
Bell v. Clark, 111 Pa. 92; 1 Cent. Rep. 852 (Pa.); 17 W. N. C. 44.....	741, 918
v. Day, 82 N. Y. 165.....	340
v. McClintock, 9 Watts, 119.....	687
Bellinger v. Craigue, 81 Barb. 535.....	71
v. New York Cent. R. R. Co., 28 N. Y. 42.....	229
Bendernagle v. Cocks, 19 Wend. 207.....	646
Bennett v. Hethington, 16 Serg. & R. 193.....	464
Benson v. Wolf, 14 Vroom, 78.....	90
Benzing v. Steinway, 101 N. Y. 547; 2 Cent. Rep. 491.....	524
Berchere v. Colson, Str. 876.....	886
Berks v. Pile, 18 Pa. 498.....	262
Bermes v. Frick, 11 Stew. Eq. 89.....	870
Bettison v. Bromley, 12 East, 250.....	770

Biddle v. Black, 99 Pa. 380.....	750	Cake v. Philadelphia & E. R. R. Co., 87 Pa. 307.....	267
Billingsley v. State, 14 Md. 869.....	846	Calkins v. Isbell, 20 N. Y. 147.....	60
Birmingham Fire Ins. Co. v. Kroegher, 88 Pa. 64.....	725	Callahan v. Township of Morris, 1 Vroom, 167.....	882
Bissell v. Mich. Southern, etc. R. R. Co., 22 N. Y. 258.....	802	C. & A. R. R. Co. v. Comrs. of Appeals, 8 Harr. 71.....	481
Blair v. Bartlett, 75 N. Y. 152.....	71	Camden & At. R. R. Co. v. Hoosey, 99 Pa. 492.....	902
Bleecker v. Hennion, 8 C. E. Green, 123	56	Camden & Bur. R. R. Co. v. Cook, 8 Vroom, 388.....	431
Board Chosen Freeholders, Somerset Co., v. Veghte, 15 Vroom, 509	407	Cammack v. Lewis, 15 Wall. 643 (82 U. S. bk. 21, L. ed. 244).....	811
Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328; 2 Cent. Rep. 150.....	387	Campbell v. Seaman, 63 N. Y. 568.....	227
Bogert v. Elizabeth, 10 C. E. Green, 426	326	Campion v. City of Elizabeth, 13 Vroom, 355.....	811
Bonnell v. Griswold, 89 N. Y. 122.....	375	Capel v. Girdler, 9 Ves. 509.....	124
Booraem v. North Hudson Co. R. R. Co., 18 Stew. 557.....	809	Carlisle v. Cooper, 4 C. E. Green, 256; 6 C. E. Green, 576.....	73
Boraston's Case, 3 Coke, 19.....	684	Carman v. Beach, 63 N. Y. 97, 100.....	180
Boston Glass Manufactory v. Langdon, 24 Pick. 49.....	332	Carpenter v. Gray, 10 Stew. 389.....	59
Boston & L. R. R. Corp. v. Salem & L. R. R. Co., 2 Gray, 1.....	871	Carson v. Coleman, 8 Stock. 106.....	418, 871
Boston & Me. R. R. Co. v. Lowell & L. R. R. Co., 124 Mass. 368.....	267	Carstairs v. Taylor, L. R. 6 Exch. 217.....	483
Bostwick v. Frankfield, 74 N. Y. 207-120,	125	Casebeer v. Mowry, 55 Pa. 419.....	687
Bovard v. Kettering, 101 Pa. 181.....	656	Case of Mondon, <i>Infra</i> , 357 (N. Y.).....	772
Bowers v. Bowers, 95 Pa. 477.....	491	Cassidy v. Hall, 97 N. Y. 159.....	371
Bowne v. Logan, 14 Vroom, 421.....	563	Cassin v. Delaney, 88 N. Y. 178.....	324
Box v. Jubb, L. R. 4 Exch. Div. 70.....	483	Cattlin v. Hills, 65 Eng. C. L. 123 (1849)	511
Boyd v. Englebrecht, 9 Stew. 612.....	389	Central City Horse R. Co. v. Fort O. R. Co., 81 Ill. 528.....	267
v. King, 86 N. J. L. 184.....	79	Central R. R. Co. of N. J. v. Mutchler, 12 Vroom, 96.....	430, 436, 454
Bradley v. Ballard, 55 Ill. 413.....	808	v. State, 3 Vroom, 220.....	323
v. Johnson, 16 Vroom, 487; 17 Vroom, 271.....	558	Chahoon v. Hollenback, 16 Serg. & R. 425.....	768
Branch v. Jesup, 106 U. S. 468 (Bk. 27, L. ed. 279).....	801	Chambers v. Marks, 25 Pa. 296.....	898
Brandt's App., 16 Pa. 343.....	253	Champion v. Brown, 6 Johns. Ch. 398.....	124
Bray v. Neill's Exrx., 6 C. E. Green, 343	91	Chandler v. Monmouth Bank, 4 Halst. 101	567
Brenner v. Moyer, 98 Pa. 274.....	647	Chapman v. Erie R. Co., 55 N. Y. 579.....	239
Breucher v. Port Chester, 101 N. Y. 240; 2 Cent. Rep. 90.....	782	v. New Haven R. R. Co., 19 N. Y. 84.....	512
Brewer v. Fleming, 51 Pa. 102, 115.....	492, 918, 919	Chase v. Irwin, 87 Pa. 288, 290.....	741, 918
Bridge v. Grand Junc. R. Co., 3 Mees. & W. 247 (1898).....	511	Chasmar v. Bucken, 10 Stew. 415.....	868
Bridges v. Wyckoff, 67 N. Y. 180.....	240	Child v. Elsworth, 2 De G. M. & G. 679.	867
Briggs' App., 5 Watts, 91.....	895	Children's Aid Society v. Loveridge, 70 N. Y. 837.....	770
Briggs v. Waldron, 88 N. Y. 582.....	793	Chisholm v. Nat. Capitol Life Co., 52 Mo. 218.....	309
Brinck v. Collier, 56 Mo. 160.....	65	Cholmondeley v. Clinton, 2 Jac. & Walk. 1, 189.....	60
Britton v. Blake, 6 Vroom, 208.....	563	Circuit v. Perry, 28 Beav. 275.....	415
Brodess v. Thompson, 2 Harris & G. 120.	600	Citizens Coach Co. v. Camden Horse R. Co., 2 Stew. 299.....	332
Brooke v. Phillips, 88 Pa. 183.....	258	Citizens Ins. Co. v. McLaughlin, 53 Pa. 485.....	724
Brower v. Fisher, 4 Johns. Ch. 441.....	62	Clader v. Thomas, 89 Pa. 343.....	667
Brown v. Scott, 51 Pa. 357.....	262	Clagett v. Hawkins, 11 Md. 381.....	608
v. Volkening, 64 N. Y. 76.....	281	Clark v. Elizabeth, 8 Vroom, 120.....	809
Brownlee v. Lockwood, 5 C. E. Green, 239.....	589	v. Phillips, 17 Jur. 886.....	406
Brubaker's App., 98 Pa. 21.....	677	v. R. R. Co., 28 Minn. 128.....	915
Bruce v. Continental L. Ins. Co., 1 New Eng. Rep. 635 (Vt.).....	785	v. Wilder, 25 Pa. 314.....	270
Budd v. Hiler, 3 Dutch. 43.....	56	Clark's Exrs. v. Wilson, 3 Wash. C. C. 560.....	79
Budlong, <i>Re</i> , 100 N. Y. 203; 1 Cent. Rep. 286.....	770	Clarkson v. Doddridge, 14 Gratt. 42.....	614
Bunting's App., 4 Watts & S. 469.....	895	Clauser's Est., 1 Watts & S. 215.....	895
Burke v. Witherbee, 98 N. Y. 562.....	521	Clegg v. Dearden, 12 Ad. & El. N. S. 601	856
Burrough v. Skinner, 5 Burr. 2639.....	820	Cleveland & P. R. R. Co. v. Speer, 56 Pa. 325.....	267, 280
Burrows v. Erie R. Co., 63 N. Y. 556.....	777	Clough v. London, etc. R. Co., L. R. 7 Exch. 26, 37.....	823
Bwlch-y-Plwm Lead Mining Co. v. Baynes, L. R. 2 Exch. 324.....	828	Coach Co. v. R. R. Co., 6 Stew. 267.....	826
Byard v. Holmes, 4 Vroom, 119.....	828	Coatesville Gas Co. v. Chester Co., 97 Pa. 476.....	307

C.

Cagger v. Lansing, 64 N. Y. 427..... 536
C. R., v. IV.

Cobb v. Davenport, 3 Vroom, 869, 885.	879	Cross v. Hayes, 16 Vroom, 12, 565.	811
Cochrane's Exr. v. Ingersoll, 73 N. Y. 618	212	v. Mayor of Morristown, 3 C. E.	
Coddington v. Exrs. of Bispham, 9 Stew.		Green, 805-809.	574
574.	564	Crouse v. Frothingham, 97 N. Y. 105.	390
Coggis v. Bernard, 2 Ld. Raym. 918.	207	Crowell v. Currier, 12 C. E. Green, 152,	
Cogswell v. Cogswell, 2 Edw. Ch. 240.	799	160.	863, 864
Cole v. Berry, 13 Vroom, 808.	851	Cuff v. Hall, 1 Jur. N. S. 972.	868
Colerain v. Bell, 9 Met. 499.	346	Culhane v. N. Y. C. & H. R. R. Co., 60	
Colgate's Exr. v. Colgate, 8 C. E. Green,		N. Y. 188.	536
872	848, 873	Cumberland v. Codrington, 3 Johns. Ch.	
Collins v. Hasbrouck, 56 N. Y. 157.	119, 122,	229.	132
	126	Cummings v. Nat. Bank, 101 U. S. 154	
Colwell v. Easley, 83 Pa. 3.	768	(Bk. 25, L. ed. 903).	454
Combes v. Cadmus, 36 N. J. Eq. 382.	591	Cunningham v. Morrell, 10 Johns. 203.	886
Commissioners of N. J. v. Linden, 13 Stew.		v. Smith's Exrs., 70 Pa. 450.	309, 310
27.	811	Curre v. Bowyer, 5 Beav. 1.	557
of Marion Co. v. Clark, 94 U. S.		Current v. Current, 3 Stock. 186.	849
284 (Bk. 24, L. ed. 61).	536	Curry v. Raymond, 28 Pa. 144.	463
Commonwealth v. Cary Improvement Co.,		Cutler v. Powell, 6 T. R. 320.	71
98 Mass. 19.	458		
v. Erie & N. E. R. R. Co., 27 Pa.			
889.	279		
v. Farren, 9 Allen, 489.	547		
v. Mitchell, 82 Pa. 843.	760		
v. Patton, 88 Pa. 258.	314		
v. Perkins, 7 Pa. 42.	760		
v. Pittsburgh, etc. R. R. Co., 24			
Pa. 159.	280		
v. Smith, 103 Mass. 444.	547		
v. Union Ins. Co., 5 Mass. 230.	332		
v. Wentworth, 118 Mass. 441.	547		
v. Williams, 6 Gray, 1.	855		
Condit v. Baldwin, 21 Barb. 181; 21 N. Y.			
219.	340		
Cone v. Delaware, etc. R. R. Co., 81 N.			
Y. 206.	522, 523		
Congregation Shaser Hash Moin v. Halla-			
day, 50 N. Y. 664.	387		
Conn. Mut. L. Ins. Co. v. Luchs, 108 U.			
S. 498 (Bk. 27, L. ed. 800).	811		
v. Schaefer, 94 U. S. 457 (Bk. 24, L.			
ed. 251).	311		
Conover's Case, 1 Stew. Eq. 330.	62		
Conover v. Davis, 19 Vroom, 112; 3 Cent.			
Rep. 260 (N. J.).	565		
v. Stillwell, 5 Vroom, 54.	251		
Cook v. Harris, 61 N. Y. 448.	240		
v. McClure, 58 N. Y. 437.	877		
Cooper v. Cooper, 9 Stew. 121.	878		
v. Hepburn, 15 Gratt. 563.	604		
Cope v. Humphreys, 14 Serg. & R. 15.	458		
Corwine v. Corwine, 9 C. E. Green, 579.	402		
Cottam v. Partridge, 4 Scott, N. R. 819.	897		
Cottrell, Matter of, 95 N. Y. 829.	852		
Cowles v. Continental Life Ins. Co., 1			
New Eng. Rep. 247 (N. H.).	735		
Cowley v. People, 83 N. Y. 464.	792		
Cowperthwait v. Roney, 10 W. N. C. 482	508		
Coykendall v. Durkee, 18 Hun, 260.	210		
Cozzens v. Higgins, 1 Abb. Ct. App. Dec.			
451.	792		
Craig v. Brands, 17 Vroom, 522.	568		
v. Wells, 11 N. Y. 315, 322, 385, 386.	387		
Crawford v. Stewart, 88 Pa. 34.	661		
Creed v. Pa. R. R. Co., 86 Pa. 189.	901		
Cresswell v. Cheslyn, 2 Eden, 123.	406		
Crest v. Jack, 8 Watts, 288.	101		
Crissy v. Pass. R. Co., 75 Pa. 83.	700		
Croft v. Williams, 83 N. Y. 384.	529, 529		
Crompton v. Lea, L. R. 19 Eq. 115.	481		
Cronley v. Cronley, 13 Stew. 30.	56		
Cross v. Del Valle, 1 Wall. 5 (68 U. S. bk.			
17, L. ed. 515).	59		
		D.	
		Dalby v. India & L. L. Assur. Co., Exch.	
		Ch., 15 C. B. 365.	810
		D'Arras v. Keyser, 26 Pa. 249, 252.	741, 918
		Darrow, Matter of, 95 N. Y. 668.	352
		Darst v. Gale, 83 Ill. 137.	803
		Dashwood v. Peyton, 18 Ves. 27, 41.	414
		Davenport v. City of Elizabeth, 12 Vroom,	
		362.	811
		Davers v. Dewes, 3 P. Wms. 40.	87
		Davidson v. New Orleans, 96 U. S. 97	
		(1877) (Bk. 24, L. ed. 610).	438
		Davis v. Clark, 106 Pa. 384; 15 W. N. C.	
		209.	314, 815, 819
		v. Clark, 87 N. Y. 623.	352
		v. Harrison, 17 Vroom, 79.	575
		v. Miller, 14 Gratt. 13.	613
		v. Morris, 36 N. Y. 569.	119
		v. Tallcot, 12 N. Y. 189.	71
		Davone v. Fanning, 2 Johns. Ch. 253.	197
		Day v. Bach, 87 N. Y. 56.	217
		v. Bennett, 8 Harr. 287.	80
		Dech's App., 57 Pa. St. 467.	101
		Decker v. Fisher, 4 Barb. 592.	221
		Deere v. Guest, 1 Myl. & C. 516.	418
		Deering's Case, 93 N. Y. 861.	357
		DeHaven v. Bartholomew, 57 Pa. 126.	293
		DeLafield v. Parish, 25 N. Y. 9, 35.	841
		Delaney v. Brett, 51 N. Y. 78.	353
		Delaware, etc. R. R. Co. v. Toffey, 9	
		Vroom, 525.	884
		Demarest v. Terhune, 3 C. E. Green, 532.	134
		v. Wynkoop, 3 Johns. Ch. 129.	60
		Den v. Steelman, 5 Halst. 193.	136
		Dengler v. Kiehner, 13 Pa. 37, 41.	768
		Denise v. Denise, 10 Stew. 168.	415, 596
		Denison's Exrs. v. Wertz, 7 Serg. & R. 373	584
		Detrick v. Sharrar, 9 Pa. 521.	491
		Devault v. Camden, <i>Infra</i> , 82 (N. J.).	572
		DeWitt v. Van Sickle, 2 Stew. 200.	184
		Dickenson v. Blissett, 1 Dick. 263.	62
		Dietrich v. R. R. Co., 71 Pa. 432.	720
		Dilts v. Parke, 1 South. 219.	589
		Dixon v. Oliver, 5 Watts, 509.	918
		Doe v. Bateman, 2 Barn. & Ald. 163.	118, 119,
			120, 122
		Doolittle's Lessee v. Bryan, 14 How. 563	
		(55 U. S. bk. 14, L. ed. 543).	601
		Dorsey v. Gilbert, 11 Gill & J. 87.	598
		Dougherty v. Cent. Nat. Bank, 93 Pa. 227.	263,
			673

Douglass v. Pike Co., 101 U. S. 677 (Bk. 25, L. ed. 968).....	598
Downin v. Sprecher, 35 Md. 474.....	598
Downing's Est., 5 Watts, 90.....	895
Drake v. Mount, 4 Vroom, 441.....	826
Dublin & Drogheda R. Co. v. Navan, etc. R. Co., 5 Irish Rep. Eq. 893.....	267
Duncan v. Commonwealth, 2 Pear. 218.....	278
Duncomb v. N. Y. H. & N. R. R. Co., 84 N. Y. 190.....	195
Dunham v. Bower, 77 N. Y. 80.....	71
Durst v. Masters, L. R. 1 Prob. Div. 373, 878.....	792
Duryea v. Mayor, 62 N. Y. 594.....	886
Dusenbury v. Newark, 10 C. E. Green, 295.....	826
Dyer v. Erie R. Co., 71 N. Y. 228.....	512

E.

Eager, <i>Re</i> , 46 N. Y. 109.....	857
Early v. Burtis, 18 Stew. 501.....	852
Eberly v. Lehman, 100 Pa. 542, 546.....	741, 918
Eckert v. Reuter, 4 Vroom, 268.....	557
Edelin v. Sanders, 8 Md. 118.....	850
Edelman v. Yeakel, 27 Pa. 26.....	919
Edgell v. Hart, 9 N. Y. 213.....	285
Edwards v. Edwards, 2 Comp. & M. 612 v. Hodding, 5 Taunt. 815.....	820
Eggler v. People, 56 N. Y. 643.....	772
Elizabeth v. Meeker, 16 Vroom, 157.....	484
Ellis v. Hamlen, 3 Taunt. 52.....	71
Elmendorf v. Lockwood, 57 N. Y. 822.....	215
v. Taylor, 10 Wheat. 157 (23 U. S. bk. 6, L. ed. 291).....	60
Emigrants Sav. Bank, <i>Re</i> , 75 N. Y. 889.....	782
Erie Co. v. City of Erie, <i>Infra</i> , 305 (Pa.).....	808
Ernst v. Morgan, 12 Stew. 891.....	571
Essex Public Road Board v. Speer, <i>Infra</i> , 829 (N. J.).....	831
Evans v. Maury, 18 W. N. C. 377; 3 Cent. Rep. 187 (Pa.).....	894
v. Smallcomb, L. R. 8 H. L. Eng. & Ir. Apps. 249.....	802
Everett v. Hydraulic F. T. Co., 23 Vt. 225.....	483
Everson v. Pitney, 13 Stew. 539.....	883
Exchange Bank of Columbus v. Hines, Ohio St. 1.....	454
<i>Ex parte</i> Jones, 13 Ves. 237.....	587

F.

Farmers Loan & Trust Co. v. Henning, 17 Am. Law Reg. N. S. 266.....	208
Farrar v. Earl of Winterton, 5 Beav. 1.....	557
Farrier v. Schroeder, 11 Vroom, 601.....	251
Fellows v. Comrs. of Oneida, 36 Barb. 655.....	340
Fennimore v. Fennimore, 2 Green Ch. 292.....	552
Fenny v. Ewestace, 4 Maule & Sel. 58.....	866
Ferguson v. Wright, 61 Pa. 258.....	270
Ferry v. Laible, 12 C. E. Green, 146; 4 Stew. 566; 5 Stew. 791.....	58, 59
Field v. Field, 77 N. Y. 294.....	780
Filer v. R. R. Co., 49 N. Y. 47.....	777
Finley v. Hanbest, 80 Pa. 190.....	646
Finucane v. Gayfere, 1 Eccl. Rep. 425; 3 Phill. 405.....	609
Firmstone v. Wheeley, 2 Dowl. & L. 203.....	856

C. R., v. IV.

First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 295.....	206
Fischer v. Raab, 81 N. Y. 235.....	218
Fish v. Dodge, 4 Denio, 311.....	227
Fisher v. Consequa, 2 Wash. C. C. 352.....	79
v. Skillman, 8 C. E. Green, 229.....	554
Fitzgerald v. New Brunswick, 18 Vroom, 479; 1 Cent. Rep. 457 (N. J.).....	573, 574
v. R. Co., 8 Am. & Eng. R. R. Cas. 310.....	921
Flagg v. Baldwin, 11 Stew. 219.....	423
v. Mann, 2 Sum. 490, 533.....	851
Flanagan v. Camden Mut. Ins. Co., 1 Dutch. 506.....	565
Fleet v. Hegeman, 14 Wend. 42.....	221
Fleming v. New Brunswick, 18 Vroom, 231.....	567
Fletcher v. Rylands, L. R. 1 Exch. 280, 482, v. Smith, L. R. 2 App. Cas. 781.....	483, 800
Flike v. Boston & A. R. R. Co., 58 N. Y. 549.....	524
Florence v. Shumar, 5 Vroom, 455.....	896
Folger v. Columbian Ins. Co., 99 Mass. 267.....	332
Foot v. Aetna Life Ins. Co., 61 N. Y. 591.....	533
Fort Wayne, etc. R. R. Co. v. Gilder-sleeve, 38 Mich. 133.....	521
Foster v. Jack, 4 Watts, 334.....	898
Foulk v. Brown, 2 Watts, 209.....	453
Fox's Appeal, 3 Cent. Rep. 561, 566.....	455
Fox v. Hempfield R. R. Co., 79 Pa. 68.....	768
France's Estate, 75 Pa. St. 220.....	84
Francis v. Wigzell, 1 Madd. 145.....	553
Freeman v. Robinson, 9 Vroom, 383.....	559
Fritsch v. Allegheny, 91 Pa. 226.....	700
Fuller v. Fuller, 6 Stew. 583.....	89

G.

Gage v. Pumpelly, 115 U. S. 454 (Bk. 29, L. ed. 449).....	326
Gaines v. Green Pond Iron Mining Co., 83 N. J. Eq. 603.....	590
Galatian v. Erwin, Hopk. 48.....	59
Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 483 (78 U. S. bk. 20, L. ed. 199, 206).....	852
Ganson v. Tift, 71 N. Y. 48, 54, 120, 122.....	126
Gardner v. McEwen, 19 N. Y. 123.....	235
v. Newburgh, 2 Johns. Ch. 162.....	229
Garland v. Richeson, 4 Rand. 266.....	614
v. Towne, 55 N. H. 57.....	483, 484
Garle v. Robinson, 3 Jur. N. S. 633.....	418
Garthwaite v. Lewis, 10 C. E. Green, 351.....	87
Gates v. Preston, 41 N. Y. 118.....	71
Gatz's Appeal, 10 W. N. C. 453.....	230
Gay v. Alter, 102 U. S. 79 (Bk. 26, L. ed. 48).....	828
George's App., 12 Pa. 260.....	895
Gerrish v. Shattuck, 132 Mass. 235.....	252
Getty v. Binsse, 49 N. Y. 885.....	396
Gibbin v. McMullen, L. R. 2 P. C. Cns. 327.....	207
Gibbs v. Morgan, 12 Stew. 126.....	571
Gibson v. Jeyes, 6 Ves. 267, 273.....	62
v. Lenhart, 101 Pa. 522.....	106
v. Minet, 1 H. Bl. 569.....	533
Gihon v. Belleville White Lead Co., 3 Halst. Ch. 581.....	861
Gilbert v. Moose's Admrs., 18 W. N. C. 489.....	811

Giles v. Melsom, L. R. 6 H. L. 24.....	867	Hancock v. Podmore, 1 B. & Ad. 260....	845
Gilman v. City of Sheboygan, 2 Black, 510, 518 (87 U. S. bk. 17, L. ed. 805, 809).....	450, 454	Hand v. Marcy, 1 Stew. 59.....	87
Gladius v. Black, 67 N. Y. 568.....	583, 584	Harlan v. Harlan, 15 Pa. 507.....	919
Glading v. Frick, 88 Pa. 463.....	667	Harman v. Brotherson, 1 Den. 537.....	218
Glasey v. R. Co., 57 Pa. 172.....	921	Harpending v. Munson, 91 N. Y. 650.....	195
Glenn v. Howard, 2 Cent. Rep. 643 (Md.)	181	Harris v. Bell, 10 Serg. & R. 89.....	741, 918
Glover v. Portington, Freeman, Ch. 182; 1 Ch. Cas. 51.....	895	v. Ryding, 5 Mees. & W. 60.....	859
Godsall v. Boldero, 9 East, 72.....	810	Harrison v. Great North Western R. Co., 3 Hurl. & C. 288.....	483
Goltier Case, 8 Bland, 200.....	600, 601, 604	Hart v. Carroll, 85 Pa. 508.....	491
Good v. Mylin, 8 Pa. St. 51.....	51	Hasler v. Haaler, 1 Bradf. 248.....	845
Gore v. Kinney, 10 Watts, 189.....	741, 918	Haston v. Castner, 4 Stew. 697.....	875
Gorham v. Gross, 125 Mass. 232.....	483	Hathaway v. Payne, 84 N. Y. 92.....	124
Gould v. Hudson River R. R. Co., 6 N. Y. 524.....	518	Hatton v. Weems, 12 Gill & J. 83.....	601
v. McKenna, 86 Pa. 302.....	901	Havens v. Thompson, 11 C. E. Green, 883.....	846
Gourley v. Kinley, 86 Pa. 270.....	298	Havergal v. Harrison, 7 Beav. 49.....	406
Graham v. Fireman's Ins. Co., 87 N. Y. 69.....	582	Haworth's Case, 4 Carr. & P. 254, note.....	860
Gramlich v. Wurst, 86 Pa. 78.....	901	Hays' Admr. v. Miller, 6 Hun, 820; affd. 70 N. Y. 112.....	124
Grant v. Grant, 9 Stew. 502.....	185	Head Money Cases, 112 U. S. 580, 594 (Bk. 28, L. ed. 798, 802) 489, 493	489, 493
Graver v. Fehr, 89 Pa. 460.....	495	Heft v. McGill, 8 Pa. 256.....	918
Graves, <i>Re</i> , 1 Hagg. Eccl. 818.....	90	Heine v. Levee Comrs., 19 Wall. 655 (86 U. S. bk. 23, L. ed. 225).....	810
Graves v. Hampden Fire Ins. Co., 10 Al- len, 281.....	187	Hemingway v. Chicago, 60 Ill. 324.....	65
Gray v. Gray, 12 Stew. 511.....	863	Hendrickson v. People, 10 N. Y. 13, 49, 859, 861	859, 861
v. Gutteridge, 3 Car. & P. 40.....	820	Heppburn v. Montgomery, 97 N. Y. 617.....	796
Gredy v. Passaic, 13 Vroom, 87.....	567	Hering v. Chambers, 103 Pa. 172.....	908
Green v. Green, 80 N. J. Eq. 451.....	590	Herman v. Brookerhoff, 8 Watts, 241.....	495
v. Van Buskirk, 7 Wall. 151 (74 U. S. bk. 19, L. ed. 113).....	661	Hess v. Heebler, 6 Serg. & R. 57.....	647
Greenawalt v. Kohne, 85 Pa. 369.....	748	Heywood v. Shreve, 15 Vroom, 94.....	553
Greenhalgh v. Manchester & B. R. Co., 3 Myl. & C. 784.....	418	Hickok v. Hine, 28 Ohio St. 523.....	267
Greenwich v. Easton & A. R. R. Co., 9 C. E. Green, 217; 10 C. E. Green, 565.....	828	Hicks v. Dorn, 42 N. Y. 47.....	206, 207
Greenwood v. Spring, 54 Barb. 375.....	180	v. Downing, 1 Ld. Raym. 99.....	118
Gregg v. Patterson, 9 Watts & S. 197, 208.....	741, 918	Higgins, Matter of, 94 N. Y. 554.....	552
Gregory v. Thompson, 2 Vroom, 166.....	565	Hightstown v. Glenn, 18 Vroom, 105.....	84
Greig, <i>Re</i> , L. R. 1 Prob. Div. 72.....	883	Higinbotham v. Stoddard, 72 N. Y. 94.....	225
Griffith v. Cochran, 5 Binn. 87.....	760	Hill v. Managers of Metropolitan Asylum District, L. R. 4 Q. B. Div. 483; L. R. 6 App. Cas. 193.....	230
Griggs v. Houston, 104 U. S. 553 (Bk. 26, L. ed. 840).....	536	Hilton v. Lord Granville, 5 Adol. & El. N. S. 701.....	859
Groat v. Gile, 51 N. Y. 431.....	534	Hinchman v. Cook, Spen. 272.....	567
v. Moak, 94 N. Y. 115.....	387	v. Paterson, Horse R. R. Co., 2 C. E. Green, 75.....	871
Gross v. Painter, 1 W. N. O. 154.....	508	Hinton v. Dibbin, 2 Q. B. 650.....	207
Grove v. Van Duyn, 15 Vroom, 654.....	567	Hockenbury v. Snyder, 2 Watts & S. 240	663
Gunnis v. Cluff, 111 Pa. 512; 2 Cent. Rep. 356.....	263	Hoe v. Butterworth, 8 Mackey, 229.....	626
Gwynne v. Burnell, 7 Cl. & Fin. 572.....	346	Hoey v. Collector of Ocean Township, 10 Vroom, 75-79.....	578
H.		Hogencamp v. Ackerman, 4 Zab. 133.....	565
Haight v. Love, 10 Vroom, 14.....	572	Holcombe v. Holcombe, 12 C. E. Green, 473; 2 Stew. 597.....	55
Haines v. Campion, 3 Harr. 49.....	563	Holt v. Creamer, 7 Stew. 181.....	184
Haldeeman v. Bruckhart, 45 Pa. 514.....	480	Holton v. White, 3 Zab. 380.....	414
Hale v. City of Kenosha, 29 Wis. 599-604	454	Hooker v. New Haven & N. Co., 14 Conn. 146; 15 Conn. 812.....	230
v. Omaha Nat. Bank, 49 N. Y. 626	234	Horan v. Weiler, 41 Pa. 470.....	720
Hale's Exrs. v. Ard's Exrs., 48 Pa. 22.....	290	Horne v. Webster, 4 Vroom, 887.....	863
Hall v. Leaming, 2 Vroom, 321.....	249	Houghton's Case, 20 Hun, 395.....	357
v. Logan, 84 Pa. 381.....	276	Housatonic R. R. Co. v. Ill. & H. R. R. Co., 118 Mass. 391.....	267
v. McLeod, 2 Met. (Ky.) 98.....	65	Hovey v. Blakeman, 4 Ves. 596.....	553
v. Snedeker, 18 Vroom, 76.....	565	Howard v. Moot, 64 N. Y. 262.....	355
Hallahan v. N. Y. L. E. & West. R. R. Co., 102 N. Y. 195; 2 Cent. Rep. 924.....	779	Howe, <i>Re</i> , 1 Paige, 125.....	594
Hammersmith, etc. R. Co. v. Brand, L. R. 4 H. L. Cas. 171.....	228	Howell v. Green, 2 Vroom, 570.....	406
		v. McCoy, 3 Rawle, 256.....	484
		Howley v. Knight, 14 Adol. & El. 240.....	614
		Hoxsey v. City of Paterson, 10 Vroom, 489.....	567
		Hoy v. Bramhall, 19 N. J. Eq. 563.....	182
		Hoyt v. N. Y. Life Ins. Co., 3 Bosw. 440.....	811

Hudnıt v. Nash, 1 C. E. Green, 550	71	Kent v. Rand, 2 New Eng. Rep. 858 (N. H.)	559
Hudson v. Roberts, 6 Exch. Welsb. H. & G. 699	560	Kent, Santee & Co's App., 87 Pa. 165	661
Huguenin v. Baseley, 14 Ves. 278; 2 White & T. Lead. Cas. Eq. *556, top 1156, Am. notes	69	Kentucky Railroad Tax Cases, 115 U. S. 821 (Bk. 29, L. ed. 414)	483
Hughes, Re, 98 N. Y. 518	782	Kerlin's Lessee v. Bull, 1 Dall. 177 (1 U. S. bk. 1, L. ed. 89)	684
Hunt's App., 86 Pa. 294	690	Kernochan v. N. Y. Bowery Fire Ins. Co., 17 N. Y. 428	137
Hunt v. Silk, 5 East, 449	828	Kerr v. Day, 14 Pa. 112	492
Huyilar v. Cragin Cattle Co., 13 Stew. Eq. 892; 2 Cent. Rep. 204	405	Keystone Mut. Asso. v. Beaverson, 16 W. N. C. 188	809
Hyatt v. Johnson, 91 Pa. 200	586	Keyworth v. Hill, 3 Barn. & Ald. 685	324
I.			
Indianapolis Mfg. & Carpenters Union v. Cleveland, etc. R. R. Co., 45 Ind. 281	118	Kimball v. Lee, 18 Stew. 403; 4 Cent. Rep. 832 (N. J.)	598
Ingersoll v. Ingersoll, 9 Stew. 127	874	King v. Berry, 2 Green, Ch. 261	880
Inglis v. Haigh, 8 Mees. & W. 769	897	Kingman v. Kingman, 121 Mass. 249	874
Ins. Co. of Pa. v. Phoenix Ins. Co., 71 Pa. 81	270	Kip, Matter of, 4 Edw. Ch. 86	187
Irvin v. Bleakley, 67 Pa. 28	919	Kiahacoquillas Turnpike Co. v. M'Con- aby, 16 Serg. & R. 140	882
Irwin v. Wickersham, 25 Pa. 316, 317	271	Kittanning Coal Co. v. Commonwealth, 79 Pa. 109	453
Ives v. Sterling, 6 Met. 310	611	Kitzmiller v. Van Rensselaer, 10 Ohio St. 63 Klapworth v. Dressler, 18 N. J. Eq. 68; 2 Beas. 82	215
J.			
Jackson v. Roberts, 14 Gray, 546	406	Knowlton v. Board of Supervisors of Rock Co., 9 Wis. 410	454
v. Winne, 7 Wend. 47	424	Koch & Balliet's App., 98 Pa. 484	698
Jacob's Case, 98 N. Y. 98	547	Kuhns v. Turney, 87 Pa. 497	290
Jacoby v. Shafer, 105 Pa. 610	766	L.	
Jeffery v. Wooley, 5 Halst. 128	79	Lackawanna Iron & Coal Co's Case, Re, 10 Stew. Eq. 26	867
Jeffrey v. Owen, 12 Vroom, 260	562	Lake Shore & M. S. R. R. Co. v. N. Y. C. & S. L. R. Co., 8 Fed. Rep. 858	268
Jersey City v. Elmendorf, 18 Vroom, 288 v. Green, 18 Vroom, 627	801	Lamb v. Walker, L. R. 3 Q. B. Div. 889	860
v. Lembeck, 4 Stew. 255	811	Lancaster Co. Bank v. Gross, 50 Pa. 224	661
v. O'Callaghan, 12 Vroom, 849	811	Lancaster Fire Ins. Co. v. Lenheim, 89 Pa. 497	725
v. Vreeland, 14 Vroom, 638	247	Landt v. Hiltz, 19 Barb. 283	213
Jersey City & B. R. R. Co. v. Jersey City, 2 Vroom, 575, 577	433	Lane v. Lane, 95 N. Y. 494	770
Johnson v. R. R. Co., 70 Pa. 857	643	Langford v. Brighton, etc. R. Co., 4 Ry. & Can. Cas. 69	418
v. Van Horn, 16 Vroom, 136	810	v. Selmes, 3 Kay & J. 220	121
Johnston v. Trenton, 14 Vroom, 166	811	Laning v. N. Y. C. R. R. Co., 49 N. Y. 582	524
Jones, Ex parte, 18 Ves. 237	587	Lausing v. Smith, 8 Cow. 146; 4 Wend. 9	517
Jones' App., 10 W. N. C. 249	678	Lapham v. Curtis, 5 Vt. 371	488
Jones v. Festinlog R. Co., L. R. 3 Q. B. 736	482	Laroe v. Douglass, 2 Beas. 808	552
v. Granite Mills, 126 Mass. 84	521	Lawrence's Case, 1 Stew. Eq. 831	62
v. Western Vt. R. R. Co., 27 Vt. 899	484	Lawson v. Price, 45 Md. 183	349
Juniata Building Asso. v. Hetzel, 108 Pa. 507	748	Leach v. Ansbacher, 28 Legal Int. 277	271
K.			
Kade v. Lauber, 16 Abb. Pr. N. S. 288	378	League v. Waring, 85 Pa. 244	262
Kana v. Bolton, 9 Stew. 21	252	Lebanon Mut. Ins. Co. v. Losch, 43 Legal Int. 410	689
Kane v. Bloodgood, 7 Johns. Ch. 90	407	Lee v. Mnggeridge, 5 Taunt. 36	559
v. Hibernia Mut. Fire Ins. Co., 9 Vroom, 441	137	v. Payn, 4 Mich. 106	118
Kauffman v. Griesemer, 26 Pa. 414	481	Leeke v. Bennet, 1 Atk. 470	867
Keene v. Munn, 1 C. E. Green, 398	59	Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle, 10	687
Kelley v. Silver Spring Co., 12 R. I. 112	521	Lehigh Iron Co. v. Lower Macungie Township, 81 Pa. 482	807
Kellogg v. Thompson, 66 N. Y. 88	240	Ledy v. Messinger, 71 Pa. 177	276
Kelsey v. Northern Light Oil Co., 45 N. Y. 509	586	Levy v. Gadsby, 3 Cranch, 180 (7 U. S. bk. 2, L. ed. 404)	534
Kendall, Re, 85 N. Y. 802	857	Lewis v. Elizabeth, 10 C. E. Green, 298	826
Kent v. Quick-silver Mining Co., 78 N. Y. 159	802	v. Freeholders of Hudson, 8 Vroom, 254	249
		v. Perkins, 7 Vroom, 183	558

Lichtenwallner v. Laubach, 105 Pa. 366.....	722	Maclaren v. Stainton, 4 Jur. N. S. 199.....	874
Lichty v. Hugus, 55 Pa. 434.....	898	McLaughlin v. McLaughlin, 7 O. E. Green, 505.....	56
Lilienthal, <i>Re</i> , 28 Hun. 641.....	357	McLenahan v. McLenahan, 18 N. J. Eq. 101.....	182
Lima, <i>Re</i> , 77 N. Y. 170.....	782	McLeod v. Marsden, Barnes, 27.....	886
Linn v. Commonwealth, 96 Pa. 285.....	898	McNish v. Guerard, 4 Stro. Eq. 66.....	608
Lippincott v. Whitman, 88 Pa. 244.....	748	McQuade v. Emmons, 9 Vroom, 397.....	588
Little v. Bowers, 17 Vroom, 300..... 483, 487, 489	449	Madras R. Co. v. Zemindar, etc., L. R. 1 Ind. App. 364; 30 L. T. N. S. 770; 22 Week. Rep. 865.....	488
Littlefield v. Crocker, 30 Me. 192.....	215	Malloney v. Horan, 49 N. Y. 111.....	215
v. Shee, 2 Barn. & Ad. 811.....	559	Manhattan R. R. Co., <i>Re</i> , 102 N. Y. 802; 8 Cent. Rep. 329.....	782
Little Rock, etc. R. Co. v. Miles, 18 Am. & Eng. R. R. Cas. 10.....	902	Maples v. Mackey, 89 N. Y. 146.....	897
Livingston v. Adams, 8 Cow. 175.....	458	Marie v. Garrison, 83 N. Y. 14.....	195
v. Newkirk, 8 Johns. Ch. 312.....	91	Marks' App., 85 Pa. 281.....	687
Lloyd v. Cozens, 2 Ashm. 188.....	118, 120	Marks v. Townsend, 97 N. Y. 599.....	219
Lockhart v. Lichtenthaler, 46 Pa. 151. 511, 512	512	Marsh v. Chickering, 101 N. Y. 396; 2 Cent. Rep. 419.....	521, 524
Lodge v. Patterson, 8 Watts, 74.....	464	Marshall v. Welwood, 88 N. J. L. 839.....	488
Logan v. Caffrey, 30 Pa. 196.....	646	Marvin v. Smith, 46 N. Y. 571.....	215
Loker v. Damon, 17 Pick. 284.....	858	Marx Case, 99 N. Y. 377.....	545, 546
Lomer v. Meeker, 25 N. Y. 361.....	588	Marx v. McGlynn, 88 N. Y. 357.....	852
Long v. Long, 63 Md. 38.....	598	Mason v. Hill, 5 Barn. & Ad. 11.....	484
Longuet v. Seawen, 1 Ves. 406.....	851	Masterson v. N. Y. Cent. etc. R. R. Co., 84 N. Y. 247.....	512
Longwell v. Bently, 23 Pa. 99.....	492	Mather v. Brokaw, 14 Vroom, 587.....	558
Loomis v. Eagle L. & H. Ins. Co., 6 Gray, 896.....	809	v. Trinity Church, 3 Serg. & R. 518.....	492
Loomis v. Fry, 91 Pa. 896.....	290	Matter of Barker, 2 Johns. Ch. 232.....	62
Lord's App., 105 Pa. 451.....	491	Matter of Cottrell, 95 N. Y. 329.....	852
Lord v. Dall, 12 Mass. 115.....	809	Matter of Darrow, 95 N. Y. 668.....	352
Lorenz v. Oriady, 87 Pa. 226.....	661	Matter of Higgins, 94 N. Y. 554.....	352
Lorillard v. Silver, 86 N. Y. 578.....	886	Matter of Kip, 4 Edw. Ch. 86.....	187
Loose v. Buchanan, 51 N. Y. 477..... 488, 484	484	Matter of Pittsburg, 2 Watts & S. 320.....	800
Louisville & Nashville R. Co. v. Kentucky, 115 U. S. 321 (Bk. 29, L. ed. 414).....	486	Matter of Ross, 87 N. Y. 514.....	352, 353
Lounsbury v. Purdy, 18 N. Y. 515.....	514	Matter of Valentine, 100 N. Y. 607; 1 Cent. Rep. 76.....	352
Lowber v. Smith, 7 Pa. 381.....	898	Matter of Yates, 99 N. Y. 94.....	352
Lowden, <i>Re</i> , 89 N. Y. 548.....	357	Mayenborg v. Haynes, 50 N. Y. 675.....	880
Lowe v. Jolliffe, 1 W. Bl. 865.....	770	Mayor, etc., of Pittsburgh v. Pa. R. R. Co., 48 Pa. 355.....	279
Lowndes v. Dickerson, 34 Barb. 589.....	221	Mears v. Dole, 135 Mass. 508.....	488
Loyd v. Lee, 1 Strange, 94.....	559	v. Humboldt Ins. Co., 92 Pa. 15.....	724
Lucas' App., 53 Pa. 404.....	764	Medlar v. Aulenbach, 2 Pen. & W. 359.....	298
Lucas v. Lecompte, 42 Ill. 803.....	646	Merchants Bank v. Bliss, 85 N. Y. 412.....	208
Luse v. Jones, 10 Vroom, 707.....	251	Merriam, <i>Re</i> , 84 N. Y. 607.....	357
M.			
McArthur v. Scott, 118 U. S. 840 (Bk. 28, L. ed. 1015).....	685	Merritt v. Parker, 1 Cox (N. J.) 460.....	481
McCabe v. Fowler, 84 N. Y. 814.....	528	Mersey Docks & Harbour Board, 7 Hurlst. & N. 839.....	884
McCaffrey v. Woodin, 65 N. Y. 459.....	284	Messinger's App., 1 Cent. Rep. 423.....	480
McCallum v. Germantown Water Co., 54 Pa. 40.....	484	Messler v. Flemming, 12 Vroom, 108.....	562
McCandless' App., 98 Pa. 489.....	764	Meyer v. Haworth, 8 Adol. & El. 467.....	569
McCarthy v. Commonwealth, 16 W. N. C. 497; 1 Cent. Rep. 111 (Pa.).....	315	v. Patterson, 1 Stew. 289.....	835
McClintock v. R. R. Co., 42 Legal Int. 82.....	648	Miller's Admr. v. Miller, 10 O. E. Green, 355.....	555
McCoury's Exrs. v. Leek, 1 McCart. 70.....	415	Miller v. Adams, 7 Lans. 183.....	219
McCoy v. Rhodes, 11 How. 140 (52 U. S. bk. 18, L. ed. 684).....	617	v. Eagle Life & Health Ins. Co., 2 E. D. Smith, 268.....	811
McCully v. Clarke, 40 Pa. 406.....	901	v. Hershey, 59 Pa. 64.....	271
McCurdy v. Potts, 2 Dall. 98 (2 U. S. bk. 1, L. ed. 806).....	492	v. Jamison, 9 O. E. Green, 41.....	870
McDonough v. Loughlin, 20 Barb. 288.....	770	v. Leldig, 3 Watts & S. 458.....	298
McFadden v. Hunt, 5 Watts & S. 468.....	276	v. Lotz, 15 Pittsb. Legal Jour. 189.....	262
McFee v. Harris, 25 Pa. 102.....	908	Milliken v. Gardner, 87 Pa. 456.....	263
McGrew v. Foster, <i>Infra</i> , 915 (Pa.).....	741	Mills v. Hall, 9 Wend. 815.....	240
McIntyre v. R. R. Co., 87 N. Y. 287.....	777	Milne's App., 99 Pa. 488.....	895
McKee v. Bidwell, 74 Pa. 218.....	700	Milne v. Moreton, 6 Binn. 361.....	661
v. Phoenix Ins. Co., 28 Mo. 388.....	311	Minsker v. Morrison, 2 Yeates, 846.....	741, 918
McKeever v. N. Y. Cent. & H. R. R. Co., 88 N. Y. 667.....	586	Missimer v. Ebersole, 87 Pa. 109.....	661
McKim v. Aulbach, 130 Mass. 481.....	529	Mitchell v. Darley Main Colliery Co., L. R. 14 Q. B. Div. 127.....	860
McKown v. McDonald, 43 Pa. 441.....	491	v. Hamilton, 8 Pa. 491.....	768
C. R., V. IV.			
	2	v. Union Life Ins. Co., 45 Me. 104.....	809

Mondon's Case, <i>Infra</i> , 857 (N. Y.).....	772
Monell v. Monell, 5 Johns. Ch. 283.....	558
Monson v. Essex, 8 L. J. Ch. 169.....	867
Montgomery v. Trenton, 7 Vroom, 79.....	871
Moody v. Vandyke, 4 Binn. 41.....	918
Moore v. Bonnell, 3 Vroom, 90.....	58
v. Small, 19 Pa. 461.....	491
Morgan v. Elizabeth, 15 Vroom, 571.....	826
v. Scott, 26 Pa. 51.....	492
Morris' App., 88 Pa. 868.....	661
Morris v. Carter, 17 Vroom, 260.....	864
v. Lindsley, 16 Vroom, 435.....	558
v. Travis, 7 Serg. & R. 220.....	464
Morris & Essex R. R. Co. v. Central R. R. Co., 2 Vroom, 205.....	802
v. Comr., 8 Vroom, 228; 9 Vroom, 472.....	449, 450
v. Miller, Collector, 2 Vroom, 521.....	438
v. Newark, 2 Stock. 352.....	828
Morrison v. Erie R. Co., 56 N. Y. 802.....	777
v. Wurtz, 7 Watts, 437.....	492
Moulor v. Am. L. Ins. Co., 111 U. S. 335 (Bk. 28, L. ed. 447).....	584
Mowry v. Home Ins. Co., 9 R. I. 346.....	811
v. Peet, 88 N. Y. 458.....	128
Moyer's App., 105 Pa. 432.....	491
Muir v. Newark Sav. Inst. 1 C. E. Green, 537.....	840
Mundy v. Duke of Rutland, L. R. 23 Ch. Div. 81.....	869
Murdock v. Phillip's Academy, 12 Pick. 248.....	88
Murray v. Keyes, 85 Pa. 384.....	290

N.

National Copper Co. v. Minnesota Mining Co., 56 Mich.....	857
Nat. Docks R. Co. v. Central R. R. Co., 5 Stew. 755.....	832
Neuendorff v. World Mut. Life Ins. Co., 69 N. Y. 889, 892.....	180, 536
Newark v. Schuh, 7 Stew. 263.....	827
Newark Savings Inst. v. Forman, 6 Stew. 436.....	863, 864
New Boston Coal & M. Co. v. Pottsville Water Co., 54 Pa. 164.....	484
N. J. Exp. Co. v. Nichols, 4 Vroom, 434.....	826
N. J. Southern R. R. Co. v. Board of Railroad Comra., 12 Vroom, 235.....	480, 486, 484
New Orleans v. Kauffman, 29 La. Ann. 283.....	453
New World, The, v. King, 16 How. 474 (57 U. S. bk. 14, L. ed. 1021).....	207
N. Y. C. & H. R. R. R. Co. <i>Re</i> , 77 N. Y. 248, 249, 263.....	517, 518
N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co., 14 N. Y. 85.....	180
N. Y. & Greenwood Lake R. R. Co. v. Stanley, 7 Stew. 55; 8 Stew. 238.....	418
N. Y. & Harlem R. R. Co. v. Kip, 46 N. Y. 547.....	517
N. Y. Life Ins. Co. v. Statham, 98 U. S. 30 (Bk. 23, L. ed. 791).....	785
N. Y. Lac. & W. R. R. Co., <i>Re</i> , 99 N. Y. 21.....	517
Nichols v. Marsland, L. R. 10 Exch. 255.....	483
Nickerson v. Bowly, 8 Met. 424.....	87
Nightingale v. Meginnis, 5 Vroom, 461.....	251
Noon v. Salisbury Mills, 3 Allen, 840.....	821

C. R., v. IV.

Normand's Admr. v. Grognaud, 2 C. E. Green, 425.....	588
North v. Sergeant, 33 Barb. 350.....	340
v. Wiggins, 1 Str. 1063.....	586
North Hud. Co. R. R. Co. v. Boornem, 1 Stew. 450.....	413
North Ward Bank v. Newark, 10 Vroom, 880; 11 Vroom, 558.....	447, 450

O.

Oaks v. Spaulding, 40 Vt. 347.....	560
O'Brien v. O'Connor, 2 Ball. & B. 154.....	895
O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. 239.....	901
O'Leary v. N. Y. City, 93 N. Y. 1.....	321
Ormiston v. Olcott, 84 N. Y. 839.....	528, 553
Overseers of Manchester v. Guardians of Ormskirk, etc., L. R. 16 Q. B. Div. 723.....	425
Oxford v. Brands, 16 Vroom, 832.....	563
Ozeas v. Johnson, 1 Binn. 191.....	276

P.

Packer v. Sunbury & E. R. R. Co., 19 Pa. 211.....	268
Paget v. Gee, Ambl. 198; 3 Swans. 694.....	867
Palge v. Wheeler, 92 Pa. 282.....	667
Palmer v. Edwards, 1 Doug. 187, note, 118, 120.....	855
Palys v. Jewett, 5 Stew. 812.....	802
Parish v. Wheeler, 22 N. Y. 494.....	290
Parker v. Kleeber, 87 Pa. 251.....	589
Parke v. Thompson, 1 Vroom, 811.....	533
Parkhurst v. Smith, Willes, 332.....	118
Parmenter v. Webber, 8 Taunt. 593.....	687
Pastorius v. Fisher, 1 Rawle, 27.....	919
Patterson v. Martz, 8 Watts, 874.....	844
v. Patterson, 59 N. Y. 574.....	491
Pattison's App., 61 Pa. 294.....	902
Payne v. Reese, 12 W. N. C. 97.....	594
v. Wilson, 74 N. Y. 348.....	868
Pearce v. Gardner, 10 Hare, 287.....	918
Peebles v. Reading, 8 Serg. & R. 496.....	857
Pelton, <i>Re</i> , 85 N. Y. 651.....	124
Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605.....	852
Penn Mut. Life Ins. Co. v. Semple, 11 Stew. Eq. 575.....	775
Pennie v. Brooklyn, 97 N. Y. 654.....	494
Pennington v. Brinsop Coal Co., L. R. 5 Ch. Div. 769.....	267, 279
Pa. R. R. Co.'s App., 93 Pa. 150.....	902
Pa. R. R. Co. v. Barnett, 59 Pa. 265.....	901
v. Beale, 73 Pa. 504.....	902
v. Langdon, 92 Pa. 21.....	430
v. Wetherill, 12 Vroom, 147.....	895
Pennypacker's App., 14 Pa. 430.....	553
Pentz v. Simonson, 2 Beas. 232.....	208
People v. Albany & Vt. R. R. Co., 24 N. Y. 261.....	431
v. Barker, 43 N. Y. 70.....	775
v. Board of Assessors, 39 N. Y. 88.....	775
v. Board of Police Comrs., 82 N. Y. 506.....	775
v. Board of Tax Comrs., 85 N. Y. 655.....	775
v. Boas, 92 N. Y. 560.....	771
v. Carpenter, 102 N. Y. 233; 3 Cent. Rep. 179.....	791

People v. Clipperly, 37 Hun, 320; 101 N. Y. 684; 1 Cent. Rep. 804.....	547	Potter v. Burd, 4 Watts, 15.....	263
v. Cook, 8 N. Y. 67.....	536	Potts v. New Jersey Arms, etc. Co., 2 C. E. Green, 395.....	864
v. Crowley, 102 N. Y. 284; 2 Cent. Rep. 896.....	791	Poulson v. Nat. Bank of Frenchtown, 6 Stew. 250, 618.....	886
v. Doe, 36 Cal. 222.....	307	Powell v. Thomas, 6 Hare, 800.....	418
v. Faber, 92 N. Y. 146.....	379	Prescott v. De Forrest, 16 Johns. 159.....	119, 120, 121
v. Fire Comrs., 77 N. Y. 153.....	83	Prospect Park & C. I. R. R. Co. v. Williamson, 91 N. Y. 552.....	267
v. Fowler, 55 N. Y. 675.....	353	Purcell v. Mayor, 85 N. Y. 830.....	513
v. Guidici, 100 N. Y. 503; 1 Cent. Rep. 721.....	771		
v. Hendrickson, 10 N. Y. 13.....	362		
v. Hill, 53 N. Y. 547.....	775		
v. Hovey, 5 Barb. 117.....	379		
v. Knowles, 47 N. Y. 415, 420.....	775		
v. Lamb, 2 Keyes, 871.....	772		
v. McGloin, 91 N. Y. 24.....	364		
v. McMahon, 15 N. Y. 384, 359, 361, 363.....	363		
v. Montgomery, 13 Abb. (N. Y.) 207, 251.....	363		
v. Murphy, 63 N. Y. 590.....	361		
v. Otto, 101 N. Y. 690; 2 Cent. Rep. 899.....	791		
v. Solomon, 51 Ill. 52.....	307		
v. Stilwell, 19 N. Y. 531.....	775		
Peoria, etc. R. R. Co. v. Thompson, 103 Ill. 187.....	303		
Perkins v. Elliott, 8 C. E. Green, 526.....	553		
Peter v. Beverly, 10 Pet. 532 (85 U. S. bk. 9, L. ed. 522).....	529		
Peyser v. Mayor, etc., of N. Y., 70 N. Y. 497.....	514		
Phelps v. Racey, 60 N. Y. 10.....	548		
Philadelphia v. Devine, 1 W. N. C. 858.....	508		
v. Gross, 2 W. N. C. 429.....	508		
Phila. City Pass. R. Co. v. Boudroun, 92 Pa. 480.....	901		
Philadelphia, etc., R. R. Co. v. Boyer, 97 Pa. 91.....	511, 512		
v. Keenan, 103 Pa. 124.....	521		
Philadelphia & Trenton R. R. Co.'s Case, 6 Whart. 25.....	279		
Philadelphia, W. & B. R. R. Co. v. Stinger, 78 Pa. 219.....	902		
v. Williams, 54 Pa. 103.....	267		
Phillips v. R. R. Co., 49 N. Y. 177.....	778		
Philson v. Barnes, 50 Pa. 230.....	661		
Phoenix Mut. L. Ins. Co. v. Bailey, 18 Wall. 616 (80 U. S. bk. 20, L. ed. 501).....	811		
Platt v. Vattier, 9 Pet. 405 (34 U. S. bk. 9, L. ed. 173).....	459		
Pickart v. Ridgfield Park R. R. Co., 10 C. E. Green, 816.....	418		
Pidcock v. Bye, 8 Rawle, 183.....	293		
Piggot v. Mason, 1 Paige, 412.....	120		
Pinney v. Barnes, 17 Conn. 420.....	646		
Pittsburg, Matter of, 2 Watts & S. 820.....	300		
Pittsburg & C. R. R. Co. v. Southwest P. R. R. Co., 77 Pa. 173.....	267		
Pixley v. Clark, 35 N. Y. 520, 524.....	483		
Pleasants v. Fant, 22 Wall. 120 (39 U. S. bk. 22, L. ed. 782).....	536		
Plommerfelt v. Zellers, 2 Halst. 81 (1823).....	588		
Pluck v. Digges, 6 Bligh. N. R. 81.....	113		
Pool v. Sacheverel, 1 P. Wms. 675.....	586		
Poor Directors v. School Directors, 42 Pa. 21.....	307		
Popfinger v. Yutte, 102 N. Y. 38; 3 Cent. Rep. 291.....	773		
Porter's Lessee v. French, 9 Irish Law Rep. 514.....	118, 122		
Porter v. Trail, 8 Stew. 106.....	589		
Post v. Kearney, 2 N. Y. 394.....	119, 120		
C. R., V. IV.			
		R.	
		Radcliff's Exrs. v. Mayor, 4 N. Y. 198.....	327
		Rader v. Road District, 7 Vroom, 273.....	864
		R. Co. v. Arms, 91 U. S. 489 (Bk. 23, L. ed. 874).....	723
		R. R. Co. v. Aspell, 23 Pa. 147.....	643
		v. Greenwood, 79 Pa. 873.....	720
		v. Heileman, 49 Pa. 60.....	901
		v. Jones, 95 U. S. 439 (Bk. 24, L. ed. 506).....	903
		v. Kilgore, 32 Pa. 292.....	643
		v. Mahoney, 57 Pa. 187.....	921
		v. Moore, 4 Zab. 824.....	826
		v. Schwindling, 101 Pa. 258.....	721
		v. Shertle, 2 Am. & Eng. R. R. Cas. 158, note.....	915
		v. Snyder, 18 Ohio St. 399.....	921
		v. Troutman, 11 W. N. C. 453.....	632
		v. Van Horn, 9 Vroom, 133.....	826
		Manhattan, Re, 102 N. Y. 802; 3 Cent. Rep. 829.....	782
		N. Y. C. & H. R., Re, 77 N. Y. 248, 249, 268.....	517, 518
		N. Y. L. & W., Re, 99 N. Y. 21.....	517
		Railroad Tax Cases, 92 U. S. 575 (Bk. 24, L. ed. 668).....	455
		Ramsden v. Shadwell, 1 Ambli. 269.....	422
		Randolph v. Daly, 1 C. E. Green, 813.....	870
		Rappelyea v. Russell, 1 Daly, 217.....	844
		Rawls v. American Mut. L. Ins. Co. 87 N. Y. 282.....	311
		Re Arnold's Estate, 33 Beav. 163, 171.....	415
		Budlong, 100 N. Y. 208; 1 Cent. Rep. 286.....	770
		Eager, 46 N. Y. 109.....	857
		Emigrants Sav. Bank, 75 N. Y. 389.....	782
		Graves, 1 Hagg. Eccl. 318.....	90
		Greig, L. R. 1 Prob. & Div. 73.....	333
		Howe, 1 Paige, 125.....	594
		Hughes, 98 N. Y. 513.....	782
		Kendall, 85 N. Y. 802.....	357
		Lackawanna Iron & Coal Co.'s Case, 10 Stew. Eq. 26.....	867
		Lillienthal, 28 Hun, 641.....	357
		Lima, 77 N. Y. 170.....	782
		Lowden, 89 N. Y. 548.....	357
		Manhattan R. R. Co., 103 N. Y. 802; 3 Cent. Rep. 829.....	782
		Merriam, 84 N. Y. 607.....	357
		N. Y. C. & H. R. R. R. Co., 77 N. Y. 248, 249, 268.....	517, 518
		N. Y. L. & W. R. R. Co., 99 N. Y. 21.....	517
		Pelton, 85 N. Y. 651.....	357
		Stanhope's Trusts, 27 Beav. 201.....	406
		Walton's Est., 8 De G. M. & G. 173.....	873
		Weil, 83 N. Y. 543.....	782
		Whitney, 4 Hill, 533.....	123

		S.	
Reading & C. R. R. Co. v. Ritchie, 102 Pa. 425.....	901		Sager v. Galloway, <i>Infra</i> , 681 (Pa.)..... 635
Reddish v. Miller's Admr., 13 C. E. Green, 514.....	555		St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642..... 227, 482
Reed v. Cumberland Ins. Co., 9 Stew. Eq. 393.....	870		St. Luke's Home v. Association, etc., 53 N. Y. 191..... 584
Reeve v. Crosby, 3 Redf. 74.....	770		St. Paul Union Depot Co. v. St. Paul, 80 Minn. 350..... 267
Reeves v. R. R. Co., 80 Pa. 454.....	901		Salt Lake City Bank v. Hendrickson, 11 Vroom, 53..... 565
Reg v. Abingdon, L. R. 5 Q. B. 406.....	425		Saltsman v. Erie, 9 Pittsb. Legal Jour. N. S. 55..... 489
v. Bradford Nav. Co., 6 Best & Smith, 631.....	280		San Mateo Case, 8 Am. & Eng. R. R. Cas. 1..... 433
v. Glossop, L. R. 1 Q. B. 227.....	425		Santa Clara Case, 9 Sawy. 165..... 433
v. St. Ives, L. R. 7 Q. B. 467.....	425		Sarkie's App., 2 Pa. 157..... 673
v. St. Leonard, L. R. 1 Q. B. 21.....	425		Sayre v. Fredericks, 1 C. E. Green, 205..... 134
v. Wheatland, 8 Carr. & P. 238.....	380		Schaffer v. Kettell, 14 Allen, 528..... 406
v. Worcester, L. R. 9 Q. B. 840.....	425		Schall's App., 40 Pa. 170..... 293
Rensselaer, etc. R. R. v. Davis, 43 N. Y. 137.....	517		Schatt v. Grosch, 4 Stew. 199..... 326
Reserve Mut. Ins. Co. v. Kane, 81 Pa. 154.....	309		Schenck v. Dart, 22 N. Y. 420..... 353
Rex v. Carroll, 1 Wils. 75.....	587		v. Griffin, 38 N. J. L. 462, 467..... 78
v. Davis, 6 Carr. & P. 177.....	380		v. Schenck, 1 C. E. Green, 174..... 554
v. Jones, 1 Str. 185.....	586		Schmidt v. Opie, 6 Stew. 138..... 184
v. Lewis, 6 Carr. & P. 161.....	380		Schnatterly v. Crow, 2 Lan. Law R. 126 276
v. Pease, 4 Barn. & Ad. 30.....	280		Schnep's Appeal, 47 Pa. 87..... 768
v. Unitt, 1 Str. 567.....	586		School Trustees v. Bennett, 3 Dutch. 517 71
v. University of Cambridge, 1 Str. 557, 565.....	587		Schum v. Pa. R. R. Co., 107 Pa. 8..... 901
*v. Wilton, 2 Salk. 428; 5 Mod. 257.....	572		Schuyllkill, etc. Improvement Co. v. Munson, 14 Wall. 442 (81 U. S. bk. 20, L. ed. 867)..... 586
Rhinehart v. Lance, 14 Vroom, 311 (1881) 588	588		Schwinger v. Raymond, 83 N. Y. 191..... 375
Richard v. Brehm, 73 Pa. 140.....	680		Scott v. Dickson, 16 W. N. C. 181; 4 Cent. Rep. 181 (Pa.)..... 809, 310, 311
Richards v. Baker, 2 Atk. 821.....	867		v. Fritz, 51 Pa. 418..... 263
Riddlesburg Coal & Iron Co's Appeal, <i>Infra</i> , 702 (Pa.).....	706		v. Shufeldt, 5 Paige, 43..... 424
Ridgeway v. Michellon, 13 Vroom, 405 574	62		Scowden's App., 96 Pa. 423..... 314
Ridgway v. Darwin, 8 Ves. 65.....	182		Scratten v. Brown, 4 Barn. & C. 485..... 877
Riggin v. Magwire, 15 Wall. 459 (82 U. S. bk. 21, L. ed. 232).....	602		Scudder v. Vanarsdale, 2 Beas. 109..... 88
Rinker v. Streit, 33 Gratt. 637.....	396		Semon v. Trenton, 13 Vroom, 439; 4 Cent. Rep. 80 (N. J.)..... 574
Risley v. Brown, 67 N. Y. 160.....	681		Seybolt v. N. Y. L. E. & W. R. R. Co., 95 N. Y. 570..... 524
Ritter v. Brendlinger, 58 Pa. 68.....	582		Seyer v. Seyer, 10 Stew. 210..... 424
v. Kunkle, 10 Vroom, 259.....	587		Seyfert v. Edison, 18 Vroom, 428; 1 Cent. Rep. 464 (N. J.)..... 247
Roach v. Garden, 2 Atk. 469.....	305		Shadduck v. Marsh, 1 Zab. 484, 463..... 80
Road in Borough of Phoenixville, 2 Ches. Co. Rep. 433.....	492		Shalter's App., 48 Pa. 83..... 868
Robb v. Mann, 12 Pa. 800.....	587		Shamokin, etc. R. R. Co. v. Malone, 85 Pa. 25..... 458
Roberson v. Lambertville, 9 Vroom, 69.....	271		Shannon v. Shultz, 87 Pa. 481..... 290
Roberts v. Hopkins, 11 Serg. & R. 202.....	663		Sharpe's App., 87 Pa. 168..... 678
Robins v. Kitchen, 8 Watts, 390.....	215		Sharpless v. Ziegler, 92 Pa. 467..... 750
Robinson v. Bates, 3 Met. 40.....	870		Shaw v. Church, 89 Pa. 226..... 646
v. Davis, 3 Stock, 802.....	512		Sheldon v. Sherman, 42 N. Y. 484..... 483
v. N. Y. Cent. etc. R. R. Co., 66 N. Y. 11.....	353		Sherman v. Parish, 58 N. Y. 488..... 523
v. Raynor, 28 N. Y. 494.....	128		v. Wooster, 26 Iowa, 272..... 867
Roe v. Boyle, 81 N. Y. 305, 308.....	844		Shipley v. Fifty Associates, 106 Mass. 194 483
Rogers v. Price, 3 Younge & J. 28.....	353		Short v. Woodward, 13 Gray, 86..... 534
Ross, Matter of, 87 N. Y. 514.....	59		Shrewsbury v. Smith, 12 Cush. 177..... 483
Rubber Co. v. Goodyear, 9 Wall. 807 (76 U. S. bk. 19, L. ed. 829).....	770		Sickles v. Carson, 11 O. E. Green, 440..... 424
Rugg v. Rugg, 83 N. Y. 592.....	759		Simpson v. Hand, 6 Whart. 311..... 511
Runkle v. Commonwealth, 97 Pa. 328.....	309		v. Hornbeck, 3 Lans. 53..... 218
Ruse v. Mut. Benefit L. Ins. Co., 23 N. Y. 516.....	72		Siter, James & Co.'s App., 26 Pa. 173..... 492
Rusling v. Bray, 11 Stew. 398.....	553		Skellenger v. Skellenger, 5 Stew. 659..... 87
v. Rusling, 18 Vroom, 8.....	919		Slaughter House Cases, 16 Wall. 36 (83 U. S. bk. 21, L. ed. 894)..... 446
Russell v. Baughman, 94 Pa. 400.....	508		Slee v. Bloom, 5 Johns. Ch. 366..... 332
v. Foran, 1 W. N. C. 470.....	218		Smalley v. Hendrickson, 29 N. J. L. 371 534
Rutherford v. Holmes, 66 N. Y. 370.....	536		Smallwood v. Bilderback, 1 Harr. 497..... 56
Ryder v. Wombwell, L. R. 4 Exch. 9.....	860		Smiley v. VanWinkle, 6 Cal. 605..... 120
Rylands v. Fletcher, L. R. 3 H. L. Eng. & Ir. Apps. 330..... 483, 484, 859,			

Thorogood v. Bryan, 65 Eng. O. L. 114 (1849).....	511, 512	Van Riper v. Parsons, 11 Vroom, 1, 8, 123.....	431, 436, 443
Tiger v. Morris Co. Com. Pleas, 13 Vr. 631.....	85	Van Swearingen v. Harris, 1 Watts & S. 856.....	898
Tipping v. St. Helen's Smelting Co., 4 Best & S. 608.....	484	Varnum v. Camp, 1 Green, 326.....	58
Todd v. Cochell, 17 Cal. 97.....	483	Vatable v. N. Y. Lake Erie & West. R. R. Co., 96 N. Y. 79.....	868
v. Rafferty, 8 Stew. 254.....	407	Vaughan v. Taff Vale R. Co., 5 Hurl. & N. 679.....	230
Tomlinson v. Jessup, 15 Wall. 454 (82 U. S. bk. 21, L. ed. 204).....	437	Veazie Bank v. Fenno, 8 Wall. 543 (75 U. S. bk. 19, L. ed. 487).....	438
Toomey v. London, B. & S. C. R. Co., 3 C. B. N. S. 146.....	536	Vedder v. Fellows, 20 N. Y. 126.....	239
Townsend v. U. S. Trust Co., 3 Redf. 223.....	799	Veeder v. Baker, 83 N. Y. 155, 156, 160.....	209
Township of Pine Grove v. Talcott, 19 Wall. 666, 675 (86 U. S. bk. 23, L. ed. 227, 232).....	450	Vernon v. Vernon, 2 Bro. C. C. 659.....	867
Township of Talcott, 19 Wall. 666-675 (86 U. S. bk. 23, L. ed. 227-232).....	454	Vreeland v. Jersey City, 14 Vroom, 135; 10 Stew. 574.....	247, 431
Traphagen v. Hand, 9 Stew. 384.....	402	W.	
Trenton Iron Co. v. Yard, 13 Vroom, 357.....	450		
Trenton Mut. Life & Fire Ins. Co. v. McKelway, 1 Beas. 183.....	808	Wagner v. Baird, 7 How. 234 (48 U. S. bk. 13, L. ed. 681).....	459
Trenton Water Power Co. v. Chambers, 1 Stock. 475.....	418	Wainwright v. Bland, 1 Moody & R. 431.....	311
Tresch v. Wirtz, 7 Stew. 124.....	863	Wait v. Wait, 4 N. Y. 95.....	377
Truman v. London, Brighton, etc. R. Co., L. R. 25 Ch. Div. 423.....	230	Walker v. France, 17 W. N. O. 313; 2 Cent. Rep. 781 (Pa.).....	748
Trustees, etc. v. Township Com. of Readington, 7 Vroom, 66.....	449	Wallace v. Dold, 3 Leigh, 258.....	862
v. Trenton, 8 Stew. 667.....	326	Walton's Est., 2s, 8 De G. M. & G. 173.....	873
Trustees of East Hampton v. Kirk, 68 N. Y. 459.....	877	Ward v. Craig, 87 N. Y. 550.....	796
Trustees of Public Schools v. City of Trenton, 2 Stew. 668.....	450	v. Johnson, 95 Ill. 215.....	803
Tugwell v. Heyman, 8 Campb. 298.....	844	v. Taylor, 1 Pa. 233.....	492
Tuomy v. Dunn, 77 N. Y. 515.....	396	Warner's App., 13 W. N. C. 505.....	661
Twyne's Case, 3 Coke, 60.....	234	Warnock v. Davis, 104 U. S. 775 (Bk. 26, L. ed. 924).....	310
Tyrone, etc. R. Co. v. Jones, 79 Pa. 60.....	458	Warren v. Comings, 6 Cush. 103.....	646
Tyrrell v. Holt, 1 Barn. K. B. 12.....	770	R. R. Co. v. State, 5 Dutch. 353.....	328
U.		Warwick v. Chase, 23 Md. 154.....	79
Umback v. R. Co., 8 Am. & Eng. R. R. Cas. 98.....	915	Watson v. O'Hern, 93 Pa. 434.....	693
Union Pac. R. Co. v. Cheyenne, 113 U. S. 517 (Bk. 28, L. ed. 1099).....	453	Weakland v. Hoffman, 50 Pa. 517.....	919
v. Halt, 91 U. S. 343 (Bk. 23, L. ed. 428).....	208	Weakly v. Bell, 9 Watts, 278.....	646
U. S. v. Bayaud, 16 Fed. Rep. 884.....	547	Well, 2s, 83 N. Y. 543.....	782
v. Bigelow, 3 Mackey, 893.....	620	Wells v. Railway Rubber Co., (4 C. E. Green, 404.....	250
v. Clafin, 97 U. S. 546 (Bk. 24, L. ed. 1082).....	602, 608	v. R. R. Co., 56 Iowa, 520.....	915
v. Eggleston, 4 Sawy. 189.....	844	Welsh v. Duser, 3 Binn. 329.....	534
v. Fisher, 2 Cranch, 390 (6 U. S. bk. 2, L. ed. 814).....	229	Wennall v. Adney, 3 Bos. & Pul. 247.....	559
v. Tynen, 11 Wall. 88 (78 U. S. bk. 20, L. ed. 153).....	602, 608	West Cumberland Iron & Steel Co. v. Kenyon, L. R. 11 Ch. Div. 732.....	481
Upper Alloways Greek Township v. String, 5 Halst. 323.....	408	Western, etc. R. R. Co. v. Bishop, 50 Ga. 465.....	531
V.		Wheatley v. Baugh, 25 Pa. 523, 532.....	490, 484
Vall's Exrs. v. Runyon, 13 Vroom, 93, 99.....	451	Wheeler v. Dawson, 63 Ill. 54.....	55
Valentine, Matter of, 100 N. Y. 607; 1 Cent. Rep. 76.....	352	v. Spinola, 54 N. Y. 877.....	879
Vanderbeck v. Hendry, 5 Vroom, 467.....	570	White v. Stretch, 7 C. E. Green, 76.....	811
Vanderplank v. Miller, 1 Mood. & M. 169.....	511	v. Thielens, 106 Pa. 173.....	750
Van Houten v. Post, 12 Stew. Eq. 51.....	867	Whitney, 2s, 4 Hill, 533.....	123
Vankirk v. Skillman, 5 Vroom, 109.....	558	v. Phoenix, 4 Redf. 180.....	799
Van Rensselaer's Exrs. v. Gallup, 5 Denio, 454.....	125	Arms Co. v. Barlow, 63 N. Y. 63.....	808
		Wilds v. Hudson River R. R. Co., 24 N. Y. 433.....	536
		Wiles v. Suydam, 64 N. Y. 173.....	209
		Wilkinson's Appeal, 65 Pa. 189.....	908
		Wilkinson v. Bauerle, 14 Stew. 635; 5 Cent. Rep. 119 (N. J.).....	824
		Williams' Case, 3 Bland, 186.....	598
		Williams v. Gale, 3 Harr. & J. 231.....	481
		v. Ingersoll, 89 N. Y. 508, 518.....	376
		v. McKay, 13 Stew. 189.....	407
		v. Nixon, 2 Beav. 473.....	553
		v. Pomeroy Coal Co., 37 Ohio St. 583.....	857

Williams v. Reilly, 14 Stew. 187; 3 Cent. Rep. 675 (N. J.).....	407	Wood v. Waud, 3 Ex. 748.....	484
v. Smith, 108 Eng. C. L. 596; 14 C. B. N. S. 596.....	219	Woodbridge v. State, Allen, 14 Vroom, 262.....	575
Willing v. Brown, 7 Serg. & R. 467.....	492	Woodhull v. Rosenthal, 61 N. Y. 391, 392.....	119
Wilson v. Brett, 11 Mees. & W. 118.....	207	Woodruff v. Erie R. Co., 93 N. Y. 609.....	808
v. Herbert, 12 Vroom, 454.....	558	Worcester v. Worcester, 116 Mass. 193..	307
v. The Tuscarora, 25 Pa. 316, 317.....	271	Worthley v. Steen, 14 Vroom, 542.....	578
v. Waddell, L. R. 2 App. Cas. 95.....	481, 860	Wright v. Carter, 3 Dutch. 76.....	881
	895	v. Vickers' Admrs., 81 Pa. 124.....	764
v. Webb, 2 Cox, 3.....	79	Wykoff v. Wykoff, 8 Watts & S. 481 ...	918
v. Wilson, 8 Gill, 193.....	271		
Winchester v. Bennett, 54 Pa. 510.....	444	Y.	
Wisconsin Central R. R. Co. v. Taylor Co., 52 Wis. 37.....	234	Yates, Matter of, 99 N. Y. 94.....	852
Wisner v. Ocumpaugh, 71 N. Y. 113.....	586	Young v. Parker, 5 Vroom, 49.....	565
Wittkowsky v. Wasson, 71 N. C. 451.....	118, 119, 120	Youngblood v. Sexton, 32 Mich. 406... 444, 458	
Wollaston v. Hakewill, 3 Scott, N. R. 616.....	521	Youst v. Martin, 3 Serg. & R. 432.....	918
Wonder v. Balt. & O. R. R. Co., 82 Md. 411.....	418		
Wood v. Charing Cross R. Co., 33 Beav. 290.....	128	Z.	
v. Howard Ins. Co., 18 Wend. 646.....	484	Zeigler's App. 85 Pa. 178.....	208
v. Sutcliffe, 16 Jur. 75.....			

C. R., V. IV.

CENTRAL REPORTER.

(Each case shows its date of decision.)

PENNSYLVANIA.

SUPREME COURT.

McDEVITT'S APPEAL.

A devise to a son, of a share to be retained by a trustee for and during the son's natural life, and the interest thereof to be paid to the son yearly, and after his death his share to be equally divided among his children, if he should have any, or to their issue, creates only a life estate in the son.

(Decided May 31, 1886.)

APPPEAL from a decree of the Orphans' Court of Lancaster County, dismissing exceptions to an auditor's report. *Reversed.*

The facts as found by the auditor are as follows:

Richard Derrick died May 30, 1863, testate. By his will, dated April 22, 1863, he directed: 1, the payment of a pecuniary legacy in equal shares to the children of his first wife, the issue of such as might be dead when the legacy should take effect to receive their parent's share; 2, that certain real estate should be sold and the proceeds equally divided among all his children, as well those by his first as those by his second wife, with a like provision as to issue taking their parent's share as in the first clause; 3, that his widow should have a life estate in other real estate and, after her death, that all his property, real and personal, should be sold and distributed as in the next preceding clause; 4, all the rest, residue and remainder of his estate, of whatever kind, the testator gave to his children, as well by the first as by the second wife, to be equally divided among them, with a like provision as to issue taking their parent's share as in the first clause.

The next clause of the will provided:

"All the share of my property which my son, Eli T. Derrick, is or will be entitled to under the foregoing provisions of this will, I direct to be retained by my son, George W. Derrick, as trustee for the said Eli, during the natural life of said Eli; and I direct the interest thereof to be annually paid to Eli, and after his death his share to be equally divided among his children, if he should have any, or to their issue; the issue in all cases taking the share which their parent would have taken."

The trustee named in the will died and a new trustee was appointed. Eli T. Derrick died on July 31, 1884, leaving neither widow nor issue. The account of the new trustee was filed and an auditor (Alfred C. Bruner, Esq.) appointed to distribute the balance appearing by his account. The auditor held that the legacy was intended as an absolute gift to Eli and his heirs, and further reported:

"The provisions made for the payment of the principal to his children or their issue, after the death of the said Eli, in our mind, confirms this view. Further, there is no special bequest over on the death of the said Eli; the evident intention of the will being to provide for the said Eli during life, and for his issue after his death.

The fact that this special clause is preceded in the will by a general residuary clause does not in our opinion militate against our position. See *Willard's Est.* 68 Pa. St. 327.

Even should a doubt exist as to the absolute character of this bequest, we must give the legatee the benefit of such doubt. As was said in *Smith's App.* 11 Harris, 9: 'In cases of doubtful construction the law leans in favor of an absolute rather than a defeasible estate.'

The construction placed by the supreme court in *Sprout's App.* 13 W. N. C. 168, shows clearly that, wherever possible, distribution shall be made to conform to the general rules of inheritance."

The auditor awarded the fund to the administrator of Eli T. Derrick. Exceptions to this report by the appellant, one of the heirs of Richard Derrick, were dismissed by the court and the auditor's report confirmed. This appeal was then taken.

Messrs. William B. Given and Eugene G. Smith, for appellant:

This legacy was never vested in Eli T. Derrick. It is evident from the will that the testator never intended that it should so vest. The enjoyment of it by Eli is restricted to the term of his natural life and there is a bequest over. A bequest of income will not carry an absolute estate in the principal where the plain intent of the testator is otherwise; and in arriving at that intent, the words of the will must be permitted to have their proper force.

Bentley v. Kauffman, 86 Pa. St. 99.

The intention of the testator is unmistakable.

There is no direction or power given to anyone to pay over the principal or corpus of this fund or any part of it, to Eli T. Derrick at any time or upon the happening of any contingency. The fund was placed, by the very terms of the bequest, in the hands of a trustee "during the life of Eli," with direction that "the interest thereof to be annually paid to Eli," and with the provision immediately following that "after his (Eli's) death his share to be equally divided among his children, if he shall have any, or to their issue."

Thus the testator clearly distinguished, by apt expression, between the limited use given to his son, Eli T. Derrick, and the entirety which was to go to the children of Eli, or their issue.

It was a gift only of the income of the fund with a limitation as to time; and, therefore, the corpus of the fund never vested in Eli T. Derrick.

Millard's Appeal, 87 Pa. St. 457.

Eli T. Derrick had nothing in this fund that was the subject of gift, sale or attachment.

The estate was vested in the trustee to support the contingent remainder, charged with the burden of paying income to Eli T. Derrick, during his lifetime.

Huber's App. 80 Pa. St. 348.

The trust for Eli was an active one; *Earp's App.* 75 Pa. St. 123; *Ash's App.* 2 W. N. C. 360; consequently the legal estate for life was in the trustee, to perform the duties imposed by the donor, and could not therefore coalesce with any subsequent estate.

Dodson v. Ball, 60 Pa. St. 492.

The construction of testamentary words must always depend in some measure upon the special facts.

Huber's App. 80 Pa. St. 348.

(No brief was submitted by the appellee.)

Mr Chief Justice **Mercur** delivered the opinion of the court:

Section 9 of the Act of April 8, 1833, declares: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over or by words of limitation or otherwise, in the will, that the testator intended to devise a less estate."

The present contention is as to whether Eli T. Derrick took a fee in the real estate of his father Richard Derrick, under the will of the latter. The clause under which it is claimed Eli took a fee contains no words of inheritance. It is, therefore, by implication only that it can be claimed he took a fee. *France's Estate*, 75 Pa. St. 220.

In arriving at the intent of the testator we must seek to give effect to every part of the will and to give harmony to the whole instrument.

Turning, then, to the language of the testator, he declares all the share of his property which his son Eli will be entitled to under the provisions of the will shall "be retained by my son George as trustee for said Eli during the natural life of the said Eli;" and "I direct that the interest thereof be annually paid to Eli; and after his death, his share to be equally divided among his children, if he should have any, or to their issue; the issue in all cases taking the share which their parent would have taken."

Eli died intestate, unmarried, and without leaving children or any descendants. The court decreed the fund to the administrator of Eli. In this we think it erred. The legacy was not vested in Eli. A trust was created and George was made the trustee of the whole fund. The corpus thereof was never to be paid to Eli nor to any person to be designated by him. His whole right under the devise was limited to the receipt of the interest thereon. This he was to receive from the hand of the trustee. It, therefore, clearly appears that the testator, by words of limitation in the will, intended to devise to Eli an estate less than one of inheritance.

Decree reversed at the costs of the appellee, and record remanded, with instructions to make distribution to the heirs and devisees of Richard Derrick, entitled to the fund.

Jacob STOKES, *Pf. in Err.*,

v.

Annie M. MILLER, by her Next Friend.

1. **Words**, spoken of a single woman, impliedly charging her with **degradation of character**, and which justify a jury in finding that the intent was to impute to her an act of **fornication**, are clearly **actionable**.
2. **Evidence as to the common understanding of the words used** was held to be **irrelevant**.

(Decided May 31, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment on a verdict for plaintiff in an action on the case for slander. *Affirmed*.

The declaration alleged, *inter alia*, that "the said defendant * * * did speak and utter the following false, scandalous and defamatory words, to wit:

" 'Annie Miller had got crab lice on her, and to destroy them she used turpentine and it ran into her private parts and made her scream at a great rate and waken up the whole family. And I cast it up to her father and he did not deny it.' 'It's true, she had crab lice and must have got them from her lover.' Thereby meaning and intending, the said Annie M. Miller had been guilty of fornication, obscenity, impurity and gross filthiness of person. * * *

"And the said plaintiff further says that by reason of the said false, scandalous and defamatory words, she has suffered special injury in her good name, fame and reputation."

The plaintiff proved the speaking of the words as laid, but did not offer to prove that they were understood as charged in the innuendo.

The proof of special damages was confined to loss of sleep, injury to health, pain and suffering, bodily and mental, loss of happiness and peace of mind and capacity to do her usual household work.

The court disallowed defendant's offer to prove by physicians that having "crab lice" by an unmarried person does not indicate or prove "that such unmarried person had been guilty of fornication, obscenity, impurity and gross filthiness of person," and such is not the common or proper understanding on the subject. [Fifth assignment of error].

Defendant's first point was as follows:

"1. As Annie M. Miller, the plaintiff in this case is a private person, the words laid in the first count in the declaration are not actionable, because they do not contain an imputation against the plaintiff of an indictable offense of an infamous character, and subject to an infamous and disgraceful punishment; therefore the verdict of the jury should be in favor of the defendant on said first count in the declaration."

Answer:

"If the jury, from the evidence, believe and find that defendant uttered and published the words laid in the narr. and that, in uttering the words so laid in the narr., he intended to charge and cause it to be believed that Miss Miller had been guilty of the crime of fornication, a crime which would put her in peril of loss of social

standing and companionship, and being indictable, and attaching to her impurity, depravity and moral turpitude, then the words are actionable, and the plaintiff would be entitled to your verdict for at least nominal damages, without proving any malice, or special damage, for both malice and damage or injury would then be implied. If the jury find that the words as charged do not charge or were not intended to charge or impute that Miss Miller had been guilty of fornication, then she is not entitled to a verdict, unless she has satisfied you that the words were uttered maliciously and that she has suffered special injury and damage."

The plaintiff excepted to this answer and made it the sixth assignment of error.

Verdict for the plaintiff for \$1, the defendant to pay the costs. The defendant took this writ, assigning, *inter alia*, the above as errors.

Mr. J. W. Johnson, for plaintiff in error:

No action could have been maintained if there had been a direct charge of fornication.

Goeling v. Morgan, 32 Pa. St. 273, and a long line of cases leading to it; *Colbert v. Caldwell*, 3 Grant, 186; *Stitzell v. Reynolds*, 67 Pa. St. 56.

The words in the narr. do not charge fornication. There is no evidence that anyone so understood them. We offered to prove that such is not the common understanding. "Unless the words, therefore, without torturing them, imply a charge of felony, neither the innuendo nor the verdict will help them."

McClurg v. Ross, 5 Binney, 220.

Mr. W. A. Wilson, for defendant in error:

Words are actionable "whenever they impute an offense of moral turpitude, punishable in the temporal courts."

Klumph v. Dunn, 86 Pa. St. 146; *Shaffer v. Kintzer*, 1 Binney, 537; *McClurg v. Ross*, 5 Binney, 218; *Andres v. Koppenheaver*, 8 Serg. & R. 255; *Goeling v. Morgan*, 32 Pa. St. 255; *Beck v. Stitzell*, 21 Pa. St. 523.

The danger of punishment is not a necessary element. Indeed it is declared that words may be actionable, although the offense imputed be barred by the statute, or the punishment already inflicted.

It is expressly decided in *Vanderlip v. Roe*, 23 Pa. St. 82; *Walton v. Singleton*, 7 Serg. & R. 449 and *Evans v. Tibbins*, 2 Grant, 451, that words imputing fornication are actionable.

The same doctrine is also held in other States, in some of which fornication is not even an indictable offense.

Smalley v. Anderson, 2 T. B. Mon. (Ky.) 56; *Wilson v. Robbins*, Wright (Ohio) 40; *McBrayer v. Hill*, 4 Ired. (N. C.) 136; *Rickett v. Stanley*, 6 Blackf. 169; *Joralemon v. Pomeroy*, 2 Zab. 271.

The sense in which words are received by the world is the sense which courts of justice ought to ascribe to them on the trial of actions for slander. Slander imputes an injury; and the injury must arise from the manner in which the slanderous language is understood.

Rue v. Mitchell, 2 Dall. 58 (2 U. S. bk. 1, L. ed. 286); *Call v. Foresman*, 5 Watts, 831; *Bricker v. Potts*, 2 Jones (Pa.), 200; *Lukehart v. Byerly*, 3 P. F. S. 418; *Stitzell v. Reynolds*, 9 P. F. S. 489.

The following words have been held actionable: "She is a loose character—a bad character." *Vanderlip v. Roe*, 23 Pa. St. 82. "You

got to bed with Sarah M." *Walton v. Singleton*, 7 Serg. & R. 449. "Plaintiff and one A. B. were caught together in the packing room." *Evans v. Tibbins*, 2 Grant, 451.

In none of these cases was there any specific evidence offered to show expressly that the hearers understood the ambiguous words to imply fornication. A court may properly take notice of the import of words in popular parlance.

Call v. Foresman, 5 Watts, 831.

And the jury is the proper tribunal to pass upon the truth of the innuendo.

Dottarier v. Bushey, 16 Pa. St. 208.

If the words are not actionable, the special damages alleged and proven will support the verdict and judgment.

1 Stark. Slander, p. 2; 2 Greenl. Ev. 14th ed. § 414, note; *Pa. Canal Co. v. Graham*, 68 Pa. St. 290; *Scott v. Montgomery*, 95 Pa. St. 444; *Bradt v. Towseley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333.

Words imputing merely a want of chastity are not actionable *per se*. Special damages must be alleged and proved; but any special damage, however slight, will sustain the action.

Ross v. Fitch, 58 Tex. 148.

Per Curiam :

The words averred in the declaration and proved on the trial are clearly actionable. Spoken of a single woman, they impliedly charge her with degradation of character, and justified the jury in finding that the intent was to impute to her an act of fornication, which is an indictable offense under the laws of this Commonwealth.

Judgment affirmed.

Matthias BUSH, *Plff. in Err.*,
v.

George D. BENDER.

In the negotiation for the purchase of horses, the vendee paid part of the purchase money. The horses were to be delivered at a subsequent date, when the vendee offered notes drawn by the vendor in part payment, which offer was refused on the ground that the sale was for cash. The vendee got possession and the vendor brought **replevin, without returning the hand money**. The vendee pleaded *non cepit* and property. The court refused to instruct that a return of the hand money was necessary to maintain the suit. **Verdict for plaintiff**, with assessment of damages. Held, that the judgment must be **affirmed**.

(Decided May 31, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment on a verdict for plaintiff in replevin. *Affirmed*.

On February 3, 1883, Bush called on Bender and bought three horses for \$355. After agreeing upon the price, Bush paid \$10 in cash. It was agreed that the horses should be delivered

the following Monday at the Black Horse Hotel, in Lancaster. The horses were brought according to agreement and tied in the hotel yard while the parties repaired to the bar room, where Bush, or one Resh, offered in payment \$40 in cash and two notes drawn by Bender to Edward A. Ransing, one for \$150, dated September 18, 1882, for sixty days; the other for \$152.20, dated November 22, 1882, at sixty days. Bender refused to receive the notes in payment and went to the yard for his horses but found that they had been taken away at Bush's instance. Bender then brought replevin the same day without returning the \$10 paid him. Bush claimed the property and gave bond to the sheriff. In court he pleaded *non ceptit* and property. On the trial Bender testified that the sale was for cash on delivery, and that the latter note was a renewal of the first one. Bush testified: "Nothing was said about cash; he, Bender, said one of the horses was a little higher priced than I generally bought; and I asked him if I did not pay him for all I got, and he said I did." Bush also testified that he and Resh were purchasing agents for Ransing, and that the horses in suit were purchased for Ransing, although Bender did not know it.

The court refused to permit E. A. Ransing to answer the question "whether or not Matthias Bush knew that you would pay Bender with his own notes before the day of payment."

Third assignment of error.

The court also refused to admit in evidence the notes given by Bender to Ransing, referred to above. *Fourth assignment of error.*

The court, Livingston, P. J., charged the jury, *inter alia*, as follows: "But we do instruct you, that if Bush bought these three horses for \$355, said nothing about buying for Ransing, and that he agreed to the price asked of \$355 and requested Bender to deliver the three horses at the Black Horse Hotel; and you believe that either Bender or his man brought them there and tied the horses in the back yard and then went into the hotel with Bush to settle for them for the price agreed upon, and that there in the hotel Bush refused to pay for the horses, but looked on while William Resh counted down to Bender \$40 and then threw down two notes of Bender's that he had given to one Ransing long before, threw them down to Bender as part of the purchase money, and which Bender refused to accept—if you believe from the evidence that Bush did that or had Resh do it, and that while this thing was going on in the hotel the horses were unloosed from where Bender's man, Fogel, had tied them, and taken away, the court does instruct you that if you believe that testimony, believe that payment was offered in the manner stated, we instruct you that it was fraud—actual fraud in fact upon Mr. Bender by the defendant. Bush cannot consummate the contract for the purchase of the three horses in that manner." *Fifth assignment of error.*

The court refused to charge the jury as follows:

1. That before the plaintiff, Geo. D. Bender, can rescind the contract made with the defendant, Matthias Bush, for the sale and delivery of the horses in question, he must have first returned or offered to return the \$10 paid him as

a part of the consideration money, and that before the bringing of this suit. Plaintiff not having done so, the verdict should be for the defendant.

8. If the jury believe that the sale and delivery were obtained by actual fraud, then such sale cannot be rescinded by the plaintiff without having first returned or offered to return the \$10 paid him as part of the consideration money. The plaintiff having acknowledged that he made no such return or offer to return, then the verdict should be for the defendant. *First and second assignments of error.*

Verdict for plaintiff for \$397.96 and judgment thereon. The defendant took this writ specifying the assignments of error above stated.

Messrs. W. W. Franklin, Jno. A. Coyle and B. F. Eshleman, for plaintiff in error:

A tender of the money paid on account must be made before suit brought.

Pearson v. Chapin, 44 Pa. St. 9; *Turnpike Co. v. Commonwealth*, 2 Watts, 433; *Roth v. Criss*, 30 Pa. St. 145; *Staines v. Shore*, 16 Pa. St. 204; *Leaming v. Wise*, 73 Pa. St. 173; 1 Benj. Sales, § 606, p. 530, note 2, 4th Am. ed.

The fact that the value of the property not returned is small should make no difference in the principle.

Morse v. Brackett, 98 Mass. 209; and *Bassett v. Brown*, 105 Mass. 551, 558.

If there was evidence of fraud it should have been left to the jury. The court here instructed that there was actual fraud.

"Fraud without damage or damage without fraud gives no cause of action." The payment of Bender's own debt was no damage.

1 Benj. Sales, § 429, p. 467, and notes.

Bush was innocent of misrepresentation or artifice, and should have been allowed to show by Ransing that he did not know of the notes at time of purchase. This distinguishes the case from *Harnet v. Fisher*, 58 Pa. St. 453, and kindred cases.

Messrs. H. M. Houser and B. F. Davis, for defendant in error:

"Where no time is fixed, the law implies that the terms are cash on delivery."

1 Benj. Sales, § 335.

"It is a condition precedent of a sale for cash, in order to pass the property to the vendee, that payment should be made—clearly so, unless there has been delivery."

Welsh v. Bell, 32 Pa. St. 12, Strong, J.

Under the facts here, the property in the horses in dispute remained in Bender.

1 Benj. Sales, § 336; *Lester v. McDonnell*, 18 Pa. St. 91; *Henderson v. Lauck*, 21 Pa. St. 359.

Nor would the payment of the \$10 earnest money have any effect in changing the title of the property.

"Whatever may have been thought by some old writers respecting the effect, in the transmission of property, of giving and receiving earnest money, it is now considered of no importance, or of the smallest importance."

Elgee Cotton Cases, 22 Wall. 180-195 (89 U. S. bk. 22, L. ed. 863).

To the same point, and also to show that the contract was merely executory.

See *Nesbit v. Hurry*, 25 Pa. St. 208.

Pearson v. Chapin, 44 Pa. St. 9, only ap-

plies to executed contracts and where the fraud is discovered after the contract is executed. In this suit the contract was merely executory and the fraud discovered before it was executed. Besides, the grievance complained of was corrected on the trial and by the verdict, which specially sets forth "in favor of plaintiff for \$355 less \$10."

This is in accordance with the principle enunciated in *Babcock v. Case*, 61 Pa. St. 431: "If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial, as it may be in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded."

"A reconveyance or return of the property is only required, in order to prevent the party from holding the thing paid for and recovering the price."

Burns v. McCabe, 72 Pa. St. 314.

See also *McCabe v. Burns*, 66 Pa. St. 356; *Spalding v. Hedges*, 2 Pa. St. 243; *George v. Braden*, 70 Pa. St. 56; *Hamilton v. Wheeler*, 14 Pitts. L. J. 423.

In *Bleakley's App.* 66 Pa. St. 187, it is held that one attempting to defraud another by payment cannot ask repayment from him whom he has attempted to defraud.

Harner v. Fisher, 58 Pa. St. 453, is a case very similar in its facts to the one in controversy, and rules this case.

For answer to fourth assignment, we refer to *Allen v. Hartfield*, 76 Ill. 358, where seller refused to receive his own note in payment of horses, and maintained an action of trover for their value.

Per Curiam:

This was an attempt of the defendant below to get possession of the horses, contrary to the manifest intent and spirit of the contract. He was not entitled to the possession until he paid for them. The ingenious device to which he resorted to compel the application of the notes, which he held against the other party, cannot receive the sanction of law. Having given bond in this action of replevin and retained the horses, on the right being found against him, the further finding was an assessment of damages. In fixing on this amount it was proper for the jury to take into consideration the \$10 which he had paid. They are presumed to have done so, and to have returned a verdict for the residue of the damages.

Judgment affirmed.

James PEELING, *Piff. in Err.*,

v.

COUNTY OF YORK.

1. The compensation ordered to be paid to the sheriff, by authority of law, for the board of prisoners in the county jail, is an emolument of his office, within article III, section 13, of the Constitution of 1874. (*Apple v. Crawford Co.* 105 Pa. St. 300.)

2. An order of court, under the Act of April 10, 1873, fixing the rate of compen-

sation of an incumbent sheriff of boarding prisoners, at one sum for one year and at a less sum for another year, during his term of office, is not in violation of article III, section 13, prohibiting the increasing or diminishing of the salary or emoluments of any public officer after his election or appointment; notwithstanding another order had been made, during the incumbent's term, fixing the compensation for the past services of his predecessor in office.

(Decided May 31, 1886.)

ERROR to the Common Pleas of York County, to review a judgment in favor of defendant on a case stated. *Affirmed.*

The case stated contained the following facts:

The plaintiff below was duly elected sheriff of York County on November 6, 1877, and was duly qualified and commissioned, and entered upon the duties of his office on the first Monday in January 1878, and continued in office and in the performance of his duties during the years 1878, 1879 and 1880, the full term for which he was elected.

One of the official duties of his office was to board the prisoners of the County, for which he was entitled to be paid by the County.

On March 2, 1878, in pursuance of the Act of Assembly of April 10, 1873, Michael Stambaugh, the predecessor of the plaintiff in the office of sheriff of the County, presented his petition to the court of quarter sessions of the peace of said County, setting forth, among other things, "that his term of office expired on the first Monday of January, 1878;" "that in accordance with his duties he boarded all and every of the prisoners committed to the jail of said County during his said official term, in accordance with the requirements of the laws with regard to such duty; that he has not had any settlement with the officials of said County for the boarding of said prisoners, whose duty it is to allow and pay him for such boarding; that no rate of compensation has been fixed by the proper tribunal to be allowed to your petitioner for boarding said prisoners in said jail;" and prayed the court to fix the compensation to be paid to your petitioner for the boarding of each prisoner at the jail as aforesaid. Whereupon the said court made the following order, namely: "And, now, to wit: March 2, 1878, we fix the allowance prayed for at thirty-five cents per diem."

On January 8, 1879, the commissioners of York County presented their petition to the said court of quarter sessions of the peace, praying, among other things, "that they are informed and believe that the court of quarter sessions of the peace of York County shall have the power to increase or decrease, from time to time, the compensation of the sheriff of said County for boarding prisoners in the county jail, and fix the sum at any amount which said court may think reasonable and just; and that it shall be the duty of your petitioners as county commissioners of said County, to pay to the sheriff the amount so fixed by said court."

"Your petitioners, that they may know the better how to arrange financial matters to meet the necessary and lawful expenditures in con-

ducting the business of their said office, pray Your said Honors to fix the compensation of the sheriff as aforesaid, at as early a day as possible and convenient for Your Honors, and would respectfully recommend to Your Honors, in view of the great reduction in the price of all kinds of produce, etc., that Your Honors fix the compensation of the present sheriff for boarding prisoners for the year 1878 and 1879 at twenty-five cents per diem for each prisoner."

Whereupon the court made the following order, namely:

"And now, to wit: January 28, 1879, the court fix the compensation of James Peeling, Esq., Sheriff of York County, for boarding prisoners, at thirty-five cents each per diem for the year 1878 and twenty-five cents each per diem for the year 1879 as prayed for."

Upon an account stated by the said plaintiff, he was, on January 6, 1879, paid by the County defendant, thirty-five cents per diem for each and every prisoner boarded by him from the commencement of his term of office to the above date.

In pursuance of the order of court made January 8, 1879, accounts, giving the number of days of each prisoner boarded and the price per day as fixed by the court, were presented by the plaintiff to the defendant; and he received twenty-five cents per diem for each and every prisoner boarded by him for the year 1879; and, in accordance with similar accounts presented by the plaintiff against the County defendant, he received from the County defendant twenty-five cents per diem for each and every prisoner boarded by him for the year ending January 2, 1881, being the end of his term of office.

James Peeling gave a receipt in full for his fees for boarding prisoners up to January 6, 1879, but has not given receipts in full for boarding prisoners during the years 1879 and 1880; and this action was brought to recover the difference between the amount paid and that due at thirty-five cents for each prisoner per diem.

Upon these facts, the court entered judgment for the defendant. The plaintiff took this writ assigning for error the action of the court in entering judgment for the defendant.

Mr. Horace Keesey, for plaintiff in error: The Act of April 10, 1878, P. L. 666, gave the judges power to increase or decrease, from time to time, the compensation of the sheriff, and fix such sum as they might think reasonable and just; but does not require the amount to be fixed for each succeeding sheriff.

The order of March 2, 1878, continued in force until it was rescinded or altered; and this cannot be done so as to increase or decrease the amount during the term of office. Article III, section 18, Constitution of 1874.

That the compensation is an emolument is settled by *Apple v. Crawford Co.* 105 Pa. St. 300.

Messrs. Levi Maish and J. R. Strawbridge, for defendant in error:

The word sheriffs, not sheriff, is used in the Act. It is evident, therefore, that the Legislature intended to embrace the officer and not the office.

If the court failed to fix the compensation before the election or before the officer entered upon his term of office, the compensation was fixed afterwards.

At the time of the plaintiff's election no rate was fixed. How, then, could it be decreased? This distinguishes the case from *Apple v. Crawford County*, 105 Pa. St. 300.

If the court had, prior to the plaintiff's election, made an order such as was made on January 28, 1879, fixing the sheriff's compensation, no question could successfully have been raised as to its constitutionality, because different amounts were fixed for similar services.

Mr. Chief Justice Mercur delivered the opinion of the court:

This contention arises under the Act of April 10, 1878, P. L. 666, modified by section 13, art. III of the Constitution of 1874. The latter declares: "No law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

The compensation ordered, by authority of law, to be paid to the sheriff, for the board of prisoners in the county jail, is an emolument of his office within the section of the Constitution cited. *Apple v. Crawford Co.* 105 Pa. St. 300.

The difficulty of the plaintiff in successfully invoking the aid of this section to sustain his contention arises from the fact that there was not any fixed compensation for such an emolument applicable to his office, when he entered on the term thereof.

It appears that his predecessor served an entire term without any rate of compensation having been fixed, or having existed, applicable to his term. Two months after the expiration of his term, on his application, for the purpose of enabling him to settle with the County for the boarding of prisoners, the court fixed the compensation to be paid to him for a claim arising during his term.

This order was one of doubtful authority, even between the former sheriff and the County. It was, however, limited in its application to the payment for past services, to one whose term of office had expired. Although made after the term of the plaintiff had commenced, yet it did not apply to him nor to the office of sheriff generally. No compensation had been fixed when the term of his office commenced. The only order applicable to the plaintiff is the one made on January 28, 1879. Although this fixes one per diem for 1878 and another for 1879, yet it is by virtue of an order made at one time, and soon after the plaintiff had entered upon the second year of his term. He took the office subject to the power of the court to fix his compensation for this service. It made but one order designating the sum he should be paid. He cannot accept one part and repudiate the other part. It is of binding force in its entirety.

It follows that the judgment entered on the case stated is correct.

Judgment affirmed.

RE ROAD IN DRUMORE TOWNSHIP.

1. In the absence of the record in road proceedings showing to the contrary, the presumption is that, whenever practicable, the road was laid at a proper grade.

2. Viewers were entertained by a petitioner for a public road. There was no rule of court prohibiting it. The court found that it was done under circumstances evincing no sinister purpose or effort to unduly influence the viewers. It was held that the proceedings would not be set aside.

(Decided May 31, 1886.)

CERTIORARI to the Quarter Sessions of Lancaster County, to review the action of the court in dismissing exceptions to the report of viewers laying out a public road. *Affirmed.*

The facts are stated in the opinion of the court below by Livingston, P. J.:

"On August 17, 1885, a petition was presented and filed, praying this court to appoint viewers to view and vacate part of a public road in Drumore Township, at Mechanics Grove, Lancaster County, and to lay out another road in lieu thereof. On August 20, 1885, viewers were appointed, to whom an order was issued. On November 16, 1885, the report of the viewers was presented to and confirmed *in* by the court. In this report the viewers state that in pursuance of the order, they met at the time and place designated in the notice annexed, and after being respectively sworn or affirmed to perform the duties of their appointment impartially and according to the best of their judgment, they all viewed the ground, etc., and agreed that part of said road had become useless, etc., and say: 'We do therefore vacate the same, and do lay out in lieu thereof for public use the new road,' and returned the same in accordance with the courses and distances therein given; and the plot or draft thereof, made part of the report, having had respect to the best ground for a road, the shortest distance, and in such manner as to do the least injury to private property, and as agreeably to the desire of the petitioners as may be; that they endeavored to procure releases from all the land owners, etc., but failed to procure releases of damages from C. H. Hilton and Joseph Retzer. To Hilton they awarded no damage, he being benefited, and to Joseph Retzer they awarded thirty dollars, etc.

"The following exceptions were filed, among others:

"1. The report of viewers does not set forth that said road laid out does not at any point or points exceed an elevation of five degrees, or that by moderate filling and bridging the declination of the road may be preserved within that limit at the crossing of ravines and streams, as set forth in the Act of Assembly.

"2. The said viewers were entertained on the day of the view, September 20, 1885, by Jacob M. Swarr, one of the petitioners, at his residence near the road laid out by the viewers.

"The Act of Assembly requires that, in their report, the viewers shall state particularly: 1. Who of them were present at the view; 2. Whether they were severally sworn or affirmed; 3. Whether the road desired be necessary for a public or a private road. They shall also annex and return to the court a plot or draft thereof, stating the courses and distances, and noting briefly the improvements through which it may pass. The law further requires them, whenever practicable, to lay out the said roads

at an elevation not exceeding five degrees (except at the crossing of ravines and streams), where by moderate filling and bridging the declination of the road may be preserved within that limit. But the fact that they do not state in their report that they have done so is not sufficient cause for setting aside their report.

"2 Binn. 250; 4 Binn. 174; 13 Serg. & R. 25; 9 Barr. 70; 9 Harris, 220.

"The supreme court has said that the presumption is that the requirements of the statutes have been complied with by the viewers; and therefore it is not necessary specially so to state in the report, unless specially required by the Act regulating the subject.

"If viewers have disregarded the provisions of the law relating to elevation, exceptions may be filed, and the exceptant may show by proof that the elevation of the road laid out exceeds five degrees, and that it was practicable to lay out a road between the points at an elevation not exceeding five degrees.

"Exception 1 does not allege that the viewers have laid out this road at any elevation exceeding five degrees; the only complaint is that the viewers do not set forth the elevation in their report. This, as we have seen, is not a sufficient reason for setting aside the report; the first exception, therefore, is not sustained.

"In *Road in Sadsbury Township*, in 5 Lanc. Bar, 162 (Mar. 7, 1884), this court held that 'partaking by viewers of a meal, given by a party interested in the road, without other circumstances evincing a sinister purpose, or effort to unduly influence the viewers, is not sufficient to impeach their report and set it aside.' To the same effect was the decision of the supreme court in *Road in Plymouth Township*, 5 Rawle. 150.

"The evidence presented with reference to the second exception does not show any circumstances evincing a sinister purpose, or any effort to unduly influence the viewers; and therefore under the above decisions said exception is not sustained.

"8 Casey, 383; 10 Casey, 418; 7 Lanc. Bar, 146; 2 Pitts. R. 184."

The report stated that "at no place does the road as laid out exceed an elevation of — degrees."

The exceptions were dismissed and the report confirmed. Joseph Retzer, the exceptant, took this writ, assigning for error the action of the court in not sustaining the above exceptions.

Mr. Benj. F. Davis, for appellant:

The viewers undertook to report on the elevation but left it blank. The presumption is they omitted the degrees because they exceeded the legal limit.

The report should have been set aside because of the entertainment of the viewers.

Magnolia Street, 8 Phila. 468.

As another reason it may be urged that in Lancaster County the payment of costs on the part of petitioners for a view depends upon their success. Act of 1867, P. L. 388, § 1.

In *Road in Heidlersburgh*, 1 Pa. C. C. R. 7, the only interest that appeared was liability for costs.

Road in Plymouth Township, 5 Rawle, 150, and *Road in Sadsbury Township*, 5 Lanc. Bar, 162, were reviews, and this distinguishes these cases.

Mr. Simon P. Ely, for defendant in error:

It is the practice in Lancaster County to furnish printed returns with blanks. It was in this way that the blank in this case occurred.

The viewers are not required by Act of Assembly to report the elevation of the road, and all the presumptions are in favor of the legality of the proceedings.

Act of June 18, 1836, § 3; *Road in Middle-creek Township*, 9 Pa. St. 70; *Spear's Road*, 4 Binn. 174; *McCall's Ferry Road*, 13 Serg. & R. 25.

On the question of entertainment of viewers, the case is ruled by *Road in Plymouth Township*, 5 Rawle, 150.

It was suggested in that case that "an abuse might give room for an interference." But the court held in this case that there were no improper motives. The findings of the court will not be reversed on *certiorari*.

Re Germantown Avenue, 99 Pa. St. 479.

There were rules of court expressly forbidding the entertainment of viewers in *Magnolia Street*, 8 Phila. 468, and *Road in Heidersburgh*, 1 Pa. C. R. 7. There is no such rule in Lancaster County and these cases do not apply.

A jury of view acts for the public and not between individuals; and their action is in a great measure merely advisory, subject to the approval or disapproval of the court. It is not, therefore, analogous to the case of a jury appointed to assess damages, where a stricter rule prevails.

Per Curiam:

Both the assignments of error are to questions of fact. On *certiorari* we cannot look at the depositions. They are no part of the record. We adopt the facts found by the court as correct.

The Act of Assembly specifies what the viewers shall state in their report, but does not mention the elevation of the road as one of those things. In the absence of the record showing to the contrary, it will be presumed that "whenever practicable," the road was laid at a proper grade. In the absence of any rule of court prohibiting the viewers from being entertained and upon the finding of the court that it was done under circumstances evincing no sinister purpose or effort to unduly influence the viewers, the second specification cannot be sustained. When viewers are required to go a considerable distance in the country, a necessity for refreshments may exist that would not in a city.

Judgment affirmed.

David BOVAIRD *et al.*, *Appts.*,

v.

Samuel B. DICK *et al.*

1. **Equity has jurisdiction to compel an accounting and discovery in aid thereof, and to restrain the manufacture of other than a patented article, in violation of the terms of a written contract.**
2. **It is no defense to an action to enforce a contract granting a license to manufacture an article, recited in the con-**

tract as a patented article, to allege that the plaintiff had no right to the patent or to grant the license to others.

3. **A contract for the manufacture of a licensed article, providing that in case of default of monthly statements of sales and payments accordingly, the agreement should be null and void and that the license granted should be forfeited, at the option of the licensors, can not be rescinded by the licensees' refusing the statements. The licensees are liable as long as they manufacture during the continuance of the patent.**

(Decided May 31, 1886.)

A PPEAL and *certiorari*, to review the judgment of the Common Pleas of McKean County, in equity. *Affirmed.*

The facts appear in the opinion of the court below, on exceptions to the report of the master, by Olmsted, *P. J.*:

"The plaintiffs and defendants, on October 15, 1878, entered into a contract in which it was recited that the plaintiffs were the owners of certain letters patent for improvements in the construction of drilling jars, or jar fillings, and that the defendant desired to manufacture said jars for sale and use. The contract then provides as follows:

'Now, therefore, the parties of the first part hereby agree to, and do, license the said second parties to manufacture and sell said jars and jar fillings at their place of business in Bradford, McKean County, Pa., as long as they perform the stipulations and agreements herein specified to be performed by said second parties.

"In consideration whereof, the said parties of the second part agree to render to the said first parties, their heirs or assigns, on or before the fifth day of each and every month, a full, true and perfect statement of all jars and jar fillings made during the preceding month, and to whom sold; which statement shall be verified by the affidavit of the parties of the second part or their agent. And the said parties of the second part agree to pay to said first parties, their heirs or assigns, at the time said statement is rendered, the sum of \$10 as royalty for each and every jar or jar filling so made during the preceding month.

"The said parties of the second part further agree that in case of any default in making the statement and payments herein provided, then the agreement shall be considered null and void, and the license granted to said second parties shall be forfeited, at the option of the parties of the first part.'

"It appears, from the evidence, and from the report of the master, that the defendants entered upon the manufacture of these jars at their place of business at Bradford, Pa., and continued to manufacture jars up to the 4th day of June, 1885, when the plaintiffs' patent expired by its own limitation.

"The plaintiffs' bill in this case prays for an account under the contract, for discovery in aid of the account, and for an injunction restraining the defendants from manufacturing

jars or jar fillings other than those covered by the contract of the 15th of October, A. D. 1878. On the 2d of April, 1881, a preliminary injunction was ordered, restraining the defendants from manufacturing any jars other than those covered by the patent to the plaintiffs in this case. The defendants' answer was then filed; and on the 24th day of November, 1882, the decree of April, 1881, was amended by adding the words: 'And that the defendants' account to plaintiffs as provided for in this bill of complaint, and that the master heretofore appointed in this case, state said account.'

'Subsequently a motion was made by the solicitor for the defendants to amend the decree for an account, and it was amended by the court by adding the words: 'And to so much of the account as accrued after December 14, 1880, the master is also to take and report the testimony, and his opinion thereon, affecting the liability of the defendants to account after the said date.'

'The proceedings in the case are voluminous, but probably no further reference to them is necessary for a proper understanding of the questions raised by the exceptions to the master's report.

'The exceptions filed by the counsel for plaintiffs are numerous; they are forty-nine in number, but they seem to raise but three questions. The first question raised is: when does the liability of the defendants to account under the contract cease? The contract itself is indefinite as to time; it gives the plaintiffs the power, at their option, to terminate it, and declare the license forfeited at any time when the defendants shall make default in making the statements and payments required of them by the contract. The expiration of the patent on the 4th day of June, 1885, of course terminated the license. It is fair to presume that the parties negotiated with full knowledge of the duration of the patent, and that they had that period in view. The plaintiffs, in case of default on the part of defendants, could terminate it at any time; but the permission was evidently intended for the benefit of the plaintiffs, and it did not enable the defendants at their option to terminate the contract by simply refusing to comply with its terms, and neglecting and refusing to make statements and payments as they agreed to do.

'The defendants were licensed to use the plaintiffs' property; they were not bound to make any specified number of jars nor, indeed, to make any jars at all. If the defendants did not avail themselves of the power which they acquired under the license, if they made no jars such as were covered by the plaintiffs' patent, they could not be called upon to account. If they had made an improvident or unwise contract, they had the power of protection from it in their own hands. But they enter upon the manufacture of these jars under this license and account under the contract up to such period as they might themselves select and, while continuing in the manufacture of the jars, terminate their liability to account under the contract by giving the plaintiffs notice that they will continue to manufacture; but they will not account or pay. They enjoyed the advantages which they contracted for, and they are bound to pay the consideration there-
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for so long as they manufacture these jars, or until the expiration of the patent.

'That the learned master erred in his legal conclusion upon this question seems to us too clear for argument. Of course the parties who made this contract could have terminated it on the 14th day of December, 1880, by an agreement then made to do so; but the master does not find, as matter of fact, that it was terminated then by agreement of the parties; but he finds its determination as a matter of law because the defendants, on this date, renounced the license.

'We do not discover anything in the position of the plaintiffs that precludes them from asking for an account up to the termination of the patent. At the time of the filing of the bill in this case, the defendants confessedly had neglected or refused to make monthly statements as required by the contract and were continuing to manufacture jars such as were covered by the plaintiffs' license. The plaintiffs could therefore properly ask for an account; and the fact that the plaintiffs sought for and obtained an injunction, restraining the defendants from manufacturing jars other than those covered by the patent, cannot operate to prevent an account for the whole period of time during which the defendants were engaged in manufacturing jars that confessedly were of the kind covered by the patent. We conclude, as before stated, that the learned master erred in his finding that the plaintiffs were not entitled to an account for jars manufactured subsequent to the 24th day of December, 1880.

'The plaintiffs' exceptions raise a further question as to the liability of the defendants to account for jars sold by them, and returned because defective, either from imperfect materials used in the construction or defective workmanship. We think a fair construction of the contract is that the defendants were liable to account and pay for the jars manufactured by them and sold; and that a jar nominally sold, but returned because not a merchantable jar, cannot be considered as a jar sold within the meaning of the contract. We think, therefore, that the master was correct in his finding that jars returned to the defendants because of such defaults as made them unmerchantable should not be included in this accounting.

'The plaintiffs' exceptions raise a further question growing out of the fact of the manufacture of jars by the defendants, alleged by the defendants not to be of a kind covered by the plaintiffs' patent. It will be observed that the defendants, by their contract, agree not to manufacture or sell any jars or jar fillings other than those covered by the plaintiffs' patent during the continuance of the agreement. The plaintiffs' patent seems to have been on a combination of iron and steel in the manufacture of drilling jars, so as to secure the necessary tensile strength in the parts subject to the greatest longitudinal strain, and the hardness of steel to the parts which receive or give the blow, and which are subject to great frictional wear; and this purpose was obtained by welding into the wrought iron jars a steel headpiece to receive the blow, and by making the inner faces of the link bars of steel where the frictional wear is greatest.

'The master finds that 197 jars manufactured

by the defendants and included in their return were not made under the letters patent. If the plaintiffs sustained injury by the violation of the contract on the part of the defendants in this respect, they have a remedy; but we do not see how, under the pleadings in the case, and from the evidence as reported by the master, we can adjust the damage which the plaintiffs may have sustained in this accounting. The plaintiffs' bill is for an account for royalties under the contract; and if we go outside of the contract, we cannot see what there is in the evidence before us by which we can fix the amount of royalty which the plaintiffs should receive for such jars manufactured by the defendants, upon which the plaintiffs had no patent and upon which they were not, therefore, entitled to claim royalty at all.

"We are not unmindful of, nor do we intend to disregard, the general rule that when once a court of equity acquires jurisdiction and control of a case it will settle and determine the whole controversy between the parties, but we do not see how we can make it apply here. We are not clearly able to see how the master found from the evidence that there was so great a number as 197 jars that were not covered by the patent. It may be conceded that, as the patent is for a combination of iron and steel so as to obtain certain results, a jar manufactured entirely of iron or entirely of steel would not be covered by the patent and could not, therefore, if we are right in our conclusion above stated, be brought into this account; and the defendants, in their statement of account rendered to the master, returned 197 jars as being made of steel; but, on examination of the defendants' evidence, it appears that the jars in this schedule called steel jars were not made entirely of steel, but were partly iron and partly steel.

"Mr. Seyfang says: 'The steel jars mentioned in my statement as steel jars were not all steel, including boxes and pins.' The same witness further testifies: 'We have made very few of all solid steel.'

"It is quite apparent that the bulk of the 197 jars called steel jars were partly of steel and partly of iron; and the question at once presents itself whether these jars, made as they were, are covered by the patent, and therefore the subject of this account. The patentee claims, in his specifications forming part of the letters patent, after describing the manner of the combination of the iron and steel:

"1. The manufacture of drilling jars of combined iron and steel in which, at least, the part in each half of the jars that receives the blow, and the inner faces of the link jars shall be of steel, substantially as and for the purposes described. 2. The hereinbefore described drilling jars constructed of wrought iron and steel combined substantially in the manner and for the purpose set forth. The draft of the patent, and the description thereof, in the application, shows a hammer face of steel, link bars lined with steel to avoid friction, and the balance of the link bars of iron to obtain tensile strength.

"We incline to adopt the conclusion of the learned master that if the head piece or hammer face is of steel, and the link bars also of steel, it would not be a use of the combination

of iron and steel upon which the plaintiffs' patent is based.

"If the master is right in his conclusion from the evidence that the defendants did not avail themselves of the combination of iron and steel as described in the plaintiffs' patent in the manufacture of the 197 jars, we think he did right in excluding them from the account. It is difficult to determine the number made from the evidence; but we cannot say that the number stated by the master, 197, is too great.

"The plaintiffs' exceptions, so far as they relate to the period of time to be covered by this accounting, are sustained. The balance of them are not sustained, but they are overruled. The defendants' exceptions are overruled."

The court entered judgment against the defendants for a sum named, with costs. The defendants thereupon took this appeal.

The specifications of error raise several questions not touched upon in the above opinion.

The answer of the defendants, to the plaintiffs' bill, denied, in the first paragraph, that the plaintiffs were the original inventors or assignees of the inventors of the improvements in drilling jars, or that plaintiffs had the right to the exclusive use of the improvement or to license others; and alleged that such invention was publicly used by others prior to the patent. The plaintiffs demurred to the above paragraph, and the court sustained the demurrer and struck out the paragraph. *2d assignment of error.*

The defendants, appellants, further assigned as error the action of the court in sustaining "plaintiffs' exceptions to the master's report, so far as they relate to the period of time to be covered by the accounting," quoting the exceptions; also in dismissing the defendants' exceptions, quoting them and making each a separate assignment. The exceptions were, in substance, that the plaintiffs had no title to the letters patent and had no right to bring this action on the agreement set forth in the bill; that the bill should have been dismissed for want of equity at the costs of the plaintiffs; and that the defendants should not have been ordered to pay to the plaintiffs the sum recommended, with costs.

Messrs. James C. Boyce, N. B. Smiley, David Sterrett and M. F. Elliott, for appellants:

Under the pleadings it must be held that the plaintiffs have no title to the patent mentioned in the bill and agreement. The allegation of that fact in the bill is expressly denied in the answer. Matter of estoppel must be specially pleaded as such.

Bowman v. Rostron, 2 Ad. & E. 295; *Curt. Pat. § 199*; 1 Chitty, Pl. 509, 603, 227, 611; *Freeman v. Cooke*, 6 Dow & L. 187; *Reg. v. Houghton*, 1 El. & Bl. 501.

The answer is responsive to the bill and therefore conclusive in favor of the defendants.

Eaton's App. 66 Pa. St. 483; *Burke's App.* 11 W. N. C. 501.

The bill should be dismissed for want of jurisdiction. The plaintiffs claim that all jars made, whether under the patent or not, were subject to the royalty; hence, they could not need an injunction. The agreement was in re-

straint of trade, and plaintiffs should be left to their remedies at law.

Keeler v. Taylor, 58 Pa. St. 467; *Gompers v. Rochester*, 56 Pa. St. 194; *Harkinson's App.* 78 Pa. St. 196; *Gillis v. Hall*, 2 Brewst. 342.

Nor should the bill be sustained for an account. The items are all on one side. It is a mere question of how many jars were made.

Grubb's App. 90 Pa. St. 228; *Paseyunk Build. Association's App.* 83 Pa. St. 441.

A bill for an account must aver an indebtedness to the plaintiff, at the time of filing it.

Volmer v. McCauley, 7 Phila. 332; *Metz v. Farnham*, 8 Phila. 267.

All the discovery sought or obtained could have been had in an action of assumpsit.

Milne's App. 2 Cent. Rep. 84.

The license ended December 14, 1880, when the defendants surrendered their license and made themselves liable thereafter to be sued only in the United States Courts.

White v. Lee, 5 Bann. & Ard. Pat. Cas. 572; *Moody v. Taber*, 5 Off. Gaz. 278.

Even in a lease, when an option is given, the option is that of the lessee.

Dann v. Spurrier, 3 B. & P. 399, 442; *S. C.* 7 Ves. 231; *Price v. Dyer*, 17 Ves. 363; *Doe v. Dixon*, 9 East, 16; *Doe d. Lockwood v. Clark*, 8 East, 185; *Doe v. Hawke*, 2 East, 481; *Commonwealth v. Sheriff of Phila. Co.* 3 Brewst. 539.

This cause should not have been referred to a master before there was an interlocutory decree finding a liability to account.

Collyer v. Collyer, 38 Pa. St. 257.

Messrs. Joshua Douglass and W. B. Chapman & Son, for appellees:

The title of the plaintiffs is admitted by the contract between the parties, which estops the defendants.

Curt. Pat. §§ 215-217.

The jurisdiction of equity restraining by injunction the breach of a trade contract is clear.

Kerr, Inj. 493; *McClurg's App.* 58 Pa. St. 51; *Builer v. Burleson*, 16 Vt. 176.

The cases cited by the other side are plainly distinguishable. They all show, when examined, that contracts like this are not in restraint of trade.

The Act of October 13, 1840, Brightly's Purd. Dig. 692, provides:

"The several courts of common pleas, within this Commonwealth, shall have all the power and jurisdiction of courts of chancery in settling partnership accounts and such other accounts and claims as, by the common law and usages of this Commonwealth, have heretofore been settled by actions of account-render; and it shall be in the power of the party desirous to commence such action, to proceed either by bill in chancery or at common law."

In *Dick's App.* (*Samuel B. Dick and the Gibbs & Sterrett Manufacturing Company v. Bovaïrd & Seyfang*—this case), reported in 106 Pa. St. 589, *Mr. Justice Trunkay*, in delivering the opinion of the court, said:

"The learned judge of the common pleas rightly ruled that the bill set out a case suable in account-render, and therefore within the general Statute of 1840."

Further reference on the same subject is made to the following:

Wesley Church v. Moore, 10 Pa. St. 278-279; *Shriver v. Nimick*, 41 Pa. St. 80; *Danzeisen's* PA.

App. 78 Pa. St. 65; *Allison's App.* 77 Pa. St. 221; *Wilhelm's App.* 79 Pa. St. 120; *Paseyunk Build. Association's App.* 83 Pa. St. 441; *Darlington's App.* 86 Pa. St. 512; *Reesler v. Witner*, 1 Pears. 174; *Gandolfo v. Hood*, 1 Pears. 269; *Adam's Eq.* 57, §§ 1, 2, 8—182-3, and notes § 77; *Bisp. Eq.* 526, § 431, *et seq.*; *Bright. Eq.* 118, 121, 125; 1 Story, Eq. 64, 69, 439; *Port v. Kimberly*, 9 Johns. 493; *Taylor v. Taylor*, 43 N. Y. 584.

The prayer in the bill for general relief entitles the complainant to any relief which is consistent with the case made in the bill.

Bailey v. Burton, 8 Wend. 344; *Wilkin v. Wilkin*, 1 Johns. Ch. 117; *Story*, Eq. Pl. 40, 41 and note; *Traff v. Gould*, 15 Me. 82; *Brown v. McDonald*, 1 Hill, Ch. 302; 1 Daniell, Ch. Pr. 383 and cases cited; *Beaumont v. Boulbee*, 5 Ves. 485; *Palk v. Clinton*, 12 Ves. 68; *Read v. Cramer*, 1 Green, Ch. 277; *Bleeker v. Bingham*, 3 Paige, Ch. 246; *Del. & Hud. Can. Co. v. Pa. Coal Co.* 21 Pa. St. 181.

The bill in this case, being for discovery also, it will be made effectual for the purpose of full relief.

Story, Eq. § 64; *Gloninger v. Hazard*, 42 Pa. St. 401; *Adey v. Whitstable Co.* 17 Ves. 323; *Ryle v. Haggie*, 1 Jac. & Walk. 236; *McKenzie v. Johnson*, 4 Madd. 378; *Bank of Ky. v. Schuykill Bank*, 1 Pars. Eq. Cas. 219, 235; *Hare*, Discovery, 8.

The defendants could not rescind this contract and yet use the patent. The option to rescind was for the plaintiffs alone.

Patterson's App. 99 Pa. St. 521; *S. C.* more fully reported in 11 W. N. C. 572.

Equity having taken cognizance of litigation will dispose of every feature of dispute.

Brightly, Eq. § 124; 1 Story, Eq. § 457; *Bank of U. S. v. Biddle*, 2 Pars. Eq. Cas. 53; *McGowin v. Remington*, 12 Pa. St. 56; *Shollenberger's App.* 21 Pa. St. 337; *Brightly*, Dig. 3175.

It is submitted that the defendants cannot annul this contract and lawfully disregard its obligations without the consent and agreement of the plaintiffs. It is a universal rule of law and equity that a contract can be rescinded only by the acts of both parties.

New England Iron Co. v. Gilbert El. R. R. Co. 91 N. Y. 155; *Patterson v. Silliman*, 28 Pa. St. 304.

"No warranty of validity of the letters patent is implied in any license given thereunder, and unattended proof of invalidity is therefore no defense to any suit for promised royalties."

Walker, Pat. 221, § 807; *Birdsall v. Peregó*, 5 Blatch. 251; *Sargenti v. Larned*, 2 Curt. 340; *Marsh v. Dodge*, 4 Hun, 278; *Bartlett v. Holbrook*, 1 Gray, 118; *Marston v. Sweet*, 66 N. Y. 207; *Kineman v. Parkhurst*, 18 How. 289 (59 U. S. bk. 15, L. ed. 385); *Kerr*, Inj. 425; *Curtis*, Patents, 246, § 217; 247, § 218; 2 Whart. Ev. 1149.

Per Curiam:

We have no doubt of this being a proper case for a court of equity. The appellants were licensed to use the appellees' property. They were not bound to make any specific number of jars. It was optional with them whether to make any under their license. Having, however, commenced to make them and so continuing, they became obliged to pay so long as

they manufactured them, until the expiration of the patent. They were, therefore, obliged to render an account.

We see no error in the conclusion of the learned judge as to the number for which they should be charged, and the sum which they should pay.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Samuel B. DICK *et al.*, Appts.,

v.

David BOVAIRD *et al.*

1. A contract to render a patentee monthly statements of all articles made during the previous month and to whom sold, with an agreement to pay a royalty for each article so made during the preceding month, will not include unmerchable articles, under a fair construction of the agreement.
2. In a bill in equity for an account of royalties on patented articles manufactured, articles made in violation of the agreement, but not under the letters patent, can not be included in the account.
3. A patent drilling jar of combined iron and steel, in which the hammer face which receives the blow is of steel, and the link bars lined with steel, to avoid friction, and the balance of the link bars of iron, to obtain tensile strength, will not include a drilling jar with the hammer face of steel and the link bars of steel.
4. Parol evidence to change a written contract considered.

(Decided May 31, 1886.)

APPEAL and *certiorari* to review a judgment of the Common Pleas of McKean County, in equity. *Affirmed.*

This was an appeal by Samuel B. Dick and the Gibbs & Sterrett Manufacturing Company from the same decree reported in the next preceding case. The facts are stated in the report of that case.

The defendants alleged at the hearing before the master, that at and before the execution of the contract of license, a parol agreement was entered into between themselves and Mr. Sterrett, on behalf of the plaintiffs, that broken jars should not be taken into account nor royalty paid on them. The evidence on this point was as follows:

R. H. Sterrett testified:

"I am acquainted with the Gibbs & Sterrett Manufacturing Company, and was in October, 1878. I was a director of said company at that time, and so continued to the present. * * * In October, 1878, the 16th, I was at the shops of Bovaird & Seyfang in Bradford, Pa., and issued to them this license. (The paper offered.) I was acting as the agent of the Gibbs & Sterrett Manufacturing Company and S. B. Dick in the matter. This is my signature as subscribing witness to said paper. I am acquainted with the signature and handwriting of S. B.

Dick. I should say this is his signature. I have seen it a great many times. I signed the "Gibbs & Sterrett Manufacturing Company" for them. I saw Bovaird and Seyfang sign the paper referred to at their office in Bradford, Pa. Bovaird and Seyfang were both present at the time of the execution of this contract, signed by one in the presence of the other, and in my presence. The paper was executed in duplicate. I took one of the papers and Bovaird & Seyfang took the other. I can't say which one of them signed the paper. They were both there. The Gibbs & Sterrett Manufacturing Company was a corporation and had a common corporate seal. I had not at that time any other office of the corporation except director. I think I saw Dick sign the paper. Dick was not present when Bovaird and Seyfang signed it. I signed it for the company, and then witnessed it. In relation to my conduct and management of their affairs in regard to this patent at and prior to October, 1878, the president, treasurer and secretary of the company told me that I could give licenses to parties who were making jars, and that I should do so and look after the company's interest in that patent. This was in connection with Mr. Dick's part. It was mutually agreed by both parties that I should represent them, to report to them and pay one half the money that was collected to them and the other half to Mr. Dick, which I did."

Q. "I wish to call your attention to the statement of Mr. Seyfang at a former hearing in this case as follows: 'We objected to the contract as printed, raising the question of broken jars; and refused to sign the contract until it was agreed by the licensors to exclude these, to which condition he agreed.' What do you say as to that statement?"

A. "I never agreed that they should have any credit for broken jars. The question wasn't raised. I have seen Exhibit A, the license in this case. On the date of the license, before the execution of the license, I exhibited it to the defendants, executed by Mr. Dick. They examined it and read it. They objected to some of its provisions. * * * The only and principal objection that was made, and that they talked more about and dwelt on more than any other (I think Mr. Bovaird was more particular about it than Mr. Seyfang), was the printed clause in the license requiring them to report and pay royalty on the 5th of every month, on all jars made and sold during the preceding month, and wanted me to change that so that it would read, not earlier than the 10th or 15th of the month. Their reasons for that was that they could not or might not get in their collections so early in the month. I told them that I could not make any changes in the printed form of the license; that I never had and would not, as I had no right to or authority; but in addition I said, that being the only or the principal objection, I would promise them that they could have until the 10th of the month to report, and if they paid their royalty and made their report by the 10th of the month I would make them no trouble. I think there were no other objections made by them to the printed form. I cannot recall any other. The same day the license was executed in duplicate."

J. L. Seyfang testified:

"Prior to our signing of the contract, we objected to the contract as printed—raising the question of broken jars, the injustice of paying royalty on the same. The question was involved, and we refused to sign that contract until it was agreed by the licensors, by Mr. Sterrett their representative, and to which condition he agreed before our signature to that contract—that was that we would not pay and were not to pay for broken jars. This was before we signed the contract, and after that agreement we signed the contract. * * * Upon representation of these facts, as before stated, and with the understanding before testified to, the defendants in this case, Bovaird & Seyfang, signed that article of agreement."

All of the foregoing answer was objected to for the reason that it purported to have relation to conversations and promises of an agent, and was collateral and incompetent.

It was admitted on the part of the counsel for the plaintiffs that R. H. Sterrett acted as agent of the plaintiffs in the execution of the partly printed and partly written contract of the parties in evidence here, and to collect the royalties thereunder, but not as their agent for any undertakings other than those described; that for this purpose the contracts were printed in blank and executed by Samuel B. Dick, one of the plaintiffs, and committed to Mr. Sterrett for execution by the other parties; and plaintiffs denied that there was any authority to Mr. Sterrett to modify the terms of the contract in any way.

Witness: "No one of the plaintiffs but Mr. Sterrett called upon us in this matter. I remember four interviews with Mr. Sterrett before we signed the contract. We never received any communications from the plaintiffs nor wrote any concerning this matter. * * * I think I signed the contract on the day it is dated. The conversations with Mr. Sterrett were at our office in Bradford. The first one was about six weeks prior to the execution of the contract. I did not send for him. The next was probably one or two weeks after the first. The next was some time after; I cannot state how long. The last time, the fourth, was when the contract was signed. I had not asked him to come nor written to him. I did not write to the plaintiffs, nor any of our concern, asking for license. I can't say that Mr. Sterrett exhibited the blank contract at the first conversation. I think he did at the second. Mr. Sterrett and I had a talk. He did not say he could not change any of the terms of the contract, that he had no authority to; nor did he say that he would not change the terms. I told Mr. Sterrett that if we were expected to pay for broken jars we wouldn't sign the contract. I don't remember whether or not I asked him to change the words of the contract."

David Bovaird testified as follows:

Q. State if you were present at any of the conversations with the representative of Dick and the Gibbs & Sterrett Manufacturing Company prior to and at the time of the signing of the license upon which this suit was brought.

A. I was. I couldn't be positive whether I was present on the day the license was signed, but I think I was.

Q. State, Mr. Bovaird, any conversation that

there was between the representative of the plaintiffs and the defendants; and any representations made by him to induce you and your partner to sign that license; or any agreement that he made with you concerning what jars royalty should be charged upon.

Objection on the part of the plaintiff on the same ground as to similar question to Mr. Seyfang on the same subject, and this objection is to apply to all questions touching the same subject matter.

A. We had a talk, Mr. Sterrett, Mr. Seyfang and myself. We would not pay for broken jars. Mr. Sterrett made a remark that he couldn't warrant our jars. We told him we didn't ask him to warrant our jars, but if we had to pay for broken jars we shouldn't sign that contract. Now I don't know whether it was at that time that the contract was signed, because there were two or three times that I was present and it was talked about. We had not been manufacturing jars, but we had a jar maker hired to make them. Before the signing of that contract Mr. Sterrett said that we wouldn't need to pay for broken jars, and that he would protect us; that if any were manufactured that were not paying royalty, there would be suits started to make them pay it.

The master found from the evidence as follows: "This parol agreement is denied by Mr. Sterrett; but it is positively stated by both Seyfang and Bovaird and must, therefore, be considered established by a preponderance of testimony. * * * The parol agreement proved neither contradicts nor alters the written license. Under the latter, as already construed, royalty was to be paid only upon jars sold; and a conditional sale therefore, if the conditions should not be fulfilled, would not be subject of royalty."

The plaintiffs excepted to these findings by the master, and the court overruled the exceptions.

The assignments of error raised the questions whether 197 of the jars were made under the letters patent and whether or not they should be included in the account; and whether broken or defective jars should also be included.

Messrs. Joshua Douglass and W. B. Chapman & Son, for appellants:

The injunction restraining the defendants from selling drilling jars of any other patent or make than those held by plaintiff was in aid of the legal right.

Kerr, *Inj.* 498; *McClurg's App.* 58 Pa. St. 51; *Butler v. Burleson*, 16 Vt. 176; *Beard v. Dennis*, 6 Ind. 200.

The defendants are not permitted to deny the use of the patented article.

Palmer's App. 96 Pa. St. 106; *Curt. Pat.* 215; *Baird v. Neilson*, 8 Cl. & F. 726

When a court of equity acquires control of a case, it will determine every feature of dispute in the transaction.

Brightly, *Equity*, § 124; 1 Story, *Eq.* § 457; *Bank of U. S. v. Biddle*, 2 Par. *Eq. Cas.* 53; *McGowan v. Remington*, 12 Pa. St. 56; *Shollenberger's App.* 21 Pa. St. 337; *Brightly, Dig.* 3175.

The testimony of the defendants is not sufficient to justify a reformation of the contract.

"To reform the contract the evidence of fraud or mistake ought to be what occurred at the execution of the agreement; and should be clear, precise and indubitable."

Martin v. Berens, 67 Pa. St. 463; *Stine v. Sherk*, 1 Watts & S. 195; *Miller v. Smith*, 33 Pa. St. 386.

Parol evidence is admissible to support allegations of mistake, surprise or fraud. The remedy however is applied reluctantly and cautiously; and only on strong proof that the reformation was one intended, and was prevented only by mutual mistake, surprise or fraud.

2 Whart. Ev. § 1019; Sug. Vend. 8th Am. ed. 262; Kerr, Fraud, 423; Walker, Pat. 220, § 808; Curt. Pat. 584, § 438.

The evidence of Mr. Sterrett's agency to bind his principals was not sufficient.

Story, Ag. pp. 124, 125, 116, § 127, note 2; Smith, Merc. L. 59.

When parties without fraud or mistake have put their engagements in writing, that is not only the best but the sole evidence of their agreement.

Martin v. Berens, 67 Pa. St. 459; 2 White & Tudor's Cases in Equity, part 1, pp. 944-60; Bisp. Eq. 488, § 381; 1 Story, Eq. 151-164.

Parol evidence is not admissible to contradict or vary written instruments unless: (1), there has been fraud, accident or mistake in the creation of the instrument itself; or (2), unless there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed.

Rosand v. Finney, 96 Pa. St. 192; *Barnhart v. Riddle*, 29 Pa. St. 92; *Hill v. Gaw*, 4 Pa. St. 493; *Stine v. Sherk*, 1 Watts & S. 195; *Anspach v. East*, 52 Pa. St. 356; *Spencer v. Colt*, 89 Pa. St. 814; *Hacker v. National Oil R. Co.* 73 Pa. St. 93; *Thorn v. Warflein*, 100 Pa. St. 519; *Miller v. Smith*, 33 Pa. St. 386; *Kostenbader v. Peters*, 80 Pa. St. 438; *Graver v. Scott*, 80 Pa. St. 88; *Wagner v. Wright*, 10 W. N. C. 488.

The late case of *Phillips v. Meily*, 106 Pa. St. 586, contains a clear definition of the principles which courts in this State apply to cases where there is an attempt to modify a written contract by parol.

Mr. James C. Boyce, for appellees:

The finding of facts by a master, approved by the court below, will only be set aside for plain error.

Kisor's App. 62 Pa. St. 428; *Phillip's App.* 68 Pa. St. 180; *Sproull's App.* 71 Pa. St. 137; *Clarkson v. Norton*, 31 Legal Int. 277; *Shoemaker v. Mutual Livestock Ins. Co.*, *Crowell v. James*, and *Tresler v. Mennig*, 32 Legal Int. 284, 420, 677; *Walton v. Whann*, 8 Legal Gaz. 82; *Winton v. Mott*, 4 Luz. L. Reg. 71.

The evidence of the parol agreement that broken jars should not be paid for was properly admitted.

Parol evidence may be given to explain a written agreement, so far as to give locality and identity of the subject matter and to apply the contract to it.

Bertsch v. Lehigh C. & N. Co. 4 Rawle, 130; *Nixon v. McCallmont*, 6 Watts & S. 159; *Gould v. Lee*, 55 Pa. St. 99.

To materially vary or contradict a written contract, by evidence of a contemporaneous parol agreement, it must be alleged that the contract was executed on the faith of the parol agreement.

154

Callan v. Lukens, 89 Pa. St. 134; *Parson v. Adeler*, 8 W. N. C. 72.

Mr. Seyfang and Mr. Bovaird both testify that if the parol agreement had not been made the contract would not have been signed.

But apart from the parol agreement it is only a reasonable construction of the license that it applies to only sound, merchantable jars. It would be inequitable to require the defendants to pay two royalties on only one actual and consummated sale. When the manufacturer replaces a defective set by a sound set, it is evident that there is a sale made of a second set, which would not have been sold, if the first set was good.

The agreement is to be construed most strictly against the plaintiffs as a lease is construed most strongly against the landlord.

Commonwealth v. Sheriff of Phila. Co. 3 Brews. 537.

This contract was in restraint of trade. Therefore equity will not enforce it, but the plaintiffs must be left to their remedies at law.

Keeler v. Taylor, 53 Pa. St. 467; *Gompers v. Rochester*, 56 Pa. St. 194; *Harkinson's App.* 78 Pa. St. 196; *Gillis v. Hall*, 2 Brews. 342.

Per Curiam:

We think a fair construction of the contract imposed no obligation upon the appellees to account for and pay royalty on jars not merchantable. This agrees with the finding of the master and the conclusion of the court. It was correctly held that the parol evidence was not sufficient to change the written contract.

We see no error in the decree.

Decree affirmed and appeal dismissed, at the costs of the appellants.

RANCK'S APPEAL.

1. In the distribution of an intestate's estate, the **next of kin** "of the blood of the ancestor or other relation from whom real estate descended or by whom it was given or devised," who alone can take such real estate **under the Act of April 27, 1833**, must be found **entirely within the blood of such ancestor**, without regard to the other relationship which they may bear to the intestate.
2. In the distribution of real estate derived from the intestate's paternal grandfather where there are **next of kin** related to the intestate through his mother, and who are also of the blood of the grandfather, who are **four degrees removed** from the intestate on the mother's side, but who in tracing relationship through the grandfather are **six degrees removed** from the intestate, they will be **excluded in favor of next of kin, who are of the blood of the grandfather five degrees removed** from the intestate.

(Decided May 31, 1886.)

APPPEAL from a decree of the Orphans' Court of Lancaster County, dismissing exceptions to an auditor's report. *Affirmed.*

The following facts were found by the auditor: Amos Rhoads died intestate, unmarried and without issue, seised of a farm which had been devised to him by his grandfather, John Rhoads. Deceased also owned other real estate which he had acquired by purchase. The balance of the account for distribution was the proceeds of this real estate, sold by order of court for payment of debts. The nearest relatives of Amos Rhoads, on his father's side, were the children of the brothers and sisters of his grandfather, John Rhoads, from whom he had derived the farm as aforesaid. One of these children, Lucy, had married Jacob Rance, who was a brother of Amos Rhoads' mother. She died before the intestate, leaving seven children, the appellants.

Before the auditor, William A. Atlee, Esq., the appellants, urging that they were of the blood of the perquisitor and nearer of kin to the intestate than the children of his grandfather's brothers and sisters, claimed the whole of the estate. The auditor, after reviewing the facts, proceeded:

"Who are the next of kin? The next of kin are to be ascertained by the rules of the civil and not of the canon law.

McDowell v. Addams, 9 Wright, 480.

According to these rules the nearest of kin on the father's side are in the fifth degree, being grandchildren of the common ancestor, the great-grandfather of the intestate; and the nearest of kin on the mother's side are in the third degree, being brothers and sisters of the mother of the intestate; and the children of such brothers and sisters who were dead at the time of intestate's death are in the fourth degree.

"If there were no land here except that purchased by Amos Rhoads, all would therefore go to the next of kin on the mother's side. But some of it came by devise from John Rhoads, the paternal grandfather.

"Section 9 of Act of April 8, 1833, says: 'Provided also, That no person who is not of the blood of the ancestors or other relations from whom any real estate descended or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate of inheritance therein; but such real estate, subject to such life estate as may be in existence by virtue of this Act, shall pass to and vest in such other persons as would be entitled by this Act, if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate.'

"The next of kin on the part of the mother are therefore excluded from participation in the proceeds of the land which the intestate acquired by devise from John Rhoads; while they are entitled to the whole of the proceeds of the land acquired by the intestate by purchase, to the exclusion of the next of kin on the part of the father, being nearer in degree.

"But there is another question raised and ably argued. There is a class of next of kin who are of the blood of the deviser of the land, John Rhoads, being in the sixth degree of kinship with Amos Rhoads on the part of the father. The same persons are in the fourth degree of kinship with the intestate on the part of the mother. They are therefore one degree nearer in kin to the intestate than any of those

who claim on part of the father, and they are also of the blood of the father; and it is therefore claimed that they are entitled to all the proceeds of the land devised to the intestate.

"At first sight the claim is plausible, but it cannot bear close investigation. In distributing lands acquired by an intestate by inheritance, gift or devise from an ancestor or relation, we must treat all persons and relationships, not of that blood, as nonexistent; we must search entirely within that blood for next of kin, and cannot go outside of it to see whether there are relations remote in that blood but near outside of it. Whether wisely or unwisely, the Legislature has enacted that land shall be kept within the blood of the perquisitor; and that only those of that blood shall enjoy it; and that the search for those who shall thus enjoy it shall be entirely within that blood, without reference to any other relationship. This claim is, therefore, not allowed by the auditor."

Exceptions were filed by the appellants to the disallowance of this claim by the auditor, which were dismissed by the court and the report confirmed. This appeal was then taken.

Messrs. D. G. Eshleman and A. W. Snader, for appellants:

If the appellants are excluded at all, it must be by the proviso in the ninth section of the Act of April 8, 1833.

Purd. Dig. p. 564, pl. 27; P. L. 318.

But they are of the blood; and they are the next of kin who have any of the blood of John Rhoads, the perquisitor. They have the same blood with the appellees, and they are nearer of kin to the intestate; the appellees being in the fifth degree, while the appellants are in the fourth degree.

The law does not measure fractions of blood. According to *Justice Story*, in *Gardner v. Collins*, 2 Pet. 87 (27 U. S. bk. 7, L. ed. 357), cited approvingly in *Hart's App.* 8 Pa. St. 37: "A person is, with the most strict propriety of language, affirmed to be of the blood of another, who has any, however small a portion, of the same blood derived from a common ancestor."

The proviso in the ninth section was intended only to prevent estates crossing over from the family who acquired them into families who had no part in such acquisition.

Roberts' App. 89 Pa. St. 420.

Under the Act of 1833, brothers and sisters of the half blood and their issue take, to the exclusion of more remote kindred of the whole blood and in preference to a deceased uncle of the whole blood.

Hart's App. 8 Pa. St. 32; *Baker v. Chalfant*, 5 Whart. 477.

In *Bevan v. Taylor*, 7 Serg. & R. 397; *Lewis v. Gorman*, 5 Pa. St. 166 and *Maffit v. Clark*, 6 Watts & S. 258, the next of kin were not of the blood of the perquisitor. To follow those cases, therefore, would nullify the provision in the seventh section of the Act of 1833, as limited by the ninth section.

Mr. Eugene G. Smith, for appellees:

"The maxim under our statutes, as well as at common law, is, that he who claims an estate descended to an intestate must show himself heir to him from whom it descended as perquisitor."

Lewis v. Gorman, 5 Pa. St. 166.

"He is the propositus and from him the inheritable blood is to be derived."

It is necessary to ascend to the first purchaser, to discover who the "ancestors or other relations" are, and in and through his blood find the next of kin. With the light of this rule the appellees are the next of kin and entitled to this fund.

Roberts' App. 39 Pa. St. 417; *Perot's App.* 102 Pa. St. 235.

The appellants claim inheritable blood through their mother, Lucy Ranck, who died before the intestate; and they are one degree more remote than her brother and sisters, to whom, with others, the fund was awarded. The appellees are in the fifth degree, and the appellants in the sixth, and therefore not next of kin.

Act of April 8, 1888, § 7, 1 Purd. Dig. 568, pl. 24.

"Consanguinity or kindred is defined by the writers on these subjects to be '*Vinculum personarum ab eodem stipite descendit*,' the connection or relation of persons descended from the same stock or common ancestor."

2 Bl. Com. *202.

There cannot be two perquisitors from whom to trace the blood in order to fix the next of kin to inherit the real estate devised by one.

The appellants claim all of this fund, when their mother, if living, would be entitled to only one share of it; and they claim through her blood. They certainly cannot contend that the mother could have inherited the whole fund, to the exclusion of her own brother and sisters. She was not next of kin to the intestate, through the blood of the Rancks. She could have no inheritable blood through her husband. She was not of his blood. The appellants' father, if living, would be entitled to none of this fund, because he is not of the blood of the perquisitor. Yet he is the brother of the intestate's own mother and the intestate's next of kin, as are his brother and sisters, who do not claim this fund. Yet, by the accident of death, the children, who are more remote, claim the entire fund, and attempt to exclude all of the class to which their mother belonged.

If the appellants' theory be logically carried out it becomes an absurdity; if their mother were living now they would inherit and exclude even her, through whom they claim their blood, just as they attempt to inherit to the exclusion of her brother and sisters. She would not be next of kin to the intestate and of the blood of the perquisitor. She would be next of kin through the blood of the perquisitor, just as are all the appellees. But she could not be next of kin of the intestate through her husband's blood, by which the appellants fix their kinship. Any argument which the appellants can advance must apply with the same force against their mother, if living, as it will against the appellees.

The question of whole blood and half blood does not enter into the case and therefore the cases of *Hart's App.* 8 Barr, 87, and *Baker v. Chalfant*, 5 Whart. 481, do not apply.

Per Curiam:

This fund was correctly distributed. The appellants are one degree more remote from
156

the perquisitor than the appellees, to whom the money was decreed. If the contention of the appellants was logically correct and their mother was still living, they would take, to her exclusion, although they now claim their inheritable blood through her.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Levi SENSENIG, *Plff. in Err.*,
v.

Henry B. PARRY *et al.*

1. Counsel fees are not recoverable as legal damages in an action on an injunction bond, conditioned to indemnify for all damage that may be sustained by reason of the injunction.*
2. In an action for damages on a bond in injunction proceedings to restrain tearing down an alleged party wall, preparatory to building a new building, evidence is admissible, to disprove damages, that the new building erected beside the old wall could have been erected without any detention, with the old wall standing.

(Decided May 31, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment on a verdict for defendants in an action of debt on an injunction bond. *Affirmed.*

The plaintiff and the defendant Parry were owners of adjoining lots in Lancaster city. The plaintiff, preparatory to building an addition to the rear of a hotel on his lot, began to pull down an old building and wall that stood near the line between the parties. The defendant, alleging that the wall was a party wall, procured a preliminary injunction, August 30, 1880, restraining the plaintiff from interfering with said wall. The condition of the injunction bond given by the defendant was "to indemnify the said Levi Sensenig for all damage that may be sustained by reason of such injunction." The injunction was dissolved on September 28, 1880; the bill was dismissed May 4, 1882; and on appeal to this court the judgment of the court below was affirmed May 31, 1882. Immediately upon the dissolution of the injunction the plaintiff commenced work on the new building. This building, as finally erected, was wholly on the land of the plaintiff, 9½ inches at one end and 20 inches at the other end, from the old wall, which was the subject of the injunction. It was alleged that it was built this way in order to furnish light to the building.

The plaintiff brought suit on the injunction bond against principal and sureties and, on the trial, offered evidence as to the damages. The court refused to admit evidence as to counsel fees paid by plaintiff "for the purpose of having the injunction dissolved." (*1st assignment of error.*)

To disprove damages, the defendant offered evidence to show that, "with the given dis-

*See, *contra*, *Cook v. Chapman* (N. J.), 2 Cent. Rep. 136.

tance of 9½ inches at one end and 20 inches at the other, from the wall that was taken down, Sensenig could have erected his building without any detention of his operations, with that wall standing." The plaintiff objected, but the court admitted the evidence. (*2d, 3d, 4th and 5th assignments of error.*)

The court, Livingston, *P. J.*, after reviewing the proceedings, charged the jury as follows:

"If you find from the whole evidence that Mr. Sensenig could have proceeded with the erection of his building, notwithstanding the injunction, without tearing down or injuring the old wall, which the injunction restrained him from disturbing, and without any additional expense or damage by reason of the injunction, then, and in such case, Mr. Sensenig would only be entitled to any additional expense or damage accruing to him in tearing down the old wall, caused by the injunction."

"If he could not have so proceeded during the continuance of the injunction, but could have proceeded, at additional expense and damage, he would have been entitled under the bond, to recover such damage, in a suit on the bond."

"If you find from the evidence, that Mr. Sensenig could not have proceeded with the erection of, or erected his building, during the continuance of the injunction, by reason of the injunction, without being subject to additional cost and expense; that he was necessarily restrained from proceeding with his building and delayed from August 30 to September 28, 1880, by reason of the injunction and such delay consequent upon it, he would be entitled to recover by your verdict such an amount of damages, as he has, by the evidence produced before you, satisfied you he has sustained by reason of this injunction, and by reason of this injunction only."

"If you find that no such damages have resulted, of course you should allow none."

"You will, under no view you may take of the matter, allow any remote or merely consequential or speculative damages. You must allow no damages except such as flow directly from the injunction, as its immediate consequences; for the liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction. Our own supreme court has said that the injunction bond binds a defendant to pay all such damages as may be sustained by reason of the injunction bond."

"If you find that any damages have been sustained by Mr. Sensenig, the plaintiff, by reason of the injunction, you will then have to ascertain what such damages were, of what they were composed, and their amount; extra labor thereby occasioned and paid for; coal rendered necessary and used; stoves rendered necessary and their moving; mortar lost by freezing; extra cost of plastering; royalty for use of yard; rent; and such damages as were really occasioned by reason of the injunction only, you may take into consideration."

"The items of damage claimed you will consider. See whether or not they are sustained by the evidence. You have heard the testimony from the witnesses on the stand, as they were examined before you. These witnesses

were all competent under the law; their credibility is for you."

"If you find that Mr. Sensenig has sustained damages by reason of the injunction, and find that the amount of such damages with interest is less than the amount of the bond with interest from the time the injunction was dissolved, September 28, 1880, you will return a verdict for plaintiff, for the amount of such damages."

"If you find that such damages exceed the amount of the bond and interest upon it from September 28, 1880, you will return your verdict for the amount of the principal of the bond with interest from September 28, 1880."

"If you find from the evidence that Mr. Sensenig could have gone on with his building, notwithstanding the injunction, without taking down or injuring the old wall, but at an additional expense, he would be entitled to recover the amount of such additional expense as the injunction occasioned."

"If you find from the evidence that Mr. Sensenig sustained no damage by reason of the injunction, your verdict will be for the defendants."

Verdict for defendants and judgment thereon. The plaintiff took this writ, specifying for error the assignments above mentioned and the portions of the charge in brackets.

Messrs. D. G. Eshleman, S. H. Reynolds and A. J. Eberly, for plaintiff in error:

The Act of May 6, 1844 (1 Purd. Dig. 699), provides: "No injunction shall be issued by any court or judge until the party applying for the same shall have given bond with sufficient sureties, to be approved by said court or judge, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction."

The court below decided that counsel fees could not be allowed as damages, basing the decision upon the ruling of *Stopp v. Smith*, 71 Pa. St. 285, and *Good v. Mylin*, 8 Pa. St. 51, where it is held that in tort the plaintiff cannot recover as damages, compensation for his necessary expenses together with counsel fees.

The court, in following those cases, failed to see the distinction between an action in tort and an action in debt on a bond, provided by the Legislature to indemnify against all damages that may be sustained by reason of an injunction.

If the defendant had not issued his injunction, the plaintiff would not have been delayed with his building, to his great damage; and he would not have been under the necessity of employing counsel. The payment of counsel fees as well as the other damages were the direct result of the injunction. If the plaintiff had not paid counsel fees the injunction would not have been dissolved, and he would thereby have been deprived of his right of property. What right had the defendant to put the plaintiff into a position which obliged him either to expend money for counsel fees or to lose his property?

In a great number of other States the question has arisen and it has always been held that, in actions on injunction bonds, counsel fees and other expenses incurred in procuring dissolution have been allowed as damages. If the rule

is a good one in one place it ought to be good in all. If the reasoning upon which it is based is sound it ought to be adopted here.

In ascertaining damages in an action upon an injunction bond, a reasonable sum may be allowed for expenses incurred in procuring a dissolution.

High, *Inj.* § 967; *Hill. Inj. chap. II, § 54.*

Counsel fees paid in procuring a dissolution of an injunction are allowed in an action on the bond.

High, *Inj.* § 973.

In *High on Injunctions*, § 973, the rule is thus stated: "A reasonable amount of compensation, paid as counsel fees in procuring the dissolution of an injunction, may be recovered in an action upon the bond, if the injunction was improperly or wrongfully sued out, the amount being limited to fees paid to counsel for procuring dissolution, and not for defending the entire case. Counsel fees in such cases are regarded as a proper subject of consideration in estimating the damages incurred, the loss being as direct and immediate as any other."

In *Derry Bank v. Heath*, 45 N. H. 524, the condition of the bond was "that whereas, an injunction has this day been issued by the Hon. J. E. Sargent, one of the Justices of the Supreme Judicial Court of said State, against said Derry Bank, upon the petition of said Albe C. Heath, now if the said Heath shall pay and satisfy to said bank all such damages as may be occasioned to the said bank by reason of said injunction in case the proceeding in which the said injunction has been issued shall be determined against himself, then this obligation shall be void, otherwise in force." It was held that the plaintiff should be allowed as damages in the case such reasonable counsel fees as they have paid or are liable to pay to their counsel.

In *Edwards v. Bodine*, 11 Paige, 224, the condition of the bond "to pay the party enjoined such damages as he may sustain by reason of the injunction" was held to be broad enough to embrace the necessary counsel fees incurred by the defendant in getting rid of the injunction.

In *Corcoran v. Judson*, 24 N. Y. 106, the ruling was the same.

In *Prader v. Grim*, 13 Cal. 585, the usual bond having been given, an order was made to show cause why an injunction should not issue. A restraining order "in the meantime" was issued. On hearing, the order was dissolved, injunction denied and suit dismissed. In an action on the bond it was held that counsel fees for dissolving the order were recoverable.

In *Ryan v. Anderson*, 25 Ill. 872, the condition of the bond was to pay "all moneys and costs due or to become due, and such damages as shall be awarded them, in case said injunction herein granted shall be dissolved," etc. In an action on the bond it was held that the counsel fees should be allowed as damages.

The 2d, 3d and 4th assignments of error were to the admission of expert testimony. When "experts" are called for the purpose of relieving the obligor in an injunction bond, the jury ought at least to be instructed, in accordance with the views of Dr. Wharton, that such testimony should be received with great caution. 1 *Whart. Ev.* § 454.

The first part of the charge of the court ob-

jected to ignores the fact that the wall, the ground and building was Sensesig's and that he could use his property as he pleased. The other part of the charge objected to, while probably legally correct and intelligible to a lawyer, should have been explained to the jury.

Messrs. Wm. Aug. Atlee and B. Frank Eshleman, for defendants in error:

"In estimating damages sustained by the improper issuing of an injunction, courts proceed upon equitable grounds; and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed. And where no damages have been actually incurred, none should be assessed."

High, *Inj.* § 964.

Counsel for plaintiff in error have cited *High on Injunctions*, § 973, and analyzed many cases, all of which and more are cited by High to sustain his position, to show that counsel fees are allowed as damages, in some States. They are not in Pennsylvania. In this State for a time they seem to have been allowed; but in *Good v. Mylin*, 8 Pa. St. 51, this court restored the true rule, *Gibson, C. J.*, saying:

"To overrule decisions so recent and direct must cast a doubt on the stability of judicial decision. Yet it is better to eradicate an erroneous principle, while it has scarce taken root, than to let it grow up into a fixed rule of property;" and the judgment of the court below was reversed because counsel fees had been allowed as damages.

In *Stopp v. Smith*, 71 Pa. St. 285, this court reversed a judgment where counsel fees had been allowed, saying: "The principle was exploded in *Good v. Mylin*," and adhered to that ruling.

In *Murphy v. Jarvis*, 1 Phila. 84, *Judge Sharswood* adhered to the rule and held counsel fees not recoverable as damages.

If the plaintiff had sued the defendant for the damages directly, he would have had to sue in tort; the bond gives him security for the payment of such damages as he could have recovered by direct suit; and therefore the rules in actions in tort are directly applicable here.

The same general principle which we are now considering controls compensation on the subject of counsel fees. The law awards to the party plaintiff his taxable costs; but the fees which he pays to counsel are not taken into consideration, either because they are too remote, or perhaps because the law does not see fit to look with too harsh an eye on those who appeal to its protection. This is uniformly true in all cases of contract.

Sedg. Dam. § 99.

In *Haverstick v. Erie Gas Co.* 5 Casey, 254, an action of covenant, this court says: "The plaintiff cannot recover damages for having to employ counsel to bring this suit." In Pennsylvania, therefore, the rule that counsel fees cannot be recovered is the same in actions in tort and actions on contract, and the ruling of the court below is correct.

As to the other assignments, it is enough to say that no point or request for ruling was presented to the court below on the subject.

Per Curiam :

There was no error in disallowing the evidence of counsel fees paid by the plaintiff. It is not such legal damage as is specified in the condition of the injunction bond, as to permit a recovery therefor. *Good v. Mylin*, 8 Pa. St. 51; *Stopp v. Smith*, 71 Pa. St. 285.

All other alleged damages "sustained by reason of such injunction" was a question of fact, and the evidence relating thereto was submitted to the jury in a clear and correct charge. There was no error in the admission of evidence tending to disprove damages.

Judgment affirmed.

Alexander REESER, *Appt.*,

v.

John REESER.

Equity will, at the instance of a trustee, **restrain**, by preliminary injunction, a **cestui que trust, from issuing execution** on a judgment in his own name, where there is a dispute as to whether or not the judgment is included in the trust.

(Decided May 31, 1886.)

A PPEAL from a decree of the Common Pleas of York County, in equity, restraining by injunction the collection of a judgment. *Affirmed.*

The bill in equity, filed September 9, 1885, by the plaintiff below, the appellee, alleged that William Reeser died, having made a will, probated March 11, 1872, in which he provided *inter alia* as follows: "I give and bequeath unto my son Alexander, during his lifetime, a tract of land (describing it) subject to the payment of \$300 to my estate; and further I appoint my son Abraham Reeser trustee over the estate of my son Alexander."

The residue of the estate, after payment of legacies, etc., was directed to be shared among his children "share and share alike." Abraham Reeser died without having acted in the trust, and the plaintiff was appointed trustee in his place by the orphans' court, October 8, 1872.

The bill further alleged that Alexander Reeser was a "man of weak mind and of unstable purposes and easily led by others." He lived with different brothers for a time and with a nephew, and with Jacob Mohr, a brother-in-law, who was one of the executors of William Reeser's will. Jacob Mohr, by the plaintiff's consent and in subordination to his wishes and under his direction, assisted in the management of Alexander's estate, taking notes for money loaned, and crediting interest payments thereon. The notes were written in the name of Alexander, but with one or two exceptions they were retained in the custody of Jacob Mohr.

In the spring of 1883 Alexander loaned \$500 to John A. Bahn, upon his judgment exemption note, with S. L. Bahn as security, and received one year's interest. On April 22, 1884, judgment was entered on this note in the name

of Alexander, and interest paid to the plaintiff in the spring of 1885. Since 1884 Alexander has lived in Adams County with the plaintiff's son, who is married to the daughter of one Blauser. The plaintiff alleged that he was informed that his son and the said Blauser had acquired complete control over Alexander, and that they had procured him to execute a power of attorney to Blauser to collect his moneys and manage his affairs; and that they had procured Alexander to execute to plaintiff's son a promissory note for \$900, without any or sufficient consideration, and to execute a paper appointing Blauser trustee. The plaintiff further alleged, on information and belief, that Alexander or those who thus represent him was about to issue execution on the judgment against Bahn; that the money loaned to Bahn was trust money, under the will of William Reeser; and praying for an injunction to restrain the execution.

The affidavit of Alexander Reeser, the defendant, alleged that the trust created by the will related only to the management of the real estate and was so understood and acted upon by John Reeser, the appellee; that the said John Reeser, on March 28, 1881, nearly nine years after his appointment, filed his first account as trustee, in which is embraced not an item of the personal property now claimed as covered by the trust but only income or proceeds of crops annually raised on the real estate; that the other moneys and property bequeathed to the said Alexander were absolute bequests and not upon any trust; and the same, amounting to \$1,323.75, were paid over to him by the plaintiff and Jacob Mohr, the executors of the will, who took a release for the same, duly acknowledged and recorded.

The affidavit further alleged that the deponent was owner of about \$2,000 received from his father in his lifetime and about \$1,000 of his own earnings; that these sums with their accretions amounted to about \$6,000; and by reason of the commingling of these sums it was impossible to ascertain from which source the \$500 loan to Bahn came.

The defendant denied that he was of weak mind, or that Blauser or others had complete control over him, or that Mohr had acted as his agent in subordination to the plaintiff; and alleged that if interest had been paid by Bahn to the plaintiff, it was without the defendant's knowledge or consent and he would hold the maker for it. The defendant further alleged that he had left his brothers because they did not treat him kindly, and that they only wanted his money.

Affidavits were filed by both parties in support of their allegations.

On June 8, 1885, John Reeser filed a second account in the register's office of York County, as trustee under the will of William Reeser, deceased, in which he charged himself with "note vs. Bahn, in hands of Alexander," \$500, together with other notes, etc., to which exceptions were filed, which are still pending.

The court, Gibson, J., granted a preliminary injunction, delivering the following opinion:

"As this is a case between a trustee and the *cestui que trust* and involves the question of an active trust, as regards the personal estate bequeathed to Alexander Reeser, under the will

of William Reeser, deceased, as well as the extent to which the trust declared in the will is simple or special, it is peculiarly within the province of a court of equity; and as the application of the plaintiff for a special injunction is for the temporary restraint of the defendant from the collection of moneys alleged to belong to the trust, I think it is proper that the injunction should be granted until the final hearing.

"And now, October 10, 1885, this cause came on to be heard on a motion for a special injunction, and was argued by counsel on affidavits; whereupon, on consideration, it is ordered and decreed that, security being given in the sum of \$1,000, the defendant his agents or attorneys be restrained from the collection of said judgment by execution or otherwise, until the further order of the court."

The appellant took this writ, assigning for error the action of the court in granting the injunction.

Messrs. J. C. Neely, H. L. Fisher and George G. Fisher, for appellant:

The legal title to the judgment is in the appellant. It did not become so by any trick, fraud or mistake. Equity was never intended to be used to obstruct the collection of debts.

Winch's App. 61 Pa. 426; *Hunter's App.* 40 Pa. 194; *Gilder v. Merwin*, 6 Whart. 541; *Riley v. Ellmaker*, Id. 545.

The right of pursuing a trust fund falls when the means of ascertainment fail.

Thompson's App. 22 Pa. 16.

A clear legal or equitable right must be shown, to authorize a preliminary injunction.

Scott v. Burton, 2 Ashm. 812; *Auburn etc. Plank Road Co. v. Douglass*, 12 Barb. 555; *Smith v. Lard*, 28 Ga. 585; *Commonwealth v. Bank of Pa.* 8 Watts & S. 198.

Where the answer denies all the equity, if any, in the bill, no injunction will issue.

Crandall v. Woods, 6 Cal. 449; Hill. Inj. chap. I. §§ 16, 18, 19.

This plaintiff has been guilty of most unreasonable laches, by which he has forfeited his right to relief if ever he had any.

Grey v. Ohio & Pa. R. R. Co. 1 Grant, 412; *Dohnert's App.* 64 Pa. 815.

The delay which precludes the relief may apply to the right sought to be enforced, as well as to the remedy.

Hill. Inj. chap. I. § 48; chap. IV. § 22.

An injunction at the instance of a trustee against his *cestui que trust* is anomalous. If it is sustained, how can the judgment be collected? If it were trust money, he would have a full and ample remedy at law.

160

Act of April 7, 1859 (Brightly's Purdon, p. 1423, pl. 54); Act of April 22, 1846 (Brightly's Purdon, 1452, pl. 53).

The appellee might have a bill in the nature of an interpleader.

Act of June 16, 1836, Div. IV. Brightly's Purdon, 401; *Dohnert's App.* 64 Pa. 814.

Or, if he is entitled to be substituted as legal plaintiff in the judgment, he can reach that end by motion in the court below.

Drucknmiller v. Young, 27 Pa. 97.

Mr. W. C. Chapman, for the appellee:

Trusts are peculiarly within the province of a court of equity; and threatened loss of trust funds will be restrained by injunction.

Lyons' App. 61 Pa. 15; *Commonwealth v. Bank of Pa.* 8 Watts & S. 184.

That the legal title is in the appellant makes no difference.

Stockdale v. Ullery, 87 Pa. 486.

The common pleas as well as the orphans' court has jurisdiction here.

Souder's App. 57 Pa. 498; *Campbell's App.* 80 Pa. 298.

A preliminary injunction will be awarded in the discretion of the chancellor, to preserve the *statu quo* until final hearing.

When the question of right depends upon the true construction of an agreement, an injunction will lie to maintain the *statu quo*.

Atlantic & Ohio Tel. Co. v. Phila. etc. R. R. Co. 8 Phila. 248.

When two conflicting parties claim to hold the same office, an injunction will be granted to maintain the *statu quo* until final hearing.

Miller v. Corcoran, 3 L. T. 179.

"It is true, as was said in *Rhea v. Forsyth*, 87 Pa. 508, a court of equity will not ordinarily interfere to prevent the disturbance of an alleged easement when the right of the complainant is doubtful, or seriously disputed, until he has established his claim by an action at law. But even in such case the court may retain the bill until the plaintiff has had time to settle such right in a court of common law; and if, in the meantime, it appears to be necessary, the defendant may be enjoined from meddling with the easement; in other words, the chancellor may keep things *in statu quo* until he is in a position to make a final decree."

Per *Mr. Justice Gordon*, *Bitting's App.* 108 Pa. 517.

Per Curiam:

This preliminary injunction is continued, the decree affirmed and appeal dismissed, at the costs of the appellant.

NEW JERSEY.
COURT OF CHANCERY.

Matthew A. VAN WINKLE, *Complainant*,
v.

Matthew ARMSTRONG *et al.*

In a suit by an assignee for the benefit of creditors of a firm, and as to the individual estates of assignors for the benefit of their individual creditors, to rectify the deed of assignment, because of the absence thereof of words of inheritance, and to make it so that it may convey the real estate in this State in fee; where the object of defendant is to get a decree in his favor, for a debt due by the other assignor, and to collect the amount thereof out of his property situated in this State, a cross bill is not necessary. He cannot involve complainant in a litigation in this suit, for the purpose of establishing his debt. The allegations in the cross bill tending to establish the debt may be regarded, so far as complainant is concerned, as averments that defendant is a creditor in this State, and of the firm, and is therefore entitled to resist the application to rectify the deed of assignment.

(Decided July 31, 1886.)

MOTION to strike out, so far as the complainant is concerned, so much of the answer of Matthew Armstrong to bill to rectify deed of assignment as is by way of cross bill. *Granted.*

The facts are stated in the opinion.

Mr. E. M. Colie, for the motion.

Mr. S. C. Mount, *contra*.

Ranyon, *Chancellor*, delivered the following opinion:

• The bill is filed to rectify a joint and several deed of assignment made in New York, in January, 1883, by William and Matthew Armstrong, the members of the firm of M. Armstrong & Sons, to the complainant, for the benefit, so far as the partnership assets are concerned, of the creditors of the firm, and as to the individual estates of the assignors, for the benefit of their respective individual creditors. The deed purports to convey all the property of the assignors. It does not pass the title in fee to real estate in this State, because of the absence thereof of words of inheritance. In view of that defect, Matthew Armstrong made another assignment, a separate one, in March following.

William Armstrong had real estate in Hudson County in this State. He has made no assignment except that which this suit is brought to correct. The bill states that that deed was filed in the office of the register of Hudson County in January, 1886; that Matthew Armstrong claiming that the firm was indebted to him as surviving executor of Matthew Armstrong, deceased, proved the debt and received a dividend thereon from the assets of the firm under the assignment, and that afterwards he caused an

action at his suit as such executor to be begun against himself and William Armstrong, in Hudson Circuit Court, for the recovery of the debt; in which suit judgment was entered by default on service of a summons upon himself alone, and that he has issued execution upon the judgment and has caused it to be levied upon real estate in Hudson County which was owned by William Armstrong at the time of making the assignment.

The bill charges that the judgment is fraudulent and was intended to defeat the assignment, and that the defendant Matthew Armstrong, as executor of Matthew Armstrong, deceased, is indebted to William Armstrong in a sum greatly exceeding the amount of the claim upon which the judgment was founded. Matthew Armstrong has answered. Part of his answer is by way of cross bill against the complainant and William Armstrong. In the cross bill he states that William Armstrong has taken steps to set aside the judgment, on the ground that Matthew Armstrong, the plaintiff therein, and Matthew Armstrong, defendant, are the same person. He also alleges that the claim for the recovery of which the action was instituted is a valid one, and claiming that if not cognizable at law it is in equity, he insists that he is entitled to have it paid out of any property of the firm or of the members thereof in this State, in preference to any claim of the assignee to such property under the assignment. The complainant moves to strike out the answer by way of cross bill, so far as he is concerned.

The object of the bill is to rectify the assignment so that it may convey the real estate of William Armstrong in this State in fee. The assignment, so far as the partnership debts and the individual debts of Matthew Armstrong are concerned, provided for preferences. It is contrary to the policy of our law to recognize such an assignment as against the claims of persons domiciled here. *Varnum v. Camp*, 1 Green, 326; *Moore v. Bonnell*, 2 Vroom, 90.

The bill not only attacks the judgment but avers that Matthew Armstrong, upon an accounting by him as executor, would be found to be indebted to William Armstrong to an amount exceeding the amount of the claim upon which the suit was brought. It seems to me to be quite clear that the cross bill is not necessary to Matthew Armstrong's defense. His object in filing it is to get a decree of this court in his favor as executor against William Armstrong for the debt and to collect the amount of it out of the property of the latter in this State. He insists, in effect, by his answer that in equity his claim should be satisfied out of that property before rectifying the assignment. That defense can be set up without a cross bill. He cannot involve the complainant in a litigation in this suit for the purpose of establishing his debt as against William Armstrong and collecting it out of William Armstrong's property. The allegations in the cross bill tending to establish the debt may, however, be regarded, so far as the complainant is concerned, as averments that he is a New Jersey creditor of the firm and is therefore entitled to resist the application to rectify the assignment. *The motion will be granted* (but without costs) and the answer (which is not sworn to) will be so amended that the matter exhibited by way of cross

bill shall, so far as the complainant is concerned, stand as part of the answer proper.

Jacob P. SNYDER *et al.*, *Complainants*,
v.

August SEEMAN *et al.*

When a temporary injunction to restrain eviction under an action of ejectment, granted on a bill not stating that the ejectment action had proceeded to judgment, is continued after it appears from the answer that judgment had been obtained in said action, the complainant must give such security as would have been required upon the granting of the injunction had it been known that a judgment had been entered in the ejectment action—the bond to cover damages from the commencement of the injunction suit.

(Decided August 23, 1886.)

BILL for relief. On motion to dissolve injunction upon bill and answer. *Motion denied.*

The facts are stated in the opinion.

Mr. R. P. Tuller, for the motion.

Mr. F. F. Hogate, *contra*.

Runyon, Chancellor, delivered the following opinion:

This is a suit for an injunction, to prevent the defendants Greaves and Seeman from turning the complainants out of possession of certain land in Cumberland County, by means of an action of ejectment brought by Seeman against them. The property is the subject of litigation in this court in another pending suit brought by the complainants against Greaves. Seeman claims the property under a tax title; and the bill in this case charges that Greaves and Seeman have colluded together for the purpose of evicting the complainants by means of the tax title, and the ejectment suit thereon.

It states that the ejectment suit is not at issue.

The answer says that the suit was indeed not at issue at the time of filing the bill, but that a judgment by default had been entered in that action; and that at the time when the injunction was served the sheriff had already served an execution issued on that judgment. The complainants however are still in possession.

It appears from the statements of counsel on the argument that an application (still pending) has been made to set aside the judgment. The case is one in which it is proper, in the exercise of a sound discretion, notwithstanding the denial in the answer of the facts upon which the equity of the bill rests, to retain the injunction until the final hearing.

But the complainants must give such security, according to the 125th Rule (the amount to be fixed by a special master of Cumberland County), as would have been required upon the granting of the injunction had it been known that a judgment had been entered in the ejectment suit; and the bond is to cover damages from the commencement of this suit.

No costs of this motion will be awarded to either side.

John V. BECKETT, *Exr.*, *Complainant*,
v.

Horatio G. ZANE *et uz.*

Defendants, in a suit to compel them to produce a will in their possession, held, after delivering up the will, to have been in the wrong originally and liable for costs.

(Decided August 24, 1886.)

BILL for relief. On final hearing upon pleadings and proofs. *Granted.*

The facts are stated in the opinion.

Messrs. A. Cochran and M. P. Grey, for complainant.

Mr. R. S. Clymer, for defendants.

Runyon, Chancellor, delivered the following opinion:

This suit was brought by the executor of the will of Rachel Ward, deceased, late of Salem County, against Lavinia Zane, the daughter of the testatrix, and Horatio G. Zane, her husband. The bill states that the will was, soon after the death of the testatrix, delivered to Mrs. Zane, at her request, by the executor, who in delivering it to her acted in ignorance of his duty in the matter; that he afterwards repeatedly demanded it of the defendants in order that he might present it for probate; but they refused to deliver it to him. It prays an answer on oath, and an injunction to prevent the defendants from destroying, injuring or altering the instrument, and that they may be required to produce it.

By their answer the defendants admit that they have possession of the will, deny that they have ever refused to produce it and allege that on the contrary they have, since it came to their hands, always been ready to deliver it to the complainant on request, but that he has never asked them to do so. On a motion made to dissolve the injunction, they delivered up the will in open court and it has since been admitted to probate. The only question to be decided is as to their liability to pay the costs of the suit.

It appears from the testimony that the will was delivered up by the complainant to Mrs. Zane (who was very much dissatisfied with it) at her request; and that she so obtained it with a view of suppressing it if she could lawfully do so. She was the testatrix's only heir at law and was her next of kin. She deposited it for safe keeping with Rev. Mr. Stultz, who kept it until October, 1884, when he returned it to her. On receiving it from him she gave it to her husband, who had control of it from that time until the bringing of this suit. It does not appear where he kept it. Mrs. Zane swears that she herself did not know. From this testimony it would seem that it was secreted by him. The complainant made three several demands for it at different periods, but without success. One of them was he says in October, 1884. He swears that on that occasion both Mr. and Mrs. Zane, with very strong expressions of determination, declared that the will should never be admitted to probate if they could prevent it. He testifies that another occasion was in July, 1885, and that then Mrs.

Zane said she did not know who had the will and that she did not know whether her husband did. The complainant swears that he could get no satisfactory information as to the will, from either her or her husband. He is corroborated by the testimony of Adin Beckett who was present at that conversation. Immediately after that demand the suit was brought.

The preponderance of evidence is with the complainants. The defendant must pay costs.

William H. SPINNING, Complainant,
v.
Harriet SPINNING.

***A widow in possession under the second section of the statute concerning dower, giving her the right to hold her husband's homestead until her dower is assigned, is not a tenant for life, and is not, therefore, bound to keep down interest on an incumbrance, and to pay taxes and to make necessary annual repairs.**

(Filed July 23, 1886.)

BILL to compel a widow in possession of the homestead property to pay taxes, etc. On final hearing on bill and answer and proofs taken in open court. *Dismissal advised.*

The case is stated by the court.

Mr. Franklin M. Olds, for complainant.
Mr. Samuel H. Pennington, for defendant.

Van Fleet, V. C., delivered the following opinion:

The only question in dispute in this case is, whether a widow, who remains in the house of her husband after his death until dower is assigned, is, while so in possession, subject to the duties of a tenant for life, that is, bound to keep down the interest on incumbrances, to pay ordinary taxes and to make necessary annual repairs. It is well settled that these burdens must be borne by a life tenant. 1 Wash. R. P. 96, § 25, 25a, 115 § 81. 1 Story, Eq. Jur. § 488.

And a tenant in dower, like other life tenants, is subject to them. 4 Kent, Com. 75; 2 Scrib. Dow. 732.

This obligation has been extended in this State so as to make it the duty of a person entitled to the interest of a fund for life to pay the tax assessed against the principal of the fund. *Holcombe v. Holcombe*, 12 C. E. Green, 473; *S. C.* on appeal, 2 Stew. 597.

The reason assigned for imposing this duty on the person entitled to the interest, is stated as follows by *Justice Van Syckel*: "So long as the life tenant enjoys the entire produce of the fund, he should be required to keep down the taxes on it; otherwise the fund itself must become impaired, and the entire burden be thrown upon those who take the fund at his death."

The obligation of a widow to perform the duties of a life tenant while in possession under the statute is put upon the ground that the right given to her by the statute is, in substance, a

life estate. Unless this position can be maintained, it is admitted she ought not to be held liable to the duties of a life tenant. Other tenants, such as tenants for years, from year to year, and at will, are not, in the absence of a contract to that effect, subject to them. They rest alone on tenants for life. The widow's right is given by these words: "That until dower be assigned to her, it shall be lawful for the widow to remain in, and to hold and enjoy the mansion house of her husband and the mesuage or plantation thereto belonging, without being liable to pay any rent for the same." Rev. 820, § 2.

The purpose of this provision, as it seems to me, is to confer a right of possession similar to an estate or tenancy at will rather than to create a life estate. The language employed is manifestly much more appropriate to raise a right of that kind than for the creation of a life estate. The first and most important provision of the statute, it will be observed, is that the widow can only remain in possession until her dower is assigned. When that is done her estate ceases and her right is gone. Either she or the heir may have dower assigned. She may also surrender her possession at any time. So that the duration of her right depends entirely upon the will of herself and the heir, and like other tenants at will, her right may be determined, at any time, either at the will of the person in possession or the person entitled to the reversion. It is true her occupation may be lengthened out to the end of her life, and she may thus enjoy what is equivalent to a life estate; but her possession can only have that duration when such is the joint will of herself and the heir; and such may be the extent of the duration of a tenancy at will in any case where the parties to the demise so desire.

Judicial opinion is not entirely uniform as to the nature of the right given by this and similar statutes. Under a statute substantially similar to ours, the Supreme Court of Illinois have held that a widow while in possession is bound to pay taxes and keep the premises in repair. *Wheeler v. Dawson*, 63 Ill. 54.

They do not, however, place her liability on the ground that her right is an estate for life, but on the broader ground that it is equitable, inasmuch as she is entitled to the whole produce, that she should bear these burdens. The court says: "Being entitled to use and occupy the homestead without accounting for the profits and gains made from it, no one would say that she should not, in justice and equity, pay the taxes and keep the premises in repair. We are aware of no principle of law or equity that would impose the duty on the heir to pay the taxes and keep up the repairs of the farm for the use of the widow, when she is in the receipt of all the rents and profits." This view, it will be perceived, pays no attention to the duration of the widow's right, nor to the object which the Legislature had in view in creating it, and entirely overlooks the fact that the law has always highly favored the rights of persons of this class.

Justice Ford, in *Ackerman v. Shelp*, 3 Halst. 125, in deciding a motion to strike out a notice accompanying a plea of the general issue, giving notice of the special matter which the defendant intended to give in evidence under the

*Head note by VAN FLEET, V. C.

plea, said incidentally that the estate given to the widow by this statute is a freehold for life, unless sooner defeated by the act of the heir; and *Justice Elmer*, in *Budd v. Hiler*, 3 Dutch. 48, defines her right in the same way, adding, however, that her estate may be determined either by her own act, or that of the heir; thus giving, as I understand it, a perfectly accurate description of an estate at will. The widow's possession can only endure so long as she and the heir so will; and either may at any time determine it by the mere exercise of his or her will.

In the subsequent case of *Smallwood v. Bilderback*, 1 Harr. 497, *Justice Ford* speaks of the widow's right as a privilege, and such is the designation given to it by *Chief Justice Beasley* in *McLaughlin v. McLaughlin*, 7 C. E. Green, 505, and by *Vice Chancellor Dodd* in *Bleecker v. Hennion*, 8 C. E. Green, 128. The latter says: "It is a privilege preceding, but in nowise preventing or impeding, the assignment or disposal of her dower."

It is plain, I think, when we look at the language used, and also consider the object which the Legislature had in view, in the enactment of this statute, that the right given to the widow is not a life estate but may be accurately described as a privilege in the nature of a tenancy at will. By *Magna Charta* the widow had a right to tarry in the chief house of her husband for forty days after his death and to have maintenance, for that period, out of his estate. The object was to give her a home. Our statute was intended to amplify that right, by extending her right of possession until her dower was assigned. The Legislature meant, undoubtedly, that she should hold for the additional period, beyond the forty days, upon the same terms that she had a right to hold for the forty days.

"The purpose of the Act," says the *Chief Justice* in *McLaughlin v. McLaughlin*, *supra*, "is obviously to provide a home for the widow until her dower be assigned, as well as to put a compulsion on the heir to make the assignment." To treat her as a life tenant while she is in the enjoyment of a mere fugitive right, which has been given to her simply as a temporary provision, and to constrain the heir to put her in possession of what she is entitled to permanently, would serve rather to frustrate than effect the legislative will. And although the Legislature, in defining the terms upon which the widow shall hold, use the word rent, it is quite evident, I think, that what they meant was that she should hold without being subject to any charge whatever.

This question has already been dealt with by this court. In *Cronley v. Cronley*, 13 Stew. 80, the Chancellor held that a widow, while in possession under this statute, of her husband's homestead, was not bound to keep down the interest on a mortgage thereon. This adjudication, of course, settled the law of this court.

In a previous case, decided orally, without argument and without much consideration, and making a free application of the principle established by *Holcombe v. Holcombe*, that he who takes the benefits of property should bear its burdens, I held that a widow was bound, while in possession, to keep down the charges on the land which she enjoyed. A careful ex-

amination of the question with the aid of a full argument has satisfied me that that conclusion is erroneous, and that it should be held, both according to principle and precedent, that she is not subject to that duty.

UNITED NEW JERSEY RAILROAD & CANAL CO. *et al.*, Complainants,

LONG DOCK CO. *et al.*

To induce the court to entertain favorably an application, made after final decree, for leave to file a supplemental or amended answer setting up facts known to defendant when the original answer was filed, there must be some special ground; it must appear that hardship will result to defendant if permission be not accorded, and that he is not in fault for not having set up the defense in his answer originally.

(Decided August 23, 1886.)

MOTION for leave to file supplemental answer. *Denied.*

Suit to establish and enforce the liability of the defendant, the Long Dock Company, to pay to the complainants part of certain moneys paid by the United New Jersey Railroad & Canal Company to perfect and defend its title to land in Jersey City, part of the Harsimus Cove property conveyed to the New Jersey Railroad & Transportation Company by trustees for the Long Dock Company and others, in pursuance of an agreement made September 10, 1867. By that agreement it was provided that in locating the division line, the title of the whole tract should, for the sake of convenience of division, be deemed equally good and valid; and that if at any time afterwards either of the Companies should be dispossessed of any portion of the tract conveyed to it or its assigns by virtue of the agreement, or should be put to any cost or expense in defending its title thereto, or in extinguishing any outstanding title or claim against it, then the other party should bear its proportion of such loss and expense, according to its proportion of interest in the entire property, which should be a lien on the part set off and conveyed to it.

Mr. Cortlandt Parker, for the motion.
Messrs. J. B. Vredenburg and J. D. Bedle, *contra.*

Runyon, Chancellor, delivered the following opinion:

The defendants apply by petition for leave to file a supplemental answer setting up the fact that part of the land set off and conveyed to the Long Dock Company under the agreement of September 10, 1867, was land under water, the title to which was in the State; that the defendants have extinguished that title as to part of the land, by filling in and docking, and that as to the rest the title is still in the State; and claiming that the complainants' proportion of the cost of perfecting the title to the last mentioned part at the same price as that fixed by the commissioners for the State's title to land

under water, set off and conveyed under the agreement to the New Jersey Railroad & Transportation Company, and also the cost of extinguishing the title to the other part by filling and docking, should be allowed to the defendants as an offset in this suit against the amount found due from them to the complainants.

The cause has been decided upon final hearing (11 Stew. Eq. 142) and the defendants appealed from the final decree to the court of errors and appeals, and the decree was affirmed.

When the petition was filed, the testimony under the reference ordered by the decree had been closed, and the matters had been partially summed up before the master, one of the counsel upon each side having been heard thereon. This is in fact an application for leave to amend the answer, for all the facts which it is proposed to set up in the so called supplemental answer existed, and were known to the defendants when they filed their answer in the cause.

To induce the court to entertain favorably an application of this kind at so late a stage in the suit, there must be some special ground, some cogent reason for so doing; it must appear that hardship will result to the defendant if the permission be not accorded, and that he is not in fault for not having set up the defense in his answer originally. No such ground is shown here and there was no good reason why the defense was not set up in the answer. If the defense is valid now it of course would have been equally so then. The only excuse presented is that the defendants were advised that this suit could not be successful. But obviously that cannot avail them. They might have tested the bill by demurrer but they did not do so. They not only permitted the cause to go to final hearing without applying to amend the answer, but they delayed applying until after the proceedings upon the reference under the decree were almost at an end. Such delay is inexcusable. No hardship will ensue to them by denying this application.

The agreement provides that if either party shall be dispossessed of any portion of the tract conveyed to them or their assigns, by virtue of the agreement, or shall be put to any cost or expense in defending their title thereto, or in extinguishing any outstanding title or claim against the same, then the other party shall bear their proportion of such loss and expense according to their proportion of interest in the property, and that such proportion shall be a lien on the part set off and conveyed to such other party.

This suit is not a suit in partition nor is it of that nature. It is merely a suit to recover the price paid to perfect the title to certain lands set off and conveyed to the New Jersey Railroad & Transportation Company under the agreement. The decree will of course be no bar to the collection by the defendants, from the complainants, of any money which they may now or hereafter be entitled to recover from them, under or by virtue of that provision of the agreement. The agreement gives a lien for such money, upon all the property set off and conveyed to the other party under the agreement.

It is not alleged or even suggested that the defendants have any reason to apprehend loss in case they are not permitted to offset such

moneys in this suit. Whether they are entitled to recover from the complainants money which they have neither paid nor been called upon to pay, and whether the expense of docking and filling is, under the circumstances, to be regarded as expense of extinguishing the State's title within the provisions of the agreement, are questions which, under the circumstances, it would not be just to compel the complainants to litigate in this suit. They ought not to be subject to the delay which would necessarily be occasioned by permitting the defendants to introduce those matters now.

The petition will be dismissed, with costs.

Gottfried KRUEGER, Complainant,

v.

Ebenezer L. FERRY et al.

- *1. The right of a mortgagor to compel a mortgagee in possession to account for the rental value of the mortgaged premises is, in a suit by the mortgagee to foreclose, a pure matter of defense, which the mortgagor may avail himself of by answer.
2. The new facts which may properly be introduced into a pending litigation, by means of a cross bill, are such, and such only, as are so directly and closely connected with the cause of action on which the original bill is founded as to render the cross suit a mere auxiliary of the original suit, or a graft or dependency upon it.
3. A purchaser of an equity of redemption, at judicial sale, takes the land burdened with the mortgage, and he has no right, therefore, to ask that some other fund be applied in discharge of the mortgage debt in relief of his estate.
4. The personal estate of a decedent is the primary fund for the payment of his debts; and an heir, or devisee, or widow has a right to have it so applied in relief of the land which they may take, but this right belongs to them alone. Their alienee or mortgagee has no such right.

(Filed August 12, 1886.)

BILL for the foreclosure of a mortgage. On motion to dismiss cross bill. Heard on notice given under page 215 of the Rules. *Motion granted.*

The facts are stated in the opinion.

Mr. Samuel McDonald, for complainants, for motion.

Mr. Anthony Q. Keasbey, for defendants, *contra.*

Van Fleet, V. C., delivered the following opinion:

This suit is brought to foreclose a mortgage made by John Laible and Johanna, his wife, to William Ortlund, bearing date July 2, 1860. The mortgage embraces a tract of land situate in the City of Newark, and was given to secure the payment of \$3,500 with interest, at the end of a year from its date. The complainant ob-

*Head notes by VAN FLEET, V. C.

tained title to the mortgage, by assignment, on the 4th of March, 1881. He was at that time in possession of the mortgaged premises. John Laible, the mortgagor, died testate, on the 21st of August, 1862. At the time of his death, he was the owner of a large brewery in the City of Newark, in which he was carrying on the business of a brewer. By his will he directed that his business should be continued after his death. This direction was obeyed, and the defendants (Ferry and Akin) became large creditors of the business, furnishing almost all the malt that the business required. The amount remaining due to them in 1874 exceeded \$65,000. They filed their bill in this court, in that year, to obtain a decree, adjudging what part of John Laible's estate should be held to have been embarked by him in business, and also directing that they and the other creditors of the business should be paid out of the estate so embarked. Relief was given to the defendants, both in this court and by the court of errors and appeals; but the court of errors and appeals decided that the *quantum* of the estate so embarked was much less than that which this court adjudged the testator had embarked. *Ferry v. Laible*, 4 Stew. 566; *S. C.* on appeal, 5 Stew. 791.

The decree finally made in the suit adjudged the mortgaged premises, now sought to be condemned to sale for the payment of the complainant's mortgage, to be a part of the trade property, and directed that they should be sold for the payment of the trade debts. They were sold under that decree to the defendants on the first of March, 1881, and the defendants thus acquired an interest in the mortgaged premises which made them necessary parties to this suit.

The defendants have answered the complainant's bill. They admit the due execution of the mortgage on which the complainant's bill is founded, and say that it may be true that he is now the owner of the mortgage, but require him to prove his title. They also say that they have never had possession of the mortgaged premises, but that the premises were in possession of the complainant at the time they acquired their title to them, and have remained in his possession ever since; and that if he is the owner of the mortgage in question, he is a mortgagee in possession of the mortgaged premises, and as such is bound to account for their rental value. The defendants have also filed a cross bill, and it is the relief which they seek by this pleading which forms the subject of the present controversy.

The defendants by their cross bill make three distinct claims to relief. First, they say that the complainant, being a mortgagee in possession, must account for the rental value of the mortgaged premises; second, they say that John Laible died possessed of a large personal estate, sufficient to pay all his debts, including that of the complainant, and also seised of several tracts of land, which he empowered his executors to sell, and some of which they still hold, unsold; and that, inasmuch as there is a large balance still due to them on the decree which they obtained as creditors of the *post mortem* business; and that as the personal estate of a decedent is, by law, the primary fund for the payment of his debts, and that, inasmuch also as their debt was contracted pursuant to the direction of John Laible, and to enable his

executors to carry out his principal testamentary scheme, their position in this litigation is invested with such strong and extraordinary equities that the court should, before condemning their property to sale for the payment of the complainant's debt, exhaust all other possible means of satisfying that debt, even if it should be necessary to go to the extent of compelling the executors to make good any loss which John Laible's estate has sustained in consequence of their wrongful acts or omissions; and third, they say that the complainant, in December, 1874, procured a large amount of the personal property embarked in the *post mortem* business, and which stood liable in equity for the payment of the trade debts, to be seized and sold under a judgment which he had previously recovered against Johanna Laible, who held possession of such property as one of the executors of John Laible, and also as one of the managers of the *post mortem* business, and at such sale purchased the property himself, and afterwards took possession of it and applied it to his own use; and thus, the defendants say, the complainant, without right or warrant of law, obtained over \$9,000 worth of property which should, in equity, have been applied to the payment of the trade debts. The defendants claim that by force of these facts they are entitled to a decree in this suit, requiring the complainant to account for the value of the property so obtained by him, and that he be directed to pay the same, either to them or to the receiver already appointed in the suit which they brought to establish their rights as creditors of the *post mortem* business. The complainant moves to dismiss the cross bill, on the ground that its subject matters are so foreign to and distinct from the matter put in litigation by the original bill that they cannot be regarded as, in any sense, necessarily connected with or auxiliary to the subject matter of the original suit.

The defendants' right to have the complainant to account for the rental value of the mortgaged premises, during the time he has been in possession of them under his mortgage, is a pure matter of defense, and like other pure defenses should be interposed by answer. They have set it up in their answer, and as they can have the full benefit of it under that pleading, a cross bill is both useless and irregular.

The other claims to relief made by the cross bill, are, in my judgment, so entirely foreign to the cause of action upon which the complainant rests his right to relief, that the court must, both for considerations of justice and convenience, deny the defendants' right to litigate them in this suit. Whether a cross bill is filed for the purpose of enabling a defendant to make a defense more complete and effectual than he would be permitted to make if he stood on an answer alone, or for the purpose of enabling the court to do more complete justice to all parties, in respect to the matter put in litigation by the original bill, the rule is imperative that the new facts sought to be introduced by it must be so directly and closely connected with the cause of action set up in the original bill as to render the cross suit a mere auxiliary of the original suit, or a graft or dependency upon it. "A cross bill," says Cooper, "*ex vi terminorum* implies a bill brought by a de-

defendant in a suit against the plaintiff, respecting the matter in question in that bill; and it is a weapon of defense in such case. But sometimes it is brought against the codefendants in such depending suit, where they have opposite claims, which the court cannot determine upon the bill already filed, and the determination of such clashing interests is still necessary to a complete decree upon the subject matter of the suit." *Coopers' Eq.* Pl. 85.

And Mitford says that where a cross bill is not filed as a means of defense, it is "a proceeding to procure a complete determination of a matter already in litigation." *Mit. Eq.* Pl. 76.

The new facts which it is proper for a defendant to introduce into a pending litigation, by means of a cross bill, are such, and such only, as it is necessary for the court to have before it, in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it, in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant, or one or more of his codefendants, his pleading will not be a cross bill, but an original bill. *Ayres v. Carter*, 17 How. 591 [58 U. S. bk. 15, L. ed. 179]; *Cross v. Del Valle*, 1 Wall. 5 [68 U. S. bk. 17, L. ed. 515]; *Rubber Co. v. Goodyear*, 9 Wall. 807 [76 U. S. bk. 19, L. ed. 829]; *Galatian v. Erwin*, Hopk. 48.

The chancellor, in *Carpenter v. Gray*, 10 Stew. 389, held that a cross bill must be confined to the matter contained in the original bill, and that if a defendant attempts, by cross bill, to engraft on the litigation, introduced by the complainant's bill, questions not necessary to the proper determination of the complainant's right to relief, his bill must be dismissed.

It is obvious, I think, that if we try the pleading under consideration by these rules, it must be held to have been improperly filed, and should, therefore, be dismissed.

But, I think, this pleading is subject to a more formidable objection than that urged against it by the counsel of the complainant. According to my view, it presents no ground upon which any relief whatever can be given to the defendants.

The defendants are creditors of the *post mortem* business, and as such have a very limited remedy. They must look alone to the property embarked in the *post mortem* business for the payment of their debts. They have no right to or claim upon the testator's general estate. This is the well established rule.

Both this court and the court of errors and appeals have affirmed it whenever the defendants' rights, in this respect, have been presented for judgment. *Ferry v. Laible*, 12 C. E. Green, 146; *S. C.* 4 Stew. 566; *S. C.* on appeal, 5 Stew. 791.

The mortgaged premises, at the time they were embarked in the *post mortem* business, were subject to the complainant's mortgage; and hence, all that was embarked was the tes-

tator's equity of redemption, and this was all the defendants acquired when they took title to them. By their purchase they acquired a right to redeem the land from the debt for which it stood pledged, by paying the debt, but, having acquired merely an equity of redemption, and paid for that alone, and not the full value of the land, they stand without the least right to call upon the court to apply any other fund to the payment of the mortgage debt in exoneration of their estate. They took title to the land subject to the burden of the mortgage, and they must, therefore, either pay the mortgage themselves or suffer the land to be sold for its payment. 2 Washb. Real Prop. 567.

It is undoubtedly true that the personal estate of a decedent is the primary fund for the payment of his debts, and that an heir at law, or devisee, or widow, has a right to call upon the administrator or executor of the decedent to exonerate his land from a mortgage debt existing thereon, for which the decedent is personally liable, by paying the same out of the personal estate, but this right belongs alone to the three classes of persons just mentioned. An alienee or mortgagee of an heir or devisee has no such right. *Keene v. Munn*, 1 C. E. Green, 398; 2 Washb. Real Prop. 566.

It would seem, therefore, to be entirely clear that the defendants are without the least right in equity to have the complainant's debt cast upon the testator's general estate.

The defendants also say that the complainant in 1874, over eleven years ago, wrongfully possessed himself of over \$9,000 of the trade property, and thus converted to his own use assets which should have been applied to the payment of the trade debts. The title to this property was in the executors. If the complainant obtained it wrongfully, the legal injury resulting was done to the executors. No wrong was done to the defendants. They had neither title to the property, nor a lien upon it. The executors, by acquiescence or participation in the wrongful acts of the complainant, may have rendered themselves personally liable to the defendants and the other creditors of the *post mortem* business for the value of the property so diverted or abstracted; but if so, it is manifest that that question forms no part of this litigation, and should not be examined or decided in this suit.

The cross bill must be dismissed, with costs.

Sarah E. CHAPIN, Complainant,
v.

George A. WRIGHT *et al.*

***Twenty years' possession of the premises by a mortgagee, under his mortgage, pursuant to the eighteenth section of the Statute of Limitations, bars the mortgagor's equity of redemption, and the extinguishment of the mortgagor's equity effected by this Statute, unlike the extinguishment effected by mere judicial action, is not subject to be waived by an incautious admission of the mortgagee.**

*Head note by VAN FLEET, V. C.

(Filed August 19, 1886.)

BILL to quiet title. On motion to strike out part of defendant's answer. Heard on notice given pursuant to page 215 of the Rules. *Motion granted.*

The facts are fully stated in the opinion.

Mr. Benjamin A. Vail, for complainant, for motion.

Mr. Alan H. Strong, for defendants, *contra*.

Van Fleet, V.C., delivered the following opinion:

The complainant brings this suit to quiet her title to certain land. Her bill is filed under the Act of 1870. Rev. 1189. Instead of simply alleging that she is in peaceable possession of the land in question, as owner, she has given a full history of her title. It originated, as her bill states, in a mortgage made on the 21st day of June, 1830, by Lewis Wright and wife to Timothy Herbert, to secure the payment of \$165 on the 21st day of June, 1831. The mortgage conveyed the fee. The mortgagee took possession of the mortgaged premises, under his mortgage, on the 30th day of April, 1836, and he, and his successors in title, have continued in possession ever since. Lewis Wright, the mortgagor, died intestate, about forty years ago. His heirs at law are the defendants to this suit. Four of them have appeared and answered, insisting that the land is still subject to their equity of redemption. Their claim in this regard rests upon the following facts: the complainant, on the 31st of October, 1885, made a contract to sell and convey the land, which contract required her, for the purpose of perfecting her title, to bring a suit, and obtain a decree of strict foreclosure against the heirs at law of the mortgagor. Such suit was subsequently brought, but was afterwards, on the 17th of March, 1886, and after the defendants had appeared to it, dismissed, on the complainant's own motion. The defendants insist that the institution of the suit to foreclose, taken in connection with the agreement making it the duty of the complainant to bring such suit, constituted such an admission of their right of redemption, as amounted to a conclusive waiver of any bar to such right which previously existed.

The complainant moves to strike out that part of the answer which asserts that the defendants still have a right to redeem, on the ground that the matters there alleged are impertinent and constitute no defense. On the admitted facts of the case, it is clear that the title which the complainant now holds was at one time subject to an equity of redemption, and it is equally certain that this equity was subsequently barred by lapse of time. The defendants admit that the person holding the mortgage executed in 1830, took possession, under his mortgage, of the land in question, in 1836, and that he and those who succeeded to his rights have continued in the uninterrupted possession of the land from that time up to October, 1885, a period of over forty-nine years; and that during the whole of this long period, neither the mortgagor nor those standing in his rights either exercised or attempted to exercise their right of redemption. They also admit that neither the mortgagee nor those standing in his rights did, at any time during

the same period, do or say anything which, either directly or indirectly, admitted or recognized that the land was subject to an equity of redemption. These admissions render it perfectly clear that for a period of over twenty-nine years prior to the 31st of October, 1885, the equity which the defendants now claim stood wholly barred and extinguished; for it is a principle of equity jurisprudence authoritatively settled and universally recognized, that the laches and nonclaim of the rightful owner of an equitable estate, who is under no disability, and in a case free from fraud, for a period of twenty years, will, where the person in possession has held adversely to such owner, without in any way recognizing his right, constitute a conclusive bar to all right to equitable relief. In support of a principle so generally recognized, only a leading case or two need be cited. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; 8 C. on appeal, *Id.* 189; *Elmendorf v. Taylor*, 10 Wheat. 157 [28 U. S. bk. 6, L. ed. 291].

This principle applies in all its force to the equity of redemption of a mortgagor. Twenty years' possession by a mortgagee, of the mortgaged premises, under his mortgage, without accounting to the mortgagor for rents or profits or otherwise recognizing his mortgage as a subsisting lien, will, where the mortgagor is under no disability, bar his equity of redemption. *Demarest v. Wynkoop*, 8 Johns. Ch. 129; 2 Jones, Mort. § 1144; Angell, Lim. § 456.

Although there are but few statutes limiting the time within which equitable remedies must be enforced, yet courts of equity have, from the earliest times, given effect to lapse of time, as a bar to the remedies which they administer; and they, as a general rule, measure the period of laches or nonclaim which will be sufficient to bar an equitable action, by the period, fixed by the Statute of Limitations, for the extinguishment of a similar right of action at law. And as twenty years' adverse possession will bar a right of entry or an action of ejectment, courts of equity have, in analogy to the Statute of Limitations, adopted that as the period which shall be sufficient to bar an equity of redemption. This rule, however, is a mere judicial regulation; it is founded on the maxim, *Interest reipublice ut sit finis litium*; and, like other judicial rules, is subject to change, by the power which created it, whenever that course may seem necessary for the furtherance of justice. The courts have, accordingly, annexed to this rule the following important qualification: If a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor revived. 2 Jones, Mort. § 1163.

And an admission having this effect will be considered to have been made if the mortgagee institutes proceedings, either by suit or otherwise, to foreclose his mortgage; the reason assigned being that such act is entirely inconsistent with any pretension on his part that his possession had ripened into a title. 2 Jones, Mort. § 1170; Angell, Lim. § 458; *Calkins v. Isbell*, 20 N.Y. 147.

And it has also been held that an admission, entitled to like effect, may be made by the

mortgagee's offering to purchase the mortgagor's equity of redemption. *Angell, Lim.* § 458.

Applying the rule as thus qualified to the case in hand, it would seem to be clear that the defendants are entitled to the protection they ask, unless the sufficiency of their defense is to be judged by some other rule, or the trial of the equity which they claim will necessarily involve the investigation of transactions occurring so long ago that it will be impossible for the court in consequence, either of the loss of evidence or of the very imperfect and indeterminate character of that to which resort must be had, to ascertain the truth concerning them with that degree of certainty which will enable it to do, at least, approximate justice. The latter alternative need not, however, be discussed, for, in my judgment, the question, whether or not the defendants are entitled to the equity which they claim, must be decided in conformity to the plain direction of a positive law. The eighteenth section of the Statute of Limitations declares: "That if a mortgagee, and those under him, be in possession of the lands, tenements and hereditaments contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption of the mortgagor therein shall be forever barred." *Rev.* 597.

The regulation which this statute prescribes concerns a pure matter of equity. As between a mortgagee and a mortgagor, the legal title to the mortgaged premises is in the mortgagee. Originally, it will be remembered, the most rigorous principles of the common law, respecting estates granted on condition, were applied to mortgages, and it was, at one time, the settled law of England, that if a mortgagor did not pay the money secured by his mortgage, on the very day appointed for its payment, the land, by the mere force of his default, became vested absolutely in the mortgagee, freed from the condition; or in the words of the books, "the land was taken from him forever, and so was dead to him." 2 *Coke*, *Litt.* § 832, title *Estates*, 205a.

Now, however, according to the law of modern times, a mortgagor has a right, after condition broken, and at any time before his equity is lost by laches, to redeem the land which he has conveyed in pledge, by paying the mortgage debt. This right, however, is a pure equity, cognizable alone by courts of equity. A mortgagor can assert it in no other forum. This statute, then, was manifestly designed to regulate and limit an equitable remedy—to fix the period within which a mortgagor must, after his mortgagee has taken possession of the mortgaged premises, exercise his equity of redemption, or lose it—and courts of equity are, therefore, as much bound to respect it, and give effect to it, as they are to observe and enforce any other legislative mandate issued to them.

There can be no doubt that this statute binds this court, and that this court must take it as it finds it, and give effect to it, according to its plain words, adding nothing to it and taking nothing from it.

The statute is an old one, having been passed in 1799, and stands to day in the very words in which it was originally enacted. *Patt. Laws*, 354. Its meaning is so plain that its con-

struction has never, so far as I can discover, been the subject of doubt or discussion. It says, as plainly as language can speak, that twenty years' possession by a mortgagee, under his mortgage, after the mortgagor has made default, shall bar the mortgagor's equity of redemption, and that when his equity is once extinguished in this way, it shall remain extinguished forever.

There is nothing in its words, and nothing in its spirit or purpose, which will justify even a suspicion that the Legislature which passed it intended that the bar which it created should, after it becomes complete—after the mortgagee's legal estate becomes perfect by being freed from the mortgagor's equity—still be subject to be waived, at least, by anything which the mortgagee might happen to do with intent to strengthen his title; on the contrary, I think it is evident that what was meant was that when the mortgagor's equity was once extinguished, it should remain absolutely blotted out forever. This, I think, was *Chancellor Williamson's* construction of it. He said in *Bates v. Conrow*, 3 *Stock*, 137, that twenty years' possession by a mortgagee, under his mortgage, by force of this statute, bars the mortgagor's equity of redemption; and he gave effect to this bar, in that case, regardless of the fact that an application had been made to the mortgagor, after the mortgagee had been in possession for over twenty years, to convey his interest in the mortgaged premises to the mortgagee, to save the mortgagee the expense of a suit to foreclose his mortgage.

But whether my interpretation of this case is correct or not, one thing is certain: the law under consideration is a statute of repose, enacted in the interest of peace, and to promote the security and stability of titles to land by preventing litigation respecting stale claims. This being its obvious design, it would, in my judgment, be a direct violation of its most conspicuous purpose, to declare that a mortgagor might not only lie by for twenty years, after his mortgagee had taken possession of the mortgaged premises, and neglect for that period to assert his rights, but that he could also remain inactive for an additional period of twenty-nine years, and still be able (in case his mortgagee should subsequently by an incautious word or act seem to admit that the mortgage was still a subsisting lien) to successfully assert the equity which the statute plainly intended, on the lapse of twenty years, to utterly obliterate and destroy.

It may be proper to say a word respecting the position which the parties to this litigation occupy towards each other. The defendants seek to interpose their lost equity against a right claimed by the complainant. There can be no dispute that it is a principle of equity jurisprudence, of almost universal application, that he who asks equity must do equity; but this principle, in my judgment, has no application to this case, for, by the peremptory mandate of this statute, a mortgagor whose mortgagee has for twenty years been in possession of the mortgaged premises, under his mortgage, has no equity.

The lapse of that period of time, by force of the statute, extinguishes, absolutely and forever, all equitable right which he previously

possessed. The defendants, therefore, have no equity to urge against the complainant.

The complainant's motion must be granted with costs.

IN THE MATTER OF the Alleged Lunacy of Mary S. PERRINE.

An inquisition, finding a deaf-mute to be "of sound mind and capable of controlling her property by the selection of a proper person to act for her," set aside; the proof being certified to be that she was incapable of understanding business or of receiving any communication on the subject.

(Decided August 24, 1886.)

ON motion to set aside inquisition. *Granted.* The case is stated in the opinion.

Mr. A. S. Appelget, for the motion.

Runyon, Chancellor, delivered the following opinion:

The inquisition in this case is signed by nineteen of the twenty-four jurors. They find that the alleged lunatic "is of sound mind and is capable of controlling her property by her own selection of a proper person to act for her." The other five certify that she is "not of sufficient understanding to enable her to manage her property." She is about sixty-five years old and has never been married. The commissioners have made a report concerning her condition. They say that she is not an idiot or lunatic in the popular sense of the words; that she has been a deaf-mute ever since she was two or three years old; that she is ignorant, having never been taught any language whether spoken or of signs; that she can neither read nor write and cannot express to others her understanding, if any she have, of any business transaction; that she cannot be made to comprehend a business transaction, except, perhaps, a very ordinary one involving no more money than a dollar or two; that she has learned to fetch and carry and do common, every-day housework; that is, she can sweep, wash, cook an ordinary meal, etc.; that it is possible by rude gestures to communicate to her a desire that she should do such work; that she has never managed her property nor any part thereof, and that the acting trustee of her estate has never informed her of the amount, character or income of her property, and that it is doubtful whether she can be so informed; that she has always been cared for by her near relatives with whom she has lived, by her mother for about fifty years and until her mother's death; after her mother's death by her unmarried sister so long as that sister lived, and since that sister's death by her married sister with whom she now lives.

Application is made to set aside the inquisition, on the ground that the finding is contrary to the evidence.

Lord Hale says that a man deaf and dumb from his birth is in presumption of law an idiot; and the rather because he has no possibility to understand what is forbidden by law to be done or under what penalties. He also says that if it can appear that the man has the use of un-

derstanding, which, he adds, many of that condition discover by signs to a very great measure, then he may be tried and suffer judgment and execution, though great caution is to be used therein. *Hale, P. C. 34.*

In *Brover v. Fisher*, 4 Johns. Ch. 441, **Chancellor Kent** said, speaking of such persons: "Perhaps, after all, the presumption in the first instance is, that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on the notorious fact that the want of hearing and speech exceedingly cramps the powers and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind oppresses the understanding. *Affligat humo divina particulam aures.* A special examination to repel the inference of mental imbecility seems always to have been required." A person born deaf and dumb but not blind, is not an idiot. *Coll. Lun. 4, § 5; Shelf. Lun. 4; Brover v. Fisher, supra.*

But in order to warrant this court in interfering in behalf of a person to protect him against the consequences of his own mental incompetency, it is not necessary that he should be an idiot or a lunatic; it is enough if from any cause, whether by age, disease, affliction or intemperance, he has become incapable of managing his own affairs. 2 *Mad. Ch. 732*; 1 *Bl. Com. 304*; *Ridgway v. Darwin*, 8 *Ves. 65*; *Conover's Case*, 1 *Stew. Eq. 380*; *Lawrence's Case*, *Id.* 331.

In *Gibson v. Jeyes*, 6 *Ves. 267, 273*, **Lord Eldon** says that upon a commission in the nature of a writ *de lunatico inquirendo* it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs.

It was so held by **Chancellor Kent** in the *Matter of Barker*, 2 *Johns. Ch. 232*, where the person who was the subject of the inquiry had become incapacitated by old age. Whether persons born deaf and dumb are to be treated judicially as persons mentally incompetent to manage their affairs must depend upon the evidence they are able to give of the possession of capacity.

In *Dickenson v. Blisset*, 1 *Dick. 268*, a person who was born deaf and dumb, and who had attained to her majority, applied for possession of her real estate and for an assignment to her of her personal property. **Lord Chancellor Hardwicke** having put questions to her in writing, to which she gave sensible answers in writing, thereupon granted the application. In *Brover v. Fisher*, 4 *Johns. Ch. 441*, above cited, a commission was issued to inquire as to the mental competency of such a person.

In the case in hand the jury found that Miss Perrine was of sound mind and capable of controlling her property by her own selection of a proper person to act for her. But if the proof was, as the commissioners certify, that she is incapable of understanding the business or even of receiving any communication upon the subject, and therefore does not understand and cannot be made to understand what the necessities of the management of her estate demand or what an agent is or what his duties are; or, in other words, if the proof was as they certify, that she does not understand and cannot be made to understand any matter of business except it may be such as

are of the most simple character—if she has no comprehension of business matters—it is obvious that she is not capable of managing her affairs and the inquisition cannot be sustained. The jury does not find that she is herself competent to manage her business, but that she is capable of controlling it by an agent of her own selection. But if she cannot be made to understand what the business is, how can she select an agent to manage it?

The inquisition will be set aside.

SOUTH BRANCH R. R. CO. *et al.*, Complainants.

v.

Willard C. PARKER.

- *1. A street was opened and dedicated to the public use, after which one of the complainants purchased a portion of the land over which the street extended, taking a deed therefor with full covenants of warranty, and completely obstructed the street by making deep excavations for its road and by laying its tracks. Held, that the complainants are estopped from claiming that any portion of the said street was dedicated.
2. Afterwards, the surveyors made return of a public road over the same land, crossing the railroad of complainants, against the recording of which return the complainants filed a caveat, and prevailed; and then built a water tank twelve feet in diameter about in the center of the said proposed highway. Held, that this too works an estoppel.
3. When part of an alleged way is over a private alley way owned by two in common, the court will not declare the existence of such alleged way unless both the owners of the private way are before the court.
4. In such case the court would rather presume a license by the absent owner than to declare the use adverse, without his being heard.
5. To establish a by-road, from twenty years' uninterrupted adverse enjoyment, there must be a certain well defined line of travel in the same place over the entire route for all that time.

(Filed September 4, 1886.)

BILL for an injunction requiring the removal of certain obstructions to an alleged public highway. On bill, answer and proofs. *Dismissal of bill advised.*

The facts are fully stated in the opinion of the Vice Chancellor.

Messrs. G. H. Large and Benj. Williamson, for complainants.

Messrs. H. A. Fluck, J. A. Bullock and J. N. Voorhees, for defendant.

BIRD, V. C., delivered the following opinion:

The complainants, certain Railroad Corporations and their receivers, file their bill of com-

*Head notes by *BIRD, V. C.*

N. J.

plaint and ask thereby for an injunction requiring the defendant to remove the posts and boards constituting a fence erected by him across what they claim to be a street, and also the dwelling house now being erected by him on a portion of said street, which they charge is a public street running to and from their tracks.

The complainants own a railroad running into the Village of Flemington, at which point they have passenger and freight depots. Prior to their purchase of the right of way, J. G. R. had opened a street over his land fifty feet wide, from the south end of the defendant's lot to Church Street, over lands which he afterwards conveyed to the Railroad Company; and had made one or more conveyances of parcels of his land adjoining on said street and described them as bounded thereon and thereby; showing an intention to dedicate so much of his land to the public use as had then been designated for that purpose by removing fences and fixing the boundaries by the erection of fences from the south end of defendant's lot.

It is alleged that it was the intention of J. G. R. to extend the said street northward over the lot now owned by the defendant to Mine Street; but he did not do so, as the proof shows, at the time he opened it from the south end of said lot. But it is clear that the street had been opened and a conveyance made calling for it as a street before the Railroad Companies took their title.

It is an important fact that the Railroad Companies accepted a deed from J. G. R. for the right of way across this street, with full covenants of warranty. It is likewise important that they at once made a cut through said street and laid their tracks across it. It is admitted that these tracks completely obstructed the travel over the alleged street. In July, 1864, the Companies commenced running their trains and their patrons delivered to them their produce as freight. It is insisted that many of them used the lot now owned by the defendant, in passing to and from the depot of the complainants, with their horses and wagons.

In the year 1884 the defendant became the owner, as tenant in common, of the lot over which the way in dispute is said to have been acquired. In 1885 he became the owner of the entire fee and very soon thereafter erected a fence on the south end thereof, and also commenced the construction of a house which was inclosed, roofed and plastered at the time of the filing of the bill. These are the structures upon the lot of the defendant which the complainants pray this court to compel the defendant to remove.

In brief, then, the complainants claim that J. G. R. dedicated a strip of land running north and south from Mine Street to Church Street and opened it as a street, including therein the lot now owned by the defendant at the northern end thereof, and that he made conveyances calling for a street thereon; and that after the construction of their road, all that portion of the said street south of their road was abandoned; but they insist that all that portion north, not only to the defendant's lot, to which place J. G. R. had opened it as a street, but also all of the defendant's lot was used by the patrons of the railroad as they pleased.

Another important fact should be noted; that is that J. G. R. never was the sole owner in fee of the defendant's lot but held it in common with another. They purchased it in 1860. But the complainants urged that the work of dedication was never the less complete because it was immediately thrown open as part of said street; and that if it was not so thrown open, then there has been an uninterrupted adverse user for more than twenty years.

Still another fact must not be lost sight of; that is that when J. G. R. and his cotenant acquired the title to the defendant's lot in 1860 there was secured, by deed, a right to an open alley way, twelve feet wide, over this and the adjoining lot on the east, to which easement each lot contributed one half.

It is important also to bear in mind that within a period of twenty years, application was made for the appointment of surveyors to lay out this very strip of land, all the way from Mine Street over the lands of the defendant and of the complainants, crossing their tracks of course, and over the lands of J. G. R. to Church Street. It is admitted that the surveyors were appointed and made a return, laying out a public road over the alleged street. But the Railroad Companies filed a *caveat* against recording the return and succeeded. Immediately afterwards they erected a water tank ten or twelve feet in diameter, about in the center of what they claim J. G. R. intended as a public street, and also of what the surveyors returned as a public road.

Two questions are presented: first, was there an act of dedication, which included the lot of the defendant, of which the complainants can take advantage? Second, if not such dedication, has there been an uninterrupted adverse user of the whole of the defendant's lot as a public street, or of any certain and well defined portion of it, for over twenty years?

First; the complainants can claim nothing by any covenants, references or descriptions under which they have title to the lands covered by the alleged street or adjoining the same. The contrary thereof, rather, is the effect of this deed with its full covenants of warranty. By the acceptance of such a deed they ignore or repudiate the existence of a street which they now claim had before that time been solemnly dedicated to public use, and with reference to which private individuals had made purchases. Not only this; but the railroad, as has been said, was so constructed as to render the use of the street impossible. Still more than this; when the public in a formal manner, according to law, appealed to the courts to have this street made a public highway beyond a peradventure, and it is declared by the public authorities to be necessary to open it as a highway, the Railroad Companies not only resisted it so as to defeat the public desire, but at once erected a water tank in the proposed way, a substantial and permanent structure, and an effectual barrier to the use of the land as a street. And this tank stands on the north side of the tracks of the complainants' road, and on the very land which by their bill they claim was dedicated to the public by J. G. R.

Are those acts consistent with their present demands?

Would it be equitable for the court to allow

the complainants to destroy or obstruct so much of this street as may suit their convenience, and claim the benefit of the residue under the original act of dedication as against all the world? In other words, do the complainants come into court with clean hands and are they entitled to a favorable hearing? I think not. I conclude that the complainants, having by their deed accepted a conveyance of the fee of the land over which the way is alleged to have been dedicated, and having obstructed such way, by the construction of their roads and the erection of a water tank within the limits of such way, they are estopped from calling upon a court of equity to declare that the balance of said street was dedicated to public use, and from asking the aid of such court to enjoin others from obstructing it.

I say the complainants are estopped. I speak only with reference to them. I make no mention of the rights of others either at law or in equity.

But in case I am in error in the foregoing conclusion and notwithstanding it appears that part of the way has been effectually obstructed and destroyed by the complainants, has the allegation that the other portion of the alleged way was dedicated been sustained? In my judgment it has not. It is very certain that when J. G. R. opened the street from the rear of the Parker lot, he did not remove the fence from the rear of said Parker lot.

C. K. J., a highly credible witness who helped to measure the width of the street and saw the lateral fences erected and the cross fences taken up, says the fence on the Parker lot was not disturbed. I can see no reason to doubt his statement. It is true that J. W. says he was in the employ of J. G. R. and removed the fence in the rear of the Parker lot in the year 1860 or 1864 or 1865; but his testimony was not so clear nor so distinct as that of C. K. J. Besides, C. K. J. says, and he is not contradicted, that J. W. assisted in removing the other cross fences, by which he may most honestly conclude at this distant period that his work included the other also. There is also much other testimony to sustain C. K. J.

First, J. G. R. was not the sole owner of the fee of the Parker lot in 1860. He and S. E. purchased it that year, as tenants in common; and there is no pretense that S. E. ever intended to dedicate it to public use. S. E. continued the owner of the undivided one half until 1871. This of itself is conclusive against the assertion of dedication in 1860.

Second, very many witnesses who had excellent opportunities for knowing, sustain C. K. J. They give circumstances or incidents, such as repeatedly climbing over the fence in going to and from school and in going to and from their play at ball and to and from their neighbors when visiting, and falling off from it after the year 1867, with such detail as to exclude all reasonable doubt of the correctness of their statements, whether we consider the events themselves or the times of their occurrence.

One witness says that while resting from ball playing he was sitting on this fence and when he went to get off, he fell and cut his forehead so badly that the aid of a surgeon was required, and he still carries the scar. Another, in going on an errand for a sick lady, let a bottle of

medicine fall, which she thought had broken it. She remarked about it to the sick lady, who said she wished it had broken. Such incidents strengthen the direct assertion.

Therefore, it is very plain J. G. K. did not, in the year 1860, as is alleged, remove the fence in the rear of the Parker lot and thereby dedicate said lot to public use. And there has been no effort to show that he did so afterwards.

But the complainants allege that, independent of any act of dedication, the public have enjoyed such an uninterrupted adverse use of this alleged street for twenty years as to secure to the complainants all the benefits of a public highway.

At the very outset I may say that it seems to me to be impossible for any considerate person to adjudge that all of the Parker lot has been subjected to any such uninterrupted adverse enjoyment. For, to say nothing about the fence on the south end thereof, it has been so plainly proved that there was a fence on the north end of it, for many years within the statutory limit, except over six feet of a twelve foot alley way, that I need not stop for one moment to balance the testimony. So that if there has been a way established, by an uninterrupted adverse user, it must be limited to a very narrow portion of the north end of the lot. And since all the rest of the lot at that end was inclosed by a fence, if a way does exist it must be confined to the said alley way in entering upon the Parker lot.

At this point a serious hindrance presents itself; so far as the proof extends, all the use of the Parker lot, whether more or less, was gained by entering at the alley way named. That alley way was a private alley way, intended for the benefit and enjoyment of the owner of the Parker lot and the lot adjoining it on the east. By express stipulation it was to be an open alley way. Both lots were at one time owned by the same person, and when he conveyed the Parker lot, he secured to each said alley, in width twelve feet, imposing one half on each.

Now, I remark, that if a way of any kind has been proved, it must in part be over this private right of way or alley. And the hindrance referred to is the absence of the owner of the one half of the alley way, from these proceedings. He has not been brought into court. As the facts are, how can I advise a decree against him? Or how can I advise a decree which will be ineffectual unless it be against him? No consideration of the case has been presented to me which overcomes this difficulty.

But if it be said that the use being proved, the presumption is either an acquiescence or a grant, still, he has a right to be heard. If any presumption arises, it would be as fair to presume that the persons using the way did so by the license, merely, of the other joint owner; or did so when in or about his business. See *Washb. Easms.* *133, *143, *144; *Brinck v. Collier*, 56 Mo. 160; *Hemingway v. Chicago*, 60 Ill. 324; *Hall v. McLeod*, 2 Met. (Ky.) 98.

Passing on I do not find a twenty years' adverse user in a legal sense. If the witnesses referred to already be believed, the south end of the Parker lot was obstructed by a post and rail fence as late as 1899, and if two other most reputable witnesses be believed, later still they

encountered obstructions at different times which hindered them from entering upon said lot from the south.

There were gates at the northern end of the alley way, and a great deal of time was spent in an effort on the one side to show that they were closed within the twenty years, and on the other that they were not. If the latter, I do not see that any inference follows, since by deed the alley was to be an open one. Of course if closed, the act of closing would be a denial of the public right and a prevention of the operation of the statute. There does not seem to be any doubt but that one or both of the gates was or were closed within twenty years.

Again; it is urged that twenty-eight witnesses, called by the complainants, have sworn to the use of this alley way and this Parker lot ever since the construction of the railroad in 1864. Certainly, a large number of these witnesses swear that they used this alley way and this lot from the period named, whenever they had occasion to do so, without interruption. I believe them. One witness is contradicted. Another says he often opened the gates for him. It is not necessary that I should attempt to settle or harmonize this difference. Suffice it to say that a great many witnesses passed in and out of this gate way at different times.

The material questions are, on this head: Where did they make their exit from the lot and enter upon it at the end opposite the gates? And also, where did they travel after passing the gate way in reaching the other end? These important questions have not been settled by the proof offered. There is nothing which shows a well defined line of travel at the south end of the lot for twenty years.

As I have stated, the proof satisfies me that there has been a post and rail fence across that end of the lot within twenty years. What then? Are all these witnesses called by the complainants to be discredited? Not at all, for there was a way to reach the depot, the place to which they were going, without going over the south line of the Parker lot. That lot was only fifty feet wide. A portion of the lot adjoining on the west was unfenced, both on the east and south lines. This is the proof. One witness swears to it very clearly, and the owner of the lot says that when he fenced his lot on the east side in 1876 he also put a fence on the south line. Now it was easy enough for those who went to that depot to pass around the west end of the fence on the Parker lot and not cross the south line at all. Especially may this view be taken, when it appears by all the proof that there was a way greatly traveled for several years over that part of the said lot west of the Parker lot, which way led directly to the depot. And yet, while this view reconciles what otherwise seems to be in hopeless contradiction, there is not a single witness who testifies that the travel took any such route.

Therefore, it is only left for me to consider whether or not there was a well defined way over the Parker lot for over twenty years. This branch of the case is also, as I think, against the complainants. No one, however skillful, could take the testimony and from it lay a road and say that it had been traveled in that particular line for twenty years.

One witness says they went up the alley way to the tie post and then broke off and went as they pleased. Another says they went half way up the alley way, which would be perhaps a hundred feet further than the tie post, and then went across the Parker lot. Another says he would go up the alley way to the barn and then out to the railroad grounds. Another says: we drove anywhere, just where we could find the best road. Another says he didn't remember going any other way than going up the straight line, which would be up the alley way. He said he used to cart ties up there and wood also, and went up the straight line. When afterwards pressed by the complainants' counsel, he said he went in at the corner, meaning the alley way, "and when we got in we went pretty much as we pleased." And still another witness said: "We didn't always go in one place. An apple tree stood there but I can't tell on which side we drove."

Manifestly, if the complainants' witnesses cannot more clearly define the alleged way it would seem to be quite useless for the court to declare that there has been one in any given place for over twenty years. It might be safe for me to say that there has been some travel over the lot in question somewhere, but precisely where I cannot tell, and this I regard as absolutely essential. He who claims an easement over the land of another, by the uninterrupted adverse enjoyment thereof for over twenty years, must show that such adverse enjoyment has been in the same place for the period of time required.

The complainants' bill should be dismissed, with costs; and I shall so advise.

Robert O. BABBITT *et al.*, Complainants,
v.

Frederick K. DAY.

Dower does not attach, either at common law or under N. J. Rev. p. 320, to real estate of which the husband was seised in **joint tenancy**.

(Decided July 14, 1886.)

BILL for specific performance of a contract for the sale of real estate. On general demurrer. *Overruled.*

The case is stated in the opinion.

Messrs. Edward A. & William T. Day, for demurrant:

There is no essential quality in a joint estate necessarily incompatible with the existence of an inchoate dower interest; and by analogy to the cases of estates determinable by condition or by title paramount it would seem perfectly consistent with principle to hold that the right of dower attaches upon such estate, subject only to be defeated by the survivorship of the cotenant of the husband.

1 Scrib. Dower, chaps. 16, 92.

The doctrine of the common law is exceptional in its character and one for which no good reason is apparent. An absurd consequence resulting from the rule is that if the husband sever the joint estate by conveying his share to a third person, the right of dower of his wife is

thereby entirely defeated; while by the same act the right of dower of the wife of his cotenant and of the third person at once attaches.

1 Scrib. Dower, chaps. 16, 93.

Messrs. Babbitt & Lawrence, for complainants:

At common law there was no dower in an estate held in joint tenancy.

1 Scrib. Dower, 257, 321 *et seq.* and cases cited; 1 Washb. R. P. *156; Wms. R. P. 215; Hill. R. P. 3d ed. 580; 4 Kent, Com. 37; *Maybury v. Brien*, 15 Pet. 21 (40 U. S. bk. 10, L. ed. 646).

If the joint estate was severed by the alienation of the husband, the right of dower was thereby entirely defeated. The dower Act, Rev. p. 320, does not change the rule.

In 2 Greenl. Cruise, R. P. 375, the reason of the rule is stated as follows: "The widow of a joint tenant in fee or in tail is not entitled to dower, because upon the death of her husband the estate goes to the other joint tenant who is then in from the first feoffor or donor and may plead such feoffment or gift as originally made to himself without naming his companion."

The possibility that the estate of each joint tenant may be defeated by his dying in the lifetime of the other prevents the right of dower attaching.

1 Greenl. R. P. 156. See also 4 Kent, Com. 37.

In the case of *Cockrill v. Armstrong*, 31 Ark. 580, it is held that there is no dower in an estate in joint tenancy.

Ranyon, Chancellor, delivered the following opinion:

This is a suit for specific performance of a contract for sale of real estate by the complainants to the defendant. The objection made to the title is that the wives of the complainants' grantors, who held the title as joint tenants in fee, did not join in the conveyance to the complainants; and it is urged that the wives, who are living, may have a right of dower in the property. By the common law no title of dower attaches where the husband is seised of the land jointly with another or others. This is owing to the nature of the estate of joint tenants. The possibility, so long as the joint ownership subsists, that the estate of each tenant may be wholly defeated by his dying in the lifetime of the other or others prevents the attaching of the right of dower in the wives of any of the tenants except the survivor. The estate which the husband must have to entitle his wife to dower is one in severalty or in common. The unity of interest in joint tenancies (each tenant is seised *per my et per tout*) prevents the admission of a right of dower or curtesy, except as to the estate of the survivor. On the decease of one joint tenant the survivor holds the whole property under and by virtue of the original grant, and holds no part of it in anywise under the decedent. 2 Cru. Dig. 444.

We have not in this State changed the law in respect to dower in such estates, either by statute or legal adjudication. The statute, it is true, provides that the wife shall have dower in all the real estate of which her husband or any other to his use was seised of an estate of inheritance at any time during the coverture, to which she shall not have relinquished her right of dower by deed duly executed and ac-

knownledge (Rev. p. 820); and an estate in joint tenancy is in terms an estate of inheritance, but the right of survivorship in such estates has not been abolished. Such estates are recognized by statute (Rev. p. 167, § 78) and they retain their common-law characteristics. By the term "estate of inheritance" in the statute is meant an estate of inheritance in severalty or in common. Estates in joint tenancy are not included.

The demurrer will be overruled.

PARKER'S ADMR., Complainant,
v.
PARKER.

1. Where two brothers, examined as witnesses as to the ownership of certain securities, respectively testify to **contradictory facts**, and both appear upon the witness stand equally fair and honest, **courts must be governed by the preponderance of the testimony.**
2. Where one of the witnesses was trustee to some extent, or agent of his mother, and had the care or custody of her estate and the possession of securities claimed to belong to such estate, he is **held to a strict account**; and the burden is on him to make clear and plain and to remove every reasonable doubt as to the ownership of such securities.
3. Where a son enjoyed the unbounded confidence of his aged mother, and exercised a great influence over her actions, and confidential relations existed between them, the **burden of proof is on such son to show**, aside from the formal way by which a gift passed to his credit, that it was in fact a gift.

(Filed September 3, 1886.)

BILL for an accounting. *Decree advised.*
The facts are fully stated by the Vice Chancellor.

Mr. W. H. Vredenburg, for complainant.

Mr. Chas. Haight, for defendant.

Bird, V. C., filed the following conclusions: In March, 1884, Mrs. Parker died leaving two sons, James and Henry, and leaving a large estate valued at over \$80,000, nearly all of which was in stocks, bonds, mortgages and other securities. She made her home with James, but confided nearly all of her estate to the care and custody of Henry, trusting him to make investments for her. In no other respect did she manifest any preference. The proof shows that she was quite careful to avoid any act which would benefit the one son more than the other. If she made purchases for one she would for the other, or give an equivalent. She purchased a barrel of sugar for James and gave Henry cash equal to the cost of the sugar.

Soon after the death of the mother, Henry and James met to make division between themselves of her estate. They divided part but not all of it. Since then a dispute has arisen between them as to the amount of the estate

in Henry's hands. Henry held ten American Dock & Improvement Company bonds valued at \$1,000 each. James insists that they all belonged to his mother. Henry claims five of them as his own and says he paid for them with his own money. James insists that Henry was indebted to his mother at the time of her death in the sum of \$14,800, in addition to the sum of \$9,800. Henry denies the former charge, but admits owing \$9,800. In June, 1888, about nine months before her death, the mother gave to Henry her own check for \$7,000. This James says he should account for. Henry claims it as a gift.

First, as to the bonds. Henry says in his answer that in the months of March and April, 1888, at the request of his mother, he had the cashier of the Freehold National Banking Company purchase five \$1,000 bonds of the American Dock & Improvement Company for his mother, which the cashier did, and says he delivered the bonds to his mother. In this he is sustained by testimony other than his own. His statement is corroborated by her bank account.

Henry swears that the other five shares were his own and that he purchased them with his own money. On this point I think his testimony is admissible. His bank book shows that in April, 1882, he was charged \$4,856.25 for bonds. He collected the dividends on these five bonds and was credited therewith in his account at the bank. The testimony so far as considered decidedly sustains Henry; but very strong doubt is thrown over this branch of the case by what Henry himself did after the death of his mother, when the brothers met and made partial distribution. James asked Henry to make a statement of the assets in his hands, which Henry did. In that statement he includes "American Dock Bonds, \$6,000." The bonds being valued at \$1,000 each, this gives to the estate six bonds instead of five. That this was not an oversight in Henry is apparent from the fact that he appends to his former statement the items which had been distributed between them, and charges James with "American Dock bonds, \$3,000," and adds: "Not divided yet and due the estate of S. G. Parker," six items, one of \$6,000, one of \$250, one of \$9,800, one of \$170.50, and one in these words and figures: "Dock stock ten shares, par value \$1,000."

In addition, James swears that Henry produced ten bonds when they met for distribution and said they belonged to his mother, and passed over to him (James) five of them, and said that they were good. He says that after they had talked awhile Henry remarked: "I guess you had better hand a couple of those bonds back to me, as I haven't looked on the bank book lately." He handed back to Henry two of them, and afterwards inquired of him about it, when Henry said his mother had only six bonds.

Henry denies making any such statement to James. I cannot but remark that if James' statement is false, in the main it is a singular concoction. Henry admits, however, that he produced ten bonds with the securities which belonged to his mother, and that they were all placed upon the table, and that five of them were passed to James.

Now, notwithstanding Henry's emphatic state-

ment under oath and the entries in his bank book, I am impressed with the belief that there must have been some transaction between himself and his mother by which these bonds became hers before her death. In the first place, it appears from his own showing that these five bonds which he claims as his own were kept with his mother's bonds and her other securities; and that when he produced such securities to make distribution thereof between himself and his brother, he also produced these five bonds which he now claims. In the next place, there must have been serious doubt in his mind about it, or he would not have charged James in his statement of the assets distributed, with the three bonds, without charging himself with the other two, which he did not do, although he retained them in his possession and charged himself with all the other items which he took in the division. His statement shows this fact.

These undisputed facts are proof of the assertion that his mind was in doubt, and sustain the testimony of James when he says that Henry expressed doubts and asked to have two bonds returned and said he had not looked over the bank book in some time. And in the third place is the entry in Henry's statement, which he furnished to James, after first making a general statement of the whole estate, in which only six bonds were mentioned, and then a further statement following, in which he charges James with what had been passed over to him and charges himself with what he had retained in the division, he makes this additional statement: "Dock stock, ten shares, par value \$1,000;" besides which on the margin is written these words: "Not divided yet and due the estate of S. G. Parker."

If Henry was the *bona fide* owner of five of these bonds, I find myself wholly unable to reconcile such ownership with the three considerations just presented. It should be further considered that the bonds which Henry says he purchased as his own were purchased April 6, 1882, and that only about two years expired before he and his brother met to make the division; and that he had made the purchase of the five bonds, which he admits belonged to his mother, only about a year before they met to make such division. With these transactions so distinct and occurring so recently, I cannot understand how there could have been any doubt in Henry's mind nor why he should make the statement that he did, if five of those bonds were his.

I have endeavored to reconcile these circumstances with the testimony given by Henry and to conclude that these bonds belong to him as he swears they do, but I cannot. Henry appeared upon the witness stand as a fair and honest witness. I was favorably impressed with his manner. Nothing was presented to awaken discredit. It is only fair that I should say as much of James. Under such circumstances what is the duty of the court? Fortunately long experience has established safe rules.

First, it is well established that courts must be governed by the preponderance of testimony. Therefore, although the brothers may be said to be equally interested, yet all the other facts and circumstances above alluded to seem to give the greater weight on the side of the complainant.

And in the second place it must be considered, because it has also been long and well established, that Henry was trustee to some extent, or agent for his mother, and had the care and custody of her estate, and as such is held to a strict account. As such the burden is upon him; it was for him to make clear and plain, and to remove every reasonable doubt as to the ownership of these securities.

Consider next the claim of James, that Henry owes the estate \$14,800, besides the note of \$9,800. James says that some time prior to his mother's death he called on Henry and had an interview with him, respecting his mother's securities; and spoke of the impropriety of Henry's holding the notes which he had given to his mother, and that upon that occasion Henry produced three notes drawn by himself, one for \$5,800, one for \$2,500 and one for \$6,000. He says that Henry retained these notes. It will be observed that these sums aggregate \$14,800, the amount which James claims is now due, in addition to the \$9,800.

As I understand James' testimony, he got the impression, at the time of the interview with Henry before their mother's death, that Henry said he owed \$14,800; and from that fact and other circumstances seems to have the conviction that that indebtedness remains as well as the \$9,800. Henry admits that at the time of that interview he did owe his mother \$14,800, but says that afterwards he had a settlement with his mother which included the three notes; and that he gave her a note for the amount found to be due her at that time, which was \$800. This note bears date July 1, 1882. The mother was present at that interview and so far as appears did not question anything that Henry may have said.

Independent of Henry's testimony, I am not able to conclude that he should be charged, according to the prayer of the bill, with \$14,800 and \$9,800. It is true he produced notes aggregating the former amount, when he and James met; and while he does not now produce the same identical notes, he admits a liability of \$15,800. I am aware of the force of the insistence that Henry was holding the securities of his mother, among which were these notes which he had given her, which created obligations on his part toward his mother of a fiduciary nature; yet I can see no reason for charging Henry with the destruction of the two notes (one for \$5,800 and one for \$2,500), since a larger amount of indebtedness remains and may fairly be supposed to be included in the \$9,800 note. I am entirely satisfied that on this point there is nothing more due the estate than the \$9,800 and the \$6,000.

Consider, in the last place, the alleged gift of \$7,000 to Henry. A check is produced in which the blanks are filled in by Henry, dated June 25, 1888, signed by his mother, for \$7,000. The last charge in her bank book shows that this went into her account. Can this be sustained as a gift? The mother was then seventy-six years of age, declining somewhat at least in physical and mental strength. She died the next March. The physician produced said that he was called to visit her prior to and subsequent to the date of the check. He swears that her brain was paralyzed to a certain extent. He says that he saw symptoms of this several

months before her death. I am satisfied, however, that Mrs. Parker was a woman of great vigor of intellect, retaining her faculties of thought and action to a great degree, excepting only so far as indicated by the physician. Nevertheless, I must consider the fact that she was an aged woman and the mother of Henry, in whom she had unbounded confidence.

This confidence is particularly striking in that she not only trusted him with her securities, evidences of indebtedness by others, but the securities also which Henry had given, showing his indebtedness to her to the amount of \$15,800. I have no doubt, from the testimony and from what I have seen of Henry upon the witness stand, that, to his mother, he was a prepossessing son, and that his influence over her was very great indeed, and that too without any special effort upon his part.

These things being so, such confidential relations existing, the burden of proof is on Henry who claims the benefit of the gift. He has the money, it is true, and shows the formal way by which it passed to his credit. There he rests his case. Does this bring him within the rule of law and save him from accounting for the \$7,000?

I think Henry is obliged to account for the \$7,000. This view seems to be sustained by all the authorities.

Huguensin v. Baseley, 14 Ves. 278; *S. C.* 2 White & T. Lead. Cas. Eq. *556, top 1156, American notes; Kerr, Fraud & M. 182, 183, 189.

I will advise a decree in accordance with these views.

Catherine CLEINE, Complainant,

v.

Anthony ENGLEBRECHT.

*Mr. E. as solicitor agreed with Mrs. C. to defend certain suits, for which she agreed to give him half of all the property or money that should be recovered. The defense entered failed, and the property was all recovered from Mrs. C. by judgment; Mr. E. procured Mrs. C. to execute and deliver to him a deed for one half of other property which she owned, without question, representing to her that it was for his compensation under the agreement. Held, that such deed is fraudulent and void, both in law and in fact.

(Filed September 9, 1886.)

BILL to have a deed set aside as fraudulent and void. *Decree in accordance with prayer of bill advised.*

The facts are stated by the Vice Chancellor.

Mr. F. Frambach, Jr., for complainant.

Mr. S. B. Ransom, for defendant.

BIRD, V. C., delivered the following opinion:

The complainant asks to have a deed, which she made and delivered to the defendant for the undivided one half interest in two lots of land, set aside as fraudulent and void. Although she denies all knowledge of executing this deed, she no doubt did so. Her claim is

*Head note by BIRD, V. C.

N. J.

also that fraud and deception were practiced upon her by the defendant. She obtained her title to these lots by devise from Mr. Cox, whom she claimed to have been her husband. Mr. Cox died in 1878, leaving a will devising to her these lands, and also leaving other lands. The will was admitted to probate, thus perfecting her title. She claimed that she was entitled to dower as widow in the lands not devised. To dispose of this claim and to free the estate from embarrassment, the executor filed a bill against her.

The defendant is an attorney at law and one of the solicitors at this court. Mrs. C. employed E., the defendant, to defend the suit brought by the executor. He entered into an agreement in writing with her, that for his services for defending said suit she should give him "one half of all sums of money recovered from the estate of Mr. Cox, deceased, either by suit or compromise."

Mrs. C. was in possession of a house and lot, not one of those devised, and an action in ejectment was commenced against her to recover the possession. An opinion was pronounced in the suit in chancery, in the October Term, 1884, adverse to Mrs. Cox; and although it does not appear definitely, yet about that time judgment was recovered against her in the action of ejectment. These events and dates are given for the purpose of adding and connecting therewith the fact that November 17, 1884, a very formal agreement in writing was entered into by Mrs. Cox and Mr. E., in which it is recited that "there is now a suit or suits at issue and pending," etc., and in consideration of \$1 and of E.'s maintaining and defending said suits or any other which might thereafter be brought in reference to the rights of Mrs. Cox, the said Mrs. Cox "covenants and agrees to and with the said Anthony Englebrecht that the said Anthony Englebrecht shall receive as compensation for said services one half of the properties or moneys so recovered or received in the said suits." Care was taken to have a master in chancery present to have them acknowledge the execution of this agreement.

On the fourth day of the next February (1885), Mr. E. sent for Mrs. Cox to come to his office. There, in the presence of another attorney at law, a long conversation ensued respecting the suits which had been determined against Mrs. Cox and respecting the propriety of an appeal. I think both solicitors agree that there was a great deal of intercourse upon that occasion between them and Mrs. Cox upon these subjects. They agree that an appeal was not at all advisable. But they say that then and there the deed in question was presented to Mrs. Cox; that it was read over to her twice and explained to her.

It is admitted that the lands described in the deed were never the subject matter in dispute or litigation, and there is no sort of claim or pretense that they were included or intended in any sense to be included within either said agreements respecting compensation.

Mrs. Cox is a woman of ordinary natural capacity, but can neither read nor write and is extremely ignorant of all matters of business. There is no proof that she ever had the slightest experience or the remotest opportunity of knowing anything about the titles of real estate.

The other solicitor, who was present and took the acknowledgment of the deed, says that he read the deed to her and explained its contents. It also appears that he had some interest in the suits, for he argued the one on final hearing before the chancellor, for which he has had no compensation; and avoided answering the question as to compensation in the future, by saying that Mr. E. was under personal obligations to him.

At the time of the execution and delivery of the deed, in February, 1885, the estate of Mr. Cox was not settled, the accounts of the executor not yet having passed. Mrs. Cox's children were interested in these accounts and she was doing what she could in their behalf. Mr. E. continued to correspond with her respecting the accounts, and invited her to come to his office. According to his statements she was there in June, September and November, and perhaps at other times; but at the times named, he says he spoke to her about his interest in these lands and told her that he intended to file a bill for partition. He says that at none of these interviews did she deny having executed the deed nor in any way question his right to an interest in the land.

Let us go back to the time when the deed was executed. When Mrs. Cox went to the office of Mr. E., the deed was all prepared for execution. It was prepared by the master who took the acknowledgment and who, as counsel, had argued the cause before the chancellor. It was prepared at the request of Mr. E. Mrs. Cox had not given any directions about it nor had she been consulted. She had no knowledge of it until it was about to be presented to her for execution. Mrs. Cox says that she heard nothing more of it from that day until she learned that she had in fact executed a deed for this property from Mr. Brown, who told her that she had and that he had seen the deed, and also told her that she had better employ some good lawyer. I do not think it is at all material to determine whether or not Mr. E. did speak to Mrs. Cox at different times before he filed his bill for partition in November, 1885, after which occurred the interview with Mr. Brown. I say it is not material, because he was still acting as her counsel in respect to the accounts of the executor; and she was under the same influence that she is presumed to have been when she executed the deed. The whole transaction shows that, until the filing of the bill for partition, she had unbounded confidence in Mr. E.

But the defense must fall, upon the testimony of Mr. E. himself. He says that when the deed was executed "I explained to her that it was my compensation for services under the agreement." I do not see how he could make such a statement to his client. It certainly was not true in any sense. By the agreement he was to have the one half of all that was recovered; but nothing was recovered. And the property mentioned in the deed and conveyed thereby was not by any possibility involved in the controversy.

I must pronounce that the transaction complained of was not only fraudulent in law, but in fact. Mr. E. makes it so plain that he deceived and misled Mrs. Cox that every consideration of duty requires me to say so.

Mr. E. is an attorney at law and a solicitor in this court. The courts have given him a certificate of good character, and upon this clients rely, as they have a right to. The courts, then, when called upon, must see to it that the high trust implied is not abused. The courts must meet this responsibility in a becoming spirit of firmness, or share in the odium and dishonor which is sure to follow. The reputation of both bench and bar, before an enlightened world, is so involved that nothing will save it from just reproach but the most rigid scrutiny and most exacting rules.

I will advise a decree declaring that the said deed is void and that Mr. E. execute to Mrs. Cox such a deed as she delivered to him. The complainant is entitled to costs.

CRANDALL, Complainant,
v.
GROW.

1. **Where one accepts work done under a contract, and recovers judgment at law for damages for breach of the contract, because of inferiority in quality of the article contracted for and delivered, he cannot insist, in a suit in this court, that the note given by him in payment for the article be annulled and surrendered, without crediting defendant with the balance due thereon.**
2. **In such a suit this court should decree that defendant surrender the note to plaintiff, and that plaintiff credit the amount still due on the note, upon his judgment recovered against defendant.**

(Filed July 17, 1886.)

BILL to have a certain note declared null and void. *Surrender of note advised.*

The facts are stated by the Vice Chancellor. See also *Crandall v. Grow*, 3 Cent. Rep. 506. Mr. J. J. Crandall, complainant, *pro se*. Mr. D. J. Pancoast, for defendant.

Bird, V. C., delivered the following opinion: These parties entered into an agreement under which G. was to print a book for C. for the consideration of \$1 per page for the larger, and \$1.50 for the smaller type; each form to be paid for as it came off the press.

C. alleges in his bill that G. did not perform the contract in its terms and spirit, and that he brought suit against him because the book was printed upon an inferior quality of paper and because he did not print the book in a workmanlike manner; and recovered judgment in the court of law for \$300. C. sets up in his bill that G. holds his promissory note for \$250 "and that the only and sole consideration in and for said note is a balance of about \$180 intended for the printing of said book according to contract."

The bill further alleges that said note is void in the hands of G. and prays for an injunction restraining him from transferring said note, and for an order requiring him to surrender it to C. The injunction was allowed [3 Cent. Rep. 506].

And now upon final hearing the question is,

whether or not the note shall be declared void in the hands of G. and he be compelled to surrender it to C. without having credit for the amount still due upon it on the judgment which C. recovered against G.

C. insists that he is entitled to the benefit of the verdict of the jury which gave him \$300 by way of damages for breaches of the contract, and also to have the note surrendered to him as void, and to keep the book which was printed by G. and delivered to C. In other words, it is urged that C. is entitled to all he had received directly from G., or all that he may yet receive through the verdict of the jury, without the least liability on his part to pay for so much of the work as he has received and appropriated to his own use. To sustain this view reference is made to *Ellis v. Hamlen*, 8 Taunt. 52; *Smith v. Brady*, 17 N. Y. 184; *Cutler v. Powell*, 6 T. R. 320; 2 Dutch, 290; *School Trustees v. Bennett*, 8 Dutch, 517; *Beltinger v. Craigue*, 31 Barb. 535; *Davis v. Tallcot*, 12 N. Y. 189; *Gates v. Preston*, 41 N. Y. 118; *Blair v. Bartlett*, 75 N. Y. 152; *Dunham v. Bower*, 77 N. Y. 80.

I think that we will get at the right view of this case, if we consider that the complainant is in a court of equity asking relief, and take for our standard the maxim that "He who asks equity must do equity." In this case C. has accepted the book, and has recovered a verdict of \$300 for the unfaithful performance of the contract, and he now comes and insists that this court shall give him \$180, or about that sum, in addition. I can see no reason for taking any such step in this case, after what the jury has done for C. I submit that this case may be likened to that of borrower and lender under a usurious contract, in which if the lender comes into court the borrower can safely insist upon the enforcement of the penalty; but if the borrower comes in he will be required to pay what is really and *bona fide* due. *Hudnit v. Nash*, 1 C. E. Green, 550.

Let it also be considered that this work was performed in parts and was to be paid for in parts; that is, the book was to be printed in larger and smaller type, and was to be paid for as each form came off the press; and that it nowhere appears that C. made any objections to the work or refused to receive it. And besides this, C. has recognized to some extent at least the divisibility of the contract by his payment, not only in giving the note, but in making payments upon it.

I will advise a decree that G. surrender the note, and that C. give him credit for the amount still due thereon upon his judgment. C. is entitled to costs.

Catherine A. PULLEN, *Appt.*,

v.

Ralph L. PULLEN.

1. A cross examination is never limited or controlled by the mere words and phrases used in direct examination. Where a party to a suit denies the principal allegation or charge against him, in his direct examination, he thereby lays himself liable to a cross examination upon every circumstance

or transaction with which he was connected, which may tend to establish the allegation or charge.

2. In a suit for divorce, upon the ground of the adultery of the husband, where defendant denies the charge upon direct examination, he may be cross examined about whatever is unhusbandlike, whatever looks like cruelty, whatever is evidence of unfaithfulness or whatever shows an alienation of affection or estrangement on his part, provided it occurred at or about the time of the alleged adultery and within a reasonable time before the commencement of the suit.

(Filed September 8, 1886.)

PETITION for divorce. On appeal from a ruling by a master rejecting certain testimony sought to be elicited from defendant on cross examination. *Decree reversing the ruling advised.*

The facts appear in the conclusions of the Vice Chancellor. See also, *Pullen v. Pullen*, 1 Cent. Rep. 671, and 3 Cent. Rep. 676.

Messrs. W. Y. Johnson and J. P. Stockton, Atty-Gen., for appellant, to show that the rejected evidence was admissible, cited 2 Greenl. Ev. 40; Whart. Crim. Ev. § 247; Phillips, Ev. 189; *Culver v. Culver*, 11 Stew. 164; 2 Bish. Mar. & Divorce, 5th ed. 627; *Richardson v. Richardson*, 4 Porter (Ala.) 467; *Saunders v. Saunders*, 10 Jur. 148; *Bray v. Bray*, 2 Halst. Ch. 506, 628.

Messrs. G. O. Vanderbilt and W. D. Holt, for appellee.

Bird, V. C., filed the following conclusions:

Having advised that the ruling of the master rejecting testimony which was offered by the petitioner was erroneous, the defendant's counsel ask for my conclusions in writing, because they desire to appeal.

The petition is for divorce from the bonds of matrimony because of the adultery of the husband. The defendant had been examined in chief. He had been cross examined also, and amongst other things respecting his previous relations with his wife. To some of the questions put upon cross examination, respecting their conjugal intercourse, objections were made and sustained by the master. At length, as the master has it upon his notes, Mr. Stockton said:

"In order not to waste time, I will state to the master that my object is to prove that Mr. Pullen made no effort to get his wife to come back; that he drove her improperly from his house by cruelty, and—connecting that with his employment of Mrs. Lane at so early a period—to show the preparations for the commission of the act charged in the bill. Also to show from his own admissions the state of affection between his wife and himself at the time. That is, to show the absence of affection on his part towards his wife at the time he employed Mrs. Lane. I claim that this, in the form that it is put, is all proper cross examination, as it simply develops further the motives and reasons which induced him to employ a housekeeper, and created, what the evidence in

chief attempts to show, the necessity of a housekeeper."

The master overruled the offer because he thought it was not a proper cross examination, and because the petitioner is precluded from inquiring into facts not set up in the petition.

In my judgment, the master was in error. The witness was the defendant; and it would be altogether too limited and tend to defeat the true exposition of a case to follow his view of the law. It is true, the counsel for defendant says that he framed his questions so as to prevent any cross examination of the witness, upon the things involved in the propositions of the attorney-general. But a cross examination is never limited or controlled by the mere words and phrases used in direct examination. If this were so the truth might forever be suppressed and the greatest aid in developing it, i. e., a cross examination, rendered of no avail. For example: the defendant is charged with adultery. It is admitted that he denied this emphatically upon direct examination. The insistence of counsel for defendant is to the effect that you can only inquire, upon cross examination, whether or not the defendant did or did not commit such act. In my judgment, such examination in chief opens the way for the fullest cross examination into the relations of the parties at or about the time of the alleged adultery. Whatever is unhusbandlike, whatever is evidence of unfaithfulness, whatever looks like cruelty, whatever shows an alienation of affection or estrangement, he may be examined about. Of course it must be within a reasonable time, for in most cases if not within a reasonable time, the doctrine of condonation would apply. This doctrine as to cross examination pervades the practice in all courts, civil and criminal. A defendant swears that he is not indebted to the plaintiff upon the note, bond or other obligation named in the declaration. Does that limit the inquiry and preclude the plaintiff from the most minute and detailed examination respecting the transaction, and of which the bond or other obligation originated, or as to what has transpired between the parties since? Certainly not.

Again; since criminals are permitted to testify in their own behalf, do they complete their defense and close the door of inquiry, by denying the commission of the crime with which they stand charged? Certainly nothing is plainer than that they may after such denial be inquired of with respect to whatever they may have said or done, or wherever they may have been, so far as either will shed any light upon the perpetration of the alleged crime or their relation thereto.

These illustrations, which are daily presenting themselves in every judicial tribunal, must suffice. Therefore, it seems to me that it may safely be regarded as a rule of universal application that where a party to a suit denies the principal allegation or charge made against him, in his direct examination, he thereby lays himself liable to a cross examination upon every circumstance or transaction with which he was connected, which may tend to establish the allegation or charge.

Hence I will advise that the ruling of the master be reversed and that the appeal therefrom be sustained, with costs.

Catherine A. PULLEN, *Petitioner*,

v.

Ralph L. PULLEN.

Parties to suits in which the evidence is taken before an examiner will not be permitted to appeal to the chancellor from the decision of a vice chancellor nor to have a rehearing before him, upon questions arising in an appeal from the rulings of the examiner admitting or rejecting evidence.

(Decided September 11, 1888.)

PETITION for divorce. On motion for rehearing. *Dismissed.*

The facts are stated in the opinion of the Chancellor. See also, the preceding case.

Messrs. G. O. Vanderbilt and W. D. Holt, for the motion.

Mr. W. Y. Johnson, contra.

Runyon, Chancellor, delivered the following opinion:

This is a motion for the rehearing of a decision of a vice chancellor upon an appeal from the decision of an examiner ruling against a certain line of cross examination.

In *Runyon v. Bray*, 11 Stew. 398, it was held that the chancellor himself will rehear decisions advised by a vice chancellor, only where there appear to be special reasons for so doing. No special reason appears in this case. The vice chancellor not only fully considered the subject submitted to him, but wrote out his conclusions, which are before me. The object of the rule conferring power upon examiners to decide as to the competency and admissibility of evidence cannot be fully attained if applications for rehearing by the chancellor himself of the decisions of the vice chancellors upon such rulings are to be entertained. Such applications are, in fact, appeals from the vice chancellors to the chancellor. Every consideration is opposed to the granting of them. Parties in suits tried before a vice chancellor or an advisory master are not permitted to bring before the chancellor by appeal or rehearing the rulings of such officers in such suits in regard to the competency or admissibility of evidence. No more should parties in suits in which the evidence is taken before an examiner, be permitted to appeal to the chancellor, from the decision of a vice chancellor upon an appeal from the ruling of the examiner.

The petition will be dismissed, with costs.

Milton McCONNELL, *Complainant*,

v.

AMERICAN BRONZE POWDER MFG. CO.

*1. After a mill owner has acquired by prescription an easement of flowage, no cessation in the use of it will extinguish it, unless the cessation be continued uninterruptedly for the full period of twenty years, or the cessation be commenced or continued under such cir-

*Head notes by VAN FLEET, V. C.

circumstances as to evince unmistakably, an intention by the mill owner to abandon his right, and as shall also render a subsequent resumption of it by him clearly inequitable to the owner of the servient tenement.

2. A dam can only produce its full effect on the stream above when the pond is full; and therefore the evidence of witnesses, in a flowage suit, who attempt to give the usual state of the water in the pond or in the stream above from observation, but who have made their observations without knowing at the time they were made whether the pond was full or not, is entitled to very little consideration.

(Filed September 17, 1886.)

SUIT to compel the lowering of a dam which backed water upon complainant's land. On final hearing on bill and answer and proofs taken in open court. *Relief denied.*

The facts are fully stated by the Vice Chancellor.

Mr. Joseph Coult, for complainant.

Messrs. Louis Hood and Frederick W. Stevens, for defendant.

Van Fleet, V. C., delivered the following opinion:

The object of this suit is to compel the defendant to lower its dam. The complainant owns a farm in the Township of Caldwell, in the County of Essex, lying on both sides of a small stream called Peckman River. The course of this stream through the complainant's farm is from south to north, its waters flowing in a northerly direction. The defendant owns a tract of land adjoining the complainant's farm on the north, on which there is a mill run by water, the power for which is supplied by a dam across this stream. This dam has been in existence for over seventy years. The right of the defendant to maintain a dam on this stream is not disputed; nor is it denied that the dam maintained there was, up to the fall of 1876, a lawful structure. But the complainant says that the defendant raised the dam above its lawful height in the fall of 1876 and again in 1881 or 1882, and that the two additions thus made increased its height forty-two inches beyond the elevation at which it had a right to maintain it.

The complainant brought an action at law against the defendant, in May, 1888, which was tried in September of the same year and resulted in a judgment in favor of the complainant for substantial damages. The complainant afterwards, on the 28th of April, 1884, filed his bill in this court, praying that the defendant might be decreed "to reduce the dam to its original height, as it was prior to 1876."

The defendant, on the 10th of May following and before it answered, reduced the dam five inches and seven eighths of an inch and then answered; alleging that the dam, as thus reduced, is a lawful structure, and that its height is now no greater than of right it should be. The complainant contends, however, that the dam is still too high; and he has brought his suit to final hearing for the purpose of having

the question determined whether the dam in its present reduced condition is not higher than the defendant has a right to maintain it. He insists that it is, and that his lands are, in consequence, at all times inundated with water from the defendant's pond to a greater extent than they ever were before.

The question presented for judgment requires the court to fix the height at which a dam might rightfully be maintained, at the place in question, prior to 1876. The structures existing prior to 1876 are admitted, at least impliedly, to have been lawful, for it is the addition, which the defendant made to the lawful height in the fall of 1876, that the complainant states as the foundation of his action; and it is only the excess above such height that he has a right to ask to have reduced. So that the test to be applied to the present structure is: Is the dam, as now reduced, above the height at which the defendant has a right to maintain a dam on this stream? And its right in this regard is not to be measured by the height of the structure which immediately preceded the dam built by the defendant, unless such previous structure had stood there, at the same elevation, for the full period of twenty years immediately before the fall of 1876. The previous dam may have been below the elevation at which the mill owner had a right to maintain it; if so, and it had not been kept at such reduced height for the period of twenty years, or, the mill owner, in making the reduction, did not do it under such circumstances as to conclusively evince a plain and deliberate intention to abandon all right to the excess, above such reduced height, and thereby induced the owner of the servient tenement to do something which, but for the manifestation of such intention he would not have done, he would still have a right to raise his dam to its original elevation. In other words, the settled rule on this subject may be stated as follows: after a mill owner has acquired by prescription an easement of flowage, no cessation in the use of it will extinguish it, unless the cessation be continued uninterruptedly for the full period of twenty years, or the cessation be commenced or continued under such circumstances as to evince, unmistakably, an intention by the mill owner to abandon the right, and as shall also render a subsequent resumption of it by him clearly inequitable to the owner of the servient tenement. *Carlisle v. Cooper*, 4 C. E. Green, 256; *S. C.* on appeal, 6 C. E. Green, 576.

The evidence on the part of the defendant gives what I think may be safely regarded as a trustworthy history of the several dams which have existed at the point in question since about 1845. A witness who now owns a mill located on the same stream, about a mile and a half below that of the defendant, and whose recollection of the several dams which, during the period intervening since 1846, have existed at the mill now owned by the defendant, seems clearer and more perfect than that of any other witness who has given evidence upon that subject, describes the dam existing there in 1846 as follows: the westerly end of the dam, he says, consisted of a stone bulkhead, higher than any other part of the dam, about thirty feet in length; next came a set of flood gates, covering, in their united length, a space of about ten feet;

next to them stood a stone buttress twelve or fifteen feet in length, and then came another set of flood gates, greater in length than the first set; and lastly, a dam constructed of stone, with earth placed in front of it, extending far enough to the east to strike the natural grade of the earth east of the pond. On the top of this stone dam last mentioned, the witness says pieces of timber, round saplings, were laid, which were held in position by other pieces of timber standing upright, mortised at the top and imbedded in the stones of the dam, so that the timbers lying on the dam rested in the mortises of the uprights, and were thus held firmly and made perfectly secure. These pieces of timber lying on the top of the dam constituted, the witness says, the lip of the dam, and marked the efficient height of the dam. When the pond was full, the first water which escaped from it flowed over this lip; and this part of the dam constituted what mill owners call the overflow or tumble of the dam. But he also says that while this part of the dam was the lowest and furnished the first means of escape for the water when the pond was full, it was never used as a waste way or outlet in times of flood, but that at such times the flood gates were hoisted and the surplus water discharged through them. This description of the dam of 1846 is admitted, by all the witnesses who claim to have any knowledge respecting it, to be in the main correct. Others testify to a widely different recollection as to the height of this part of the dam, when compared with certain other parts, from that sworn to by this witness; but in other respects they, with entire uniformity, agree as to the general accuracy of his description.

The dam of 1846 remained unchanged until 1860, then one set of flood gates went out, and were replaced the same year. After this no further change occurred until 1866 or 1868 (the witnesses differ as to the year, but I think the weight of the evidence shows the year to have been 1868); then the whole central part of the dam, consisting of the two sets of flood gates and the stone buttress, was carried away leaving the bulkhead on the west and the stone dam on the east still standing. They remained substantially in the same condition in which they were in 1846.

The central part of the dam was replaced the same year; but it was constructed in a different manner and to some extent of different material from its predecessor. It was made principally of wood and without flood gates. The person who built it swears that when he quit work on it, it was from four to six inches lower than the lip of the eastern part of the dam, and that its height was never subsequently increased, except temporarily by placing planks or boards on it, which were afterwards taken off. No further change was made in the dam after this until August, 1875; then the central part of it was again carried away; but its two extremities, which had withstood the previous floods, also withstood that of 1875. They remained intact. The dam remained in this broken condition until the fall of 1876. The central part of it was then restored and raised above the lip of the eastern part of the dam about six inches. Other changes were made at the same time. The proofs make it entirely

certain that a part of the lip of the eastern part of the dam, being the piece of timber lying farthest west and next to that part of the dam which had been repeatedly washed away, still remained in the fall of 1876, and also as late as September, 1888, in its place, intact and unchanged.

Now, although the only fact stated in the complainant's bill, as his ground of action, is that the defendant in 1876, and subsequently, raised its dam above its lawful height, and thereby caused the water in the pond to flow back upon his lands to his injury, yet he did not, in attempting to establish his case in the first instance, offer a word of testimony tending to show directly that the dam erected in 1876 was higher than the dam which had existed there from 1846 to 1868. He made no effort whatever, in the first instance, by direct testimony, to show either the height of the dam of 1846, or any previous or subsequent dam; or how any such previous dam compared in height with the dam of 1876. The proofs he offered, to establish his case, consist entirely of the recollection of witnesses as to the difference in the quantity of water found at certain points along the pond and in the stream above the pond, since 1876, as compared with the quantity found at these several points at various dates prior to 1876; his purpose being by this sort of proof to demonstrate that the quantity found at these places since 1876, when the waters of the stream were unaffected by exceptional conditions of the weather, and in their ordinary state, has been greater than it was previous to that year, and thus establish by inference that the dam must have been higher since 1876 than it was before.

His proofs of this description were mainly directed to five different localities viz.: first, a ford about 1,200 feet south of the dam, and used by the complainant to go from his land on the west side of the stream to his land on the east side; second, the northeast corner of the complainant's meadow on the west side of the pond, and adjacent to the mill property of the defendant; third, two rocks on the west side of the pond, standing in the pond, on land of the defendant; fourth, two small runs or guts on the east side of the pond, which some of the witnesses have called slanks; and fifth, the east shore of the pond.

Under the view I take of this evidence no synopsis of it needs to be given. Without entering into details, I think this may be stated as its fair result: that a large majority of the complainant's witnesses agree that as they compare the quantity of water which they found at such of these places as they have recently examined, with the quantity which existed there in years past, according to their present recollection, and some of the comparisons which have been attempted to be made, were between the state of the water as far back as 1810, and its state in 1883 and 1884, they believe that the quantity is greater now than it was prior to 1876; some of them declaring that the difference in quantity is so great as to leave no doubt on their minds that the capacity of the pond has been very greatly increased.

But the value of these opinions as evidence is very greatly impaired, according to my judgment, by the fact that the witnesses who utter

them differ very widely in material respects, among themselves. For example: several of them fix the southerly line of the pond, the point where the natural flow of the stream ceased or the motion of its waters became so slight as to be imperceptible, prior to 1876, when the stream was in its ordinary state, as thirty or forty feet below or north of the complainant's ford, while others put it within six, eight and ten feet of the ford and one just on the lower side of the pond; and another says that when the pond was full the water of the pond flowed back on the ford; and still another says that when the pond was full its waters flowed back over the ford and beyond it. This great discordance renders one thing tolerably certain: either that the condition of this stream, when unaffected by exceptional or accidental causes, is subject to great variations, or otherwise these witnesses have adopted widely different standards for determining when its waters are in their ordinary and usual state.

There can be no doubt that the whole value of this evidence, so far as it can have any effect in demonstrating how the dam affected the stream above it, depends entirely upon the fact whether, at the time these witnesses made the observations by which they fix the southerly line of the pond as being below the ford, the pond was full or not; for it is perfectly manifest that it is simply impossible for any person to ascertain, by mere observation, how far a dam will cause the water of the stream on which it is placed to flow back, or at what point above the dam the dam will impede the natural flow of the stream, unless such observation is made when the pond is full. It is only when the pond is full that the dam produces its full effect, and shows how far up the stream it will impede the natural flow of the stream. If the dam is a lawful structure, the usual or ordinary condition of the stream above the dam is that and that only which exists when the pond is full and the stream is unaffected by exceptional or accidental causes. Now although these are familiar truths, about which there can be no dispute, yet it appears that all of the complainant's witnesses speaking to this point, except the last two, state that they are unable to say from personal knowledge what was the condition of the water at the dam, whether it was flowing over the dam, or stood below it, when they made the observations which induce them to fix the southerly limit of the pond, prior to 1876, as being anywhere from the lower side of the ford to forty feet below it. Hence, if it be conceded that the observations of these witnesses were carefully made, under such circumstances as were likely to impress what they saw very firmly upon their memories, and that their recollection of what they then saw is still, notwithstanding the lapse of many years, fresh and strong, still, I think it is very clear that it would be giving their evidence, even if it stood wholly uncontroverted, in any material respect, a much greater force than it is justly entitled to, to declare that it established the fact on which the complainant's right to relief rests.

But the defendant controverts the case made by the complainant at all these points. It has offered evidence showing, according to the observations and recollection of its witnesses, that since the dam was lowered there is no more

water at any of these points, when the stream is unaffected by exceptional causes, than existed there for a long series of years prior to 1876. The evidence of two of them is in my judgment of the most important character. One of them says that in 1860 he carted logs for the complainant for about a dozen days, extending over a period of four or five months, and that in crossing the ford in the morning, before the mill started, when the pond was full, the water would be two and a half feet deep, coming up to the bellies of his horses; but after the mill started, the water would run down, and when he made the second crossing there would be much less water on the ford. He also says that the southerly line of the pond, at that time, when the pond was full, was from eight to twelve feet south of the ford. The other says that he crossed the ford over thirty years ago, for the purpose of carting logs, and that at that time the water on the ford, when he went over in the early part of the day, was so deep that it came over the front bolster of his wagon, showing a depth of quite three feet; and that when he returned, the water would be so far drawn down that he could cross the ford on foot, by stepping from the top of one stone to another. He also says that the southerly line of the pond at that time extended beyond the ford. Other witnesses testify to many other facts leading with more or less directness to the same general conclusion. Special allusion has been made to the evidence of the two because of the high value which I think their evidence possesses. The facts they state show, with great distinctness, the remarkable changes which daily occurred in the condition of the water at the ford, from ordinary causes; thus making it easy to explain, without impugning the integrity of any of the witnesses, how it has happened that such a wide divergence exists in the evidence on this branch of the case.

This stream and pond are both small and the volume of water in each is, in consequence, liable to be very greatly varied by very trifling causes. A single heavy shower will fill the stream and make it very turbulent and send so much water into the pond that, to save the dam, the flood gates must be hoisted; while running the mill for a few hours, when the pond is full, will draw the water down far below the top of the dam.

Prior to 1876 the mill was only run in the daytime; no water was used at night, and the reason it was not was that a sufficient supply might be collected at night for the next day. The defendant now only uses the water for three or four hours out of each twenty-four. The complainant himself says that he has known the volume of water, running at the ford, in a dry time, to be increased from one or two inches to six inches and perhaps more, by the mill immediately above being started; and one of his witnesses, who swore that he had been familiar with the condition of the water at the ford for over forty-five years, said that he had known the water at the ford to be increased, by the same cause, from two or three inches to a foot. It is evident, therefore, that it is impossible, in consequence of the variable character of this stream, to fix with precision or within a few inches the elevation at which the defendant has a right to maintain its dam, by evidence con-

sisting merely of the recollection of witnesses as to the quantity of water existing at a particular locality at one time, as contrasted with the quantity found there at another time. The quantity, it appears, varied widely, not only with the season but daily and almost hourly, and the variation was irregular; when the mill above was running, the operation of the mill below would draw down the water of the pond much less rapidly and quickly than it would when the upper mill was standing still; so that a person, being at a particular place on the pond at one hour in the day, would necessarily adopt a very different standard for the usual height of the water there, from that which another person, who happened there at a different hour, would adopt as his standard. Besides, the picture remaining before an ordinary memory of what was seen casually, although frequently, as long ago as fifteen or twenty years, can rarely be implicitly relied upon as a safe guide in determining anything so vague and shifting as the usual height of the water of a stream or pond at a particular place.

Just in this connection it is important to state that the defendant applied to the complainant, while building the dam of 1876, for information as to its rightful height, and that he, after going to the dam and viewing it, said he could not tell because he did not know. It is not pretended that he made this answer because he did not want to commit himself, nor from a mere spirit of churlishness. He says that his answer was sincere and truthful. And yet it is undeniable that all the means then existed for determining the true height of the dam, and were well known to the complainant, which he has since attempted to use to show that the dam as it now exists is too high. But one deduction can be made from this conduct: the complainant did not then regard the facts, upon which he now relies, as furnishing trustworthy evidence of the rightful height of the dam.

There is evidence in the case, however, which is sufficiently certain and definite to enable the court to reach an entirely satisfactory conclusion on the question presented for judgment. The witnesses on both sides are agreed that a part of the dam of 1846 was standing intact, in the fall of 1876. I refer now more particularly to the west end of the eastern part of the dam where pieces of timber lay, supported by upright braces.

And there is proof on the part of the defendant, which is uncontradicted, that these pieces of timber and braces were still there, in their original position as late as September, 1888. The witness who gives this evidence testified on the trial at law on the call of the complainant, and here on the call of the defendant. He now says, after he had given evidence on the trial at law, and while the trial was still in progress, that, for the purpose of satisfying himself that the evidence he had already given was accurate, he made a further examination of the dam, by making measurements and taking levels; and that at that time he saw these pieces of timber and observed that they were still in their original position and made measurements from them for the purpose of ascertaining how much higher the dam then in existence was, than the dam of 1846. He was

afterwards recalled on the trial at law, and then gave in evidence the result of his re-examination of the dam, in confirmation of his previous testimony. His evidence, taken in connection with the evidence of other witnesses who have given testimony respecting the continued existence of these and other remnants of the dam of 1846, shows that when the defendant lowered its dam in May, 1884, enough of the dam of 1846 still remained, at its original elevation and substantially unchanged, to enable the court to fix the height at which the defendant has a right to maintain a dam there with reasonable if not absolute certainty.

This witness says that the piece of timber lying on the top of the west end of the eastern part of the dam and resting in the mortises of the upright braces constituted a part of the lip of the dam of 1846, and marked in part the efficient height of that dam; the water, when the pond was full, first escaping over this lip. The defendant, in lowering its dam, adopted the standard furnished by the testimony of this witness, and reduced the dam in conformity thereto. The reduction was made under his direction and in conformity to measurements made by him. If his testimony is true the dam is now no higher than it should be, and the complainant has already had by the act of the defendant itself all the relief he is entitled to.

This witness, as already stated, was called on the trial of the action at law to give evidence against the defendant, and then testified that the dam erected by the defendant was higher than the dam of 1846, and stated how and why he knew that to be the fact. He also designated the extent of the excess. His testimony is of the kind that produces conviction. His evidence in this case exhibits a more thorough, complete and exact knowledge of the several dams which have existed at the place in question since 1845, than that of any other witness. Indeed, he is the only witness called by either party, whose recollection of the dam of 1846 continues, after this great lapse of time, so distinct and perfect that he is able to give a full and clear description of it, delineating not only how its several parts were constructed and of what material they were made but also their relative elevations. He is unquestionably a careful and intelligent observer and endowed with a remarkably retentive memory. His demeanor on the witness stand satisfied me that he is a just and truthful man. He seems to be prudent in judgment and cautious in his speech. In giving his evidence I believe that he uttered nothing that he was not fully persuaded was the truth. I think he meant to declare the whole truth, concealing nothing and exaggerating nothing. I am thoroughly convinced of the substantial truth of his testimony.

I think the defendant was, therefore, entirely justified in the situation in which it was placed, being strangers to the locality and without personal knowledge of the height of any of the previous dams and with no means of fixing the true height of its dam except those furnished by the evidence produced on the trial at law, in adopting the standard of height furnished by the testimony of this witness. It is undoubtedly true that if the dam is still too high, the mere fact that the defendant reduced it, according to the standard fixed by this witness, will

give it no right to the excess; but it shows, I think, that it has acted in good faith and with a sincere desire to respect the just rights of the complainant.

But the accuracy of the testimony of this witness in its most important particular is disputed. He says it will be remembered that the piece of timber lying on the west end of the eastern part of the dam, marked the efficient height of the dam of 1846, being one of the lowest points of that dam. His testimony in this respect, it is contended, is incorrect. And it is true that a number of witnesses, some called by the complainant and others by the defendant, have testified that according to their recollection the point which witness designated as the lowest part of the dam, or as low as any, was not the lowest but was higher than certain other parts. They say that the dam, according to their recollection, was lowest in the middle, where the flood gates were, and at its eastern extremity; the dam at these two points being on the same level and lower than it was anywhere else. There is entire uniformity in the recollection of the witnesses, who testify in this wise: that when the pond was full the water escaped from it, either over the extreme eastern end of the dam or around the east end of the dam as soon as it did in the middle or at any other point, their recollection being that the middle of the dam and the east end of it were on the same level.

Now the proof is clear and undisputed that a waste board was placed at the extreme east end of the dam a great many years ago, to serve as an outlet or waste way when the pond was full. That board, according to the testimony of one of the complainant's witnesses, who says he assisted in putting it in its place, still remained in its place, at its original elevation, at the time this cause was heard, as firm and as solid as it was the day it was put there. The fact is undisputed that a level taken from this board shows that the defendant's dam, as it now stands, is nearly an inch lower than the top of this board. So it is manifest that whether the one criterion or the other, for settling the true height of the dam, be adopted, the result reached must be exactly the same. A careful consideration of that part of the evidence which, in my judgment, is sufficiently certain and definite to be fit to serve as a guide to the judgment has led my mind to a very strong conviction that the dam as it now stands is no higher than the defendant has a right to maintain it, and consequently that the complainant is not entitled to the relief he seeks.

When the complainant filed his bill he had a good cause of action. That fact is beyond dispute. The judgment at law established it, and the defendant's subsequent act in lowering the dam admitted it. There can be no doubt, therefore, that the complainant is entitled to recover the costs of his suit up to the time the dam was lowered; and it would seem to be equally clear that since then the defendant is entitled to recover the costs of its defense. The decree to be made should, I think, therefore, declare that the complainant at the time he brought his suit had a good cause of action against the defendant, and was then entitled to a decree adjudging that the defendant's dam should be lowered; but it appearing that the

defendant had, before answering, reduced its dam to its lawful height, the complainant is not now entitled to any relief in this suit, except that the defendant pay him the taxed costs incurred by him in his suit up to the time that it filed its answer, and that the taxed costs incurred by the defendant in its defense, since then, should be paid by the complainant.

SUPREME COURT.

August HECKSCHER, *Piff.*,

Charles W. TROTTER.

- *1. The defendant had possession of a mine under a lease in which he covenanted to pay \$2 a ton royalty for all ore mined and removed, and to mine and remove 10,000 tons per annum. Held, that attachment would not lie for the damages accruing on breach of the covenant to mine and remove the stipulated quantity.
2. The plaintiff's preliminary affidavit in attachment is not conclusive as to the nature of his claim.
3. The defendant in attachment may give bond and have his personal property discharged, after appearing and pleading in the action.

(Decided August 26, 1886.)

ATTACHMENT. On rule to show cause. *Property discharged on giving bond.*

The facts are fully stated in the opinion.

See also other branches of the same litigation in 2 Cent. Rep. 729, and 3 Cent. Rep. 468, 677.

Mr. H. C. Pitney, for plaintiff:

All irregularities in the issuing of the first of the three writs of attachment in this case are waived by the appearance. This is the rule in cases of suits commenced by *capias*, and it applies with equal force to cases of attachment.

If the party wishes to attack the sufficiency of the affidavit or the cause of action he must do it before appearance.

Dalton v. Barnes, 1 Maule & S. 280; *D'Argent v. Vivant*, 1 East, 330; *Clifford v. Frankford*, 37 N. J. L. 152; *Drake*, Attachment, 112; *Waples*, Attachment, 392.

Defendant therefore cannot proceed under either sections 33 or 34 of the Attachment Act, and does not ask to proceed under section 37; and so must be presumed to proceed under section 39, which is the only provision for releasing the lien of the attachment after appearance.

That section, 39, is confined to personal property; and the bond is to be in such sum and upon such conditions as the court shall direct.

The only question for the court to determine, then, is: In what amount and upon what condition shall the bond be given?

The defendants covenanted to pay \$2 per ton for each ton actually mined and to so work the mine as to raise 10,000 tons per year. This makes the amount *prima facie* to be recovered \$20,000 a year, unless the ores raised exceed 10,000 tons in any year, in which case it would be so much more.

*Head notes by DIXON, J.

The court should require a bond in double the amount which the plaintiff may, under any view of the case, recover.

In the case of the second writ, defendant has also appeared and thereby waived any defect in the affidavit.

In the case of the third writ no appearance has been entered, and defendant is at liberty to inquire into the sufficiency of the cause of action to sustain the attachment.

The objection is that in this case we must depend, for our recovery, wholly upon the clause of the covenant which provides for raising at least 10,000 tons a year, and that the damages for such breach are unliquidated; and hence, that special bail could not at common law have been demanded of course, and that hence attachment will not lie.

The cause of action is clearly sufficient under the rulings of our neighboring States, upon statutes substantially like ours.

Drake, Attachment, §§ 12-23; *Lenox v. Howland*, 3 Caines, 323; *Re Marty*, 8 Barb. 229; *Fisher v. Consequa*, 2 Wash. C. C. 382.

The principle there laid down includes this case.

Strock v. Little, 45 Pa. St. 416; *New Haven Steam S. M. Co. v. Fowler*, 28 Conn. 108.

In the present case there is a clear measure of damages fixed by the contract itself; and that is the test laid down in most of the cases for distinguishing between liquidated and unliquidated damages in actions on contract.

Wilson v. Wilson, 8 Gill, 192; Drake, Attachment, § 15; *Roelofson v. Hatch*, 8 Mich. 277; Drake, § 22.

Attachment will lie for assumpsit on a *quantum meruit*, goods sold and delivered, work and labor done and the like, where no price was agreed upon.

Boyd v. King, 86 N. J. L. 184, 188.

The contract taken as a whole amounts to a sale to defendant of at least 10,000 tons of ore a year, to be taken away at any time during the term, and defendant has entered into possession and must pay the price.

A view which would give the plaintiff anything less than a right *prima facie* to recover the whole price of the ore would leave him with no remedy except expulsion of the defendant from the premises.

The defendant's position as a purchaser in possession is much better than that of a vendee of chattels sued on a claim for goods bargained and sold but not delivered, or that of a vendee of real estate upon an unexecuted contract, who is sued for the purchase money.

In both instances the vendor may recover the whole price.

1 Sedg. Dam. 281, 7th ed. 596, 597; *Dustan v. McAndrew*, 44 N. Y. 72; Field, Dam. §§ 299, 300; Story, Sales, §§ 436, 438; Mayne, Dam. 116; Benj. Sales, by Corbin, § 1127.

In cases of contract for sale of land, if there be a covenant to purchase and pay the purchase money upon delivery of the deed, then upon such tender the vendor may recover the whole purchase money; provided he continues at all times ready to deliver and does nothing to disable himself to make a complete title.

Havkins v. Kemp, 8 East, 410; *Franchot v. Leach*, 5 Cow. 506; *Richards v. Edick*, 17 Barb. 260; *Gill v. Bicknell*, 2 Cush. 355, 358; *Jacobs v.*

Peterborough & S. R. R. Co. 8 Cush. 223, 225; Field, Dam. § 509, and cases cited; Sedg. Dam. *191, *192; *Kauffman's App.* 55 Pa. St. 3-3; *Tripp v. Bishop*, 56 Pa. St. 424.

There has never been any doubt as to the right to recover the purchase price in such an action, when the covenant on the part of the purchaser is express to pay the purchase money upon tender of the conveyance. The doubt has arisen in cases of mere covenants to purchase at a price, without a covenant to pay in so many words.

The objection to a recovery at law was that the vendor held the title and might never convey.

Laird v. Pim, 7 M. & W. 474.

This modern English rule arises naturally out of their complicated methods of conveying, but has no application in this country.

Mr. C. Parker, for defendant.

Dixon, J., delivered the opinion of the court:

On December 16, 1884, the plaintiff made affidavit that the defendant was nonresident and was justly indebted to him in the sum of \$35,000 for rents and royalties accrued upon a certain indenture of lease, and on filing the affidavit with the clerk of this court writs of attachment were issued to the sheriff of Sussex and Mercer. Under these writs personal property valued at \$25,894 was attached. Subsequently the defendant appeared and pleaded in the suit, and thereafter, on May 4, 1886, obtained a rule that the plaintiff show cause why the defendant should not be permitted to give a bond in double the sum of \$12,000 and thereupon have his property released and discharged from the lien of the writs, upon the ground that the residue of the sum claimed in the plaintiff's affidavit consisted of damages in covenant, for which no attachment can legally issue.

On the return of this rule it appears that the lease referred to is dated April 10, 1879, and demises to the defendant a vein of Franklinite ore for fifteen years, reserving to the lessor, from whom the plaintiff has derived title, a rent or royalty of \$2 a ton for all the ore mined and removed from the premises; and containing a stipulation on the part of the defendant that he will mine and remove at least 10,000 tons of ore per annum. It also appears that the plaintiff's claim covers the period from April 10, 1888, to October 10, 1884, and is for 6,439 tons of ore mined and removed, and for the defendant's failure to mine and remove the stipulated quantity.

The principal question raised upon the rule is, whether attachment will lie for a demand accruing by reason of a breach of this covenant to mine and remove 10,000 tons per year.

The general rule established in this State is that "an attachment will not lie for unliquidated damages, and can be used only when the demand is for a sum certain." *Schenck v. Griffin*, 38 N. J. L. 462, 467.

An attachment will lie where the cause of action is founded upon contract and is of such a nature that the plaintiff would formerly have been entitled to hold the defendant to bail upon filing an affidavit of the cause of action. When the cause of action arises *ex delicto*, or is of such a nature that bail could not have been required without the order of a court or judge, resort

cannot be had to this remedy. *Jeffery v. Wooley*, 5 Halst. 123; *Boyd v. King*, 36 N. J. L. 134.

With regard to bail, Mr. Petersdorff says: "The general rule adopted by all the courts is consistent and uniform, that where the cause of action arises from a debt or money demand, or where it sounds in damages, but the damages are capable of being ascertained with certainty, by mere arithmetical computation, the defendant may be held to bail as of course; but on the other hand, where the cause of action consists merely in a right to recover some damages, but those damages are general, indefinite and undetermined, or incapable of being reduced by calculation to a proper degree of certainty, without the intervention of a jury, the defendant cannot be held to bail as of course." Petersdorff, Bail, 16, 10 Law Lib.

"In particular, in an action of covenant, the defendant cannot be held to bail as of course, unless the covenant be for the payment of a sum certain." *Jeffery v. Wooley*, *supra*.

Thus far the decisions in New Jersey carry us. When we look to the decisions in other States, we find most of them to be inapplicable, because they rest upon rules inconsistent with those already established here. But the cases of *Fisher v. Consequa*, 2 Wash. C. C. 382; *Clark's Exrs. v. Wilson*, 3 Wash. C. C. 560; *Wilson v. Wilson*, 8 Gill, 193, and *Warwick v. Chase*, 23 Md. 154, seem to proceed on the lines which our own courts have laid down, and hence are useful as illustrations of the rule.

In *Fisher v. Consequa* the defendant had bound himself to put on board ship at Canton, a cargo of teas of the very first quality, for the Amsterdam market, and, if they did not prove of such quality at the sales in Amsterdam, to make good all deficiencies. At the sales in Amsterdam the teas proved to be of inferior quality, and worth \$4,500 less than teas of the first quality. The court held that attachment would lie for the deficiency.

In *Wilson v. Wilson*, the defendants sold flour to the plaintiff and guaranteed that it should pass with the inspector as superfine, and that if it did not they would make such allowance as was customary at the place of inspection for the difference between flour of the grade certified by the inspector, and superfine flour. The flour was certified by the inspector to be of an inferior grade, and the difference in value according to the custom was 50 cents per barrel. The court held that the difference could be sued for by attachment.

In both of these cases the standard for measuring the damages was fixed by the contract, the damages being the difference in value of two articles, the value of which was already determined either by the sale of the articles themselves, or by the market price of other articles of like value. Damages so ascertained, or by calculation ascertainable, could properly be sworn to by the plaintiff.

In *Clark's Exrs. v. Wilson* the plaintiff attached for damages arising out of a breach of the defendant's covenant in a charter-party to employ a vessel for a designated voyage at \$670 per month. The plaintiff swore that the voyage would have consumed twenty-four months, and rated his damages accordingly. The court held that the length of the voyage

was conjectural, and hence the damages were so uncertain that they could not with propriety be averred in an affidavit but must be ascertained by a jury, and that the attachment was illegally used.

In *Warwick v. Chase* the claim was for damages occasioned by delay in selling a cargo of flour at Rio, and by failure to invest the proceeds in a cargo of coffee for return to Richmond. The court held that as the damages depended mainly upon the price of coffee in Richmond at the time when the return cargo would have arrived, and that time was not fixed, the damages were too uncertain for attachment. It was declared: "The general rule is that unliquidated damages resulting from the violation of a contract cannot be recovered by attachment, unless the contract affords a certain measure or standard for ascertaining the amount of the damages; * * * the standard should be a subject matter of the contract; * * * the standard must be shown by the contract, without the aid of inferences from extrinsic facts or circumstances."

In the case now before us the plaintiff insists that the damages recoverable for breach of the covenant to mine 10,000 tons a year are such as will sustain attachment within the principles of these decisions. He contends for one of the three following positions: first, that the covenant is substantially to pay \$2 a ton for at least 10,000 tons per annum; second, that the defendant being put in exclusive possession of the mine, it is as if at least 10,000 tons of ore per annum had been sold and delivered to him at \$2 a ton; third, that when less than 10,000 tons a year are mined, he is at any rate entitled to the stipulated price of 10,000 tons, less the value in the mine of the difference between 10,000 tons and the quantity of ore mined in each year; and that the value of ore in the mine is ascertainable with as much definiteness as that of merchandise generally; and hence, as attachment will lie for the value of general merchandise sold without a price stated, all the elements for calculating his damages are capable of being determined with sufficient certainty to warrant an attachment.

His first position is manifestly not in accordance with the contract; for that, by expressly binding the defendant to pay \$2 a ton for ore mined, and being silent as to what he shall pay for ore not mined, precludes us, by the plainest implication, from putting the two classes of ore on the same footing as to price. His second position is as evidently untenable; for it ignores the fact that the defendant, although in possession of the mine, has acquired and can acquire no ownership in the ore, except it be actually severed.

The liability of a purchaser for the price of goods sold rests upon his having become their owner. Hence, the attempted analogy fails at the very basis. His third position is more plausible, but is also, I think, unsound. One of its postulates is that the value of the ore unmined is fixed with such reasonable certainty as to justify the plaintiff in swearing to it. But this is not to be conceded; for even the thing to be valued is itself not ascertained, since the defendant was at liberty to mine the 10,000 tons from any part of the leased vein; and, had the very ore been ascertained, its richness would

be a matter for conjecture only, so long as it lay imbedded in the rock. An article thus conditioned is not to be compared with merchandise of determinable quality and commonly sold in the market, when the question is: How shall its value be settled?

It seems to me that neither the contract nor the law prescribes any standard for measuring the damages accruing to the plaintiff on breach of this covenant, sufficiently definite for their proper ascertainment, without the intervention of a jury, and hence, that the writ of attachment cannot legally be issued for their recovery.

The plaintiff further contends that his preliminary affidavit is conclusive, or at least that the defendant, by appearing and pleading without objection, is estopped from questioning the propriety of the writ.

The affidavit is not conclusive as to the nature of the plaintiff's claim. *Day v. Bennett*, 8 Harr. 287; *Shadduck v. Marsh*, 1 Zab. 434; *S. C.* 1 Zab. 468.

Nor should the defendant's appearing and pleading in the action impair his right to investigate the propriety of the plaintiff's claim to a special statutory lien upon his property. By appearing generally, the defendant acknowledges that "due steps have been taken to bring him personally into court to answer whatever demands the plaintiff may lawfully present in such an action as he has instituted; and by pleading, the defendant confines the inquiry touching his personal liability to the issues which his pleadings raise; but neither of these concessions seems to involve an obligation to leave his property charged with a lien for which there was no lawful warrant. The position of the plaintiff is not altered to his detriment in the least, by the defendant's giving bond now after pleading, instead of at the time of entering his appearance. Moreover, sections 38 and 39 of the Attachment Act contemplate this mode of procedure.

Let the property attached be discharged, on the defendant's giving such bond as would have been required by the Statute, in case the plaintiff had sworn to a debt of \$12,878, being the royalty of \$2 a ton for 6,439 tons of ore mined and removed.

Two other writs of attachment were subsequently issued, at the suit of the same plaintiff against the same defendant, for claims of similar character arising on the same lease. On like rules obtained by the defendant, it appears that (besides claims for unliquidated damages for failure to mine) the plaintiff claims under each writ \$2 per ton royalty for 1,700 tons of ore mined and stored by the defendant "on the earth about 100 feet from the mouth of the shaft, being on the mine hill tract mentioned in the deed from Fowler to Curtis." On these claims the question raised is, whether ore thus mined and stored is ore mined and removed from the demised premises, within the meaning of the lease.

Among the facts agreed upon under the rules, the lease is set out in full, and the deed from Fowler to Curtis appears in part. From what is thus shown we are not able to conclude that the place of storage is upon the demised premises. Hence, the royalty seems to be earned.

According to the decision in the first case, the

bonds required will be, in the second case, as if the plaintiff had sworn to a debt of \$4,160, being \$2 a ton for 2,080 tons, and in the third case, as if he had sworn to a debt of \$3,400, being \$2 a ton for 1,700 tons.

STATE, William SEMON, *Prosecutor*,

v.

Inhabitants of the CITY OF TRENTON.

1. Where the report of the board of assessors in a proceeding to condemn lands for a street opening in Trenton shows that the assessors met at the time and place appointed, and no proof is presented to show the fact to be otherwise, the report must be accepted as true.
2. Such report should show what notice of the meeting of the assessors was given and what manner of publication was adopted.
3. Everything necessary to give validity to the action of a special tribunal should appear in the report of its proceedings.
4. The assessors could not appoint meetings after the expiration of thirty days from the time appointed for their first meeting.
5. The requirement of the charter that the report be completed and filed within thirty days after the first meeting is mandatory, and compliance therewith is essential to the validity of the proceedings.

ON certiorari to review the proceedings taken in the opening of Sweet's Avenue, in the City of Trenton. *Proceedings set aside.*

The facts are stated in the opinion.

Mr. G. W. Macpherson, for prosecutor.

Mr. G. D. W. Vroom, for defendant.

Knapp, J., delivered the opinion of the court:

Under this writ the prosecutor draws in question the validity of proceedings on the condemnation of his lands in opening a street in the City of Trenton.

The first objection is that in several particulars the City failed to observe the provisions of the eighty-first section of the Act to provide for the more efficient government of the City of Trenton. Pamph. L. 1874, p. 372.

If, under the terms of the charter, the City is unable to agree with the owner of lands needed for a public street for their purchase, application is to be made by the common council to the board of assessors, to value the lands and damages and assess the sum of these upon lands and real estate specially benefited by the proposed street opening. The section referred to requires that "the common council shall designate a time and place for the meeting of the said board of assessors;" of which time and place the city clerk shall give notice by advertisement in not less than two newspapers published and circulated in said city, at least ten days before the time of meeting. It is made

the duty of the board of assessors to meet at the time and place appointed, to proceed to view the lands and make a just and true estimate and assessment, and report their proceedings to the common council, which report shall be in writing, and filed within thirty days after their first meeting.

The first error in procedure alleged is, that the common council having appointed the 25th day of July, 1888, at the city hall, as the time and place for the assessors to meet, no notice was given by the clerk of such meeting, and no meeting was then held. The report, although dated at a much later day, shows that the assessors did meet at the time and place appointed; and no proof having been taken to show the fact to be otherwise, it must be accepted as true. The report also states that the city clerk "gave due notice by advertisement according to law" of the time and place of such meeting. What notice was given and what manner of publication was adopted does not otherwise appear. This should have appeared in the report. The tribunal here acting in the condemnation of lands for public use was special, and everything necessary to give validity to its action should appear in the report of its proceedings. *State v. Jersey City*, 1 Dutcher, 809.

The second objection is that the board of assessors delayed action beyond the time limited in the charter for the completion of their work, and consequently failed to file their report within thirty days after their first meeting, as the charter requires.

The report of the assessors bears date December 31, 1888, more than five months after the time appointed for their first meeting. This delay is not accounted for. It does not appear that their proceedings were continued by adjournments, and there is no evidence that subsequent meetings were advertised, or that any notice was given of them. They might adjourn from time to time after their first meeting held pursuant to appointment and notice, within the thirty days. But after the expiration of the statutory time they could not appoint meetings or change that made by the common council. It was held in *State v. Jersey City*, under charter provisions like those of Trenton, that the common council must fix the time of meeting and could not delegate that duty to the city clerk. Certainly the assessors, without delegation, could not assume the authority.

But it is said that the requirement of the charter that the report be completed and filed with the city clerk within a limited time is mere direction, in which the land owner can have no interest or concern. But I think it is mandatory, and under the rule which requires rigid adhesion to provisions in legislation conferring upon subordinate bodies power to condemn lands for public use, they were bound to make their assessment, and return it within the statutory period. The land owner is interested in every step in such a procedure. He has the right to inspect the report as soon as it is promulgated, and he may assume that it will be filed, if at all, as the statute directs. He has no other means of knowing when it will be open for his inspection; and he is not required to be waiting and watching for an indefinite period.

The law requires the report to be before the

common council at their meeting held next after the time of filing, and that body is given four months from the time the report comes to them to decide whether they will take and pay for the lands or abandon the improvement scheme, and it is the interest of the land owner that these provisions of law shall be observed.

We think the defects existing in these proceedings are sufficient to defeat them, and they should be set aside, with costs.

NORTH HUDSON COUNTY RAILWAY CO. *Plff. in Err.*,

v.

John MAY.

1. A corporation, being a collection of individuals, acting through its officers and agents, who are admitted to testify in cases where the corporation is a party, cannot be said to be under legal disability; and the opposing party in a suit can be examined as a witness.
2. A written statement made by the conductor of a car, in the line of his duty, giving details of the accident, immediately after it happened, is not admissible in evidence; but the facts must be proved by the conductor or others who witnessed the occurrence.
3. If the conductor be sworn he may use the written statement to refresh his memory.

(Decided July 19, 1886.)

ERROR to review a judgment for plaintiff in an action for personal injuries caused by negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. C. Besson and J. B. Vredenburg, for plaintiff in error.

Mr. M. T. Newbold, for defendant in error.

Parker, J., delivered the opinion of the court:

John May brought suit against the North Hudson County Railway Company, for damages resulting from personal injuries received by him, caused by the alleged negligence of said Company. The trial resulted in a verdict for the plaintiff and judgment was entered thereon.

The first error assigned is, that the court admitted the plaintiff below to be sworn and give evidence in the cause. It is contended that the plaintiff in error, a Corporation aggregate, being only an artificial person, incapable of speaking and giving testimony, the opposing party cannot be permitted to testify, because of the provision of the statute which provides that no party shall be sworn where the opposite party is prohibited by any legal disability from being sworn as a witness.

It is true that a corporation is an artificial being, invisible and intangible; but it is a collection of individuals united in one body, acting and speaking through its officers and agents.

* Head notes by PARKER, J.

Since the law which enacts that interest in the event shall not disqualify a witness, the officers and agents as well as stockholders, are admitted to testify. So long as they are admitted as witnesses, the corporation cannot be said to be under legal disability.

The court was right in admitting May as a witness.

The next error assigned is the refusal of the court to nonsuit. When the plaintiff in the suit rested, it appeared from the testimony that he was at the time of the accident riding on a horse car of the Company, and was thrown off in consequence of the sudden starting of the car by the driver. It also appeared that the car inside was full of passengers; that the platform on which May was riding was crowded and also that the rear platform was full. It also appeared that he stood on the front platform holding on, when the violence of the sudden jerk caused by the driver whipping his horses threw him off the car. It further appeared that May was riding as a passenger on defendant's car in the only place he could find. The driver had received him as a passenger and was bound to exercise care towards him, so as to carry him safely. When the case was rested on the part of May, it had been proved that the Company was negligent in starting the car suddenly with force and speed sufficient to throw him off the platform, and there was no evidence that May had contributed to the accident.

The court did right in refusing to nonsuit.

After the motion to nonsuit was refused, the Company proceeded to call witnesses, and introduced evidence to contradict the testimony which had been given as to the negligence of the Company, and also to prove negligence on the part of May. Witnesses swore that May was not on the car when the accident occurred but at the time was trying to get on the car, while it was in motion; also that the driver did not whip the horses to start the car.

The case was submitted to the jury upon the evidence produced on both sides, which was contradictory. The motion to nonsuit was not renewed, nor was the court asked to instruct the jury to find for the Company. Under the circumstances, the refusal to nonsuit, if wrong, cannot now be taken advantage of. The case was tried on its merits and the jury gave credence to the testimony offered on the part of May. Upon writ of error the court will not set aside the judgment, even if it be thought that the verdict was against the weight of evidence. There must be some error in the instructions to the jury by the court, or in refusing to charge, or in the admission or rejection of evidence at the trial, to justify reversal.

The next error assigned is that the court refused to receive in evidence a statement made by the conductor of the car, reduced to writing by the President of the Company, the morning after the accident. When the paper was offered in evidence the court asked counsel in what view of the case he thought the evidence competent; to which question, answer was made that the offer of the paper was as a statement made immediately after the accident by a person in performance of his duty. The court did right in refusing to admit the paper in evidence. The conductor was a witness and could have given his version of what was said and done

under oath. He might perhaps have used the written statement made through his dictation in his presence, to refresh his memory; but the paper itself was not legal evidence. It was not made under oath and if it turned out that the statement was not true, an indictment for perjury would not lie.

The remaining assignments of error are to the charge of the court. One complaint is that the judge did not charge the jury that if May was guilty of negligence, the verdict should be for the Company. The court did so charge in substance. In his charge the judge said: "In stating the rule that injury resulting from negligence of one in the performance of duty is actionable and must be paid for in damages, an important phase of this rule must be emphasized; and that is, that whenever the plaintiff has himself, in any essential degree, by his own negligence, contributed to the injury there can be no recovery." And again: "If the plaintiff was in the act of boarding a passing car, it failing to stop on his signal, and by that means he became entangled and suffered injury, my instruction to you is, that was an act of contributory negligence in him such as would defeat his recovery." No language could be more emphatic.

In every respect complained of the charge was legally correct, very carefully worded, and stated the case fairly, leaving to the jury to decide upon the conflicting evidence.

The judgment should be affirmed.

STATE, Sedgwick R. DEVAULT, *Prosecutor*,
v.

MAYOR OF the City of CAMDEN.

*In proceedings for the removal of officers and employees in police departments of cities, under the Act of March 25, 1885, the same formalities are not requisite that have been prescribed for inferior criminal prosecutions. It is sufficient if the directions of the statute are substantially observed.

(Decided August 3, 1886.)

CERTIORARI to review proceedings removing prosecutor from the office of policeman in Camden. *Affirmed.*

Argued before Reed and Dixon, JJ.

The facts are stated in the opinion.

Mr. Charles E. Hendrickson, for prosecutor:

Judge Dillon in his first volume on Municipal Corporations, § 190, declares that "Principle and sound policy require that the implied power of removal for offenses against the corporation be restricted to acts of a serious nature directly affecting the rights and interests of the corporation."

There must be a charge or charges against the officer specifically stated with substantial certainty.

1 Dill. Mun. Corp. par. 193; *Murdock v. Academy*, 12 Pick. 244.

*Head note by Dixon, J.

All the facts necessary to support the proceeding must be expressly alleged and not left to be gathered by inference or intendment.

Paley, Summary Conviction, 186; O'Shaughnessy v. McLorinan, 14 Vroom, 418; Keeler v. Milledge, 4 Zab. 144; Handlin ads. State, 1 Harr. (N. J.) 97; Truck v. Dungenbacker, 8 Vroom, 359.

Jurisdiction must appear in the style and title of magistrate, the date and locality of the fact alleged, and more especially in the description of the offense, in the essential parts of which no omission or defect can be supplied by implication.

Paley, Summary Conviction, 193.

Under the laws of New York regulating the removal of a member of the fire department by the commissioners it was held that the written charge required must be such written specification of the offense charged as should enable the accused to prepare for trial.

People v. N. Y. Fire Comrs. 77 N. Y. 153.

And under the charter of New York allowing the mayor to remove heads of departments for cause it was held that the proceeding was judicial and that there must be a definite statement of the charge.

Re Nichols, 6 Abb. N. C. 474.

If the act is criminal and single in its nature so that a conviction or acquittal in the courts of law will necessarily determine the guilt or innocence of the party there must be a conviction, but otherwise there may be a removal without or independent of a conviction.

1 Dill. Mun. Corp. par. 189, note 3.

With reference to the charge of gaming it has been held that the charter authorized the council "to dismiss the marshal for malpractice in office, or neglect of duty;" that the council could not remove this officer for the crime of gambling, as this was neither malpractice in office, nor official neglect, within the meaning of the charter.

1 Dill. Mun. Corp. par. 184.

The record of proceedings of a city council upon removing an officer for misconduct should state the specific acts complained of sufficiently to show that the council had jurisdiction; no intendment are indulged in favor of the jurisdiction or regularity of the proceedings in such order of removal.

State v. Lupton, 64 Mo. 415.

Messrs. J. Willard Morgan and Thomas B. Harned, for defendant.

Dixon, J., delivered the opinion of the court:

This *certiorari* brings up the action of the Mayor of Camden removing the prosecutor from the office of policeman in that City.

Prior to the passage of the "Act respecting police departments of cities, and regulating the tenure and terms of office of officers and men employed in said departments," approved March 25, 1885, the prosecutor held his office at the pleasure of the mayor; and hence the only subject of inquiry is whether his removal has been effected in accordance with that Act.

The design of the statute is plain. It is not to prescribe any mere form of procedure or to interpose any obstacle in the way of rendering police departments respectable and efficient. It is, on the contrary, to fix substantial safeguards for the purpose of enhancing their value, by preventing interference with them except on a J. J.

proper grounds. It requires, in order to the removal of any officer or employee in such departments, that a cause of complaint should be alleged against him in writing, signed by the person making the charge; that the cause so alleged should be incapacity or misconduct with reference to his official position, nonresidence, or disobedience of some just regulation established for the department; that he should have a fair and public trial upon the charge, after due notice, and with every reasonable opportunity to make defense, before the appropriate municipal authority, and that he should be adjudged guilty of the charge.

The province of this court is simply to see that these rights have been secured. Neither the statute nor the dictates of sound policy warrant our going further. The technical rules that have been judicially adopted with regard to inferior criminal prosecutions are not to be applied to these investigations; for while it is proper that proceedings to deprive persons of common rights for alleged crimes should be confined by somewhat strict limits the removal of incompetent or ill behaved officials, from their exceptional positions of authority and responsibility, should be easy and prompt; and no forms should be requisite which are not in themselves substantial safeguards of justice. *Murdock v. Phillip's Academy, 12 Pick. 243; People v. Fire Comrs. 77 N. Y. 153.*

In our opinion the prosecutor was charged, in the mode provided by the statute, with conduct unfit for a policeman, forbidden by the rules of the department, and justifying his dismissal; was duly tried upon the charge before the proper municipal authority, and was found guilty upon evidence which, whether weak or strong, formed a rational basis for the judgment against him.

His removal was therefore legal and must be affirmed, with costs.

STATE, Wm. CLOSSON, *Prosecutor,*

v.

BOARD OF LICENSE AND Excise of the City of TRENTON.

***The Act—Pamph. L. 1880, p. 191—to establish an excise department in cities containing more than 15,000 inhabitants where the power to grant licenses is not vested in a board of excise or court of common pleas, is local and special and therefore unconstitutional.**

(Decided July 30, 1886.)

CERTIORARI to review proceedings of the Trenton City Board of License and Excise in granting a license. *Reversed.*

Argued before Depue, Dixon and Reed, JJ. The facts are stated in the opinion.

Mr. W. M. Lanning, for prosecutor:

Prior to the passage of the Act (Pamph. Laws 1880, p. 191), the common council of Trenton had the exclusive right to grant licenses within the City. (See Charter, Pamph. Laws, 1874, p. 843, § 25, ¶ IV, p. 349, § 80.)

The Act of 1880 contravenes article IV, §

*Head notes by REED, J.

VII, ¶ 11 of our State Constitution, which is in these words: "The Legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Regulating the internal affairs of towns and counties; appointing local offices or commissions to regulate municipal affairs. * * * The Legislature shall pass general laws providing for the cases enumerated in this paragraph," etc.

The Act of 1880 is special and not general, because it applies only to cities containing more than 15,000 inhabitants. Classification by population, for the purpose of determining what cities may have license and excise departments, is not a classification warranted by the Constitution. The Act does not embrace all of the group of objects naturally related to the subject matter of the Act. A classification which excludes Orange from the provisions of the Act, with its 11,000 inhabitants, and includes New Brunswick, with its 16,000 inhabitants, is not a constitutional classification.

Hightstown v. Glenn, 18 Vr. 105; *Anderson v. Trenton*, 13 Vr. 488; *Van Riper v. Parsons*, 11 Vr. 9.

The Act is also special and not general, because it excludes all cities in which licenses are granted by a board of excise, or a board of excise commissioners, or by the court of common pleas. The cities containing over 15,000 inhabitants in 1880, were: Camden (where the power to grant license was in common council, see 12 Vr. 495); New Brunswick (where the power was in common council, see Pamph. Laws, 1871, p. 307, § 7); Paterson (where it was in board of aldermen, see Pamph. Laws, 1871, p. 819, ¶ VI); Trenton (where it was in common council, see Pamph. Laws, 1874, p. 343, ¶ IV, and p. 349, § 30); Elizabeth (where it was in board of excise, see Pamph. Laws, 1870, p. 755, § 3, and 17 Vr. 312); Newark (where it was in excise commissioners, see Pamph. Laws, 1875, p. 425); Jersey City (where it was in excise commissioners, see Pamph. Laws, 1878, p. 366); and Hoboken (where, I think, it was in the court of common pleas).

From the eight cities above named, containing over 15,000 inhabitants in 1880, four were subtracted merely because licenses were granted in them by boards of excise, boards of excise commissioners, or the common pleas court. Such an Act is not general, but special. Such classification is not based upon substantial differences.

Hammer v. State, 15 Vr. 670.

The Act of 1880 is special; first, because it arbitrarily selects cities containing more than 15,000 inhabitants from all the cities of the State; and, second, because of the cities thus isolated it absolutely and forever excludes from the provisions of the Act four cities in which licenses are granted by boards of excise, boards of excise commissioners, and the court of common pleas.

It also regulates the internal affairs of cities.

Bingham v. Camden, 11 Vr. 158; *Tiger v. Morris Common Pleas*, 13 Vr. 632; *Leigler v. Gaddis*, 15 Vr. 365.

Mr. A. J. Smith, for respondent.

Reed, J. delivered the opinion of the court: This writ brings up the proceedings of the

Board of License and Excise of the City of Trenton in granting a license to one James V. Crawford to sell strong spirituous and malt liquors at a certain place in the City of Trenton.

The Board is organized under the provisions of an Act to establish a license and excise department in certain cities (Pamph. Laws, 1880, p. 191).

One of the reasons filed attacks the constitutionality of this Act.

The ground upon which the alleged unconstitutionality was placed was its conflict with that clause of the amended Constitution which proscribes the passage of local or special legislation regulating the internal affairs of towns and counties.

The Act provides that it shall be lawful for any city in this State containing more than 15,000 inhabitants to provide by ordinance for a department to be called the license and excise department.

It then provides for the organization of the board and that the compensation, duties and rules and regulations of the board and the penalties to be inflicted upon those who violate them shall be fixed by ordinance.

It finally contains a proviso that the provisions of the Act shall not apply to any city in which the granting of such license is now vested in a board of excise or excise commissioners, or in any city where the court of common pleas now grants licenses.

This legislation is, in my judgment, clearly special.

There can be no reason suggested why cities with more than 15,000 inhabitants should have a system of granting licenses differing from that of cities with a less population.

In respect to the subject matter of the legislation all cities are a class and an attempt to segregate cities into distinct classes for this purpose by a standard of population is not classification but an arbitrary selection of one or more localities for legislation.

This legislation is in respect to this feature similar to the Act of 1883 providing that in boroughs of the third class the licensing power should be in the courts of common pleas.

The last Act was pronounced unconstitutional in the case of *Hightstown v. Glenn*, 18 Vr. 105.

The vice of that Act was declared to consist in an attempt to classify municipalities upon the basis of population for the purpose of that legislation.

In both Acts an attempt was made to establish for some municipalities having populations of a certain size a peculiar method of granting licenses.

Each is vicious constitutionally in respect to the local and special character of its provisions.

But the Act is unsound because its operation is further local and special in another particular.

The limitation of its operations is not merely to cities containing more than 15,000 inhabitants but to only those cities of this group in which there was not already a board of excise or excise commissioners, or wherein licenses were not granted by the court of common pleas.

It leaves the City of Elizabeth with a board under an Act differing from this.

It leaves Newark with another board under still another Act, and Jersey City and Camden

under boards peculiar to each of those cities.

The intention of those who passed this Act was to take the licensing power from the common councils wherever it had theretofore existed in cities of more than 15,000 inhabitants.

But it is perceived that even if the Act had not attempted to classify by the standard of population, it would yet have left existing certain members of the class with variant methods of exercising the licensing power.

Inasmuch as the granting of licenses is a matter which appertains to all cities, any legislation which deals with the method of granting licenses must apply to all cities or reduce all cities to a uniform system.

Tiger v. Morris Co. Com. Pleas, 18 Vr. 631.

That this legislation is of a character regulating the internal affairs of cities has been repeatedly decided.

The action of the board in granting the license is reversed.

STATE, *ex rel.* Henry H. YARD, *Demurrant*,
v.
BOROUGH COMMISSIONERS OF OCEAN
BEACH, Charles H. Thompson *et al.*

- *1. The Act entitled "An Act for the Formation of Borough Commissioners" prescribes that the Chosen Freeholder of any township shall call a **special election** upon a petition being presented to him signed by **owners of at last one tenth in value of the lands to be embraced in the projected borough**. Held, that the provision required that the petitioners be such owners **at the time of presenting the petition**.
2. Where specifications of the grounds of objection are subjoined to a **demurrer** the party demurring will at the argument be confined to such grounds.

(Decided July 19, 1886.)

ON demurrer to plea to information in the nature of *quo warranto* to inquire by what warrant defendants organized themselves into a municipal government. *Demurrer sustained, with leave to amend.*

The facts are stated in the opinion.

Mr. William H. Vredenburgh, for demurrant:

The practice adopted in this form of inquiry by the State's representative, the Attorney-General, is well settled, both in England and in those of the States which have adopted common-law forms of practice, where the purpose is a judgment of ouster or dissolution.

See 2 Dill. Mun. Corp. 2d ed. § 580, p. 771; § 714, p. 806; § 719, p. 811; 2 Cooley, Blackstone, p. 263; Ang. & Ames, Corp. §§ 731, 734; *Rex v. Williams*, 1 Burr. 407.

"And it (information in the nature of *quo warranto*) lies where any new jurisdiction or public trust is executed without authority, though it is no usurpation upon any franchise of the Crown."

Comyn, Dig. Quo. War. A. See also cases *State v. Village of Bradford*, 32 Vt. 50. *People v. Carpenter*, 24 N. Y. 86.

The court said in the latter case, p. 88, that the

objection, which was that if there was no such town there could be no office, was too technical.

People v. Bank of Niagara, 6 Cow. 196; *People v. Van Slyck*, 4 Cow. 297; *People v. Draper*, 15 N. Y. 532.

To be a corporation is a franchise. The very existence of a corporation is a franchise, and every act of a corporation affecting the public is the exercise of a franchise.

People v. Geneva College, 5 Wend. 218; *People v. Utica Ins. Co.* 15 Johns. 883; *Commonwealth v. Fowler*, 10 Mass. 290-294; *S. C.* 11 Mass. 339. And New Jersey cases: *State v. Paterson & H. Turnp. Co.* 1 Zab. 9; *Atty-Gen. v. Stevens*, Saxton, 369; *Jersey City Gas Co. v. Dwight*, 2 Stew. 250; *Nat. Docks v. Cent. R. R. Co.* 5 Stew. 755; *West Jersey R. Co. v. Cape May R. R. Co.* 7 Stew. 184; *Atty-Gen. v. Del. & B. B. R. R. Co.* 9 Vr. 282.

Blackstone says that the form is, in case of judgment for the King, "for that the party is entitled to no such franchise or hath disused or abused it."

Angell & Ames, in the sections quoted, say that the method of proceeding against those who exercised any public franchise without the King's grant, was in the name and under the direction of the Attorney-General. In the prosecution of this right, he may, of his own authority, and without any application to the court for leave, exhibit any information in the nature of a *quo warranto* in the Court of King's Bench, against those who assume to act as a corporation, to compel them to show "by what prescription, statute or charter they make title to the franchise; or against an individual who possesses a corporate office, or any other franchise, to compel him to show his right."

In this State this practice is expressly approved. In the case of the *Atty-Gen. v. Del. & B. B. R. R. Co.* 9 Vr. 286, the court says: "When facts exist which, in the opinion of the Attorney-General, call for *quo warranto* information, he has the right to present it, without leave asked of anyone."

The information in the *Village of Bradford Case*, 32 Vt. 50, was brought against it for having usurped the prerogatives and franchises of a municipal corporation within the State, without its grant or permission, and against the individual defendants for having unlawfully, etc., presumed to hold and exercise the offices of such usurping corporation; and there was judgment of dissolution and ouster against all.

The fact that the name of a relator is inserted in this information is one of moment only to the Attorney-General, and for his satisfaction on the question of costs. It is, so far as the court is concerned, "to be considered surplusage."

See *People v. Geneva College*, 5 Wend. 220; *Commonwealth v. Fowler*, 10 Mass. 298; *Rex v. Williams*, 1 W. Bl. 98; 1 Burr. 408; 1 Dan. Ch. Pl. 13.

An information for usurping a franchise need show no title in the people to the franchise; but it lies with the defendant to show his warrant for exercising it.

15 Johns. 883, 888.

"They must plead facts, showing on the face of the plea that they have a valid title to the office. The State is not bound to show anything."

2 Dill. Mun. Corp. §§ 717, 809.

*Head notes by BEASLEY, CH. J.

The further question is raised, under the plaintiff's general demurrer (see *People v. Draper*, 15 N. Y. 532), whether this pleaded law conforms to constitutional restrictions. It is respectfully insisted that it is invalid for two reasons:

First. It is a legislative delegation of power to a voting majority to repeal a law now in force. The tenth section repeals, by necessary implication, the law giving to the inhabitants of the townships all the money raised by tax for roads.

City of Paterson v. Society, etc. 4 Zab. 399.

The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right, of which they have divested themselves by a written Constitution, to declare by their own direct action what shall be law.

State v. Com. Pleas of Morris Co. 7 Vr. 78, and cases cited on page 74, top.

Second. The Act is special in its application. Its privileges are confined to a certain number. A population of 8,100 within an area of two square miles or less, cannot avail themselves of this Act. A population of more than 8,000 are deprived of its benefits. This conflicts with article 4, §§ 7, 11, of amended Constitution. "The Legislature shall not pass private, local or special laws, granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."

Van Riper v. Parsons, 11 Vr. 1, 9; *State v. Hammer*, 18 Vr. 435, 440; *Rutgers v. New Brunswick*, 18 Vr. 51; *Anderson v. Trenton*, 18 Vr. 486; *Hightstown v. Glenn*, 18 Vr. 107.

Mr. John H. Stewart, contra.

Beasley, Ch. J., delivered the opinion of the court:

The question is whether the plea filed to this information is good.

The information shows that the defendants attempted to organize themselves into a municipal corporation under the Act entitled: "An Act for the Formation of Borough Commissioners," approved March 7, 1882, and the supplement thereto, approved April 17, 1884. These Acts prescribe a certain method to be adopted in the formation of these municipalities, and section 2 of the former Act says "that it shall be the duty of the Chosen Freeholder, * * * of any township in which it is proposed to constitute a borough under this Act, upon presentation to him of a petition for that purpose, setting forth the boundaries of the proposed borough, signed by persons owning at least one tenth in value of the taxable real estate in the limits of the proposed borough, as the same appears upon the assessor's duplicate of the township, to call a special election," etc.

The information in the present case alleges that the petition made use of in the proceeding to incorporate the defendant "was not signed by persons owning at least one tenth in value of the taxable real estate in the limits of the proposed borough as the same appears upon the assessor's duplicate," etc.

In their amended plea, in an apparent endeavor to traverse this averment the defendants say "that the petitioners who signed the petition, etc., were in the year 1884, at the time of the said year when the annual assessments for taxes were made in the Township, etc., the owners of the real estate situated in the then proposed

borough limits, which real estate was then assessed to them for taxes thereon as such owners, and that by virtue of such ownership and assessments their several names appear on the duplicate of the assessor of taxes of said Township, etc. in said year A. D. 1884, to the values set opposite their respective names in said duplicate." This traverse is manifestly insufficient. It does not constitute an effective issue. The statute requires that the petition, which is the foundation of the formative procedure, be "signed by persons owning one tenth in value of the taxable real estate in the limits of the proposed borough, as the same appears upon the duplicate." It is clear that the ownership thus referred to signifies an ownership existing at the time of presenting the petition, the evident purpose of the law-makers being to give the right to inaugurate the procedure, requisite to the creation of the corporate body, to a certain specified portion of the inhabitants having a present interest as owners in the district to be embraced in the projected municipality. Such a prerogative could not have rationally been conferred on persons who, having once been possessed of such an interest, had divested themselves of it. And yet it is upon this latter notion that this plea is based, as its allegation is, not that the petitioners at the time of moving in the matter were land owners but that they had been such at the time of the year when the annual assessments for taxes were made, a period that had no relation to the time of presenting their petitions. Such a statement is no answer to the averment of the information that it undertakes to confront.

As the pleadings stand, the relator is entitled to judgment.

With regard to the topic involving the question as to the alleged unconstitutionality of this statute, it suffices to say, that the court does not deem such discussion now in place. The relator has annexed to his demurrer specifications of the grounds on which it was to be tested, and a demurrer in this form cannot, in the practice of the courts of this State, be treated as it was at common law, both as a general and special demurrer, as the latter form of pleading has been abrogated by statute. The consequence is that this must be treated as a general demurrer only, having notice affixed to it assigning the reasons to be urged on its support, and so formal a notification made upon the record must estop the party from departing from it. If a specification had not accompanied the demurrer the defendants would have been entitled, by force of the statute, to demand such specification, which would have conclusively limited the range of objections, and we think that this voluntary proffer of the particulars of exception must have the same effect.

The defendants will be permitted to amend their plea.

COURT OF CHANCERY.

George WARD *et al.*, Exrs., Complainants,

v.
Reuben N. DODD *et al.*

1. Upon the death of the devisee of a specific share of the residue of an estate

in the lifetime of the testator, the share devised to such person lapses, but does not sink into the residue; and the testator will be held to have died intestate as to such share.

2. Although a will declares that a certain specific devise is given to the devisee as his full portion of the testator's estate, that provision will not exclude such devisee from the portion which the Law of Descents or the Statute of Distributions gives him in the residue of the estate, as to which the testator dies intestate. So held, where the will containing the provision had disposed of all of the testator's property, and he did not intend to die intestate as to any of it.

3. Where the will contained a devise to the heirs of testator's deceased sister, and one of the children of such sister died in the lifetime of the testator, leaving children, such children will share in the distribution of the devise. The rule in such case is that as to the real estate those take who were the deceased sister's heirs at the death of the testator, and as to the personal estate those who at that time were her next of kin.

(Decided September 10, 1886.)

BILL for the construction of a will. On final hearing upon bill and answer.

The facts are fully stated in the opinion of the Chancellor.

Messrs. Whitehead & Condit, for complainants.

Mr. H. M. Barrett, for answering defendant.

Bunyon, Chancellor, delivered the following opinion:

James P. Crane, deceased, late of Essex County, by his will dated October 1, 1878, after directing that his debts and funeral expenses be paid, devised a lot of land in Montclair Township in that county, to a church, and then gave to his nephew Moses J. Williams, as his full portion of his estate, a house and lot in Orange for life, with remainder in fee to the devisee's children, subject to the use of part of the premises by the testator's niece Harriet Freeman. He then directed that the balance of his property should be divided equally among his sisters, Sarah B. Crane, Abby Williams, Eveline Dodd, and the heirs of his deceased sisters, Mary Freeman, Elizabeth Ward and Harriet Williams, respectively, making six equal portions; that is to say, one sixth portion to Sarah B. Crane, another to Abby Williams, another to Eveline Dodd, another to the heirs of Mary Freeman, deceased, another to the heirs of Elizabeth Ward, deceased, and another to the heirs of Harriet Williams, deceased; such division to be made at such time and in such manner as his executors should deem fit and proper for the best interest (as it might appear in the judgment of his executors) of his said heirs, with full power thereby granted to the executors to sell and convey or otherwise dispose of the property; and he directed

that the disposition made by the executors should be accepted by his heirs as final and without demur on their part. February 20, 1884, the testator made a codicil to the will; but the provisions of it are not material to the decision of the matters submitted. He died February 8, 1886. Sarah B. Crane died unmarried in 1880, and Eveline Dodd died in 1883, leaving three children. The heirs of Mary Freeman are her two children. The heirs of Elizabeth Ward are her four children, and the children of her son Joseph Ward, who died in 1880. The heirs of Harriet Williams are her children, one of whom is the before mentioned Moses J. Williams.

The questions presented are, whether the shares of Sarah Crane and Eveline Dodd, both of whom died before the death of the testator, lapsed; and if they did lapse, whether the testator died intestate as to them, or whether they fell into the residue. If they lapsed and did not sink into the residue, whether Moses J. Williams is entitled to a portion thereof, and whether the children of Joseph Ward represent their parent, and take what would have been his interest in the lapsed shares had he survived the testator.

The will gives to Sarah Crane and Eveline Dodd specific shares of the residue; to each one sixth. By the death of those persons in the lifetime of the testator their shares lapsed. Those shares being parts of the residue did not sink into the residue. A general residuary bequest does not include any part of the residue itself which fails. *Hawk. Wills*, 42; *Garthwaite v. Lewis*, 10 C. E. Green, 351.

The testator consequently died intestate as to those shares.

The will declares that the life estate in the house and lot in Orange is given to Moses J. Williams as his full portion of the testator's estate. That gift will not exclude the devisee from the participation which the Law of Descents or the Statute of Distributions gives him in the two shares of the residue of which the testator died intestate. A legatee or devisee will not be deprived, by force of any provision of the will, of the right to which he would be entitled under those statutes or either of them, in property of which the testator died intestate, unless it appears clearly that such was the testator's intention. 2 Redf. Wills, 753; *Hand v. Marcy*, 1 Stew. 59; *Skellenger v. Skellenger*, 5 Stew. 659; *Nickerson v. Bowly*, 8 Met. 424; *Davers v. Deves*, 3 P. Wms. 40.

A testator may provide that his legatee or devisee, in consideration of the legacy or devise, shall not enjoy such legal right. Such a provision might perhaps be regarded as equivalent to a gift of the property, from which the legatee or devisee is so excluded, to the testator's other heirs or next of kin. If it were not so regarded, the legatee or devisee would be put to his election. In this case the testator did not contemplate dying intestate of any of his property. He disposed of all of it. In making such disposition he declared that the gift to Moses J. Williams was his full portion. But so too he undoubtedly thought, although he did not say so, that the gifts to those to whom he gave the residue were their full portions of his estate; and yet those gifts will not bar those whose shares have not lapsed, from their legal

rights as heirs and next of kin in the lapsed shares. Moses J. Williams is entitled to his legal rights in the lapsed shares.

Joseph Ward, son of Elizabeth Ward, deceased, to whose heirs a share of the residue is given by the will, died in the lifetime of the testator, leaving children. The persons who are to take under the gift to "the heirs of Elizabeth Ward, deceased," are, as to real estate, those who were her heirs at the death of the testator; and as to personal estate, those who at that time, were her next of kin. *Scudder v. Vanarsdale*, 2 Beas. 109.

Joseph Ward's children are within both descriptions. They are persons who at the death of the testator would by law inherit a share of the real estate of Elizabeth Ward, and would be entitled to a share of her personal estate.

Warren F. FULLER, *Petitioner*,
v.

Anna M. FULLER.

- *1. To justify a finding that adultery is proved the court should be satisfied that the witnesses swearing to the facts showing guilt are honest; that they are not mistaken and that their testimony is true.
2. A judge is not bound to believe a thing merely because a witness swears to it; but he should test the evidence as other men of discernment would test it, believing what he is convinced is true and discarding what he is convinced is false.

(Filed September 22, 1886.)

SUIT for divorce. *Divorce refused.*

On petition, answer, supplemental answer and proofs.

The facts are stated in the opinion.

See same case in another phase, 8 Cent. Rep. 357; and former suit between same parties, 6 Stew. 583.

Messrs. Theodore Ryerson and Gilbert Collins, for petitioner.

Mr. John W. Bissell, for defendant.

Van Fleet, V. C., delivered the opinion of the court:

The petitioner sues for a divorce. He charges his wife with having committed adultery with two different men. No direct proof is offered in support of either charge. One is wholly unsupported by proof of any kind; the petitioner has attempted to establish the other by proof of circumstances.

The circumstances relied on would, perhaps, be sufficient to justify a decree of divorce if the evidence produced to establish them could be believed. But the radical infirmity of the petitioner's case lies just there. Looking at the evidence of his witnesses who testify to circumstances leading to the inference of guilt, in connection with the evidence of the defendant and her alleged paramours positively denying, not only all criminal intercourse but that they were ever together at the times and in the places testified to by the petitioner's witnesses, or that at those times they had any personal

knowledge of each other, and keeping before my mind also the fact that the petitioner, in his zeal to get rid of his wife, has invoked the aid of at least one infamous person in this case, I am compelled to say that I find it impossible to believe that the testimony of his witnesses is true in any essential part; on the contrary, my conviction is that it is false. A judge in such cases must not allow himself to be duped or misled. He must look at the evidence as other men of discernment would view it, giving credit to what seems to him, in the exercise of a cautious judgment, to be true; and rejecting what seems to him to be improbable and false. The court is never obliged to adjudge that adultery is proved, merely because a witness swears to it or swears to facts from which it must be inferred. To justify such an adjudication the court must be satisfied that the witnesses who swear to the facts showing guilt are honest; that they are not mistaken and that their testimony is true.

All of the petitioner's witnesses who give evidence tending to prove that his wife is an adulteress are persons of questionable character; they either live lewd lives or engage in unlawful practices; they belong to the class of persons whom it is possible to corrupt; and the testimony of every one of them is, in some one or more material respects, improbable and unnatural. One of the persons employed by the petitioner to collect evidence against his wife swears that the petitioner gave him \$200 to pay a witness, after the witness had testified that he had had criminal intercourse with the defendant. The person who was to serve as the witness, in this instance, also swears that he made an arrangement with the petitioner to testify that he had committed adultery with the defendant, for which the petitioner was to pay him \$200, and that the petitioner placed the money in the hands of his own agent, to be held until he (the witness) had given his evidence, and that it was then to be paid to him; but subsequently becoming satisfied that the defendant was not the person with whom he had had improper relations, he notified the petitioner that he could not perform his part of the contract.

The petitioner denounces this whole story as a wicked fabrication and as without the least shred of truth. It would be extremely difficult to decide which story is true and which is false, for I think it must be regarded as entirely certain that if the petitioner was depraved enough to enter into such an arrangement, he would not hesitate to commit perjury to escape its consequences. This much, however, is free from all doubt; that the person who says he received the \$200 was employed by the petitioner to collect evidence against his wife. This person swears that the petitioner employed him to procure false testimony; in other words, to suborn witnesses to commit perjury in swearing that they had had adulterous intercourse with the defendant. He admits that he accepted the employment and tried zealously to accomplish its object. His infamy is confessed. He presents a distressing spectacle of marvelous moral degradation. He did not return the \$200 to the petitioner, but appropriated it to his own use. When asked why he had not returned it, he replied: "Because I wasn't a fool." To be honest, even to his associate in crime, would, according to his code of honor, be the height of folly.

*Head notes by VAN FLEET, V. C.

This person, after the first witness he procured for the petitioner failed to come forward and testify as the petitioner expected he would, procured other witnesses for the petitioner, with whom the petitioner and one of his counsel (Mr. Ryerson) had interviews in the City of New York, and who, in such interviews, pretended to have knowledge of facts tending to show the defendant's guilt; and who promised the petitioner to come to New Jersey and testify to them, but afterwards refused to do so unless they were paid considerable sums of money. He was in the petitioner's employ, collecting evidence for a considerable period of time. Now in my judgment, it was impossible for any man of ordinary experience and discernment to require more than a second interview with this man to discern his real character and to see that, if nothing but the truth was desired, he was not the person to send in search of it. If the petitioner employed him originally without exercising the caution usual in such cases and in ignorance of his true character, it is entirely clear that he continued him in his employ after he had learned sufficient concerning him to know that he was utterly untrustworthy and that any evidence he procured would more likely be false than true. This fact naturally breeds deep distrust and leads a cautious mind to look with suspicion upon any evidence produced by the petitioner which does not furnish inherent testimony of its own truth or does not proceed from sources so reliable that it must be believed.

Besides, it must be remembered that this is not the first time the petitioner has unsuccessfully attempted, by the testimony of witnesses of bad character, to procure his marriage to be dissolved. He brought a previous suit, not for the same cause but a like cause. His wife recriminated in that suit as she has in this. A divorce was refused by this court, because the court thought that the proofs showed both parties to be guilty. The petitioner appealed, and the decree of this court was affirmed because, in the language of *Chief Justice* Beasley, the court of errors and appeals was of opinion that the principal testimony on each side was so untrustworthy, as well on account of the bad character of the witnesses as the great improbability of their narrations, that it was not sufficient for the purpose of founding a conclusion of the guilt of either the husband or the wife of the offense charged. *Fuller v. Fuller*, 6 Stew. 588.

This language very fitly and forcibly describes the character of the evidence upon which the petitioner's claim to a divorce rests, and also the sources from which it proceeds. *A divorce must be refused.*

This is all that it would be necessary to say in deciding in this case as between the parties; but as already stated the defendant, in resisting the petitioner's charge, has recriminated, accusing him of the same offense which he charges against her. This accusation necessarily imputes disgraceful conduct to another female. The proofs in support of that accusation have been heard and fully considered, and I feel it to be my duty to say, in justice to the person whose reputation is assailed, that they leave no doubt on my mind that the accusation is without the least foundation in fact, and that she is a pure and virtuous woman.

N. J.

Matthias WOOLLEY, Complainant,
c.

Caroline H. PEMBERTON et al.

1. Where an **administrator**, appointed during a contest over the admission of a will to probate, has **paid the debts of the estate** and costs for which it was liable **with money borrowed** by him for that purpose, and is liable to be called upon to pay the loan, and is out of office and without the means of indemnifying himself, he is **entitled to the assistance of this court** for that purpose.
2. An **administrator** who has paid the debts of the estate, to an amount exceeding the personal estate, is entitled to be **subrogated to the rights of the creditors against the lands of the deceased** and to subject them in the hands of the heirs and devisees to the payment of the money necessary to his reimbursement.
3. The **bill** for such purpose is **not multifarious** because it also seeks a settlement and account for rents applied by the administrator to the payment of debts primarily chargeable upon the personal estate, and to establish the equitable rights of the parties entitled to the lands with regard to such application of the rents, where all such parties are before the court.

(Decided July 19, 1886.)

MOTION to dismiss bill in equity filed for relief by an administrator *pendente lite*. *Denied.*

The facts are stated in the opinion.

Mr. G. C. Beekman, for the motion.

Mr. W. A. Heisley, for complainant, *contra*:

When executors or administrators, having reasonable ground to suppose that the assets are sufficient, have without negligence or misconduct, paid debts and legacies, and it afterwards appears that there is a deficiency of assets, equity will protect them from loss.

3 Wait, Act. & Def. 168; *Pooley v. Ray*, 1 P. Wms. 355; *Orr v. Kaines*, 2 Ves. 194; *Noel v. Robinson*, 1 Vern. 94.

A court of equity has concurrent jurisdiction with the prerogative court, over the administration of the assets of deceased persons.

Frey v. Demarest, 1 C. E. Green, 236. See § 351, 1 Pom. Eq. Jur. as to equitable aid of administrations.

Administrator allowed to account in equity, although letters taken out before surrogate.

Clarke v. Johnston, 2 Stock. 287.

In *Van Mater v. Sickler*, 1 Stock. 485, it is said: "The chancellor must exercise his discretion and judge as to the propriety of the court of chancery's interposing. There are many cases where the character of the estate is such that the remedy which can be afforded to parties interested, by the orphans' court, is defective. The case may be one of complication and difficulty, requiring the aid of a court of chan-

cery in ascertaining and securing the rights of those interested in the estate and in the protection of the executor or administrator."

Cited in *Search's Admr. v. Search's Admrs.* 12 C. E. Green, 140; *Personette v. Johnson*, 18 Stew. 178.

Runyon, Chancellor, delivered the following opinion:

This is a motion to dismiss the bill for want of equity and for multifariousness; or, if that should fail, to strike out specified parts of it. The suit is brought for relief in respect of the complainant's administration as administrator *pendente lite* of the estate of Mrs. Caroline Pemberton deceased, late of Monmouth County. The administration became necessary because of the contest over the admission of Mrs. Pemberton's will to probate. The complainant, after his appointment, filed an inventory. The personal property was appraised at \$5,884.96. By an arrangement between him and the defendants Caroline, John and Henry Pemberton, the three children of the testatrix, the complainant was put in charge of the real estate during the litigation. That property consisted of three pieces, two in Long Branch and the other in Asbury Park. Only one piece was devised. That was given by the will to Caroline. The testatrix died intestate as to the others. The orphans' court decreed that the will be admitted to probate and directed that the costs and counsel fees (altogether \$1,018.64) be paid out of the estate. With the consent and by direction of the three children, the complainant paid the counsel fees, \$600, out of the rents in his hands. He paid nearly all of the debts out of the rents and the proceeds of some of the personal property. The children consented to such application of the rents. From the decree of the orphans' court an appeal was taken to the prerogative court. The decree was affirmed with direction that the costs of the appeal, which amounted to \$453.88, be paid by the complainant out of the estate. Those costs have not been paid.

There was an appeal from the prerogative court to the court of errors and appeals, by which latter court the decree of the former was affirmed with costs to be paid out of the estate. The bill states that after the complainant had paid the costs in the orphans' court and some of the debts, he was proceeding to sell the personal property to pay the costs of the litigation and the debts, and that then one of the children, Caroline, made a claim upon him for the whole of the personal property except five shares of the stock of a building and loan association, valued at \$900, as being her own property and not the property of the testatrix, and threatened suit in case he should sell the property so claimed. He has not sold the property because of that claim and the evidence submitted to him in substantiation thereof.

According to the bill, proceedings in partition were taken in this court to divide the undivided real estate among the three children, which proceedings resulted in the sale of the property. The complainant made application under the rules of the court for so much of the proceeds of the sale as would enable him to pay the debts and the costs of the litigation so paid by him out of the rents, and to pay so much of the

costs as is still unpaid. This claim is resisted by John and Henry Pemberton, on the ground that the real estate is not liable for the debts or costs. The application is still pending.

The complainant states that the proceeds of the sale of the undivided property do not amount to enough to pay the costs of the litigation over the will. The complainant made no application to the orphans' court for the sale of land to pay debts, etc., because, until Caroline made claim as before stated, he supposed that the personal estate would be sufficient for the purpose. The complainant appears to be no longer administrator. He styles himself "late administrator *pendente lite*."

It was said on the argument of this motion that letters testamentary have been issued to Caroline under the will. The bill prays discovery from Caroline as to her title to the personal property claimed by her; that Caroline, John and Henry and the complainant may come to an account in this court in regard to the rents collected by the complainant and the debts, costs and expenses paid by him therefrom; that this court will decree whether the debts, costs and expenses shall be paid out of the devised or the undivided real property; that it may be decreed that the personal property and the devised real estate and the undivided real estate or some of them are liable for the payment of those debts, costs and expenses and the expenses of the complainant's administration; that the devised land may be sold if necessary, to make such payment, and that the account of the complainant's administration may be settled in this court. There is also the prayer for general relief.

It seems from the statements of the bill taken together that the children did not consent that the debts and expenses should be paid out of the rents, but that what they consented to was that the complainant, who was not in funds from the personal estate at the time, might use the rents to pay the debts and expenses upon the understanding that he was to repay them. In other words, they loaned the rents to him as administrator for the purpose of enabling him thus to pay debts and expenses. The substance and merits of the bill are that the complainant having, as administrator, borrowed money to pay the debts and costs, for which the estate was liable, and having paid such debts and costs with the borrowed money, and being now liable to be called upon to repay the loan, and being out of office and the testatrix's title to a great part of the personal estate being denied, so that he is without the means of indemnifying or protecting himself, he calls upon this court for aid and protection in the premises. Under the circumstances he is entitled to such assistance. The litigation in reference to the will having been concluded, his functions as administrator are (with the exception of accounting for what he has received and paying or delivering over whatever, if anything, may appear to remain in his hands to the person or persons pronounced by the court to be entitled thereto for further administration) at an end. *Re Graves*, 1 Hagg. Ecc. 313; *Benson v. Wolf*, 14 Vroom, 78.

If he has paid the debts of the estate and the costs of the litigation to an amount exceeding the personal estate of the testatrix, he is entitled to be subrogated to the rights of the creditors

against the lands of the testatrix, and may subject the lands in the hands of the heirs and the land in the hands of the devisee, if necessary, to the payment of the money necessary to his reimbursement. *Sheld. Sub. § 202; Livingston v. Newkirk, 8 Johns. Ch. 312; Bray v. Neill's, Err. 6 C. E. Green, 843.*

Recourse to this court is necessary in this case, not only to obtain equitable subrogation and to marshal the assets, but in order to reach some of them (the proceeds of sale of the undivided lands) which are in this court.

Nor is the bill liable to the objection of multifariousness. The land devised as well as the lands descended were, by agreement of the parties, put into the complainant's hands to be managed by him during the litigation over the will. For want of funds from the personal estate at the time, he, as before stated, with the consent of the children, applied the rents to the payment of the debts and the costs of the litigation, and he is liable to be called to account by the children for those rents. It is proper under the circumstances that the account for such rents and of the disposition thereof be in this court and in this suit, not only because the complainant expended the rents in payment of the debts and costs, thus applying them for the benefit of the estate, in discharging obligations which primarily were chargeable upon the personal estate, but also in order that the respective equitable rights of the parties entitled to the lands (all of whom are before the court) with regard to such application of the rents to the payment of the debts and costs, may be established and enforced. The subject of the rents is not distinct and unconnected with the other matters in the bill but the contrary. The defendants are all of them interested in all the matters which form the subject of the suit, and those matters are all connected with the complainant's administration.

The motion will be denied, with costs.

EASTWOOD

v.

WORRALL *et al.*

1. In an action to foreclose a mortgage where defendant filed a cross bill alleging an agreement that if the defendant would procure certain collateral securities to be executed and delivered to complainant, complainant would execute and deliver to defendant a writing extending the time for payment of a mortgage, and binding himself to accept the principal sum when tendered, and upon such payment to assign the bond and mortgage, etc., it is not necessary in order to compel the delivery of the writing to allege a tender of the amount due on the mortgage.
2. The execution of the written agreement did not depend upon the tender of the money, but upon the tender of the collaterals.

(Filed July 7, 1886.)

BILL to foreclose a mortgage. On motion to strike out answer and answer by way of cross bill. *Denied.*

N. J.

The facts are stated in the opinion.

Mr. George W. Hubbell, for complainant, for motion.

Mr. P. H. Gilhooly, for defendants, *contra*.

Bird, V. C., filed the following conclusions:

As may be done under the rules, the defendants have answered, and, in the same answer, claim affirmative relief by way of cross bill. In the answer they set up that the mortgage sought to be foreclosed is not yet due; they declare that there was an agreement extending the time for the payment of the principal sum, first to the 5th of February, 1885, and afterwards to the 5th of February, 1888. The complainant asks to have this part of the answer stricken out, because the question thereby raised has once been adjudicated. It appears that the complainant had filed a bill of complaint to foreclose this same mortgage, prior to the 5th day of February, 1886, and that the defendants answered, setting up various agreements extending the time for the payment of the principal sum; one of which agreements it was alleged was made on the 5th day of February, 1882, and another in the year 1888, each extending the time of payment of the principal sum five years. Replication was filed and the case went to a hearing. It appears, by the conclusions filed, that the court found that the agreement alleged to have been made February 5, 1882, had been made, and that the bill, having been filed before the expiration of the five years was prematurely filed, and was ordered to be dismissed. No other allegation in the answer was considered. As above stated, the present answer sets up and relies upon an agreement made February 5, 1888, extending the period of payment five years from that date and insists that this bill has been prematurely filed.

Can it be said that that question has been considered and determined by the court? I think not. All courts feel it their duty not to hear the same case between the same parties the second time. There must be an end of litigation. But in no sense can it be said that the defendants in this case were heard in the former suit, upon the allegation that the time of payment was extended five years from February 5, 1888. It was not necessary to the disposition of the cause. There may have been and there may not have been evidence upon that branch of the case. The evidence may have been slight and insufficient or abundant, and yet the court may not have considered it, or the court may have considered it and avoided expressing an opinion concerning it; because it reached a conclusion that the bill should be dismissed upon another branch of the case. I am not prepared to say that the question now should be dealt with as one already adjudicated. I am not called upon in this case to declare any rule of law, but by way of reason I may be permitted to say that it would be dangerous indeed to establish it as a principle that in every case when the complainant's bill has been dismissed the defendant is estopped from answering, in another suit, by the same complainant for the same cause, any of the matters of defense which he presented by his answer in the former suit. The mischief of any such doctrine will be discovered upon the slightest reflection. The complainant fails upon this ground.

He moves to strike out so much of the answer as is in the nature of a cross bill, setting up an agreement between the parties, to the effect that if the defendant would procure certain collateral securities to be executed and delivered to the complainant, the complainant would execute and deliver to the defendant a writing extending the time for payment of his mortgage for five years and binding himself to accept of the principal sum whenever tendered, and, upon such payment, to assign his bond and mortgage and all collaterals to any person whom the defendant might designate, and from thence to accept 6 per cent interest instead of 7 per cent; and also to permit the taxes and assessments upon the property to be adjusted according to the convenience of the defendant. He moves to strike this out because the answer by way of cross bill, does not allege a tender of the amount due; insisting that the spirit of the agreement is that the defendant shall first tender the amount due, and that then the complainant is obliged to assign. I think the complainant is very far from a correct conclusion in this respect. The agreement set forth is, that the complainant promised to execute a writing and to deliver it to the defendant containing certain stipulations, not upon the payment of the amount due upon the bond and mortgage, but upon the delivery to the complainant of certain collaterals. It alleges the delivery of the collaterals to the complainant and his neglect and refusal to execute the writing named. The defendant claims the benefit of the writing. I do not think it is an answer to this to say that he has not alleged in his cross bill that he made a tender of the money in order to get the writing. The execution of the written agreement did not depend upon the tender of the money, but upon the tender of the collaterals.

The defendants ask to have this agreement enforced, that is, that the complainant may be compelled to execute the writing which it is alleged he promised to execute. I think the allegation is sufficient to sustain the prayer of the cross bill.

The complainant has failed on both motions. I will advise an order accordingly, with costs.

Amos A. JENKS, Admr. of Lintze VerDuin,
et al., Complainants,

Peter BREEN, Exr. of Cornelius Ver Duin,
et al.

1. The surviving wife of a testator has no title to his property, except such as devolves upon her by the will; hence personal property, controlled by the husband in his lifetime in business pursuits, belongs to the executor of his estate, and not to her.
2. Where the widow never attempted to establish the will, and neglected to perfect the transmutation of the estate by lawful process, or take any steps to reduce the property to her lawful possession, but took actual possession and control and carried on the business till

she died, her administrator can have no better title than she had.

3. Declarations made by her just previous to her death are not admissible to establish title to property, unless made in the presence of the person who afterwards disputes the claim, but at the time acquiesced therein.
4. Creditors of her husband's estate having full knowledge of the facts, who neglect to compel an administration of her husband's estate, but instead (by dealing with her) encourage the confusion which has followed, should suffer any loss which may occur from provoking the uncertainty in the ownership of the property rather than the innocent remaindermen.
5. Her estate should be credited for no more than the amount of debts of her husband which she paid, and his executor should be relieved, to the extent of the proportion of such amount as will be due to the creditors of the wife who were paid by him.

(Filed September 8, 1886.)

BILL to compel a discovery and surrender of assets in the hands of an executor. *Decree advised.*

The facts are fully stated in the conclusions of the Vice Chancellor.

Mr. T. C. Simonton, Jr., for complainants.

Mr. R. Williams, for defendants.

Bird, V. C., filed the following conclusions:

Cornelius Ver Duin died March 3, 1883, in possession of a grocery business, leaving a wife and three sons, one of whom was an infant. He left a last will and testament, in and by which he directed that all his debts should be paid, and in and by which he gave to his wife, the said Lintze, all the remainder of his estate during the term of her natural life, and after her death, he gave the same to his children and to their heirs and assigns forever. He appointed his wife executrix and Peter Breen, one of the defendants, executor. The will is dated December 28, 1876. At the time of his death, he was indebted about the sum of \$700. The will was not proved by Mrs. V. nor did she take any steps to reduce the property of her late husband to lawful possession. However, she took possession and carried on the business until she died, April 5, 1884. She had assisted her husband in the management of the concern during his lifetime, and perhaps thereby became well acquainted with it. It was all conducted in her own name. At his death the stock of goods did not exceed \$500 in value. But she seems to have acquired a credit and done considerable business. One firm who are complainants sold to her about \$2,900 worth of goods, and at the time of her death she was indebted to it \$358. She was indebted to others about \$475.

One of the defendants, Peter Breen, proved said will after the death of Mrs. V. and took possession of all the goods in the store, valued at about \$476, and all the assets which were of

C. Ver Duin at the time of his death, and also \$950 in cash, \$850 of which was gold. From all this he realized \$1,780.71. He still retains possession of all which he has not disbursed in payment of debts and the settlement of the estate. But Mrs. V. left no estate, unless it is to be found in that which the executor of her husband has in his possession. As intimated she left creditors, and they are in pursuit of a portion, if not all, of the assets held by the executor. They procured Mr. Jenks, one of the complainants, to be appointed to administer her estate. He and the complainants who are creditors join in a suit against the executor and pray for a discovery of assets and of expenditures, and that he may be ordered to surrender all moneys and goods to said administrator.

Question: As the case stands who is entitled to possession of the said assets and to administer them? First, to go back: In whom was the title at the time of the death of the husband? It is admitted that he carried on the business in his own name and exercised all the control of an absolute owner up to the time of his death. He obtained a credit in that business and when he died was indebted on account of goods purchased therefor. There is no proof of any act or claim of ownership on the part of Mrs. V. before her husband's death. Everything would seem to indicate that his ownership was not only perfect but undisputed.

Therefore, I must conclude that Mrs. V. had no title except such as devolved upon her by the will of her husband. And as is above stated, this she never attempted to establish, although it secured to her a life interest in all the assets of her husband. Her neglect to perfect the transmutation by lawful process cannot inure to the benefit of others who have not been deceived.

Mrs. V.'s administrator can have no better title than she had. He takes through her. This is plain enough. But the complainants claim that an equity arises in their favor because of these facts: when Mr. V. died he was indebted to several in about \$700, and to Crosby & Sons, who are complainants, \$233.83. This last sum Mrs. V. paid. She also paid other creditors of Mr. V. The whole amount so paid was \$488.88. It is said that with the goods on hand she obtained a credit which otherwise would not have accrued to her.

As to the equity arising out of these simple facts: I think very clearly Mrs. V. was entitled to a credit for the amount of money, \$488.88, which she advanced towards the payment of her husband's debts. It was her duty to pay these debts, if she claimed at all under her husband's will. It is true she had not protected herself by clothing herself with the habiliments of a trustee as provided by law; but where no fraud is intended equity will treat such transactions as fiduciary. Therefore the defendant, the executor, must be charged with the \$488.88.

These conclusions would seem to dispose of the whole case; but the complainants go beyond a merely equitable claim and insist, as a matter of fact, in strict law that the complainant, administrator, is entitled to the \$850 which it is asserted was in the possession of Mrs. V. at her death, and to which she directed attention just

before that event. The witness who speaks upon the subject, says:

"I nursed her in her last sickness and was present at the time of her death; a short time before her death, she was looking for her money; I said, What are you doing? I said: Shall I get it for you. She said, Yes. That money is to pay my debts with. Then I took hold of her and helped her in her bed; and as I helped her to her bed and covered her up she was gone; before this happened I did not know she had any money. I afterwards hunted for and found that money. Mr. Breen, the executor, was with me."

This declaration and the alleged fact that she had possession of the money are the grounds upon which the complainants rest their claim. I cannot perceive that such declarations are in any sense admissible or relevant to establish title to property, under such circumstances, unless made in the presence of the person who afterwards disputes the claim, but at the time acquiesces therein. If such testimony is to have the force of proof, then can creditors easily find relief and posterity secure a fortune.

The alleged fact of possession is as feeble in its influence upon the question of title as the dying declaration. She had no more possession of the gold than of the horse, or the household furniture or the store goods. The horse and furniture passed to the executor beyond dispute. The husband and wife during the last years of their lives occupied different beds in different rooms, and the money was found in the room and bed occupied by the husband. This branch of the argument also seems to be against the complainants.

But to go further, there is not the slightest proof to show that the gold was in fact ever Mrs. V.'s. It nowhere appears that she had any estate of her own. Some attempt was made to show that she might have acquired such an estate, but it seems to me that no foundation whatever has been laid for a decree. Nor can I find a sentence in the proofs that would warrant the faintest presumption. It cannot be pretended that she amassed this gold during the thirteen months which she survived her husband in doing a business on a capital of less than \$500, and also discharged debts of his to the amount of \$488.88.

But again; it is said that these creditors of Mrs. V. gave her credit for goods which have gone into the estate. This is so; but the proof is that the amount of stock on hand at her death was not greatly in excess of the amount bequeathed to her by her husband. If they have contributed anything of value to the estate now in possession of the executor, I have not been able to trace it.

It ought to be observed that these creditors do not and cannot claim under mistake or fraud. They had full knowledge. They dealt with Mr. V. in his lifetime, and had claims against him at the time of his death. They had the law to protect them. They could have compelled an administration upon his assets, and it was their duty to have done so rather than to have encouraged the confusion which has followed. Instead of demanding their rights they allowed Mrs. V. to treat all the assets as her own. Now in the midst of the uncertainty

which they have created, if anyone suffers loss, the court will prefer to let it fall on those who joined in provoking the uncertainty, rather than upon the innocent remaindermen.

I can see no reason for giving her estate credit for more than the \$488.88, the amount of the debts of her husband which she paid. This indeed may be going a great way, for there is nothing to show that she added to the estate; and it is possible that this \$488.88 should be considered as part of the capital fund rather than profits, and therefore her own. Of this sum the executor has already paid on account of the estate of Lintze Ver Duin \$309.30, which

he paid in ignorance of his duty. Why did he pay her creditors? He was not executor of her estate. It seems to me that the court can only help him to the extent of the proportion of the \$488.88 which will be due to the creditors of Mrs. V. to whom he paid the \$309.30. I express no opinion as to his right to recover the excess from the persons to whom he made such voluntary payments. Of course if he paid preferred claims, he will be allowed them in full.

I will advise a decree in accordance with these views. Neither party is entitled to costs as against the other.

NOTE.—An executor's interest in testator's estate is what testator gives him; the power of an administrator is only that which the law of his appointment enjoins. *Hill v. Tucker*, 13 How. 466 (54 U. S. bk. 14, L. ed. 228).

Where the legatee is executrix, she may assent to the legacy in both characters; and so doing vests the title to the legacy in herself as legatee. *Hudson v. Reeve*, 1 Barb. 66.

Where creditors of testator received debts from the widow, out of the estate, knowing that administration had not been taken out, they were held liable as executors *de son tort* to the administrator subsequently appointed. *Mitchell v. Kirk*, 3 Sneed. 319.

Executor in his own wrong. One named as executor in a will, who never qualified as such but took possession and disposed of part of the personal property and paid debts, is chargeable as an executor in his own wrong. *Van Horne v. Fonda*, 5 Johns. Ch. 383.

An executor *de son tort* is one who takes possession of the goods of a decedent without color of title. *Johnston v. Duncan*, 3 Littell, 163.

The mere act of taking the estate and converting it may constitute an executor *de son tort*, without imposing the penalty prescribed by statute for administering without first obtaining letters. *Currie v. Currie*, 60 N. C. 553.

All acts which assume any particular control over the property without legal right wrong will make a person executor in his own wrong as against creditors. Any act which evinces a legal control, by possession, direction or otherwise, will, unexplained, make him liable. *Campbell v. Tousey*, 7 Cow. 64; *Lee v. Chase*, 58 Me. 435; *White v. Mann*, 28 Me. 361; *Hubble v. Fogartie*, 3 Rich. L. (S. C.) 413; *Givins v. Higgins*, 4 McCord, 238; *Wilson v. Hudson*, 4 Harring, 168; *Bacon v. Parker*, 12 Conn. 212; *Leach v. Prebster*, 35 Ind. 415; *Emery v. Berry*, 28 N. H. 473.

It is only in case of intermeddling with the goods or personal estate of one deceased that a person becomes executor *de son tort*; intermeddling with lands will not charge him as such. *King v. Lyman*, 1 Root, 104; *Mitchel v. Lunt*, 4 Mass. 654; *Nass v. Van Swearingen*, 7 Serg. & R. 192.

If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any act characteristic of the office of executor, he makes himself an executor *de son tort*. 1 Wms. Exrs. 148; *Foster v. Nowlen*, 4 Mo. 18; *Craslin v. Baker*, 8 Mo. 431; *Graves v. Poage*, 17 Mo. 91; *Magner v. Ryan*, 19 Mo. 106.

An executor *de son tort*, although rendering himself liable to creditors and legatees, cannot be called to an accounting before the court. *Power's Est.* 14 Phila. 239.

Such executor is not accountable to the next of kin of deceased; the latter should procure an administrator to be appointed to recover the property. *Muir v. Trustees of L. & W. Orphan House*, 3 Barb. Ch. 477; *Brown v. Brown*, 1 Id. 189.

If such executor takes out letters of administration, it legalizes his preceding tortious acts. *Ratton v. Overacker*, 8 Johns. 97; *Vroom v. Van Horne*, 10 Paige, 549; *Priest v. Watkins*, 2 Hill, 225; *Matter of Faulkner*, 7 Id. 181.

All lawful acts that an executor *de son tort* doth are good. *Coulter's Case*, 5 Coke, 80b; *Parker v. Kett*, 1 Ld. Raym. 661; *Mountford v. Gibson*, 4 East, 454; *Oxenham v. Clapp*, 2 Barn. & Ad. 309.

A person in the position of an executor *de son tort* is liable for the amount belonging to the estate wrongfully collected by him in an action by the rightful representatives of deceased; and after the death of such person his estate is liable. *Swift v. Martin* (Mo.) 2 West. Rep. 143; 1 Wms. Exrs. 153.

There may be both a rightful executor and an executor *de son tort* at the same time. See *Dorsey v. Smithson*, 6 Har. & J. 61; *Foster v. Wallace*, 2 Mo. 231; *Chamberlayne v. Temple*, 2 Rand. 384; *Hopkins v. Towns*, 4 B. Mon. 124; *Howland v. Dewa*, R. M. Charl. 353; *Simonton v. McLane*, 25 Ala. 353.

The cause of action against an executor *de son tort* does not depend upon the original debts, and the application of the Statute of Limitations to such debts has no bearing. *Swift v. Martin* (Mo.) 2 West. Rep. 143.

The administrator of an executor *de son tort* does not himself become executor in his own wrong. *Alfredit v. Daniel*, 48 Ga. 154. See *Dawson v. Callaway*, 18 Ga. 573; *McMorrine v. Storey*, 4 Dev. & B. 186; *Turner v. Child*, 1 Dev. Law 25, 133, 361; *Osborne v. Moss*, 7 Johns. 161.

A married woman being executrix may continue the chain of representation by making her own executor. *Birkett v. Vanderboom*, 3 Hagg. 750; *Bar v. Carter*, 2 Cox, 429.

The executor of an administrator cannot be charged as the representative of the original intestate. *Arline v. Miller*, 22 Ga. 390.

The administrator of the executor is merely an officer of the court and has no private relation to the original testator. 2 Bl. Com. 506; *Limmer v. Every*, Cro. Eliz. 211; *Thomas v. Wood*, 1 Md. Ch. 226.

Accounting. The court cannot order one named in the will as executor, but who has not qualified, to account. *Wever v. Marvin*, 14 Barb. 376.

So the executor of A, who was executor of B, and who never received any of B's estate, cannot be cited to account as representative of B's estate. *Dakin v. Demming*, 6 Paige, 95. See *Smith v. Lawrence*, 11 Paige, 208.

Under the New York Revised Statutes, the widow is not entitled to possession of the articles reserved for her use and that of her children, until they are inventoried and set apart for their use by the appraisers. *Voelckner v. Hudson*, 1 Sandt. 216; 2 R. S. 82, §§ 1-4.

Continuing business. Where A the widow and administratrix of B continued B's trade after his decease, and A continued to receive goods from and to make payment to C, as B had done, and she was charged in account by C with the debt, and the payments made by her to C exceeded the debt, but a balance was ultimately due to C; held, that B's debt was discharged by A's payments, and that the ultimate balance could not be proved as a debt against B's estate. *Sterndale v. Hankinson*, 1 Sim. 363.

Living in the house and carrying on the trade of deceased was held a sufficient intermeddling to make the defendant executor *de son tort*. *Hooper v. Summersett*, Wightw. 16. See *Chandler v. Davidson*, 6 Blackf. 387; *Serie v. Waterworth*, 4 Mees. & W. 9; *Paul v. Simpson*, 9 Q. B. 365.

An administrator may be allowed in his account for inventoried property which he has spent or consumed in carrying on in good faith, by the request of all parties interested in the estate, the business of the testator after his death. *Poole v. Munday*, 108 Mass. 176; *Garrett v. Noble*, 6 Sim. 604; *Colinsson v. Lister*, 20 Beav. 356, 365.

So if an executor employ testator's goods in trade, the profits shall be assets of testator's estate; he will not be suffered to speculate on the estate. *Kellar v. Belor*, 5 T. B. Mon. 574; *Moseby v. Rendell*, L. R. 6 Q. B. 338; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

Mingling funds. Executors should keep the funds of their trust separate from other funds. If they use them or mingle them with their own they are liable for all losses. *Case v. Abeel*, 1 Paige, 363; *Kellett v. Rathbun*, 4 Id. 102.

PENNSYLVANIA.
SUPREME COURT.

APPEAL OF Joseph CHURCH and Charles J. Church, Husband and Minor Son and Heir of Charlotte Church, Deceased.

1. A bill in equity for partition of lands may be maintained by a party holding an equitable title against a party in possession holding the legal title.
2. In a bill in equity against husband and wife to establish title to real estate, and to compel conveyance of the wife's title, a decree ordering a conveyance was made but the wife died without having executed the decree. A bill for partition against the husband and surviving child was sustained and a conveyance ordered.

(Decided May 31, 1886.)

APPEAL from the Common Pleas of Lackawanna County, in equity, decreeing partition and conveyance. *Affirmed.*

The facts are stated in the following portion of the opinion of the court below, on exceptions to the master's report, by Archbald, J.:

The plaintiffs by this bill seek partition of certain lands in the possession of the defendants, alleging title in themselves to forty-nine-tieths undivided, the remaining fifty-ninetieths undivided, being owned by Charles Church, one of the defendants in fee, as heir of his mother, Charlotte Church, deceased, subject to the curtesy interest of his father, Joseph Church, the other defendant. The plaintiffs set out their title in brief as follows, to wit: that Thomas Griffin, a common ancestor, was seised of these lands in his lifetime in fee, and by his will devised them to his daughter, Letta Griffin, upon the express trust that at her death she should convey or devise the undivided half thereof to the children of her deceased sister, Charlotte Stevens; that Letta Griffin died March 27, 1867, without having executed this trust, leaving Charlotte Church (one of the children of said Charlotte Stevens) and Joseph Church, her husband, in possession of the land; that said Joseph Church and wife, denying the said trust and claiming to be sole owners of the lands by deed and devise from Letta Griffin, a bill in equity was brought by the other children and heirs of Charlotte Stevens against Charlotte and Joseph Church, to enforce the trust, and it was therein decreed that Mrs. Church held said lands bound by said trust, and she was ordered to convey to the plaintiffs in said bill in fee, eight-eightieths (88/100) undivided, of said lands; that Mrs. Church died July 16, 1880, without having complied with this decree, leaving her husband, Joseph Church, and a minor child, Charles Church, surviving her, and that the plaintiffs in the present suit are substantially the same as in the former suit.

The defendants here (Joseph Church being guardian of his son Charles) in answer, deny the trust in Letta Griffin, admitting the equity proceedings, but denying that they were sufficient to vest any title in the complainants, or to authorize them to obtain a partition, and further

setting up that they are seised of the full legal title by virtue of a *bona fide* purchase for value without notice, in pursuance of which possession was taken in 1867, and continuously held ever since.

From the bill, answer and proofs the master has found the facts substantially as set forth in the plaintiffs' bill.

Having determined the facts, it remains to consider the equitable principles bearing upon the case thus presented.

There is no force in the argument of counsel that, because of defendants' adverse possession and their denial of plaintiffs' title, these proceedings for partition in equity cannot be maintained.

It is true that at law in an action of partition, possession adversely held, for however short a time, will prevent a recovery (*Law v. Patterson*, 1 Watts & S. 193; *McMasters v. Carothers*, 1 Pa. 325; *Florence v. Hopkins*, 48 N. Y. 186); for an action of partition cannot be turned into an ejectment nor made the medium of trying titles. Such action is entirely based upon the fact of joint possession.

But the distinction between the principles applicable to partition at law and in equity must be kept in view. Jurisdiction of partition in equity, like other equitable jurisdiction, grew up to supply defects and inadequacies in proceedings for partition at common law.

1 Story, Eq. Jur. §§ 650-658.

The proceedings in equity are therefore much more completely remedial; and obstacles, insurmountable in the one case, furnish in the other but occasion for assuming jurisdiction for the very purpose of overcoming them.

It is no permanent obstacle in equity that the title is denied. For if the title in dispute be legal and have not been ascertained at law, the bill is retained until the conflict of titles has been determined by action.

Wilkin v. Wilkin, 1 Johns. Ch. 117.

But if the title in question be equitable, the court at once proceeds to determine it, and then orders partition accordingly. A suit in equity for partition may thus become the medium of settling a disputed equitable title. Thus it is said in *Lucas v. King*, 2 Stock. (N. J.) 277: "The defendants deny the complainant's title. If the title in dispute is an equitable one, it is the duty of this court to settle it. If it is a legal title, the court may dismiss the bill or may retain the cause and afford the party an opportunity of settling his title at law. * * * I do not understand, however, that the bare denial of the complainant's title is any obstacle to the court's proceedings. The defendant must answer the bill; and if he sets up a title adverse to the complainant or disputes the complainant's title, he must discover his own title or show wherein the complainant's title is defective. If, when the titles are spread before the court upon the pleadings, the court can see that there is no valid legal objection to the complainant's title, there is no reason why the court should not proceed to order the partition."

Again; in *Coxe v. Smith*, 4 Johns. Ch. 276, it is said: "The first point is, whether the defendant can set up equitable rights in opposition to the legal title and claim partition according to those rights by an answer. When the legal title is disputed and doubtful, the

course has been to send the plaintiff to law, to have that title established before he comes here for a partition. * * * But when the question arises upon an equitable title set up on the part of the defendant, this court must decide the title, for equitable titles belong particularly to this court, and the parties cannot be sent to law. * * * In *Cartwright v. Pullney*, 2 Atk. 880, the plaintiff's supplemental bill for partition was founded on an equitable title, and Lord Hardwicke said he must determine it. Though the objection there was that it was an equitable title, not a legal one, he decreed a partition, and that the trustees in whom the legal title resided should convey. If the plaintiff can come into this court for a partition upon an equitable title, the defendants who are brought here upon such a bill can surely set up such a title, to be recognized and protected upon the partition."

In *Hoffman v. Beard*, 22 Mich. 59, 64, Judge Christy says: "If the title be an equitable one, or partly equitable and partly legal, the court of equity may very properly try the titles."

And in *Deery v. McClintock*, 31 Wis. 205, Dixon, Ch. J., says: "The cases in this court where issues of title adversely claimed and asserted have been tried and determined in partition have been only where such title was equitable in its nature, or where some recognized principle of equity jurisprudence was involved, thus making the title a proper subject of cognizance in a court of equity."

So in Story, Eq. Jur. § 684, note 1, 12th ed. it is said: "Where the titles are equitable, or there are equities to settle, a court of equity may be resorted to for that purpose, and will under the same bill decree partition."

See also *Obert v. Obert*, 2 Stock. 102.

The plaintiffs, therefore, asserting an equitable title, may properly proceed in equity for a partition; and the mere denial of their title, or the assertion of a possession adverse to it, is not sufficient to prevent a decree.

Nor can the defendants prevent the case from proceeding to a decree by setting up a legal title, unless thereby a dispute is made over such title.

The mere fact that, in the assertion of their equities, parties are met by a legal title will not throw the case over for determination by a court of law. Where the distinction between legal and equitable remedies is preserved, the proper forum to decide whether the equitable title shall prevail against the legal is a court of equity and not of law. To remit the case to the latter court would be to shut out the consideration of anything but the legal title which might be perfect in the defendants and yet in a court of equity have to give way. Where the legal title is in dispute between the parties it must go to a court of law, but not otherwise. How, for instance, could these plaintiffs establish their rights in a purely common-law court?

It is no answer that in this State recovery may be had in ejectment upon an equitable title. We are to consider the matter as a question of purely equitable and legal jurisdiction, and not with regard to our own mixed forms.

It is therefore clear that, as against a party in possession of land and holding the legal title, relief for another upon an equitable title must

be sought in a court of equity alone, and these equities may be declared in a bill which proceeds at the same time for a partition. It is not necessary to establish them first in an independent suit.

Cf. Coze v. Smith, 4 Johns. Ch. 276.

I have thus considered at length the proper limits of the jurisdiction of partition in equity, where there is an alleged dispute of title. It will be seen that the plaintiffs are clearly within the limits so ascertained. Their title, though in terms disputed, is not even doubtful. It has been fully established and ascertained by the former suit in equity, in Luzerne County. There is no necessity to re-establish it here. It is true they have no conveyance to them of the legal title. But what of that? Even an action of partition may be maintained, where the plaintiff has such an equity as would entitle him to compel a conveyance.

Willing v. Brown, 7 Serg. & R. 467.

How much more, a bill!

The legal title is before the court, and conveyances can be ordered if partition be decreed. There is no need, therefore, for a bill of revivor against the heir. And as for the doctrine of disseisin and descent cast, although it might have to be considered if this were a partition at law, it has no place here.

It is useless to argue, also, that the decree which established in favor of these plaintiffs a trust *ex maleficio*, arising from the breach of Letta Griffin's promise to her father, overrides the Act of 1856 relating to the conclusiveness after five years of the probate of a devise of lands. That question was considered and set at rest by the supreme court in *Church v. Ruland*, 64 Pa. 439, in passing upon this very title.

There may be expressions of opinion by individual judges of that court questioning the soundness of that decision; as by Mr. Justice Gordon in *Salter v. Bird*, 14 W. N. C. 154, where he says that the case "goes far toward the destruction of a most valuable statute, especially designed for the quieting of titles to real estate." But how can that be made available for the reconsideration of the subject, in a collateral proceeding?

The only serious question is, whether the former suit settled all the matters at issue between these parties in regard to the title to these lands, or whether the defendants may still set up and contest the title, under their deed from Letta Griffin.

Whether or not the learned master is right in holding that the defendants were bound to set up that title in the former suit, and that they are precluded from doing so now, I do not need to consider. There is a more certain ground upon which to base the conclusiveness of the former decree. As the master well says, that suit proceeded, not only for the purpose of declaring the trust in favor of the Stevens children but also of compelling a conveyance. The only object of Mrs. Ruland in joining in the suit was for the latter purpose. Her rights had been settled by her ejectment. When, therefore, the plaintiffs obtained a decree for a conveyance in fee, it bound whatever title Mrs. Church and her husband had. They could not have conveyed a fee and still have a fee in reserve.

If it was intended to reserve for further litigation the title derived by the deed from Letta Griffin (admitting that that could be done), the withdrawal was incomplete. They ought to have had that title excepted out of the decree, and any conveyance which was ordered limited simply to the estate which Mrs. Church acquired by the devise from her Aunt Letta. This was not done, and the decree must now have effect as it stands. It is of no importance that the court decided the case merely on Mrs. Church's position as a volunteer, as devisee under Letta Griffin's will. A former decision must be regarded though it may have proceeded upon an erroneous principle. *Bower v. Tallman*, 5 Watts & S. 556.

We can only look at the decree, which is for a conveyance in fee absolute. We cannot disturb it, nor refuse to give it effect.

In *Peterman v. Huling*, 31 Pa. St. 432, 433, where there was a plea of former recovery, it was said by Strong, J.: "The former action, though in form an ejectment, was in substance a bill by a *cestui que trust* against his trustee to enforce the execution of the trust. The title of Huling, the plaintiff in that case, was purely an equitable one. It rested upon the assertion that Coder and Peterman held the legal title to two tracts of land, one half of which was purchased with his money, and that they held it under an agreement that it should be for the joint use of Coder and Huling. In a court of law, therefore, Huling would have had no case. In England he must have gone into equity and prayed a chancellor to decree a conveyance by the trustee to him.

"The ejectment which he brought was a substitute for such bill in chancery. But if a chancellor had decreed such a conveyance by the trustee to the *cestui que trust* and enforced his decree, it would have forever estopped Coder and Peterman from denying that Huling was the owner, both legal and equitable, of the one half of the land. Such a decree would have been conclusive upon them in any subsequent suit, or in any other court."

Again, it is said by the same learned justice in *Stevens v. Hughes*, 31 Pa. St. 381, 387: "It is urged that the former judgment was not upon the same title as that now in controversy. We think it was. But whether it was or not is immaterial. Whatever may be the effect of a verdict and judgment in ejectment, in a second ejectment founded upon a different title it must not be forgotten that a judgment upon a traverse of a plea of *liberum tenementum* is not an adjudication of any particular right by which a party holds the land, but upon the question whether he has the freehold at all. It certainly would be esteemed no answer to a judgment establishing A's ownership of a horse, that he had asserted his title through a purchase from B, when in truth he had bought from C. The error of the argument is that it assumes that we may go behind the judgment to inquire through what evidence it was obtained."

These cases fully sustain and forcibly illustrate the conclusions arrived at above, and establish the conclusiveness in this suit of the former decree.

But the learned counsel for the defendants contends that their title under the deed could

not have been passed upon by the court of Common Pleas of Luzerne County, sitting in equity, because it was a legal title, and being such it could only, by the guaranty of the Constitution, be tried in a court of law, where two verdicts of a jury concurring are required to settle it; and that the former suit in equity was, as to such legal title, *coram non judice* and void.

The error in this position is readily apparent. That the legal title was in Mrs. Church was not disputed. But it was for the purpose of charging that legal title with an equity, to wit: a trust *ex maleficio*, that the proceedings in equity were instituted. Mrs. Church's title was legal, whether we take that which she derived by the will or that which she derived by the deed. It is true that in the one case she occupied the position of a mere volunteer, and in the other of a purchaser, and in the latter case, if for value and without notice of the trust, not bound by it. But in either case, the matters relied upon by the plaintiffs were equitable and properly, if not only, determinable in a court of equity. The defendants in the former suit could not prevent their legal title from being drawn into such court for the purpose of charging it with an equity subsisting in these plaintiffs. In fact, when Mrs. Ruland sought to enforce this trust through the medium of an ejectment, it was earnestly contended by Judge Woodward, as counsel for the Churches, that she ought to have gone into the equity courts and not subjected the determination of the case to twelve unlearned chancellors.

Church v. Ruland, 64 Pa. St. 432.

And now when that course has been pursued, it hardly lies in the mouth of the same party, by new counsel, to say that only in a common-law court can this matter be determined, because on one side a legal title is relied upon.

If there were legal titles on both sides, or if the dispute were over the legal title, the objection now raised might be good. But it must be constantly borne in mind that the plaintiffs relied solely upon an equity; and that proceedings to enforce this were necessarily equitable, whether pursued in a court of equity or set up in an equitable ejectment.

Moreover, the plea of being a purchaser for value without notice is equitable and not legal in its nature. It is simply the assertion of a superior equity (*Cf. Story, Eq. Jur. §§ 64 c. 165, 381, 434, 630, 631, 1502, 1503; Story, Eq. Pl. §§ 603 to 604 a. 805 to 810, and Williams v. Lambe*, 3 Bro. Ch. 264, Perkin's Ed. and note 1) and is, I believe, never heard of in a court of law, except where the distinction between legal and equitable rights has been done away with. At all events, it is a doctrine purely equitable in its origin, being usually invoked as an offset to another equity, or to protect the legal as against an equitable title which would otherwise prevail, and in some cases has been allowed in support of an equitable as against a legal title or demand.

The whole fabric of the argument of defendants' counsel must therefore fall. There is no constitutional barrier against their equity, to wit: the fact, if fact it be, of having paid value without notice, by which Mrs. Church's title

under her deed might be supported, being tried and determined in the former equity proceedings. The decree in those proceedings, as we have seen, in effect disposes of her whole title to forty ninetieths of this land, whether held by her by devise or deed, and it being within the power of that court to so ordain, the decree must here and now be recognized and enforced.

The court confirmed the report and referred the case to the same master and two commissioners to make partition between the parties.

The court decreed partition January 26, 1886, and that a deed be made by the defendants within ten days. The appellants took this writ. They assigned for error, *inter alia*, the action of the court in decreeing partition and the execution of conveyance.

Messrs. A. H. Winton and A. Ricketts, for appellants:

The title of Charlotte Church has been cast by descent upon her minor son, one of the defendants in the court below. Recovery can be had from this heir only by the proper action.

Gilbert, Tenures, 18; Co. Litt. 237 a, § 385; *Hoey v. Furman*, 1 Pa. 295, 300.

Decrees in equity where there is no jurisdiction, are simply *coram non iudice* and void.

Grubb's App. 90 Pa. 228, 235; *North Pa. Coal Co. v. Snowden*, 42 Pa. 488; *Norris' App.* 64 Pa. 275.

The object of the bill in equity in the following case of *Kelsey's App.* was to set aside the devise of Letta Griffin to Charlotte Church. It should have been by *caveat* and action at law.

Act of April 26, 1856, § 7; *Wilson v. Gaston*, 92 Pa. 207; *Cochran v. Young*, 14 W. N. O. 345; *Broderick's Will*, 21 Wall. 504 (88 U. S. bk. 22, L. ed. 602.)

The question is not touched by *Church v. Ruland*, 64 Pa. 432, section 7 of said Act not being mentioned.

The defendants being in adverse possession, the partition will not lie.

Law v. Patterson, 1 Watts & S. 184; *Longwell v. Bentley*, 3 Grant, 177; *McMasters v. Carothers*, 1 Pa. 325.

Joseph Church claims title, distinct from that of his wife, by purchase. He had a right to withdraw that question from the equity proceedings and to set it up here.

Haviland v. Fidelity Ins. T. & S. D. Co. 16 W. N. O. 197; *Ross v. Pleasants*, 11 Pa. 353.

To make the decree in equity conclusive as *res judicata*, the same title as well as the same land must be involved.

Treaster v. Fleisher, 7 Watts & S. 187; *Huntingdon Township v. New Columbus Borough*, 16 W. N. O. 237.

"Even in cases confessedly within the jurisdiction, as partition, equity will not interfere if the complainant's title be denied, until he has indicated it at law."

Washburn's App. 15 W. N. O. 101, 104; *Stevens v. Hughes*, 31 Pa. 385, is qualified by *Sabins v. McGhee*, 36 Pa. 453.

Messrs. Isaac P. Hand and Henry W. Palmer, for appellees:

We could not object to Letta Griffin's will, except upon the ground that she had devised land which she held in trust for us, which would be no ground for refusing to probate. After five years no one shall contest the valid-

ity of a will. So much the Act of April 22, 1856, provides. It does not enact that because no one contests a will within five years, therefore the land thereby devised belonged to the testator, and that the true owner shall be barred forever from asserting his claim. After five years the will is good to convey all the testator had, no more.

In case of a partition founded on a legal or equitable title, joint possession is not essential.

Galbreath v. Galbreath, 5 Watts, 146; *Tabler v. Wiseman*, 2 Ohio St. 207; *Foust v. Moorman*, 2 Ind. 17; *Barnard v. Pope*, 14 Mass. 436.

In *Galbreath v. Galbreath*, it is said that nothing short of an exclusive perception of profits by one tenant in common for twenty-one years, would justify the court in submitting to a jury to presume an ouster or disseisin for the purpose of defeating an action of partition.

In *Marshall v. Crehore*, 13 Met. 462, it was held that plaintiffs were entitled to partition, even though actually disseised, provided their title was clear and they had the right of entry.

In *Hoffman v. Beard*, 22 Mich. 64, it is said: "If the title, though of a legal character, be undisputed, or perhaps, though denied, if it appear to be so clear and incontestable as to admit of no reasonable doubt, and the court can see that a trial at law would be a mere formality, the bill may be maintained."

To the same effect is *Obert v. Obert*, 12 N. J. Eq. 426; and *Davidson v. Thompson*, 22 N. J. Eq. 83; *Howey v. Goings*, 13 Ill. 97-107.

The defendant had, at the time the equity suit was tried, an estate in the land as husband of his wife, (See *Bank v. Stauffer*, 10 Pa. 399), and was bound to interpose any and all defenses he had against the decree.

Stevens v. Hughes, 7 Casey, 385; *Cromwell v. County of Sac*, 94 U. S. 351 (Bk. 24, L. ed. 196); *Henderson v. Henderson*, 3 Hare, 100, 115; *Embury v. Conner*, 3 N. Y. 522; *Petersine v. Thomas*, 23 Ohio St. 596; *Lawrence Sac. Bank v. Stevens*, 46 Iowa, 429; *Kelly v. Donlin*, 70 Ill. 378, 385; *Caston v. Perry*, 1 Bailey (S. C.) 533.

Says Mr. Justice Field, in *Cromwell v. County of Sac*: "The judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

After the decree was made, its conclusiveness is described by *Judge Sharswood in Taylor v. Cornelius*, 60 Pa. 187, 199: "Whatever question was properly involved in the former suit and might have been then raised and determined is conclusively settled by the decree."

And by *Judge Agnew in Bolin v. Connolly*, 73 Pa. 336.

Further in contemplation of law we have *Church's deed* for this land, because as *Judge Sharswood* says in *Church v. Ruland*, 64 Pa. 432: "Such a conveyance will be considered as having been actually made whenever it ought to have been made."

If made, where would Mr. Church get a foothold for an ejectment, in the face of his own conveyance?

Peterman v. Huling, 31 Pa. 433.

Per Curiam:

We have carefully examined the report of the master and the opinion of the court on the exceptions filed. We have considered all the specifications of error. The able opinion of the learned Judge clearly shows that the facts proven maintain the title of the appellees set forth in their bill and entitle them to the partition prayed for and ordered by the decree.

And now, May 31, 1886, with the modification of ordering the deed to be executed and filed in the office of the prothonotary of said county, within twenty days from this date, *the decree is affirmed and the appeal dismissed, at the costs of the appellants.*

Helen M. KELSEY *et al.*, Appts.,
v.

Joseph CHURCH *et al.*

1. In partition in equity, besides his part in the land, a tenant in common is entitled to improvements made by him which are reasonably necessary for the proper enjoyment of the land and not injurious to the estate of the other cotenants.
2. A husband who thus improves property in which his wife has an undivided interest is not a stranger or volunteer.
3. The husband of a tenant in common, of coal bearing lands, in a city, built a dwelling house and buildings for mining and selling coal. A bill in equity for partition was filed, after the death of the wife, against the husband and their minor child. On the report of a master, the court determined the undivided interests of the cotenants and decreed that partition should be made. Before commissioners to divide, evidence as to the improvements was received, and the lands containing the improvements were allotted to the husband and minor child at a valuation not including the improvements. Held, proper.

(Decided May 31, 1886.)

APPPEAL from the Common Pleas of Lackawanna County, decreeing partition of real estate in equity. *Affirmed.*

Thomas Griffin died in 1854, seised of about forty acres of coal bearing land in the City of Scranton, having made a will wherein he devised this land to his daughter, Letta Griffin, relying upon an express promise made by her, by which she undertook and agreed with him that if he would devise the land to her she would hold it during her lifetime and would leave or secure to the children of her deceased sister, Charlotte Stevens, the undivided half thereof. Charlotte Stevens left ten children to survive her, one of them, Charlotte, having married Joseph Church who, in 1864, took possession of the premises at the request of Letta Griffin and, with his family, has lived there ever since. By deed dated February 18, 1867, Letta Griffin conveyed the whole of said tract to Charlotte Church in fee, for the considera-

tion named, \$1,000. Letta Griffin died March 20, 1867, having made her last will on September 22, 1862, duly probated April 24, 1867, by which she devised all of said land to Charlotte Church.

On July 26, 1867, several actions of ejectment were brought by some of the heirs of Charlotte Stevens against Joseph Church and wife for this land. On November 15, 1869, there was a verdict for plaintiffs on one of these cases, Ruland and wife, which was affirmed, on writ of error, in 64 Pa. 432.

On November 22, 1871, a bill in equity was filed by all the heirs of Charlotte Stevens, except Charlotte Church, who was the defendant, her husband being joined with her. The bill alleged a trust in Letta Griffin for the children of Charlotte Stevens, and prayed that the defendants might be decreed to execute and deliver to the plaintiffs deeds for their respective interests. The court, after hearing, made a decree accordingly, February 1, 1878.

Charlotte Church died July 17, 1880, without having executed the deed. She left to survive her, Joseph Church, her husband, and a minor child. The other heirs of Charlotte Stevens, or their vendees, then brought a bill for partition. The court appointed W. W. Lathrope, master, who reported that the plaintiffs were entitled to partition, the minor child of Charlotte Church being entitled to the undivided fifty ninetieths, subject to the life estate of Joseph Church, as tenant by the curtesy; the other parties to forty ninetieths, designating them. The court entered a decree accordingly, which was affirmed on appeal.

Church's Appeal, ante, 96.

The same master with two others were appointed commissioners to make partition of the land. It appeared at hearings before the commission that in 1869, 1870 and 1871 Joseph Church built a large brick house on the premises, valued at \$19,000. It would also seem, although this fact is not definitely found by the master, that he used this house as a dwelling for his family and that he also built a blacksmith shop and an office for the sale of coal. There was a coal breaker on the premises, in Letta Griffin's lifetime, valued at \$2,000.

Joseph Church's lessees added improvements to this to the extent of about \$8,000, at the same time opening two veins of coal and mining coal therefrom. Several parties bought lots from the Churches and built dwelling houses on them. The commissioners made one partition of the surface of the land and another division of the coal and minerals underlying the surface, allotting to the plaintiffs, of the surface, four several pieces valued at \$10,877.78; and to the defendants eight several pieces valued at \$13,597.22; and to the plaintiffs coal and minerals under the surface, two pieces valued at \$16,878.69; and to the defendants coal and minerals valued at \$20,478.36.

The commissioners, in making the partition, allotted to the defendants the surface on which the improvements made by Joseph Church stand, without taking the value of such improvements into consideration; they allotted to the defendants, in the same way, the tracts sold by the Churches; also, as a portion of their purpart, the surface on which the coal breaker was situate, and in placing a valua-

tion upon this included the value of the breaker at the time of Letta Griffins' death but did not include the value of the improvements made by the lessees. They also allotted, as a part of the defendant's portion, the two veins of coal which had been mined, including, in the valuation, as well the value of the coal mined as of that remaining. On the subject of the improvements, the master reported:

"It is contended by the counsel for the plaintiffs that these improvements belong to all the owners of the land, as appurtenant thereto, and that therefore they should be estimated and appraised as part of the property to be divided, and the division made accordingly. To sustain their position they cite *Gregg v. Patterson*, 9 Watts & S. 198; *Crest v. Jack*, 3 Watts, 238.

"Both these cases were ejectments by one tenant in common against his cotenant in possession; in which it was held that the latter, having put up valuable improvements, could not hold the land until reimbursed a portion of the moneys expended.

"It seems to be well settled that the tenant making improvements without consent of his cotenant cannot compel contribution by his cotenant. But this doctrine does not necessarily settle the question whether, in a partition in a court of equity, it is not just and equitable to assign such improvements to the tenant making them, if his cotenant is not prejudiced thereby. This question does not seem to have been ruled in this State, but the affirmative has been held in the following cases in other States, to wit:

Town v. Needham, 3 Paige, 558; *St. Felix v. Rankin*, 3 Edw. Ch. 328; *Conklin v. Conklin*, 3 Sandf. Ch. 65; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Obert v. Obert*, 5 N. J. Eq. 397; *Hall v. Pidcock*, 21 N. J. Eq. 311; *Louvalle v. Menard*, 6 Ill. (1 Gilm.) 89; *Howey v. Goings*, 13 Ill. 108; *Dean v. O'Meara*, 47 Ill. 120; *Martindale v. Alexander*, 26 Ind. 104.

"See also the following cases referred to in Abbott's U. S. Digest, which seem to be in the same line but to which the master has not had access:

Reed v. Reed, 68 Maine, 568; *Collett v. Henderson*, 80 N. C. 337; *Sanders v. Robertson*, 57 Ala. 465; *Reeves v. Reeves*, 11 Heisk. (Tenn.) 669; *Annely v. De Saussure*, 17 S. C. 389; *Sarbach v. Newell*, 28 Kan. 642; *Borah v. Archers*, 7 Dana (Ky.) 176.

"It has seemed to the master and the commissioners that the improvements made by Joseph Church could be set apart to him and his son, without prejudice to the plaintiffs. The commissioners have therefore allotted to the defendants the surface on which said improvements stand, without taking the value of such improvements into consideration; the valuation of the purpart of the defendants being fixed without reference to such improvements."

The plaintiffs filed the following exception: "The master and commissioners erred in not awarding to plaintiffs four ninths of the improvements put upon the land by Joseph Church or the value thereof." The court dismissed the exception and decreed partition in an opinion by Archbald, J., as follows:

"The learned master fully justifies in his report the course pursued. The subject is also fully considered and the position taken by the

master sustained in Freeman Cotenancy & Partition, §§ 509, 510, 511.

"A different case might be presented where one cotenant has undertaken to improve the whole estate as by erecting a building covering the whole of a city lot. But where the improvements are only such as comport with the reasonable and proper enjoyment of the land by the cotenant who has made them, it would seem highly inequitable not to allow them to him in making partition.

"But it is urged that Joseph Church, who made the improvements in question, was a stranger to the title; and again, that the trust declared in Mrs. Church in favor of the plaintiffs was one *ex maleficio*, arising out of her own wrong, and that so the rule does not apply. Neither of these contentions is sound. Mrs. Church was declared a trustee only as to four ninths, or as it is better expressed, eight eighteenths of the land. The remaining five ninths she held undisputed. Hence arises the tenancy in common, which it is the object of these proceedings to sever. The mere fact that the claim and title of the plaintiffs was contested by her and has been by these defendants should not prevent the latter from now drawing to their share the improvements in question.

"Nor can Joseph Church, as respects these improvements, be treated as a stranger to the title. As husband of his wife, Charlotte Church, he had when they were made, a freehold in the land (*Bank v. Stauffer*, 10 Pa. St. 399) as well as a curtesy estate initiate, which has now become consummate by her death. Moreover, aside from his own interest in the land, there is no reason why a husband should not for the benefit of his wife improve her land; or why, even in this light, such improvements should be treated as made by a stranger or volunteer."

The plaintiffs took this appeal, assigning as error the action of the court in dismissing their exception and in decreeing partition without allowance for the improvements.

Messrs. Isaac P. Hand and Henry W. Palmer, for appellant:

The improvements were placed on the land after the suits were commenced, in which plaintiffs' title to four ninths was established. Church and his wife enjoyed the rents, issues and profits during a period of eighteen years pending the litigation. They were held by this court to be trustees *ex maleficio* and, as such, ordered to convey four ninths of the land to the plaintiffs. No reference was made to improvements in that decree, and therefore it covered four ninths of quantity and value of all pertaining to the land described. That decree cannot be impeached or diminished in this proceeding.

In *Crest v. Jack*, 3 Watts, 238, it is said: "A joint tenant or tenant in common may not erect buildings or make improvements on the common property without the consent of his cotenant and then claim to hold, until reimbursed, a proportion of the moneys expended. Nor will it alter the case that the cotenant knew that the buildings were being erected and made no objection or opposition."

And in *Gregg v. Patterson*, 9 Watts & S. 197: "When a tenant in common, in possession of land, erects buildings and makes substantial

and valuable improvements thereon, without the consent of the heirs of his cotenant, though done under the impression that he was the sole owner, he cannot claim to be reimbursed one half the cost and expense of such improvements. For this he is without remedy, further than the rents, issues and profits received by him from the property may reimburse him."

In this case these defendants sought, by their own wrongful act, to deprive the plaintiffs of their title and possession. Said Judge Sharswood in *Church v. Ruland*, 64 Pa. St. 432: "They are trustees *ex maleficio*. If a case can be found in which a trustee was ever allowed for improvements put on the land of his *cestui que trust*, without consent and against objection, we will surrender the discussion."

If a writ of *habere facias possessionem* followed his action of ejectment it would put the tenant in common in possession of an undivided interest in the land recovered, including improvements, and if thereafter he would be entitled to share in the rents and profits arising from the land, including the improvements, to the extent of his interest therein, at what time and how does he lose any portion of his right of property by seeking a partition?

The *cestui que trust* has always his option to take or refuse the benefit or loss of the unauthorized act of his trustee.

Harrison v. Harrison 2 Atk. 120; 2 P. Wms. 453.

In *Wykoff v. Wykoff*, 3 Watts & S. 486, it is said: "In regard to the second error, we think the evidence offered by the plaintiff in error to prove the value of his improvements was rightly rejected by the court. They were not such as were necessary to the occupation and profitable enjoyment of the land; and hence to allow for such improvements, made by a person standing in the character of a trustee, as the plaintiff in error and his father did, might be in effect to permit the *cestui que trust* to be improved out of all claim to the land."

"Trustees who are invested with general powers of management will be justified in laying out money in the repair and improvement of the property. * * * But without any general authority or a special power they would run the risk of having payments disallowed, if they ventured to make such an application of trust funds."

Hill, Trustees, *429; *Green v. Winter*, 1 Johns. Ch. 26.

A trustee, acting without express authority, will not be allowed the expense of pulling down and rebuilding a house.

Hill, Trustees, *571; *Bridge v. Brown*, 2 Younge & Coll. Ch. 191.

It is an established doctrine that trustees can only be allowed for necessary expenditures.

Fountainaine v. Pellet, 1 Ves. Jr. 387.

(No counsel appeared for appellees.)

Mr. Chief Justice Mercur delivered the opinion of the court:

This bill was to compel partition of lands in which the appellees held the undivided five ninths. The court decreed partition and awarded to the appellants four ninths of the land. Their complaint now is the refusal of the court to allot to them a proportionate value of the permanent improvements erected on the

land by the appellees. It may be conceded that there may be cases of partition in which the improvements should be held to inure to the benefit of all the cotenants. It is well intimated that such might be the case where one cotenant undertakes to improve the whole estate, as by erecting a building covering the whole of a city lot.

Here, however, the improvements appear to have been such only as were reasonably necessary for the proper enjoyment of the land by the cotenant who made them. While the title was in the wife of the appellee, yet he was tenant by curtesy initiate; and, therefore, in making the improvements, presumably for himself and his wife, he cannot be treated as a mere stranger or volunteer.

While a tenant in common is liable to his cotenant for repairs absolutely necessary to buildings already erected and in being, which fall into decay, yet he is not liable to his cotenant for new and permanent buildings which the latter erects thereon. *Beatty v. Bordwell*, 91 Pa. St. 438; *Crest v. Jack*, 3 Watts, 238; *Dech's App.* 57 Pa. St. 467.

Hence, although the appellees owned the larger share of the land, they were powerless to compel the appellants to contribute towards the improvements. The appellees must either forego the proper use and enjoyment of their estate or else incur the necessary expense to make it productive. They chose to do the latter. The appellants paid nothing towards the improvements and their estate was not injured by the erection thereof. This is a proceeding in equity. Due regard must be had to the equitable rights of each party. Under the facts of this case it would not be a just application of the rules in equity to give to the appellants any share of the value of the permanent improvements made by the appellees only.

Decree affirmed and appeal dismissed, at the costs of the appellants.

BRADFORD OIL CO., *Plff. in Err.*, v.

James E. BLAIR.

1. In an oil lease on royalty, a covenant to use due diligence in operating the premises runs with the land.
2. A covenant in an oil lease to "continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption for the common benefit of the parties," construed to mean that, in the event of success, exploring and drilling for oil should be continued without interruption, for the common benefit of the parties, as well as gathering and collecting the same.
3. The liability of the defendant under this covenant depends on the question whether or not the defendant violated the covenants to use due diligence, under the circumstances of the case.
4. The measure of damages for the breach of such a covenant is the value of the oil which the lessor should have

received, less the cost of producing it and the value of the oil actually received.

5. A memorandum indorsed on a lease, signed by the parties but not dated or under seal, that "it is agreed that the said second parties are not to drill any wells in the barnyard, orchard or garden without consent of first parties, but nobody else to have the right." held inadmissible in an action of covenant on an oil lease.

(Decided May 31, 1886.)

ERROR to the Common Pleas of McKean County, to review a judgment for the plaintiff in an action of covenant. *Affirmed.*

At the trial before Brown, P. J., of the Thirty-Seventh Judicial District, specially presiding, the following facts appeared:

On July 17, 1875, the plaintiff leased an oil farm of 154 acres, at one eighth royalty, to one Peck, his heirs and assigns, to whom, by various intervening assignments, the defendant succeeded in April, 1876.

The lease granted the sole right to Peck to bore, explore and dig for oil, etc., and gather and collect the same for the term of twenty years and contained, among other provisions, a covenant on the part of Peck that he would "continue with due diligence and without delay to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption for the common benefit of the parties." Peck immediately drilled one well and the defendant finished drilling another in August, 1876, each producing about five barrels per day, by pumping.

The defendant afterwards acquired all the surrounding land except that upon one side, drilled no more wells on the Blair farm but operated extensively on the surrounding land. In April, 1877, the plaintiff notified the defendant that the lease had been forfeited by the refusal to comply with the covenant to develop the farm. On April 2, 1877, he brought ejectment, with a writ of estrepement which was afterwards discontinued. On September 6, 1878, a second action of ejectment was brought. In October, 1878, the defendant began drilling a third well, and afterwards several others were drilled.

This action of covenant was brought. The declaration alleged damages sustained by the plaintiff on account of the defendant's failure to continue with due diligence and without delay to prosecute the business of drilling for and producing oil on said premises, without interruption, for their common benefit.

The plaintiff's evidence showed that, to obtain the best results from the farm, one well should have been drilled in every five acres; that with one set of tools a well could be completed every forty days; and that the defendant's wells on the surrounding lands had drained considerable oil from the farm.

The defendant objected to the admission of the lease in evidence, but it was received by the court. The defendant then offered to prove a supplementary contract indorsed upon the lease and signed by the parties, but without date or seals, as follows: "Supplementary. It is agreed that said second parties are not to drill any

wells in the barnyard, orchard or garden, without consent of first parties, but nobody else to have the right." This was offered to show a charge made by the parties, materially diminishing the amount of land that was to be drilled upon, and that it charged the covenant declared upon by the plaintiff. The offer was rejected.

The defendant introduced evidence to show that the amount of oil produced by the two wells already in operation in 1876, the character of the soil and the inefficient devices for making oil flow in 1876-8, did not warrant further operations on the farm during that period.

After reviewing the evidence, the court charged as follows:

The duty of interpreting the lease and of defining the obligations its terms impose is exclusively for the court; and your duty as jurors is to take our interpretation as the correct one, and apply the evidence to its meaning as we define it. In the exercise of this duty we say to you that the agreement to prosecute the business for the common benefit of the parties imposes no obligation on the defendant to prosecute the business to any greater extent than could reasonably be done and leave a profit to the defendant. In other words, if the knowledge and skill of persons engaged in the oil producing business and the machinery and appliances then known and the prices of the product were such that the business could not be then carried on with a profit to the defendant after giving to the plaintiff the agreed royalty, then we think the defendant was not bound to prosecute the same to any greater extent than was done; but if it could have been prosecuted profitably to a greater extent to the mutual benefit of the parties, and ought to have been under the circumstances, then the defendant was bound so to prosecute it; and if it has failed must respond in damages.

The consideration of the lease, in part at least, was the agreement to render to Mr. Blair the one eighth of the product; and the stipulations of the lessee as set down in the agreement are, in our opinion, equivalent to a covenant on the part of the lessee and his assigns that they will prosecute the business of boring and exploring for oil and gathering the same in a proper manner and with reasonable diligence to the end that Mr. Blair should have the royalty or income in the contemplation of the parties at the time the agreement was made.

In determining whether the defendant during the time it owned the lease, that is to say from some time in May, 1876, or during the time for which the plaintiff claims it is responsible, from some time in May, 1876, to October, 1878, did prosecute the business in a proper manner and with reasonable diligence, I think it proper to say that you ought not to find against the defendant by reason of its failure to operate the southeasterly part of the farm, unless the evidence satisfies you that such failure was from a want of diligence under the light and knowledge then existing; and in this connection you will call to mind the fact that prior to some time in the fall of 1878, there had been no operations in that immediate locality. You should, in determining the question of whether the defendant has prosecuted the business with

reasonable diligence, consider the quality of the land for oil producing purposes as it was then generally known or supposed to be; the cost of production; the price of the product; the knowledge and skill then generally possessed by persons engaged in the business in the locality; and whether the appliances used and the manner of operating was or was not such as men ordinarily skillful in the business usually resorted to in the location and at the time mentioned; and whether the extent of their operations and the vigor of their prosecution was or was not such as was reasonably to be expected under the then existing circumstances.

You must not allow the plaintiff any damages for the price of oil drained or claimed to be drained from the land by reason of operations on the adjoining lands; but inasmuch as what is reasonable diligence is a question to be determined by the light of the then existing circumstances [you may take the operations on the adjoining lands into account so far, and only so far, as they enable you to answer the question whether the defendant was or was not wanting in ordinary diligence]; and we further say that you must not find the defendant wanting in diligence merely from the fact, if it is a fact, that it did not sink an equal or any number of wells opposite or in proximity to wells that were sunk on the adjoining lands and near to the plaintiff's line [the defendant's duty is not to be measured by what was done on the adjoining lands, except so far as what was done bears upon the main question running through this part of the case and which we repeat: Was the defendant, taking all the circumstances including the operations upon the adjoining property, into account, wanting in diligence in its operations upon the plaintiff's land?] I emphasize the injunction, and ask you particularly to bear that in mind, that the duties and obligations of the defendant must not be judged by the light and knowledge obtained after its ownership of the plaintiff's land had ceased, but by such as existed or prevailed during the existence of such ownership; now, so judging, you will ascertain from the evidence whether the defendant did all that it could be reasonably expected to in the business of developing the land and producing the oil therefrom; if it did, your verdict would be for the defendant; if it did not, it should be for the plaintiff, for such amount as will compensate him fairly for the damages he has sustained [and in regard to the measure of damages we instruct you in this way: in case you find that the defendant did not use due diligence in operating plaintiff's premises, you will ascertain, as well as you can from the evidence, how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the time when it should have been delivered to the plaintiff; and from this you will deduct the cost of producing what he ought to have received at the time and under the circumstances and with the appliances then known; and upon such balance you will compute the interest from the time it ought to have been delivered to the plaintiff down to the present time]; I am not able to lay down to you any more definite rule than this. I am not able to say to you at what conclusion you will arrive from the evidence in this case; as counsel on

both sides have said, the question for the jury may be a difficult one. Counsel have commented fully on the evidence, and it is not our purpose to go over it in detail.

I repeat, then, you will find as best you can from the evidence, in case you find that the plaintiff ought to recover, how much more oil he ought to have received than he actually did receive during the time in controversy, and its value; and from that you will deduct the cost of producing out of the ground as near as you can ascertain it, from the evidence, at the time and under the circumstances, and you will strike a balance and on that balance find a verdict in favor of the plaintiff.

The court affirmed the plaintiff's point, which was as follows:

"By the terms of the lease from Blair to Peck, the lessee and the defendant under him, having successfully prosecuted the business of exploring for oil, were then bound to prosecute the business of exploring and drilling for oil and gathering and collecting the same, without interruption, for the common benefit of the parties."

The defendant's points, the answers to which were assigned as error, were as follows:

"Second. The covenant declared on, if construed to relate to the drilling of new wells and the erection of new derricks and buildings, fails to fill the requirements of a covenant running with the land, in that it related to things not *in esse* at the making of the covenant; and contemplated a depletion and waste of the land and not its preservation, in that it relates to property and the use of property on the land made personal by the terms of the lease, and not any permanent structures or improvement on the land; and is shown by the language used by the parties to have been intended by them only as a personal covenant."

Answer: "We think it is sufficient to say that the covenant on which the plaintiff bases his right to recover is a covenant running with the land."

"Third. The liability of the defendant in this suit, if any, is only on the express covenants declared upon; and if the evidence does not show a violation of these there can be no recovery."

Answer: "If by this point it is meant that there can be no recovery on the covenants to be implied from the language expressly used, it is refused."

"Fifth. Under the pleadings and evidence the plaintiff cannot assert or recover for any alleged breach of covenants by the defendant in not drilling oil wells during the time he was denying its right to so drill, and was by his interference, notices, writs of ejectment and estoppel using every means known to the law to prevent it from drilling and operating the premises in question."

Answer: "We answer this point by saying that so far as the actual prosecution of the work was prevented and suspended by the matters recited in this point, there can be no recovery of damages for the failure to prosecute the work during the time the business was so suspended."

"Seventh. The covenants of the lease in question did not require the defendant, after a

well drilled and oil found, to drill any other or additional wells if the defendant, with the knowledge it then possessed, had reason to believe and did believe that it could not drill such additional wells without loss to itself."

Answer: "This point is answered by saying, as we said in the general charge, that the liability of the defendant is dependent upon the question of whether the defendant, taking all the circumstances into account, was or was not wanting in ordinary diligence."

"Eighth. The covenant to prosecute the business without interruption, for the common benefit of both parties, does not define such business to be the drilling of oil wells; and if after two wells were drilled and got to producing they were without interruption pumped and kept producing for the common benefit of both parties, then said covenant was complied with."

Answer: "This point is refused."

"Tenth. The covenant to prosecute the business without interruption does not require the drilling of more than one well at a time, if the drilling and preparation therefor is continuous."

Answer: "This point is answered by repeating that the liability of the defendant depends upon the question of whether, taking all the circumstances into account, the defendant was or was not wanting in ordinary diligence."

The jury found a verdict for the plaintiff for \$7,500 and costs, and judgment was entered accordingly; whereupon the defendant took this writ.

The assignments of error upon which stress was laid related to the portions of the charge enclosed in brackets, the admission of the lease in evidence, the rejection of the indorsement of the case, the affirmance of the plaintiff's point and the answers to the defendant's points above mentioned.

Messrs. C. W. Stone and F. L. Blackmarr, for the plaintiff in error:

The covenant by Peck was strictly personal. It does not name assigns. It is in relation to things, not *in esse* at the time it was made. It does not run with the land. It does not bind the defendant.

Spencer's Case, 1 Sm. L. Cas. 187; *Cathcart v. Bowman*, 5 Pa. St. 819; *Herbaugh v. Zentmyer*, 2 Rawle, 160; *Masury v. Southworth*, 9 Ohio St. 346.

If part of the contract was to be received in evidence, the defendant was entitled to have the whole so received.

Stark. Ev. *459.

The fact that the supplemental contract is not under seal, while the original lease is, does not affect it.

Chesapeake & Ohio Canal Co. v. Ray, 101 U. S. 522 (Bk. 25, L. ed. 792); *Phila. etc. R. R. Co. v. Trimble*, 10 Wall. 367 (77 U. S. bk. 19, L. ed. 948); *The Delaware v. Oregon Iron Co.* 14 Wall. 579 (81 U. S. bk. 20, L. ed. 788); *Swain v. Seamens*, 9 Wall. 252 (76 U. S. bk. 19, L. ed. 559); *Wilpus v. Whitehead*, 89 Pa. St. 133; *McNish v. Reynolds*, 95 Pa. St. 486; *Spangler v. Springer*, 22 Pa. St. 454; 1 Greenl. Ev. §§ 804, 805.

It was error to instruct the jury that the covenant to pay a royalty raised an implied covenant to operate the premises with reasonable diligence. *Expressum facit cessare tacitum*. A

party cannot be bound by an implied promise when he has made an express contract as to the same subject matter.

Hawkins v. United States, 96 U. S. 689 (Bk. 24, L. ed. 607); *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Frost v. Raymond*, 2 Cal. 192; *Sumner v. Williams*, 8 Mass. 201; 2 Washb. Real Prop. 671.

The covenant "if successful to prosecute the same without interruption for the common benefit of the parties aforesaid," superseded any implied covenant that might otherwise have arisen. The defendant was therefore entitled to an unqualified affirmance of its third point. The same error affects the answers to the seventh and tenth points.

This court has already held in construing this lease that the word "operations" is not to be restricted to drilling wells, but means pumping after the wells are drilled.

Blair v. Peck, 1 Pennyp. 250.

Neither should the word "business" be restricted to drilling.

The plaintiff claimed no special damages in the declaration. He used only the most general terms. Therefore he can recover, if anything, only such damages as necessarily resulted from the defendant's default.

Bristol Mfg. Co. v. Gridley, 28 Conn. 212; *Squier v. Gould*, 14 Wend. 160; *Stanfield v. Phillips*, 78 Pa. 76; 2 Wait, Act. & Def. 424; 2 Greenl. Ev. 254; 1 Chitt. Pl. 838, 896.

His only necessary loss was the interest on the value of the oil, from the time it could have been produced until the time it was produced.

Cherry v. Miller, 1 Pittsb. L. J. 98.

Or, the measure of damages may be the difference between the actual cost of producing the oil, and what he had agreed to pay for producing it, viz.: seven eighths of it.

At all events, evidence tending to establish the actual damage to the plaintiff should have been adduced.

Penn Iron Co. v. Diller, 1 Cent. Rep. 377; *Lentz v. Choteau*, 42 Pa. 488.

Messrs. B. D. Hamlin, D. H. Jack and Elliott & Watrous, for the defendant in error:

The covenant to operate runs with the land, not because the lessee and his assigns would necessarily, in operating the leased premises, erect temporary structures thereon, but for the reason that the covenant relates to the manner of use and bears relation to the rent to be derived therefrom.

See *Spencer's Case*, 1 Sm. Lead. Cas. 92; 3 Coke, 16; *Martyn v. Clue*, 83 E. C. L. R. 661; *Shelby v. Hearne*, 6 Yerg. 612; *Harris v. Gostin*, 3 Harr. (Del.) 838; *Harley v. King*, 2 Crompt. Mees. & R. 17; *Wilkinson v. Rogers*, 12 Week. Rep. 119; *Norval v. Pascoe*, 10 Jur. N. S. 792; 2 Fish. Dig. p. 2241; *Norman v. Wells*, 17 Wend. 136; *Brolaskey v. Hood*, 6 Phila. 193; *Streaper v. Fisher*, 1 Rawle, 155; *Herbaugh v. Zentmyer*, 2 Rawle, 159; *Weidner v. Foster*, 2 Pen. & W. 23; *Dunbar v. Jumper*, 2 Yeates, 74; *Pollard v. Shaffer*, 1 Dall. 210 (1 U. S. bk. 1, L. ed. 104); *Fisher's Exrs. v. Lewis*, 1 Clark, 422; *Jones v. Gundrim*, 3 Watts & S. 531.

The lease provides that "said party of the second part, his heirs or assigns, are to give to the party of the first part, his heirs or assigns, one eighth part of all the oils, salt or other

product obtained therefrom." This covenant certainly binds the assigns of Peck; and yet it is of no value to the lessor if he cannot also enforce the covenant to operate the farm without interruption for the common benefit of the parties. The rent which the lease provides for depends upon the manner in which the premises are worked. The lease is to the party of the second part, his heirs and assigns.

Per Curiam:

The agreement imposed upon the Company an obligation to use due diligence in operating on the premises. That was necessary for the common benefit of both parties. We do not think damages for not securing flowing oil are to be ascertained exactly as if it were a stationary mineral.

If oil be not utilized at a proper time it may be lost forever by reason of others operating near by. Not so with a stationary mineral. It remains for future development. While there is some difficulty in the way the damages were ascertained in this case, yet no better or more accurate manner is pointed out.

Looking at the whole case, we see no sufficient cause to justify a reversal of the judgment. *Judgment affirmed.*

William GIBSON, *Pff. in Err.*,
v.

Joseph H. LENHART, Receiver of the First National Bank of Meadville.

1. The deposit of negotiable railroad bonds, with a bank, as collateral security for a debt, passes the title, as against the bank, notwithstanding the antecedent pledge of the same stock.
2. Delivery to the bank, deposit, is delivery to the pledgee (*Gibson v. Lenhart*, 101 Pa. 522).
3. Evidence of the antecedent pledge is inadmissible, in an action of replevin against the bank for the bonds, in the absence of *mala fides* or notice of the pledge on the part of the plaintiff.
4. Where the bonds were deposited in the bank in a package, indorsed with the pledgee's name, the bank is estopped, in an action of replevin for the bonds, from alleging that the bonds in the package are not the original bonds pledged to the plaintiff.

(Decided March 15, 1886.)

ERROR to the Common Pleas of Crawford County, to review a judgment for defendant in an action of replevin for certain railroad bonds, deposited in pledge with the defendant. *Reversed.*

On the trial before Church, *P. J.*, the following facts appeared: On April 20, 1878, Dr. William Gibson made a loan to William Thorp of \$6,674.40, the latter promising to deposit as collateral security \$9,000 worth of Shenango & Allegheny Railroad bonds. Subsequently the

plaintiff received a certificate, dated May 3, 1878, signed by the cashier of the First National Bank of Meadville, and stating that "William Thorp has this day deposited in this bank \$9,000 in bonds of the Shenango & Allegheny Railroad Company, to be held as security for the payment to you of his note for \$6,674.40, dated April 20, 1878, due in one year from that date."

William Thorp failed November 12, 1878. Shortly after this the plaintiff called and was informed by the president that the bonds were in the vaults of the bank. At another time he was handed an envelope, on which was indorsed his name, which he examined and returned. He testified that the indorsement on the envelope was: "Dr. William Gibson, \$9,000, bonds Shenango & Allegheny R. R. Co."

Lenhart testified on this point: "My impression is now that it was marked 'Dr. Gibson'; but I do not think there was any amount that was in dollars. That is my impression; there may have been, but I do not think there was. I cannot say really positive whether it gave the amount on the back of the package or not; I would not be positive as to that."

A letter signed by the president, dated March 29, 1880, offered to cut off and collect "the April interest of the \$9,000, S. & A. bonds held by the bank on account of the Thorp loan; and requested the plaintiff to 'Bring the paper you hold from the bank showing that the bonds were deposited for you by Thorp and for what purpose.' These coupons, to the amount of \$815, were collected by the bank; and the money, tied up in a paper, indorsed and put in the envelope with the bonds.

On June 3, 1880, the bank failed and a temporary receiver was appointed, who handed the package to Dr. Gibson. The latter took out the \$815 and handed back the package. Joseph H. Lenhart was afterwards appointed Receiver and took possession June 30, 1880.

Replevin for these bonds was issued against Lenhart, Receiver, indicating them by numbers and amounts. On May 7, 1881, they were delivered by the sheriff to the plaintiff. The defendant pleaded *non cepit* property, and property in another.

On the trial the defendant gave evidence, under objection, that \$6,500 of the bonds replevied were pledged, September 21, 1877, to one Berringer for a debt of Thorp and Reynolds, the numbers of the bonds corresponding with those replevied. The receipt of the bank, dated September 21, 1877, with the numbers and amounts, were given in evidence.

The deposition of Thorp was received, in which he testified that these bonds were never deposited as security for Dr. Gibson's loan, that they were not in his package on November 12, 1878, and that he had other bonds of this railroad in the bank, not pledged, on May 3, 1878. The first nine assignments of error were to the admission of this evidence.

The court charged the jury, *inter alia*, as follows:

"When Dr. Gibson comes to the deposit, namely: this bank, to find out about his bonds, he finds a package which purports to be bonds upon which his name is indorsed. It is not given to him, because he has not this letter or

certificate of deposit sent by the bank. He does not get possession of these bonds until he gets possession by the sheriff in the bringing of this suit. To be sure at one time in the bank, in April, 1880, the examiner is understood as handing him the bonds, but he did not take possession; and not until April, 1880, did he even know the number of the bonds; at all events he did not take the number of the bonds until after that time, after the bank had been in the hands of a provisional receiver." *Twelfth assignment of error.*

One of the plaintiff's points, with the answer of the court was as follows:

Fourth. That the bonds in controversy are negotiable securities; and if they were negotiated to plaintiff as collateral security for a loan of money made by him to Thorp at the time, and he had no knowledge that another than Thorp claimed property in them, then he is a *bona fide* holder for value in the usual course of business, and the verdict should be for the plaintiff.

Answer. This point is affirmed, but there is evidence that \$6,500 of the bonds were not negotiated to the plaintiff for the Thorp loan; if the evidence of Mr. Thorp is believed; and you will note whether there is any evidence contradictory to Mr. Thorp's evidence upon that point.

Verdict for the plaintiff for \$2,500 of the bonds; and for the defendant for \$6,500 worth. The plaintiff then took this writ.

Messrs. H. L. Richmond and Thomas Roddy, for plaintiff in error:

The possession of the bank was the possession of the plaintiff; and the bonds being negotiable securities, and he the holder for value, he could maintain his right against all the world.

The real controversy in the present case was as to whether the title of Gibson or of Berringer should prevail. As against the latter this suit settles nothing. He was not a party to the proceedings and is not estopped.

In *Wells on Replevin*, §§ 693, 696, it is stated that in order to entitle a defendant to plead title in a third person, he must connect himself therewith.

In *King v. Roberts*, 6 Whart. 427, Judge Kennedy held that a carrier, in an action on the case by the consignor, might show that the title to the goods really belonged to a third person who had taken possession thereof. The decision rested upon the plain principle that if the goods did not really belong to the plaintiff he had received no damage; and that he who, by a deceit, had obtained a recognition of his title by the carrier had no right to complain that the rightful owner had received his goods.

Had George Berringer claimed title to the bonds in controversy, and had he made demand of the bank for them, it might have been proper for the court, upon his petition, to have allowed him to become a party defendant; in which case the court could have framed an issue between Berringer and Gibson to decide the question of right between them.

Brooks v. West. Nat. Bank, 16 W. N. C. 298.

Mr. John J. Henderson, for defendant in error:

The question is not whether any bonds were pledged to plaintiff, nor whether he has a

right of action against the bank; but whether these particular bonds were pledged as his security, as provided for in his agreement with Thorp. The defendant proved satisfactorily that these bonds were not pledged to plaintiff, and he therefore never had title to them.

In an action of replevin, evidence that another owns the property or has a right superior to the plaintiff will defeat the action.

Seibert v. McHenry, 6 Watts, 308; *Quincy v. Hall*, 1 Pick. 360.

Mr. Justice Paxson delivered the opinion of the court:

It was held when this case was here upon a former writ of error (*Gibson v. Lenhart*, 101 Pa. 522), that the plaintiff was a *bona fide* holder for value of the \$9,000 of bonds of the Shenango & Allegheny Railroad Company in controversy, and that the possession of the bank was his possession; in other words, that the delivery of the bonds to the bank for the plaintiff was a delivery to him. As the bonds were negotiable and passed by delivery, it would seem clear that the plaintiff's title thereto was good against all the world. That his case miscarried in the court below was manifestly due to errors upon the trial.

The defendant was the bank having the custody of the bonds, or to speak accurately, the receiver appointed by the government to take charge of the assets of the bank after its failure. We have the admission of the bank in the shape of its certificate signed by its duly constituted officers, that they held for account of the plaintiff \$9,000 of the bonds of this company. It also appeared that said bonds were in an envelope with the plaintiff's name indorsed thereon; that upon one occasion the coupons were cut off by a bank officer and the proceeds, \$815, placed back in the envelope; which sum the receiver afterwards paid to the plaintiff.

The defense now set up is that a portion of these bonds had been previously pledged by Thorp to one Berringer as security for a loan made by the latter to Thorp & Reynolds, and a considerable amount of evidence was received under objection to prove this fact. We are of opinion that all this evidence should have been excluded. There was neither allegation nor proof of any *mala fides* on the part of the plaintiff; nor that he had any knowledge of such pledge when he made his loan upon the faith of the bonds.

Under such circumstances his title was good, and it will not do for the bank now to set up that the bonds in the package are not the original bonds pledged to the plaintiff. If they are the same bonds, the plaintiff is entitled to recover; and the bank is estopped from alleging that they have been changed in the bundles. We are of opinion that all of the evidence referred to in the first nine specifications of error should have been excluded.

The plaintiff's fourth point should have been affirmed without qualification. There was also plain error in that portion of the charge embraced in the twelfth assignment, in which the learned judge instructed the jury that the plaintiff never had the possession of the bonds until they were delivered to him by the sheriff, upon the writ of replevin. On the contrary, he had the legal possession of them all the time

after they had been delivered to the bank, for the possession of the bank was his possession. So much was distinctly said in 101 Pa. 529.

The remaining assignments of error relate to portions of the charge referring to the evidence alluded to; as all this will be excluded on the next trial, a further discussion of it is unnecessary.

We do not pass upon Berringer's rights. He is no party to this record and the judgment does not bind him. It is a question now between the plaintiff and the bank.

Judgment reversed and a venire facias de novo awarded.

*PITTSBURGH & STATE LINE R. R. Co., Appt.,

v.

Simon ROTHSCHILD *et al.*

1. When two corporations of different States become, by the co-operating legislation of those States, a consolidated corporation, such consolidated corporation, when acting in its corporate capacity in either of the States, acts under the authority of the charter of that State, and the legislation of the other State has no operation beyond its territorial limits.
2. A mortgage of the property of a corporation is an increase of its indebtedness and can be effected only in compliance with article XVI, section 7 of the Constitution of Pennsylvania and the Act of April, 18, 1874. Otherwise the mortgage is void.
3. Foreclosure proceedings in New York are ineffectual to pass title to property in Pennsylvania.
4. A shareholder of the consolidated company who has accepted and disposed of bonds thus illegally issued, although he might be precluded from questioning the validity of the bonds and mortgage, may yet assert want of title in the purchaser of the corporate property situate in Pennsylvania and sold under the foreclosure proceedings in New York.

(Decided May 31, 1886.)

APPEAL from a decree of the Common Pleas of Elk County, granting a preliminary injunction and appointing a receiver. *Affirmed.*

Reported below, 1 Pa. C. C. R. 620.

This was a bill filed by Simon Rothschild and others, stockholders, to the amount of more than 10,000 shares of the Rochester & Pittsburgh R. R. Co., against the Rochester & Pittsburgh R. R. Co., the Rochester & Pittsburgh Coal and Iron Co., the Pittsburgh & State Line R. R. Co., the Union Trust Co. of New York, Adrian Iselin and others.

The bill, supported by affidavits, alleged, *inter alia*, that the Rochester & Pittsburgh R. R. Co. had claimed (as a consolidated corporation existing under the laws of the States of

New York and Pennsylvania by virtue of articles of consolidation and merger dated September 28, 1881, between it, three railroad corporations organized under the laws of New York, and two organized under the laws of Pennsylvania) to own a line of railroad extending from Rochester, New York, to a point about 100 miles within the State of Pennsylvania; that the articles provided for an issue, by the consolidated company, of shares to the amount of \$10,000,000, in exchange for the shares of the six consolidating companies, although the aggregate capital of the six companies was only \$6,810,000; that after the alleged consolidation the capital stock of the consolidated company was unlawfully increased to \$20,000,000; that on the first day of February, 1884, the Rochester & Pittsburgh R. R. Co. executed to the Union Trust Co. of New York, as trustee, to secure an issue of bonds not exceeding \$4,000,000, a mortgage of the entire line of railroad of the Rochester & Pittsburgh R. R. Co. in the States of New York and Pennsylvania; that the mortgage was recorded in the several counties through which the line passed; that, for default in payment of interest, a bill of foreclosure was filed by the trustee, October 2, 1884, in the Supreme Court of Monroe County, New York, and John M. Davy, the referee appointed by decree therein, having ascertained that the amount required to discharge the mortgage debt was \$2,056,292.11, sold and conveyed, October 16, 1885, to Adrian Iselin, in consideration of \$1,100,000, the entire line of railroad in the States of New York and Pennsylvania; that from the record of the proceedings for foreclosure it appeared due notice, under section 1631 of the New York Code of Civil Procedure, had been filed in the counties of both States in which the line was located; that after the sale the said Iselin had procured the incorporation of the Pittsburgh & State Line R. R. Co., and the Buffalo, Rochester & Pittsburgh R. R. Co., the former, under the laws of Pennsylvania and for the purpose of operating a line of road identical in description with so much of the line of the Rochester & Pittsburgh R. R. Co. as was within the State of Pennsylvania, and the latter under the laws of New York and for the purpose of taking title to so much of the line as was within the State of New York; that under a deed from said Iselin the Pittsburgh & State Line R. R. Co. had taken possession of and was operating all the line of road within the State of Pennsylvania; and that a consolidation of the Pittsburgh & State Line R. R. Co. and the Buffalo, Rochester & Pittsburgh R. R. Co. was about to be effected.

The bill charged that the foreclosure proceedings were collusive and fraudulently instituted; that the Supreme Court of Monroe County, New York, had no jurisdiction to vest title to the line of railroad in the State of Pennsylvania; that the sale to Iselin was ineffectual to pass title to that part of the line, and that therefore the occupation of the line by the Pittsburgh & State Line R. R. Co. was unlawful.

The bill prayed the appointment of a receiver of the Rochester & Pittsburgh R. R. Co., and an injunction, temporary until hearing and perpetual thereafter, *inter alia* restraining the Pittsburgh & State Line R. R. Co. from interfering with the operation of the line of the

*See Union Trust Co. v. Rochester & P. R. R. Co. (N. Y.), ante 840.

Rochester & Pittsburgh R. R. Co. or consolidating with the Buffalo, Rochester & Pittsburgh R. R. Co.

Upon appointing a receiver and granting a preliminary injunction as prayed, *MAYER, P. J.*, after stating the facts, delivered the following opinion:

"Conceding that the increase of the capital stock of the consolidated company was in excess of the amount authorized by the Consolidating Acts of the States of New York and Pennsylvania, and consequently illegal, it does not follow that the consolidated company has no valid or legal existence, or that the validity of such consolidation can be assailed in this collateral proceeding. Its legality can only be questioned by the State, and then only in a direct proceeding instituted for the purpose. Where a corporation has abused its powers or committed acts which are unlawful, it nevertheless continues to exist as a corporate body, until the State or government which created it shall, by a proper proceeding, procure an adjudication and enforce a forfeiture of the charter. But all such proceedings are at the instance and on behalf of the State or government. *Ormsby v. Vermont Copper Co.* 65 Barb. 360.

"The invalidity of a charter cannot be inquired into collaterally, and least of all by a member who has enjoyed the benefits of its privileges. *Dyer v. Walker*, 40 Pa. St. 157; *Hanover Junc. & S. R. R. Co. v. Haldeman*, 82 Pa. St. 36.

"When a charter has actually been granted to certain persons to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment will be held against one who has dealt with them in their corporate character. *Ang. Corp. § 80.*

"He cannot be permitted to prove, in a collateral proceeding, that a condition precedent to full corporate existence has not been complied with. When there is a *de facto* corporation, and the State does not interfere, its corporate existence and its ability to contract cannot be questioned. *Spahr v. Farmers Bank*, 94 Pa. St. 434; *Comrs. v. Bolles*, 94 U. S. 104 (Bk. 24, L. ed. 46).

"The bill further charges that the bonds issued by the consolidated company, and the mortgage securing the payment of the same, executed and delivered to the Union Trust Company, of New York, and upon which the foreclosure proceedings were had in the Supreme Court of Monroe County, New York, were illegal and void, so far as they affected the property of the corporation in the State of Pennsylvania; that the bonds were issued in disregard of article XVI, section 7 of the Constitution of Pennsylvania, and of the Act of Assembly of April 18, 1874, passed to enforce the provisions of said constitutional article; that the issuing of said bonds and the creation of said mortgage, by reason of the violation of the Constitution and the laws of the State of Pennsylvania, became no lien upon the corporate property in this State; that bonds and mortgages of a corporation are within the term 'indebtedness,' as declared in the Constitution, will hardly be controverted.

"There surely cannot be higher or more

dangerous debts as applied to corporations, and they come within the meaning and intention of the law. The manifest purpose of the constitutional provision and the Act of April 18, 1874, was, that the owners of corporate property should be able to exercise some control and supervision over their property and the agents who manage it; and that stockholders should be afforded an opportunity to pass upon the question of mortgaging their property. Thus, by the adoption of this constitutional provision, the State of Pennsylvania has declared a fundamental policy in regard to the increase of the indebtedness of corporations, and prescribed under what restrictions and regulations such indebtedness shall be created.

"It was not claimed on the argument that the requirements of the Constitution of Pennsylvania and the Act of 1874 had been complied with, in the issuing of the bonds and the creation of the mortgage; but it was insisted that although the Rochester & Pittsburgh Railroad Company had increased its indebtedness and had issued its bonds and executed the mortgage so as to conflict with the Constitution and laws of Pennsylvania, they do not apply to the acts of the corporation when acting in New York; and that the corporation, having authorized there the issuing of the bonds, and being valid by the laws of that State, they are valid in Pennsylvania.

"I do not assent to the correctness of this position. Although by the terms of the Consolidating Acts of the two States the consolidating corporations are deemed and taken to be one corporation, yet it has no legal existence in either State, except by the laws of that State; and the consolidated company, so far as the regulation and control of its corporate property is concerned, must necessarily be subject to the Constitution and laws of such State, unless such control and supervision have been surrendered; so that when the consolidating corporations became one corporation by the co-operating legislation of the two States, it was subject to all the provisions of the Constitution and laws of Pennsylvania, and 'all the restrictions, disabilities and duties of each of such consolidating corporations.' *Vide Consolidation Act of Pennsylvania of 1865.*

"The status of a company acting under charters from two States is that of an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only; the legislation of the other State having no operation beyond its territorial limits." *Racine R. R. Co. v. Farmers' Trust Co.* 49 Ill. 381.

"The new company stands in the same relation to each State as the original company in that State." *Delaware R. R. Tr. Case*, 18 Wall. 206 (85 U. S. bk. 21, L. ed. 888).

"In *Graham v. Boston H. & E. R. Co.* 14 Fed. Rep. 757, in speaking of the consolidation of several railroad companies into one company, under the laws of several States, the court, in its opinion, says: 'In such cases the corporation has a common stock, the same shareholders and officers, the same property and a single organization, and is for most purposes one corporation. But it is a separate corporation in

each State so far that it is governed by the laws of each State within its own territory.' Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; in the latter case the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. Story, Conf. L. §§ 242-280.

"If valid when made it is by the general law of nations, *jure gentium*, held valid everywhere by tacit or implied consent of the parties. *Id.* § 252.

"But there is an exception to the rule as to the universal validity of contracts, which is, that no State will recognize or enforce a contract which would be repugnant to its policy or injurious to the rights, the interests, or the convenience of such State or its citizens. *Id.* § 244.

"This exception results from the consideration that the authority of acts done and contracts made in other States, as well as the laws by which they are regulated, are not *proprio vigore* of any efficacy beyond the territorial limits of that State; and whatever effect is attributed to them elsewhere is from comity, and not of strict right.

"Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.' *Bank of Augusta v. Earle*, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274).

"No State is bound to recognize and enforce contracts injurious to its own interests or those of its subjects, although valid by the law of the place where made."

36 Am. Dec. 571; 31 Am. Dec. 307; 16 Am. Dec. 212; 20 Am. Dec. 286.

"That the recognition and enforcement of the contract made in New York, for the issuing of the bonds and the creation of the mortgage, whereby the rights of stockholders in the corporate property of the company in Pennsylvania would be seriously affected and impaired, is contrary to the policy and interests of this State, is evidenced by the fact that the State has incorporated into its organic law a prohibition against the making of such contracts, unless by complying with the requirements of her constitutional provision and the laws passed to carry it into effect. The corporation, although acting in New York and according to laws of that State and having issued the bonds which are valid there, could not create a debt which would bind the corporate property in Pennsylvania, in violation of its Constitution and laws. It would be in contravention of the policy of this State, as declared in its fundamental law; and such a contract cannot be recognized or enforced here.

"Consequently, the bonds and mortgage are invalid and void, and the rights of the stockholders in the corporate property and franchises of the company in Pennsylvania are unaffected, unless by the foreclosure proceedings had in the Supreme Court of Monroe County, New York, these rights have been extinguished by the decree and sale.

"This brings us to the consideration of the

legal effect of the decree in that court, and the sale made under it. The Supreme Court of Monroe County, New York, has a general jurisdiction, both at law and in equity; and by the Revised Statutes of that State, it is enacted that 'the powers and jurisdiction of the court of chancery are coextensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State.'

"Article 4, section 1626 of the Code of Civil Procedure provides: 'In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action.'

"Section 1631 provides: 'The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this Act, which must specify, in addition to the particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of securing it.'

"Section 1632 provides: 'A conveyance upon a sale made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.'

"That this section only defines the effect of the deed cannot be controverted. It is apparent that the entire proceedings in the court of Monroe County were based upon the statutes of said State, were local in their character, and not intended to have any extraterritorial effect, unless, as is claimed, that portion of the decree which bars the equity of redemption of the mortgagor has that effect. But it will be noticed that it was only 'after filing of notices of the pendency of the action' that the defendant's equity of redemption was barred and foreclosed; and the record shows that this notice was only filed in the counties of the State of New York through which the railroad runs and where the mortgage is recorded, thus indicating that the decree was to have no further force and effect than to bar and foreclose the equity of redemption of the mortgagor in the mortgaged premises in the State of New York. But, aside from this, is the decree of the New York court effective to pass the entire title of the mortgaged premises both in New York and Pennsylvania to the purchaser, and is it conclusive upon the rights of the plaintiffs?

"It is clear that the decree of sale and the deed made in pursuance of it, are ineffective to pass the title of the property in Pennsylvania. In speaking of sales made under a decree of a

court of equity in proceedings to foreclose a mortgage, the author of *Jones on Mortgages* says (Vol. 2, § 1608):

"A sale under a decree of court is in contemplation of law the act of the court. It is made through the instrumentality of some officer designated by statute or appointed by the court. Whatever name be given to this officer, whether master in chancery, referee, trustee, commissioner or sheriff, in making the sale he acts as the agent of the court."

Vide Heyer v. Deaves, 2 Johns. Ch. 154; *May-er v. Wick*, 15 Ohio St. 548.

"Though a person having the legal title to land in one State may be decreed by a court of equity in another State to convey the land, yet 'neither the decree nor any conveyance by virtue of it, by one not having the title, can operate beyond the jurisdiction of the court.' *Watkins v. Holman*, 16 Pet. 25 (41 U. S. bk. 10, L. ed. 878).

"A court of chancery, having jurisdiction over the person who has the legal title to lands in another State, may, by a decree, force him to convey to the holder of the equitable title for whom he stands as trustee; but it cannot, by its decree or through a deed of a commissioner, pass that title." *Watts v. Waddle*, 6 Pet. 889 (31 U. S. bk. 8, L. ed. 487).

"It is claimed that under the provisions of the Constitution of the United States, the decree of the New York court, barring the equity of redemption of the mortgage in the mortgaged premises, is an adjudication of the validity of the bonds and mortgage, conclusive upon the rights of the plaintiffs, and a bar to any proceedings in this State.

"Assuming that the decree was not local in its character and effect, is it conclusive upon these plaintiffs?

"It is established that the decree and judgment of a court of competent jurisdiction of a sister State has the same credit, validity and effect in the courts of another State which it had in the State where it was rendered. But it is as well settled that the inquiry is always open whether the court by which a judgment was rendered had jurisdiction of the person or thing. 'Upon principle,' says *Chief Justice Marshall*, 'it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined.' *Rose v. Himely*, 4 Cranch, 269 (8 U. S. bk. 2, L. ed. 617).

"*Justice Story*, in his Commentaries on the Constitution, after stating the general doctrine established with regard to the conclusive effect of judgments of one State in every other State, says: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it; or the right of the State itself to exercise authority over the person or the subject matter. The Constitution did not mean to confer (upon the States) a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' § 1318.

"Want of jurisdiction may be shown either as to the subject matter or the person, or in proceedings *in rem*, as to the thing." *Thomp-*

son v. Whitman, 18 Wall. 457 (85 U. S. bk. 21, L. ed. 897).

"These authorities fully sustain the position that want of jurisdiction of a court over the subject matter may be shown at any time; and a judgment rendered in the absence of jurisdiction is inoperative and void. The following propositions have been established by repeated decisions: where the subject matter of the suit is strictly local, the jurisdiction of the court depends upon such locality, and can only be exercised in the State where the subject matter is located. In other words, where the subject matter is local, and the suit is brought for the purpose of directly affecting or acting upon the subject matter, and the decree when rendered and the relief when granted would operate directly upon such subject matter and not merely upon the person of the defendant, then the situation of the subject matter determines the proper place for the exercise of the jurisdiction; the jurisdiction can only be exercised in the State where such subject matter is located. 1 Pom. Eq. Jur. § 298 (67 U. S. bk. 17, L. ed. 311); *Miss. & Mo. R. R. v. Ward*, 2 Black, 485; *Massie v. Watts*, 6 Cranch, 148 (10 U. S. bk. 3, L. ed. 181).

"On the other hand, although the subject matter may be local, as for example a tract of land, still, if the object of the suit is to directly deal with and affect the person of the defendant party, and not the subject matter itself, and the decree when rendered and the relief when granted would in fact directly affect and operate upon the person of the defendant only, and would not directly operate upon the subject matter, then the suit may be maintained in any State where the court obtains jurisdiction of the person of the defendant, although the subject matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another State. 1 Pom. Eq. Jur. p. 332.

"Under these rules, it cannot be successfully contended that the decree of the New York court, barring the equity of redemption, can have the effect of transferring any title; nor does it determine the validity of the mortgage as to the property of the corporation in this State. To hold a contrary doctrine would be conferring jurisdiction upon the courts of one State to determine in what mode real estate may be disposed of in another State.

"No principle is better established than that the disposition of real estate, whether by deed, descent or by another mode, must be governed by the laws of the State where the land is situated." *Watkins v. Holman*, 16 Pet. 25 (41 U. S. bk. 10, L. ed. 878).

"Thus *Judge Story* declares that 'not only lands but servitudes and easements and other charges on lands, as mortgages and rents and trust estates, are deemed to be, in the sense of the law, immovables, and governed by the *lex rei sitæ*. The only process by which title can be made to such liens, or the only way by which such liens can be enforced, is that of the *situs*.' Whart. Conf. of Laws, § 291. 'So, the validity of a mortgage, as a lien on land, is to be determined by the law of the place where the land is situate, although both the parties reside

in another State.' *Goddard v. Sawyer*, 9 Allen, (Mass.) 78.

"In that case both parties resided in the State of New Hampshire; the mortgage was executed there and would have been valid in that State.

"It is true however that the law is modified when the mortgage of land is merely collateral and subsidiary to a personal contract of loan. In such case, while the mortgage or pledge cannot be enforced, or the land touched, except in the court having local jurisdiction, it is otherwise with regard to the contract, which is governed by the law of the place in which such contract has its proper seat. Whart. Conf. Laws, § 292.

But in such case proceedings must be instituted upon the principal indebtedness or personal contract and not upon the collateral.

"It remains to consider the question raised as to the right of these plaintiffs to maintain this bill.

(After citing authorities that one shareholder can maintain such a bill, 18 How. 290 (59 U. S. bk. 15, L. ed. 385); 55 N. H. 531; 24 Pa. 378; 62 Pa. 218), His Honor proceeded as follows):

"It is alleged in the affidavits presented by the defendants, and not denied in the counter affidavits, that W. H. Olmstead, one of the plaintiffs, accepted one of the bonds and disposed of it, thereby ratifying the act of the corporation in the issuing of the bonds.

"While this might preclude him from questioning the validity of the bonds and mortgage, it would not bar his right as a stockholder to assert a want of title in the purchase of the corporate property under the foreclosure proceedings in the State of New York, and maintain a bill for the protection of his interest as a stockholder in the corporate property in Pennsylvania. What has been said in regard to the validity of the charter of the Rochester & Pittsburgh Railroad Company will apply as well to the charter of the Pittsburgh & State Line Railroad Company. The plaintiffs cannot assail its legality in this proceeding. My conclusions upon the whole case are:

"First. That this bill can be maintained by the present plaintiffs, who are stockholders of the Rochester & Pittsburgh Railroad Company.

"Second. That the issuing of the bonds and the creation of the mortgage were in contravention of the policy of this State, as declared in its Constitution and the laws passed to enforce it, and are therefore illegal and void; and the lien of the mortgage did not bind the property of the Corporation in Pennsylvania.

"Third. That the proceedings had in the Supreme Court of Monroe County, New York, for the foreclosure of the mortgage, were local in their character and can have no extraterritorial effect.

"Fourth. That the decree of sale and the deed made in pursuance of it are ineffective to pass the title of the corporate property in Pennsylvania to Adrian Iselin, the purchaser, or his vendee, the Pittsburgh & State Line Railroad Company.

"Fifth. That the decree foreclosing the equity of redemption of the mortgagor had only the effect of foreclosing its equity of redemption in the mortgaged premises in the State of New York.

"Sixth. That such decree is not conclusive

upon the rights of the plaintiffs, as the courts of the State of New York had no jurisdiction to pass upon the validity of the mortgage as to the property of the Corporation in Pennsylvania.

"Seventh. That, although the issuing of the bonds by the Corporation while acting in the State of New York was a valid corporate act in that State, and could be enforced there, yet such contract, being repugnant to the policy of this State in regard to the increase of "indebtedness" of corporations, cannot be recognized or enforced by the courts of this State; and that the adjudication by the courts of New York State upon the validity of the bonds would not be binding and conclusive upon the courts of this State.

"These conclusions are not in conflict with the principles decided in the cases of *Muller v. Dows*, 94 U. S. 444 (Bk. 24, L. ed. 207), or *McElrath v. Pittsburgh & S. R. Co.* 55 Pa. St. 189.

"In neither of these cases was the question raised as to the validity of the mortgage, or the power of the corporation to create it. The corporation having the power to create the mortgage, the title of the property would pass, subject to the equity of redemption of the mortgagor, which could be barred and foreclosed by proper proceedings. But where the power to create a mortgage is wanting, the title would not pass, and there would be no equity of redemption which could be barred or foreclosed."

March 22, 1886, the court entered the following decree:

"First. That pending the final hearing in the cause, Tatlow Jackson be appointed receiver of all the property of the Rochester & Pittsburgh Railroad Company in the State of Pennsylvania, including particularly a line of railway beginning at a point on the boundary line between the States of Pennsylvania and New York, and extending thence through the Counties of McKean, Elk, Clearfield and Jefferson for a distance of about 100 miles to a point in the neighborhood of Punxsatawny in said Jefferson County; and also of the stations, depots, yards and other property appurtenant to and used in connection with said line of railway.

"Second. That said receiver shall proceed to operate or make such arrangements for the operation of said line of railway as may be determined to be for the interest of the Rochester & Pittsburgh Railroad Company, and maintain it as a highway for the transportation of passengers and freight.

"Third. That the defendant, the Pittsburgh & State Line Railroad Company, its officers, agents and employees be enjoined first, until final hearing of the cause, from taking the earnings, income and tolls of the line of railroad hereinbefore mentioned, formerly operated by the Rochester & Pittsburgh Railroad Company, or from in any manner interfering with Tatlow Jackson, the receiver hereinbefore mentioned, in taking possession, operating, and taking the earnings, income and tolls of the said line of railway.

"Fourth. That Adrian Iselin and all other persons or corporations claiming under him are enjoined, until final hearing of the cause, from making any claim of right to the possession of or title in said line of railway by virtue of the

proceedings taken by the Union Trust Company of New York, for Monroe County, and the sale directed in said proceedings made at Rochester by John H. Davy, referee, on the 16th day of October, 1885.

"Fifth. That the Pittsburgh & State Line Railroad Company be enjoined until the final hearing of the cause, from entering into or ratifying and confirming any agreement with the Buffalo, Rochester & Pittsburgh Railroad Company, for the consolidation and merger of the property, rights and franchises of said companies.

"Sixth. That all orders heretofore made in the cause be confirmed except so far as modified by the decree now entered."

The appellant took this appeal, assigning for error the action of the court in entering the above decree.

Messrs. Wheeler H. Peckham, Thomas F. Wentworth, E. Greenough Platt, John G. Hall and John G. Johnson, for the appellant:

The New York Supreme Court of Monroe County had jurisdiction of the proceedings for the foreclosure and sale of the mortgaged premises, both in Pennsylvania and New York. The jurisdiction of equity is *in personam*.

Penn. v. Lord Baltimore, 1 Ves. 444; 2 L. Cas. in Eq. 4th Am. ed. 1806.

The rule applies to foreclosure proceedings.

Toller v. Carteret, 2 Vern. 495; *Carrington v. Brents*, 1 McLean, 167; *Caldwell v. Carrington*, 9 Pet. 86 (34 U. S. bk. 9, L. ed. 60); *Massie v. Watts*, 6 Cranch, 148 (10 U. S. bk. 3, L. ed. 181); *Vaughan v. Barclay*, 6 Whart. 392; *McElrath v. Pittsburgh & Steubenville R. R. Co.* 55 Pa. 189; *Muller v. Dows*, 94 U. S. 444 (Bk. 24, L. ed. 207).

The affidavits and the record of the proceedings in New York, show that the Rochester & Pittsburgh R. R. Co. was duly served, appeared, filed an answer and must be presumed to have set up every possible defense.

Pray v. Hegeman, 98 N. Y. 353; *Revere Copper Co. v. Dimock*, 90 N. Y. 427; *Graham v. Boston, H. & E. R. Co.* 14 Fed. Rep. 753; *Oist v. Zeigler*, 16 Serg. & R. 232; *White v. Reynolds*, 3 P. & W. 97; *Duchess of Kingston's Case*, 2 Sm. L. Cas. 7th Am. ed. 761, 762; *Kilheffer v. Herr*, 17 Serg. & R. 319; *Ballance v. Forsyth*, 24 How. 183 (65 U. S. bk. 16, L. ed. 738).

The violation of article XVI, section 7, of the Constitution of Pennsylvania in the issue of the bonds, must therefore be presumed to have been set up as a plea in bar, and adjudicated.

Equity will not interfere in a dispute as to a mere legal right.

Schlecht's App. 60 Pa. St. 172; *Carrow v. Ferrier*, 18 L. T. N. S. 806; *Talbot v. Scott*, 4 Kay & J. 96.

The present *lis pendens* is notice to all parties, and is a sufficient reason for the noninterference of a court of equity by preliminary injunction.

Osborn v. Taylor, 5 Paige, 515.

The issue of bonds was lawful under the Constitution and laws of Pennsylvania, and is not governed or controlled by article XVI, section 7, of the Constitution.

It does not take away the power to borrow. The transaction was not necessarily an increase of indebtedness. The purchasers of the bonds

were entitled to presume that the money was borrowed to liquidate a prior debt.

The act was capable of ratification, and has been ratified by the acquiescence of the stockholders, and the use of the money.

Monument Nat. Bank v. Globe Works, 101 Mass. 58; *Mundorff v. Wickesrham*, 63 Pa. St. 88; *McLain v. Snyder Township*, 12 Pa. St. 204; *Moss v. Rossie Lead Mining Co.* 5 Hill, 187; *Hildebrand v. Crawford*, 6 Lans. 502; *Fisher v. La Rue*, 15 Barb. 323; *Allegheny City v. McClurkan*, 14 Pa. St. 83; *Houghton v. Dodge*, 5 Bos. 326; *Episcopal Charity Society v. Episcopal Church of Dedham*, 1 Pick. 373; *Grove v. Hodges*, 55 Pa. St. 575; *Sinith v. Hull Glass Co.* 73 E. C. L. R. 925; *Reuter v. Electric Telegraph Co.* 6 E. & B. 841; *Kelsey v. Crawford Bank*, 69 Pa. St. 426; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Eq. Cas. 287; *Phosphate Co. v. Green*, L. R. 7 C. P. 63; *Turquand v. Marshall*, L. R. 4 Ch. App. 376; *Re Cork, etc.* Co. Id. 748.

The corporate seal affixed to the bonds was a ratification.

Saint Bartholomew's Church v. Wood, 2 W. N. C. 257; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *New York Cent. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Madison R. R. Co. v. Norwich S. S. Co.* 24 Ind. 457; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 541 (62 U. S. bk. 16, L. ed. 208); *Re County Life Ins. Co.* L. R. 5 Ch. 287; *Prince of Wales Assn. v. Harding*, E. B. & E. 220; *Webb v. Commissioners*, L. R. 5 Q. B. 642; *Re Land Credit Co.* L. R. 4 Ch. 468; *Agar v. Athenæum Life Assn.* 3 C. B. N. S. 725; *Royal British Bank v. Turquand*, 6 E. & B. 337; *Berks, etc. Turnpike Road v. Myers*, 6 Serg. & R. 12.

The loan was contracted by the consolidated company in New York, where the transaction was perfectly valid.

Graham v. Boston, H. & E. R. Co. 14 Fed. Rep. 753; *Horne v. Boston & H. R. Co.* 18 Fed. Rep. 50; *Rorer, Railroads*, 38, 588-9, 596.

The bonds, if issued in violation of the Constitution of Pennsylvania, are voidable only and not void.

Payson v. Stoener, 2 Dillon, 427; *Pullman v. Upton*, 96 U. S. 328 (Bk. 24, L. ed. 878); *Zabriskie v. Cincinnati R. R. Co.* 23 How. 881 (64 U. S. bk. 16, L. ed. 488).

The issue can therefore be ratified by the stockholders.

Negley v. Lindsay, 67 Pa. St. 217.

The mortgage is good for the pre-existing indebtedness of \$600,000; and the appellant is a mortgagee in possession and cannot be disturbed.

Ahl v. Rhoades, 84 Pa. St. 319; *Youngman v. Elmira & W. R. R. Co.* 65 Pa. St. 278.

The appellant is not interested in the proposed consolidation; and, therefore, the injunction against consolidation cannot be sustained.

Kinnier v. Kinnier, 45 N. Y. 535; *Ruger v. Heckel*, 85 N. Y. 483; *Nelson v. Eaton*, 26 N. Y. 413.

Messrs. R. C. Dale, T. C. Hipple and Samuel Dickson, for the appellees, were not called upon.

Per Curiam:

This decree is affirmed, the preliminary injunction continued and the appeal dismissed, at the costs of the appellant.

NEW YORK.
COURT OF APPEALS.

Re William T. BYRNES, *Appt.*,
In

PROTESTANT EPISCOPAL SOCIETY
for Promoting Religion and Learning in
the State of New York, *Respt.*,
v.

Alexander H. STEVENS *et al.*, *Respts.*

Application of a purchaser of real estate in **Long Island City** on the foreclosure of a mortgage, to be allowed on his purchase money the amount of taxes on the property for the years 1877 to 1885 remaining, unpaid—opposed on the ground that said taxes were **illegally assessed**, and therefore not valid liens—refused, with liberty to the purchaser to be relieved from his purchase.

(Decided June 25, 1886.)

APPEAL by the purchaser at a foreclosure sale, from an order of the Supreme Court at General Term in the Second Department, affirming an order of the Special Term denying a motion to compel the allowance of taxes and assessments out of the purchase price. *Affirmed, with leave, etc.*

This was a motion by William T. Byrnes, the purchaser at a sale under a judgment in a foreclosure proceeding, for an order directing a referee, appointed to make such sale, to allow Byrnes, out of the purchase money, the amount of certain alleged taxes and assessments remaining due and unpaid on the premises. On the hearing of the motion, the court appointed George B. Newell, Esq., referee to take proofs of all taxes and assessments which were valid liens and incumbrances on the premises at the time of the sale. The referee found that the alleged taxes and assessments were not valid liens or incumbrances. His report was confirmed by the special term May 5, 1886, and an order entered that the motion of William T. Byrnes be denied. On appeal to the general term this order was affirmed and Byrnes appealed to this court. The facts appear from the following

Opinion of the Referee:

The property in question is situated in the fourth ward of Long Island City, and upon it a mortgage was made to the plaintiffs December 5, 1877.

The plaintiff has brought this action to foreclose the mortgage, has obtained judgment, and under that judgment sale was had January 9, 1886. On that sale William T. Byrnes became the purchaser, for the sum of \$18,800; and signed certain terms of sale which provided in substance that out of the proceeds of the sale the referee should allow all taxes and assessments which were valid liens and incumbrances upon the property at the time of sale.

Certain taxes appearing of record against the property, the purchaser made a motion to compel the referee to allow them out of the proceeds. The defendant Alexa C. Bowden and the plaintiffs opposed the motion, upon the

ground that the taxes were not valid liens or incumbrances for various reasons; and it was referred to me to take testimony in respect to such taxes and to report my opinion thereon.

The facts as they appear from the evidence before me are as follows:

It appears from the assessment rolls of Long Island City, that city, ward, state and county taxes for the years 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884 and 1885 were levied upon the property in question and are still unpaid.

The defendant, Alexa C. Bowden, and the plaintiffs claim that none of those taxes were valid liens and incumbrances upon the property, for the following several reasons, which I find from the testimony to be the facts:

1. That the assessment rolls of said city for the years 1877, 1878 and 1879 were not verified by the assessors in the manner provided by law.

2. That the assessors of the city intentionally omitted from assessment in the years 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884 and 1885, a large amount of real property, amounting to about 270 acres or over, and such property was not taxed in said years.

3. That such property was fraudulently omitted from assessment and taxation by said assessors.

4. That the assessors of said city for the years 1882 and 1883 agreed and resolved to assess no personal property in said city, nor any residents of said city for personal property owned by them.

5. That two of the assessors of said city for the year 1881 fraudulently prevented the third assessor from taking any part in the assessment of the property in the first and second wards of said city in said year, and fraudulently prevented him from voting upon the amounts of such assessments.

Upon the part of the purchaser it is urged that all defects, if any, in the levying and assessment of the said taxes have been cured and the taxes in all things confirmed by section 18 of chapter 883 of the Laws of 1882.

It will be convenient to first dispose of the question thus raised by the purchaser. In my opinion chapter 883 of the Laws of 1882 does not affect or confirm the taxes in question.

It is needless to discuss how far the Act intended to or could validate the taxes in question in respect to the alleged defects. It is enough that the property comes directly within the exception provided by the Act itself. It was mortgaged in 1877, several years before the passage of the Act; and the Act expressly provides that taxes upon property so mortgaged shall not be affected, validated, levied or confirmed by the Act. Chapter 883, Laws 1882, § 20.

It may be true that the section of the Act (§ 20) was not intended to be so sweeping. I am not at liberty to determine the intention, except from the words; and there is no ambiguity in the words. I am obliged to find the fact in the very words of the exception itself; and it would be a strange process of reasoning which should determine those words to mean one thing in the Act and another thing in the finding.

Moreover, it seems to me plain that this is the very case intended. If these taxes were invalid, the mortgagee would not dare pay them; nor could he, under the covenant contained in

the mortgage, foreclose because of their non-payment. To validate all these taxes would be a gross injustice to the mortgagee, even if it did not impair the obligations of the covenant, and it is not strange that the Legislature refused to do it. The case to which my attention has been called, the case of *Francklyn v. Long Island City*, 32 Hun. 451, is not in point. That case was an action to set aside taxes as a cloud upon title. The Act of 1882 (§ 18) expressly forbids this; and it may be true that the exception does not relate to that prohibition. See *Id.* § 20.

Moreover, the plaintiff in that case failed to bring herself within the terms of this exception. She had filed no affidavit, as provided in the section referred to.

Thus the question of the validity of these taxes must be considered upon the claims made and proved by the defendant Alexa C. Bowden and the plaintiff.

It is my opinion that the taxes for 1877, 1878 and 1879 are void upon their face, for the reason that the assessors did not verify the rolls, as required by law. Laws 1851, chap. 176, § 8; Charter of Long Island City, chap. 461; Laws 1871, title VI, § 6; *Hinckley v. Cooper*, 22 Hun, 253; *Westfall v. Preston*, 49 N. Y. 349.

There is no jurisdiction to issue a warrant where the assessment roll is not verified in the manner and at the time prescribed by law. *Westfall v. Preston*, *supra*.

From the year 1877 to the year 1885, both inclusive, the assessors omitted from the assessment rolls a considerable amount of real property, 270 acres or more. This property is not exempt by the general statute or by the charter of the city which adopts the statute. R. S. chap. XIII, part I, title I; Laws 1871, chap. 461, title VI, § 33.

It has never and does not now belong to Long Island City. Charter, § 33.

It is urged that this property is designated upon the city map and upon the assessment maps as streets and parks, and is therefore not taxable. But it is not owned by the city and it will not be owned by it until, on petition of its present owners, proceedings shall be taken for the opening and laying out of the designated streets and parks, and the awards made for this property shall be paid; and those awards will be the true value of the property as though it were not so designated. There is no provision in the statute or in the charter which exempts such property. There is no reason why it should be exempted. It is in the possession, occupation and enjoyment of private persons; and if it be taken for a street they will receive its full value. Any other piece of property not so designated is subject to be taken for a like purpose by Act of the Legislature; and there is no reason why the property designated should escape the burden of taxation for that reason.

But the officials of the city have not consistently maintained such a position; for certain of the designated property, notably the piece called "Ravenswood Park," was taxed during all the years; and some other of it, "Astoria Park," "Washington Hall," etc., was taxed in some years and omitted in others. In fact, the assessors of the city acted upon arbitrary and personal preference, without warrant

of law; and in my opinion, the facts prove a case of undoubted fraud.

It has been declared to be settled law in this State that the omission of taxable property vitiates a tax. *Hassan v. Rochester*, 67 N. Y. 528, and op. of Miller, J., at pp. 536, 537; *Re Protestant Episcopal School*, 75 N. Y. 324.

An omission of property from fraud would certainly vitiate a tax; for the property assessed is assessed with knowledge that it will have to bear more than its just share of the public burden and with a fraudulent design that it should be so; hence, the very assessments in question were fraudulently made. There can be no doubt that such assessment or any tax levied thereon is invalid.

It cannot be said that the omission was a trifling one. It could not, in any event be presumed that it was without evidence to establish the fact; and it seems to me plain that the omission from assessment of 270 acres of property in a small city is not a trifling but a substantial omission. My opinion, then, is that all the taxes from 1877 to 1885, both inclusive, are invalid on this account.

The other specific objection made in respect to the taxes for 1882 and 1883 is founded upon a wrong of so gross a character that I deem it proper to direct attention to it. The boards of assessors for these years deliberately agreed to assess no one for personal property, to make no assessment on personal property whatever. This was a deliberate agreement to make no effort to comply with the provisions of the general statute and of the charter, which expressly declares it to be their duty "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in the respective wards of said city; and also the taxable property, real or personal, within the same." Chapter 461, Laws 1871, title VI, § 4.

Yet after making the roll they made the statutory affidavit, in which they declare that the roll contains a true statement of the aggregate amount of taxable estate of each and every person named in such roll, etc., according to their best judgment and belief; and this in the face of their agreement that, whatever their judgment or belief, they would not put in the roll any statement of personal property whatever. This affidavit was deliberately false and fraudulent; and any such attempt to make a bad tax good must be wholly ineffectual.

This gross misconstruction of the law and willful violation of it affects every inhabitant taxable for personal estate within the city, and shifts the entire burden of taxation upon one kind of property. In my opinion it vitiates the whole levy of taxes for those years.

It has been and should be the policy of the courts to uphold the validity of taxes as the necessary means of existence of all government—even that of the courts themselves. But I apprehend that this policy is not and is not intended to be extended to cases where the defects alleged are more than irregularities of form or in procedure; and that where a case of fraud or of actual injustice is made out, the courts should and would have as little hesitation in providing the appropriate remedy as they would have in any other case of a like wrong, but connected with a different subject.

I therefore feel constrained to say that it is

my opinion that none of the taxes imposed upon the said premises from the year 1877 to the year 1885, both inclusive, were valid liens or incumbrances upon the said premises on the 9th day of January, 1886. Since I have arrived at this conclusion upon the grounds stated, the other claims urged by the plaintiff and the defendant Bowden need not be considered.

Mr. Percival J. Parris, for appellant:

The failure to make affidavit to the rolls, which is the defect alleged in respect to the taxes for 1877, 1878 and 1879, was a mere irregularity, a matter of form, which the Legislature had prescribed in the first instance and which it had the power to dispense with at any time. This the Legislature did.

Chapter 883 of the Laws of 1882 cures all the alleged defects in the city and ward taxes for the years 1877 to 1882, both inclusive.

"Where there was municipal jurisdiction of the subject matter and the defects in the exercise of it are irregularities in the mode of procedure, it is within the legislative discretion to adopt and confirm the result of the informal act."

Tift v. Buffalo, 82 N. Y. 211.

The taxes for 1877, 1878 and 1879 were not invalid on account of the omission to verify the rolls. The failure to verify the rolls is a mere irregularity which will not invalidate the tax.

The case of *Van Rensselaer v. Witbeck*, 7 N. Y. 517, was substantially overruled by the case of *Parish v. Golden*, 85 N. Y. 462.

The omission of real property did not invalidate the taxes. All the cases which the respondents cite to sustain this position are cases of assessments for public improvements. Assessors of taxes have much larger powers than those assessing for improvements. The officers themselves may be liable for misconduct, but their conduct cannot prevent the recovery of the taxes.

Dunham v. Chicago, 55 Ill. 357.

Messrs. Varnum & Harrison, for plaintiff, respondent:

I. The taxes for 1877, 1878 and 1879 were void upon the record, as no affidavit was written upon the rolls or made by the assessors, as required by law. This is an indispensable requirement.

Laws 1851, chap. 176, § 8; *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

The common council had no jurisdiction to confirm the tax or to issue a warrant; and the collector would be a trespasser if he should attempt to make a levy.

See cases cited *supra*.

II. The taxes for 1882 and 1883 were void because of the agreement made by the assessors that they would assess no personal property.

Laws 1871, chap. 461, title VI, § 4.

III. The taxes for the years above stated, and those for the years 1880, 1881, 1884 and 1885 were invalid, because the assessors did not assess 270 acres or more of taxable real estate. The omitted property was not exempt because it was designated on the city map as streets and parks. There is no such provision of law.

Laws, 1871, chap. 461, title IV, § 83; R. S. chap. XIII, part I, title I.

It is the rule in this State that the omission of part of the property liable to taxation makes the tax invalid.

Hassan v. Rochester, 67 N. Y. 528, and see cases cited.

In the absence of proof to the contrary it must be assumed that the omission is of a substantial character.

Id. 587.

Mr. Cecil Campbell Higgins, for Alexa C. Bowden, respondent:

I. Chapter 883, Laws of 1882, does not confirm or validate the city and ward taxes for 1877 to 1882, both inclusive. It does not affect them at all. Section 18 of the said Act confirms taxes theretofore laid and levied for city and ward purposes in said city, "except as herein otherwise provided." Section 20 provides: "Nor shall anything in this Act be construed to affect, validate, levy or confirm any assessment upon any lot or parcel of land which has been mortgaged."

II. The taxes for 1877, 1878 and 1879 are invalid, because the assessors did not make or attach to the assessment rolls the affidavit required by law. If the assessors fail to do this the assessment is wholly void. It gives no jurisdiction to any officer to levy a tax or issue a warrant for its collection.

Hinckley v. Cooper, 22 Hun. 858; *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

III. The taxes for all the years 1877 to 1885, both inclusive, are made invalid by the omission of taxable real property.

Hassan v. Rochester, 67 N. Y. 528; *Re Protestant Episcopal School*, 75 N. Y. 824; *Casey v. Mayor*, 5 Hun. 463; *Hersey v. Supervisors of Milwaukee Co.* 16 Wis. 185; *Weeks v. Milwaukee*, 10 Wis. 242.

It is of no importance that the property omitted was designated on the city map and on the assessment maps as streets and parks. This property was taxable and the assessors were bound to assess it. They have no discretion to omit taxable property.

Hassan v. Rochester, 67 N. Y. op. of Miller, J., 586.

IV. The act of the assessors in omitting to tax personal property was a willful violation or a gross misconstruction of the law. It affects every taxable inhabitant of Long Island City. It seems hardly necessary to discuss whether this will vitiate a tax.

Hassan v. Rochester, *supra*; *State v. Collector*, 4 Zab. 121.

Per Curiam:

Order affirmed without costs, but with liberty to the purchaser to be relieved from his purchase, if he so elect.

Cornelia M. STEWART, *Appl.*,

v.

LONG ISLAND R. R. CO., *Respnt.*

1. Where a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is

at once created between his assignee and the **original lessor**, and the latter has a right of action directly against the **assignee on the covenant to pay rent**, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original lessor has no right of action against the sublessee, there being neither privity of contract nor of estate between them.

2. **As between the transferee of a lease and the original landlord**, the rule is settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease; and the essence of the instrument as an assignment, so far as the original landlord is concerned, will not be destroyed by its reserving a new rent to the assignor with a power of re-entry for nonpayment, nor by its assuming the character of a sublease; and the assignee, so long as he continues to hold the estate, is **liable directly to the original landlord on all covenants in the original lease which run with the land**, including the covenant to pay rent.
3. **But as between the original lessee and his lessee or transferee**, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights, will arise between them.
4. **Hence, where an assignee of a lease of a railroad for fifty years**, together with the right of purchase of the fee at the end of the term, leased the road to defendant for **ninety-nine years**, reserving a different rent from that in the original lease, with a provision for re-entry but without an assignment of the right of purchase, and the defendant covenanted to surrender the premises at the end of the ninety-nine years, to its immediate lessor, the instrument to defendant **operated**, as between the defendant and the original landlord, as an **assignment of the term of fifty years**, and during such term there was a **privity of estate** between defendant and the original landlord, and the legal estate in reversion was in the **original landlord** during the fifty years; and he or those succeeding to his estate were both legally and equitably **entitled to the rents** and had a right of action therefor directly against defendant.
5. **An estate to arise in futuro cannot be tacked on to the estate of a lessee who has assigned his whole term**, so as to create a reversion in him and **establish the relation of landlord and tenant between such lessee and the person to whom he has assigned his term**, so far as strictly reversionary rights are

concerned, or prevent that relation from existing between such person and the **original landlord**.

(*Finch, J., dissenting.*)

(Decided June 15, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings County Special Term, dismissing, upon the merits, a complaint in an action to recover rent. *Reversed.*

The action was brought by plaintiff, claiming as devisee of her late husband, Alexander T. Stewart, against the defendant as assignee of a certain lease made by said Alexander T. Stewart. In January, 1873, Alexander T. Stewart leased, to the Central Railroad Company of Long Island, a railroad built by him, running from his Hempstead Plains property to Farmingdale, for the term of fifty years, at a fixed yearly rental, payable quarterly.

In June, 1874, the Central Railroad Company consolidated with the Flushing, North Shore & Central Railroad Company, and to it the Stewart contract or lease was assigned.

In May, 1876, the latter railroad company made the contract with the defendant under which the defendant took possession of the Stewart railroad, the legal effect of which contract is here in question. The defendant claims that this contract created it an under tenant of the Flushing, North Shore & Central Railroad Company, while the plaintiff claims that defendant holds as assignee of the lease. The terms of lease and contract in question are set forth in the dissenting opinion by Finch, J., at page 122, *post*.

Mr. Samuel Hand, with *Messrs. Work & McNamee*, for appellant:

I. The relation between Stewart and the Central Railroad Company was that of landlord and tenant. The fact that there was no rent, strictly speaking, but only an agreement to pay interest on purchase money is not important.

Folden v. State, 18 Neb. 828; 1 Washb. Real Prop. 292.

II. The instrument between the Flushing, N. S. & C. R. R. Co. to the defendant is in effect an assignment of the Stewart lease. The general rule is that the transfer of an entire term is an assignment and not a sublease.

Chihls v. Clark, 3 Barb. Ch. 59; *Van Rensselaer's Exrs. v. Gallup*, 5 Denio, 460; *Bagley v. Freeman*, 1 Hilt. 196; *Bedford v. Terhune*, 30 N. Y. 457; *Davis v. Morris*, 36 N. Y. 569; *Woodhull v. Rosenthal*, 61 N. Y. 991; *Toule v. Remsen*, 70 N. Y. 819.

There is nothing in any of the cases in this State which prevents the application of the rule stated, to the instrument between the Flushing, North Shore & Central Railroad Company, and the defendant. In all of the following cases there was a reversion in the original lessee.

Piggot v. Mason, 1 Paige, 412; *People v. Robertson*, 39 Barb. 9; *Post v. Kearney*, 2 N. Y. 394; *Collins v. Hasbrouck*, 56 N. Y. 157; *Gapson v. Tift*, 71 N. Y. 48; *Woodhull v. Rosenthal*, 61 N. Y. 991. See also *Detroit Savings Bank v. Bellamy*, 49 Mich. 817; *Wood, Land. & T.* 82; 2 Prest. Con. 134; *Archibald, Land. & T.* 10; *Doc v. Buteman*, 2 Barn. & Ald. 168.

This case differs from any heretofore before the courts of this State, in that the lessee has granted for a term longer than his own; and in such a case existence of reversion in him is an impossibility.

Ecker v. Chicago, etc. R. R. Co. 8 Mo. App. 223; *Boyce v. Bakerell*, 37 Mo. 492.

In England it is settled that a reversion is essential to a lease; and when a grantor has transferred all his term and estate in the demised premises, the instrument of transfer will operate as an assignment of the lease and not as an under lease, notwithstanding the reservation of a rent to the grantor or a writ of re-entry on nonpayment or on the nonperformance by the grantee of covenants contained in it and although words of demise be used instead of words of assignment.

Porter's Lessee v. French, 9 Irish Law Rep. 539; *Hicks v. Downing*, 1 Ld. Raym. 99; *Palmer v. Edwards*, 1 Doug. 187, n.; *Smith v. Mapleback*, 1 Term R. 441; *Parmenter v. Webber*, 8 Taunt. 593; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Rankin v. Newsum*, 1 Hud. & Br. 70; *Pluck v. Digges*, 2 Hud. & Br. 1; *S. C. 2 Dow & Clark*, 180; *Fawcett's Lessee v. Hall*, Alcock & Nap. 248; *Thorn v. Woodcombe*, 3 Barn. & Ad. 586; *Wollaston v. Hakevill*, 3 Scott, N. R. 593, 616; *Fitzgerald v. O'Connell*, 1 Jones & La T. 134, 156; *S. C. 6 Irish Eq. Rep.* 455; *Beaumont v. Salisbury*, 19 Beav. 198; *Langford v. Selmes*, 3 Kay & J. 220; *Beardman v. Wilson*, L. R. 4 C. P. 57.

The doctrine of the English common law exists in the other American States as well as our own.

Smiley v. Van Winkle, 6 Cal. 605; *Adams v. Beach*, 1 Phila. 99; *Indianapolis Mfg. & Carpenters Union v. Cleveland, etc. R. R. Co.* 45 Ind. 281; *Lee v. Payne*, 4 Mich. 106; *Lloyd v. Cozens*, 2 Ashm. 138.

The elementary writers, both English and American, lay down the same principles.

4 Kent, Com. 96, note 1, 12th ed.; 5 Bacon, Abr. Lease I, 3; Woodfall, Land. & T. 235, 241; Wms. Real Prop. 405; 1 Pratt, Leases, 19, 101, 102; 1 Washb. Real Prop. 5, 10-16; Digby, Hist. Laws Real Prop. 238; Wood, Land. & T. § 93, note 2.

Whatever may be the terms used in the instrument, provided they are sufficient to convey the entire estate or term of the grantor, the instrument operates to create the transferee the assignee of the original lessor, without regard to the intention of the parties that the instrument should create the relation of landlord and tenant between the assignor and the assignee.

Porter's Lessee v. French, 9 Irish Law Rep. 514; *Smiley v. Van Winkle*, 6 Cal. 605.

The agreement for the purchase of the demised premises contained in the Stewart lease does not alter the legal effect of the instrument as an assignment between the original lessor and the Long Island Railroad Company.

Langford v. Selmes, 3 Kay & J. 220.

III. The general rule is subject to the modification that the same instrument may be an assignment between the original lessor and the transferee, and a sublease between the parties to it.

1 Washb. Real Prop. 515; Taylor, Land. & T. 7th ed. 709; Wood, Land. & T. Banks' ed. § 347; *Adams v. Beach*, 1 Phila. 99; *Linden v. Y.*

Hepburn, 5 How. Pr. 188; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Preece v. Corrie*, 5 Bing. 27; 2 Platt, Leases, 351; *Porter's Lessee v. French*, *supra*.

IV. The covenant to surrender at the end of the term cannot itself create a reversion. The right of re-entry at the expiration of the term attends the reversion. If there is no reversion there is no right of re-entry. The covenant adds nothing to the legal duty imposed on every tenant; it is an incident of the reversion which exists wholly apart from it.

Blumenberg v. Myres, 32 Cal. 95; *Schilling v. Holmes*, 23 Cal. 230.

Mr. E. B. Hinsdale, for respondent:

I. The lease to this defendant did not transfer all the interest to the lessor in the Stewart contract; therefore it could not operate as an assignment of that contract. It is essential to the assignment of a lease by operation of law that the whole interest of the original lessee should be transferred. If there be any residuum of interest, then the second lessee becomes an under tenant of the first lessee; and no privity of estate exists between the under tenant and the original landlord.

Davis v. Morris, 36 N. Y. 569; *Van Rensselaer's Exrs. v. Gallup*, 5 Denio, 454; *Piggot v. Mason*, 1 Paige, 412; *Kearny v. Post*, 1 Sandf. 105; *S. C. 2 N. Y.* 394; *People v. Robertson*, 39 Barb. 9.

There was a very valuable interest remaining in the Flushing, North Shore & Central Railroad Company, outside of its lease to this defendant; for, under the agreement of purchase from Stewart, the Central Railroad Company and its successor by consolidation, the Flushing, North Shore & Central Railroad Company, were equitable owners. Their interest was real estate which, in case of an individual, would descend to heirs.

Champion v. Brown, 6 Johns. Ch. 398; *Hathaway v. Payne*, 34 N. Y. 92.

II. Even if the whole term under the Stewart contract had been vested in this defendant under the lease to it, the latter would still create an under tenancy and not an assignment; for when there are essential differences between the two contracts and where there is any substantial or valuable right or interest reserved by the first lessee against his tenant, the latter will be regarded as an under tenant and not an assignee.

Piggot v. Mason, 1 Paige, 412; *Kearny v. Post*, 1 Sandf. 105; *S. C. 2 N. Y.* 394; *People v. Robertson*, 39 Barb. 9; *Martin v. O'Conner*, 43 Barb. 514; *Collins v. Hasbrouck*, 56 N. Y. 157; *Ganson v. Tift*, 71 N. Y. 48; *Collamer v. Kelley*, 12 Iowa, 319; *People v. Shorb*, 14 Hun, 112; *Linden v. Hepburn*, 5 How. Pr. 188.

Rapallo, J., delivered the opinion of the court:

The only question in this case is whether the defendant, by entering into the contract of May, 1876, with the Flushing, North Shore & Central Railroad Company, came into such a relation with the original lessor of the railroad in question, represented by the plaintiff, as to subject it to liability directly to her for the rent reserved by the original lease of January, 1873, from her deviser, Alexander T. Stewart, to the Central Railroad Company of Long Island.

The facts are so fully stated in the opinion of

my learned brother, Finch, J., that it is not necessary to repeat them in detail.

That the contract of A. T. Stewart with the Central Railroad Company of Long Island, dated January, 1878, was a lease of the road for the term of fifty years cannot, I think, be disputed; and thus far in the discussions in this court it has been conceded.

The annual rent reserved was a percentage upon the agreed cost of the road, liable to be augmented by a percentage upon such further expenditures as might be made by the landlord during the term. If this had been all of the contract there would have been no difference of opinion between us; but it contained further provisions which have given rise to the present discussion.

The ordinary covenant to surrender the demised premises on the last day of the term was made subject to the further provisions of the contract, which were: that the lessee covenanted at the expiration of the said term of fifty years from January 7, 1878, to pay to the lessor the principal sum by him expended on the road, and that upon such payment, but not before, the payment of rent should thereafter cease, such rent however to be paid up to such time; and that upon such payment of such principal sum, the lessee, its successors or assigns should not surrender the said demised premises but should be vested with the fee simple of the right of way and all the property appurtenant thereto owned by the lessor; and that the contract should thereupon and upon such payment be deemed a sufficient grant or deed of conveyance; and that the lessor should then execute such further deed as might be necessary, etc.

Until the payment of the principal sum, however, the rent was to continue, and the lease contained the usual provisions for re-entry, for nonpayment of rent or the breach of the other covenants in the instrument, which were numerous.

In June, 1874, the entire interest of the Central Company, under this lease and contract, became vested in the Flushing, North Shore & Central Railroad Company, to which the contract was assigned, and in May, 1876, the latter company entered into the agreement with the defendant which is set forth in the opinion of Finch, J., and the effect of which is now in question.

The main feature of that agreement, to which it is necessary for the purposes of this discussion to refer, is that the last named company leased to the defendant the whole of the property which was demised by Stewart to the Central Railroad Company, and for a term longer than that of the original lease, viz.: for the term of ninety-nine years. It thus transferred to the defendant the entire term during which the Central Railroad Company was to hold the demised premises as lessee of Alexander T. Stewart, and left no particle of that term in the original lessee or in its first assignee, the Flushing, North Shore & Central Railroad Company; and the question now before us is whether it operated, as between the original lessor Stewart, or his devisee, and the defendant, as an assignment of that entire term, and thus established a privity of estate between them which rendered the defendant liable to the original lessor; or whether it was, as between those parties, a mere sublease

under which the defendant was liable only to its immediate lessor.

The rules relating to the effect of an assignment of a lease are so well settled that it is hardly necessary to do more than refer to them.

Where a lessee assigns his whole estate without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor; and the latter has a right of action directly against the assignee on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original landlord has no right of action against the sublessee, there being neither privity of contract nor of estate between them.

Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is, in legal effect, an assignment of the original lease or a mere sublease. The question has frequently, and probably most generally, arisen between the lessee and his transferee; and much confusion will be avoided by observing the distinction between those cases and cases where the question has been between the transferee and the original landlord. In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will as to the landlord amount to an assignment of the lease; and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by its reserving a new rent to the assignor with a power of re-entry for nonpayment, nor by its assuming, by the use of the word demise or otherwise, the character of a sublease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent. Taylor, Land. & T. 7th ed. 109; *Hicks v. Downing*, 1 Ld. Raym. 99; *Palmer v. Edwards*, 1 Doug. 187 [note]; *Smith v. Mapleback*, 1 Term R. 441; *Porter's Lessee v. French*, 9 Irish Law Rep. 514; *Parmenter v. Webber*, 8 Taunt. 593; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wollaston v. Hake-will*, 3 Scott, N. R. 616; *Pluck v. Digges*, 5 Bligh, N. R. 31; *Beaumont v. Salisbury*, 19 Beav. 196; *Thorn v. Woodcombe*, 8 Barn. & Adol. 586.

But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights, will arise between them.

The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term, is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor; but at the same time the relation of landlord and tenant is created between the parties to the second demise if they so intended. Taylor, Land. & T. 7th ed. § 109, notes 16, a 5; 1 Wash. Real Prop. 4th ed. 515, n. 6; *Adams v. Beach*, 1 Phila. 99; *Indianapolis Mfg. & Carpenters Union v. Cleveland, etc. R. R. Co.* 45 Ind. 281; *Lee v. Payn*, 4 Mich. 106; *Lloyd v. Cozens*, 2 Ashm. 138; *Wood, Land, & T. Barks' ed.* § 347.

These rules are fully recognized in this State. *Prescott v. DeForest*, 16 Johns. 159; *Bedford v. Terkune*, 80 N. Y. 453, 457; *Davis v. Morris*, 86 N. Y. 569; *Woodhull v. Rosenthal*, 61 N. Y. 891, 892.

There can be no doubt that in the present case the original lessee of Stewart parted with its whole term of fifty years and that the defendant acquired it. The Central Railroad Company assigned the entire contract, embracing the term of fifty years as well as the right of purchase of the fee at the end of the fifty years, to the Flushing, North Shore & Central Railroad Company; and I do not understand it to be denied by anyone that that company became liable to Stewart directly on the covenants in the lease, as assignee of the entire interest of the lessee.

But the Flushing, North Shore and Central Railroad Company, by its contract with the defendant, did not assign to the latter the right of purchase at the end of the term of fifty years. It, however, leased the road to the defendant for the term of ninety-nine years, and the defendant covenanted to surrender the demised premises to its immediate lessor at the end of the ninety-nine years. That term, however, being greater than the term of fifty years granted in the original lease, the instrument operated as an assignment of that term, and left no reversion therein in the Flushing, North Shore & Central Railroad Company; consequently during the continuance of the term of fifty years there was a perfect privity of estate between the defendant and the original lessor, and the legal estate in reversion was in the original lessor during the fifty years; and he or those succeeding to his estate were, both legally and equitably, entitled to the rents and had a right of action therefor directly against the defendant by reason of this privity of estate.

It is contended that the Flushing, North Shore & Central Railroad Company, as the assignee of the Central Railroad Company, had more than the term of fifty years, granted in the original lease, because it was also assignee of the contract of Stewart by which, in case at the end of the term the Central Railroad Company should have performed the covenants in the lease and should then pay to Stewart the principal sum expended by him in the construction of the road, the contract should operate as a conveyance in fee of the demised premises; that under this contract the Flushing, North Shore & Central Railroad Company was the equitable owner of the fee as well as of the term, and was in possession under both titles when it leased to the defendant; that the lease to the defendant, being for only ninety-nine years, did not transfer its entire interest in the premises but left in it a reversion at the expiration of that term, at which time the defendant covenanted to surrender to it, and consequently its lease to the defendant was not an assignment but a sublease.

That argument would be very forcible if the question arose between the defendant and the Flushing, North Shore & Central Railroad Company, and was whether the relation of landlord and tenant subsisted between them. But it has no application to the question upon which this case turns. The equitable estate in reversion, claimed to be in the Flushing, North

Shore & Central Railroad Company, as purchaser, is not a reversion in the term of fifty years.

The whole of that term has been transferred to the defendant; not a particle of it is retained by its immediate lessor; and there is absolutely nothing intervening between the estate of the defendant, as assignee of the lessee, for the fifty years and the legal estate in reversion of the original lessor or his devisee; and the right to the rents follows that legal estate in reversion.

The owners of the equitable estate claimed have no right, legal or equitable, to the rents. During the term of fifty years the original lessor or his devisee is entitled to them, and the whole term of fifty years being vested in the defendant it is directly liable to the holder of the legal estate in reversion, there being a privity of estate between them. If a present equitable right to the rents were vested in the same parties in whom the equitable estate in reversion is alleged to be vested, different questions might arise.

The fact that the lease to the defendant reserves a different rent from that reserved in the original lease, with a clause for re-entry, cannot affect the question, as between the parties to the present controversy, of its operating in law as an assignment of the term.

These points were expressly adjudicated in the cases of *Doe v. Bateman*, 2 Barn. & Ald. 168; and *Wollaston v. Hakevill*, 3 Scott, N. R. 616.

Neither can the covenant to surrender have any bearing. It was a covenant to surrender at the expiration of the ninety-nine years' lease, long after the expiration of the fifty years' lease.

Where, in an assignment of a lease or in a demise by the lessee for the same term as that granted by the original lease, there is a covenant to surrender to the assignor, this has in some cases been held to prevent the sublease from operating as an assignment; but this has been because the whole instrument, taken together, has been held to reserve to the original lessee some fragment of the original term, although almost inappreciable in point of duration, as in the case of *Post v. Kearney*, 2 N. Y. 394, where the assignee of a lease demised the premises for the residue of his term, reserving the right to a delivery of possession by his assignee to him on the last day of the term, and a right to intermediate possession in case the building should be destroyed by fire.

These reservations were held sufficient to characterize the demise as a sublease and not an assignment. The right to possession on the last day would leave a fragment of that day of the term in the assignor and was sufficient to create a technical reversion and thus prevent a privity of estate between his lessee and the original lessor.

In *Collins v. Hasbrouck*, 56 N. Y. 157, the sublease was of part of the demised premises and was for only two years and seven months, out of a term of ten years, and expired four years before the original lease; but the sublessee had the privilege of four years more, provided he gave two months' notice. The action was ejectment, brought by the original lessor against an assignee of the second lessee, claiming that the original lease had been forfeited by the breach of a covenant on the part of the lessee

which it contained, that he would not sublet or relet the demised premises or any part thereof without written consent, etc., under penalty of forfeiture of the term; and the sublease before referred to was claimed to be a breach of that covenant. The judgment below was for the landlord but it was reversed in this court, upon the ground that the alleged forfeiture had been waived by the landlord. In the opinion the question is discussed whether the sublease amounted to an assignment of the term of the original lease or a mere subletting or reletting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling; but in discussing it the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sublease, and of reserving to the original lessee a right of re-entry for breach of condition by his lessee, which have given rise to some confusion.

The features of the instruments which are above referred to would be proper subjects of consideration, for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz.: whether the second lease was a subletting or reletting of part of the demised premises, which constituted a breach of the covenant not to sublet or relet.

But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of that question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right of reentry for breach of condition are immaterial. *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wollaston v. Hakewill*, 3 Scott, N. R. 616; *Prescott v. De Forest*, 16 Johns. 159; 5 Bacon, Abr. *Leases*, I, 3; *Palmer v. Edwards*, 1 Doug. 187, [note]; *Smith v. Mapleback*, 1 Term R. 444; *Smiley v. Van Winkle*, 6 Cal. 605; *Lloyd v. Cozens*, 2 Ashm. 188; 2 Preston, Con. 124; Taylor, Land. & T. 7th ed. § 109; 1 Washb. Real Prop. 515, n. 6.

The cases which hold that where a lessee subleases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sublease does not operate as an assignment, proceed upon the theory that by reason of this covenant to surrender some fragment of the term remains in the original lessor.

In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sublessee would surrender the demised premises on the last day of the term.

In *Iggot v. Mason*, 1 Paige, 412, by the original lease the lessee had thirty days after the expiration of the lease to remove buildings from the demised premises. His assignee subleased for the residue of the term and his lessee covenanted to surrender possession "on the last day of the term."

In *Post v. Kearney*, 2 N. Y. 894, the covenant of the sublessee was that on the last day of his term he would surrender the possession of the demised premises to his lessor. P. 395.

Some fragment of that last day was there-

fore reserved to the original lessee, for he was entitled to the surrender during some portion of the last day. This was held sufficient to establish a technical reversion in the original lessee, and thus prevented a privity of estate from arising between his lessee and the original landlord. The same theory has been subsequently adopted in cases where the language of the covenant has been that the second lessee would surrender to his lessor at the expiration of the term of the sublease without adverting to any distinction.

In *Ganson v. Tift*, 71 N. Y. 48, 54, the sublease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessor, and the court says: "This constituted a sublease of the premises and not an assignment of the entire term."

It is obvious that the covenant to surrender cannot, in the present case, have the effect which was given to it in the cases cited, for it was to surrender at the expiration of a term of ninety-nine years, the original lease being for only fifty years, and there is no theory upon which it can be pretended that any vestige of that term or of any reversion therein remains in the lessor of the defendant.

The agreement to transfer the fee to the lessee did not merge the term of fifty years nor prevent the relation of landlord and tenant subsisting between the original lessee or its transferee of the term during its continuance. The lessee was to become entitled to the fee only in case it performed the covenants and paid the principal of the cost of the road; and the lease provides in terms that on such payment being made, but not before, the rent reserved in the lease shall cease. The payment of this principal sum at the end of the fifty years, as well as of the other sums reserved, was by the very terms of the contract made a condition precedent to the vesting of the fee in the lessee.

In this respect the case does not differ in substance from *Bostwick v. Frankfield*, 74 N. Y. 207, where a similar covenant to convey a fee to the lessee was held not to create an equitable estate in fee in the lessee in which his estate as lessee merged, but that the lease remained in full force and the relation of landlord and tenant continued until performance of the contract of purchase; and the landlord was entitled to dispossess the lessee by summary proceedings against him as tenant. In that case it was held that the doctrine which treats an individual who has contracted for the purchase of land as the owner, could not be applied when the intention of the parties was clearly adverse to such a presumption, and that a provision in the contract, that unless carried out at the time named it should become void, negated such an intention.

Here the provision is that the lessee shall hold as tenant for the term of fifty years, paying rent; and that at the end of the fifty years the lessee shall pay to the lessor the principal sum by him expended upon the road, and that upon such payment "but not before," the rent should cease, such rent however to be paid up to such time, and upon such payment of the said principal sum the lessee to be vested with the title; the right to re-enter for nonpayment of rent or breach of covenant being fully reserved.

These provisions plainly manifest an intention that no title, except an estate for years, shall vest in the lessee until the end of the term and the payment of the principal and all rent in arrears; and that in the meantime the fee and the reversion should remain in the lessor.

Until the expiration of the term the only estate which vested in the lessee was an estate for years, which was entirely separable from the right to acquire the fee. The lessee could assign the term and retain the contract for the purchase of the fee; and by such an assignment the assignee would be brought into privity with the original landlord who would be entitled to his action directly against the assignee of the term so long as it continued such assignee. It could divest itself of this liability at any time before rent had accrued, by assigning over the term; but so long as it continued to hold the term it held as tenant of the original landlord and was subject to be proceeded against as such.

The original lessee, or the lessor of the defendant, as has been shown, retained no portion of the term and consequently no reversion. Whatever equitable rights it may have had were to arise *in futuro*. An estate to arise *in futuro* cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and the person to whom he has assigned his term, so far as strictly reversionary rights are concerned, or prevent that relation from existing between such person and the original landlord.

In *Prescott v. DeForest*, 16 Johns. 159, Stewart leased a house to Satterlee for one year from the first of May, 1817. Satterlee then leased part of the house to the plaintiff at \$1,000 per annum, payable quarterly, for the same term for which he had taken it. On the first of February, 1818, Satterlee obtained a new lease of the house from the landlord, for one year from the first of May, 1818. On the second of March, 1818, Stewart distrained the goods of the plaintiff on the premises, for rent in arrears, and sold them in due form and the defendant became the purchaser. The right to distrain for rent was incident to and inseparable from the reversion, and it was held that Satterlee had no reversion; that the lease from him to the plaintiff, being for the whole of his own term, must be deemed an assignment and not an underletting, although it was for only part of the premises and reserved a new rent, payable to himself; that there was no privity of estate between him and the plaintiff, but privity of contract merely; that although at the time of the distress, Satterlee had a second lease from May 1, 1818, to May 1, 1819, that extension of his term did not operate to vest a reversion in him, because it was to commence *in futuro*; and in the meantime the reversion continued in Stewart, the original landlord, who by reason of privity of estate had the right to sue the plaintiff or distrain her goods for the rent due him. On this ground the distress by Satterlee was held void.

So in the present case, the title of the defendant's lessor under the Stewart contract, to the fee of the demised premises was not to commence until the end of the term of fifty years, and the payment of the purchase money; and

whatever equitable rights the defendant's lessor may have had under that contract, it is clear that in the meantime the legal estate in reversion continued in Stewart and his devisee; and the right to the rent followed the reversion.

The contract was not a present sale of the fee, under which the equitable title vested in the purchaser and the title to the purchase money in the vendor; but was for a sale to take place *in futuro*, that is, at the end of the fifty years.

It was expressly stipulated in the Stewart contract that the rent payable to Stewart should cease at the end of the fifty years and not before; and that then on the payment of the stipulated sum, the lessee should become vested with the fee. This was, in substance, a contract that Stewart's lessee should hold as his tenant under the lease until the expiration of the term, and that the other rights secured by the contract should then commence to operate. Whether they will then ripen into a title depends upon whether the lessor of the defendant performs the conditions precedent upon which the vesting of the title is conditioned.

In *Langford v. Selmes*, 3 Kay & J. 220, a lessee for a term of ninety-nine years, with the option of purchasing the fee simple in reversion, granted a lease for a term which exceeded the residue of his own term; and it was held that this lease established a privity of estate between the last lessee and the original lessor.

The case is not precisely in point, because here there was an unconditional contract to pay the cost of the road at the end of the term, and that on such payment the title should vest; but nevertheless the vesting of the title was conditioned on the lapse of the fifty years and on the payment being made at the end of the term. This contract, however, did not operate to enlarge the term of the original lease; it was separable from the estate for years held by the original lessee, and the transfer of the whole of that term to the defendant, while the legal estate in reversion together with the legal and equitable right to the rents were in the plaintiff, established a privity of estate between the defendant and the plaintiff which entitled her to maintain this action directly against the defendant on the covenant to pay rent contained in the original lease from Stewart.

The judgments of the General and Special Terms should be reversed and a new trial ordered, with costs to abide the event.

All concur except, **Finch, J.**, who reads dissenting opinion, and **Ruger, Ch. J.**, and **Miller, J.**, not voting.

Finch, J., dissenting:

The characteristic difference between an assignment of his lease and underletting by the original tenant resides in the inquiry whether as a result of the transaction the primary lessee has transferred his whole and entire estate and completely parted with his title, or has retained in himself some fragment or shred of his estate, either substantial or even formal and technical.

An underletting implies a constituted relation of landlord and tenant between the parties contracting; and, that in turn, the existence in the landlord of an estate superior to the leasehold and out of which the latter is carved; for there can be no tenure held of one whose title is utterly destroyed. This rule prevails even

over the apparent intention, not because that intention ceases to be the test and standard of interpretation; but because an impossible intention is never presumed in preference to one possible and operative between the parties.

The rule in its origin, under the feudal system, had a substantial and beneficial force. To the superior lord a service of fealty was due from the tenant, in virtue of his tenure; and if the lessee could part with the whole of his estate to one holding only under him the service of fealty was gone; and so in that case the new tenant was deemed to hold under the paramount title as an assignee of the lease, put in the place and room of the original tenant, and bound by his covenants to render his service. Of course that useful result has gone out of the doctrine, and it remains with us simply a rule of legal logic, much less deserving the power to override and pervert the discovered intention of the parties. As a consequence, a plain tendency to enforce that intention, even upon very narrow and technical grounds, has been developed.

Originally a reversion in the primary lessee, of some fragment of his estate, was needful to support a sublease. It was said that it might be for a day, an hour, or even a minute, but must nevertheless be, and leave in the primary lessee a reversion having a tangible existence. But that reversion now may be purely technical, and the product of reasoning rather than of substantial fact. It has been held that where the original tenant transferred for the identical term of his own lease, but the transferee covenanted to surrender to him, a reversion was implied from that fact, although no man can measure it as a tangible thing, since both surrenders, that of the subtenant to the primary lessee and that of the latter to the original landlord, are due under the contracts at the same precise moment of time. *Collins v. Hasbrouck*, 56 N. Y. 157; *Ganson v. Tift*, 71 N. Y. 48.

Indeed, the cases cited seem to go further than that and to hold that the reservation of a right of re-entry for breach of condition, and even the reservation of a new rent, makes the instrument a sublease. The case cited as to the effect of a re-entry (*Doe v. Bateman*, 2 Barn. & Ald. 168) so far from holding that a reserved right of re-entry necessarily implies a reversion, appears to me to hold the exact contrary and to determine that such right may and often does exist by pure force of the contract and without the shadow of a reversion in the land.

It is not necessary, however, to say whether the cases in our own State are in every respect correctly reasoned. It is quite obvious that they mean this at least: that the contract of the parties, construed according to their plain intention as expressed by it, shall prevail where upon such construction that contract is a possible one and can be rendered effective in subordination to established legal rules; and that where a sublease is manifestly intended, the court will search diligently and even closely for some trace of a reversion to support it.

And this result of the cases in our own court is fully sustained in the case of *Porter's Lessee v. French*, 9 Irish Law Rep. 514, in which the English cases were carefully reviewed, and it was held among other things: "It has been

argued and found that the court in construing this instrument should have special regard to its form; I mean to the circumstance that it is in the ordinary form of a lease, and that we are bound to give effect to the manifest intention of the parties themselves (a principle which I fully admit) subject, however, to the consideration that there are certain known rules and principles of law which it is not competent to individuals to set aside or overturn at their pleasure."

So that we may proceed on the assured basis that what was intended as a lease must be construed as a lease unless some inexorable legal necessity prevents.

We are now to consider the application of this doctrine to the facts developed in the case at bar. The contract of Stewart with the Central Railroad Company of Long Island was made in January of 1873. That contract begins with a recital that Stewart has built a first class railroad from his Hempstead Plains purchase to Farmingdale, at a cost which has been adjusted between the parties at the sum of \$393,000, upon lands partly owned by him and partly obtained by the Central Company under the statute, but which last were paid for by Stewart; and that it is intended, by the party of the first part, to lease the constructed line to the party of the second part.

The contract then "in consideration of the rents, covenants and agreements" thereafter mentioned, proceeds to "grant, demise and to farm let" the property, describing it, together with "the railroad track, side tracks, depots, water tanks, gravel banks and all buildings thereon and appurtenances thereunto belonging" for the term of fifty years, the railroad company paying therefor annually, for the first three years, "the yearly sum or rent" of 7 per cent upon the agreed cost, and for the remaining forty-seven years 10 per cent upon such cost.

The contract further provides that if Stewart should expend further sums in the completion or equipment of the line, or for a double track, this expense should be added to the principal sum upon which the rental percentage was to be computed; that the lessee should pay all taxes, assessments and charges upon the property; that such company should run daily trains for passengers and freight, and that for a violation of this covenant or of that to pay rent, Stewart should be at liberty to re-enter; and that on the last day of the term, the lessee would surrender the property to the lessor, subject, however, "as hereinafter provided."

That limitation upon the duty of surrender appears in a following agreement of purchase and sale, by which the Railroad Company covenants, at the end of the fifty years to pay to Stewart the principal sum by him expended, upon which the rental percentage has been computed, upon which payment the lessee shall not surrender, but shall be vested with the fee and the contract be deemed a sufficient deed of conveyance.

An additional contract between the parties specified what work was to be done upon tracks connecting with Garden City under an agreement with Pappenhusen, of which the Railroad Company had become owner; and added that expenditure to the principal drawing the rental

percentage and provided for an accounting to adjust the amount of such principal.

In June, 1874, the Central Company consolidated with the Flushing, North Shore and Central Railroad Company and to it the Stewart contract was assigned. In May, 1876, that Company made a contract with the defendant, the legal effect of which is here in question. By that instrument the Flushing Company leased to the Long Island Company the whole of its railroad from Long Island City to Babylon, including all its rolling stock, tools and machinery and all its branch lines, among which were those constructed by Stewart, for a term of ninety-nine years and a gross rent beginning with over \$200,000, and increasing year by year for six years until a final rental of \$351,000 became permanently fixed.

This rental agreement provided, for the protection of the lessee, that it might withhold the stipulated payments of rent to the amount of the Flushing Company's interest upon its bonded debt and of its incumbering rents, and apply its payments upon them as so much cash paid to the lessor; but such interest and rents were not to exceed the yearly maximum agreed upon.

Further provisions determined the order of application of the lessee's gross earnings; for subrogation to the rights of the bondholders if it should pay the lessor's bonds; for re-entry upon breach of covenants; and a surrender to the lessor at the end of the term. The question now comes, whether this instrument relatively to the Stewart lines was a lease or an assignment of the Stewart contract so far as that was itself a lease.

Of that contract two views may be taken. It may be treated as one complete agreement, establishing relations in accordance with all its terms as they act and react upon each other, or as two separate and independent agreements, having no necessary connection save that they happen to be written on one and the same paper.

The last is the appellant's contention. Her counsel divide the contract into its component parts, and argue that it consists: first, of a lease for fifty years, and then of a contract for the sale and purchase of the railroad; and that the two agreements are so free from any dependence upon each other that they might just as well have been contained in separate instruments.

Let us suppose that they had been. The supposition at once disturbs the theory of relative independence, since we discover that to make two instruments we are required to change the covenant to surrender in the lease, "subject, however, as hereinafter provided," to one "subject to the provisions of an agreement of purchase and sale made concurrently herewith;" and are further compelled to add to the terms of the sale contract, which is conditioned for a conveyance upon the prior payment of the rent reserved, a clause referring to the lease as a means of identifying the amount and times of payment of the rent intended.

The integrity of the surrender covenant in the lease contract can only be preserved by a reference to the sale contract; and the integrity of the sale agreement can only be saved by a reference to the lease to determine the rent payable as a condition; and we should be re-

quired to read the two instruments thus mutually referring to each other, made at the same time and relating to the same property, together and as if they were one, the inquiry being, What agreed relations subsisted? So that the question would recur whether the two instruments established two separate and distinct relations, or one single relation as the joint product of the two agreements.

We may solve that problem by aid of the inquiry whether at one and the same time the two separate relations could coexist without affecting or modifying each other. Under what is called the lease, the Central Railroad Company was a tenant for years, having merely a leasehold estate, the main and vital characteristic of which was a surrender of possession to Stewart at the close of the term. Under the contract of purchase, the railroad company was the equitable owner in fee, and not bound to surrender possession at all, and in terms relieved from that duty.

This assertion involves the character of the possession taken by the original vendee and lessee, which, in one view of the case, is the pivotal and determining inquiry. The complaint alleges that the Central Company went in under what is denominated the "indenture of lease and supplementary agreement." The meaning of that phrase so used in the pleading is shown by a later averment, where it is said that the Flushing Company assigned "said indenture of lease and supplementary agreement to this defendant, a copy of which instrument is hereto annexed, marked A." And the assignment of the whole contract which was made by the Central Company to the Flushing Company upon the consolidation, is described as "the said indenture of lease and supplementary agreement." So that the allegation is not that the Central Company went in under the lease as a part or fragment of the contract, or under one of its branches, but under the contract as a whole.

The answer discloses that understanding of the complaint and admits the allegation thus: "that under and pursuant to said instruments," the Central Company went into possession.

The parties thus agreeing upon the fact of possession under the contract, no proof was given or offered to the contrary, or to establish an intention to give or take possession under one branch of it alone.

We are bound, therefore, to assume that the Central Company was in possession under the contract as a whole, and both as lessee and vendee; a result not only compelled by the pleadings but indicated by a marked characteristic of the contract, that under both of its branches there was to be one continuous and unchanging possession.

It was not stipulated that the Central Company should hold possession as tenant for fifty years and then surrender that possession to the landlord and take a new one as vendee, but that at the end of the term it should not surrender at all the possession already taken.

That the Central Company was in both as lessee and vendee is further unmistakably indicated by a provision of the supplementary agreement which modifies the annual payments to be made. The language used: "The lease bearing even date herewith is modified, and its

conditions temporarily made to conform to this instrument, so that no rent or interest shall begin to accrue to the party of the first part until July 1, 1873, and the first quarter's rent or interest shall be and become payable three months thereafter."

The dual character of the payments to be made is thus clearly recognized; they are rent and they are also interest; and are one or the other interchangeably, by reason of the dual character of the possession; for if the Central Company was in only as tenant, it was nonsense to speak of its rents as synonymous with interest.

And beyond the admission of the pleadings and the obvious intent of the parties indicated by their written stipulations, it is further true that a possession taken generally and not in terms specially limited to some character or right is measured by and under the protection of the entire right belonging to the possessor, and cannot be driven out from its shelter and placed under a mere fragment or component part of such right.

The rule goes so far as this: where one takes a lease for a number of years and during the term enters into a contract of purchase with his landlord, of the same property, his possession which was taken as tenant operates as notice to one dealing with the landlord in respect to the land; not merely of his right as tenant but of his right to the inheritance. The possession although taken as tenant becomes also a possession as purchaser, protecting him as such to the extent of his entire right. *Daniels v. Davison*, 16 Ves. 253.

So that it becomes manifest that if we suppose the one contract to have been divided into two separate papers, not only would they require to be read together as mutually dependent upon each other, neither alone fixing the rights of the contractors, but possession under each, under one as lessee, and under the other as vendee, would stand admitted. That ends all practical results from a supposed separation of the two branches of the one contract, and we may drop the supposition and reason upon the contract as it stands.

The possession of the Central Company as purchaser under the contract gave it at once, upon the execution of that instrument, an equitable estate in fee. *Champion v. Brown*, 6 Johns. Ch. 398; *Hays' Admr. v. Miller*, 6 Hun, 320; *affd.* 70 N. Y. 112; *Pelton v. Westchester Fire Ins. Co.* 77 N. Y. 605.

Had the company been an individual its interest under the contract, springing at once upon its execution, would have been real estate, descendible to his heirs and devisable as such. *Hathaway v. Payne*, 34 N. Y. 92.

In equity the vendor simply holds the legal title as trustee for the vendee. The Central Company, therefore, under the contract had two estates; one legal and the other equitable; a legal estate as tenant for years and an equitable estate as owner of the fee; the former a chattel real, the latter equivalent to a freehold; and these were concurrent and not consecutive, if we assume that no merger was possible or intended. There is no difficulty in thus treating them. In case of nonpayment of the rent, the Central Company would forfeit its right of possession both as lessee and vendee, since that

payment is the condition of both estates; it is equally rent and interest, and so described. And as to remedies, Stewart might bring ejectment or proceed summarily under the Landlord and Tenant Act, since the Central Company could not deny its tenancy and its landlord's title, or defendant's possession as owner, under a contract broken and forfeited. If any doubt surrounded the summary remedy as sufficiently effective, ejectment would give redress.

But if there is difficulty in so treating them, if, as concurrent separate estates, they seem inharmonious and inconsistent, it will merely result that the equitable estate of inheritance will draw after it the term. *Capel v. Girdler*, 9 Ves. 509.

In the case cited the Master of the Rolls said: "I thought it had long been established that where the same person has the inheritance and the term in himself, though he has in one the equitable interest, and the legal estate in the other, the inheritance draws to itself the term and makes that dependent upon it;" and after citing several cases he added: "I did not apprehend that it was open to dispute."

The purchaser, therefore, under this contract could have conveyed the fee and put its grantee in possession as owner. It could, as it did, carve out of its fee an estate for ninety-nine years, stretching beyond the term of its lease, and ending with a surrender day and a reversion in fee in itself. Was that lease in any respect void beyond the fifty years? And after having cut the Stewart contract into two instruments, must we also sever the defendant's lease into halves and give him one landlord for the fifty years and another for the forty-nine succeeding? Is it possible that the immediate lessor, making one complete lease for one entire term, had no remedies of a landlord against a tenant for the first half of the term, but got them new born at the beginning of the last half? For that is the inevitable result of the appellant's theory.

During the fifty years the Flushing Company, on the basis asserted, could not dispossess the defendant under the Landlord and Tenant Act, for that remedy depends upon the existence of the conventional relation of landlord and tenant between the parties; and where there is not an underletting there is no such relation; and it is precisely for the reason that no such relation does or can exist that the construction of an assignment prevails. How could the Flushing Company make affidavit that such relation existed? Stewart alone could do that, for he becomes the sole landlord.

This difficulty is not answered by the cases which hold that even where there is an assignment the assignor may collect an excess of rent beyond what is due under the original lease, for such actions rest upon the express promise to pay, and not on an extinguished tenancy; and what is recovered is really not rent but purchase price of the lease sold and assigned.

In what character or capacity did the immediate lessor of the defendant make the lease for ninety-nine years? Certainly not in the character or capacity of a lessee of Mrs. Stewart, for as such it had no power to do as it did do; and as such the lease to defendant would neither have been given nor accepted. It is

true that a lessee for ten years cannot by a lease for eleven years clothe himself with a reversion and so make his contract a sublease, but that is because he has no reversion beyond the ten years and cannot gain one by his own wrong; but here there is no wrong, since there is an existing reversion in fee upon which the sublease is founded. It can stand upon it. Why should it not? It was so meant and intended.

Why should we do violence to the intention when no legal necessity compels? The lessee under the Stewart contract and by virtue of its terms was something more than a mere lessee for years during even the first fifty years, for its equitable estate began at the same moment with its legal estate and existed through the whole term of the latter. It did not assign its whole estate to the defendant, which it derived from Stewart, and that is conceded. Nobody claims that the equitable fee passed to the defendant. But a transfer is an assignment only when the person transferring parts with the whole estate derived from the original lessor. If that estate be a fee, he must transfer a fee. *Van Rensselaer's Exrs. v. Gallup*, 5 Denio, 454.

The case is not at all like that of *Langford v. Selnes*, 3 Kay & J. 220, to which we are referred as authority for the proposition that the covenant of sale added to the lease does not prevent a transfer of the leased estate from being an assignment. In the contract in that case there was merely an option to purchase which could only be exercised at the end of the term. There the lessee had, under the contract, no estate beyond his term. He had a legal estate but no equitable one. Whether he would have the latter or not remained uncertain until he exercised his option at the specified time. Meanwhile and during the leasehold estate, he had only the leasehold estate and no other in the land; and when the learned English vice-chancellor said: "There is no authority for the proposition," he referred to the argument, which he states, "that on the subsequent acquisition of the fee simple by the original lessee an estoppel arose by which, on the expiration of the original lease, the supposed under lessee will hold of the under lessor who had affected to demise to him at a rent of six pounds for a term greater than he was possessed of at the date of the under lease."

Here, on the contrary, the under lessor did not demise for a term "greater than he was possessed of," for it had the fee and carved out of it a lesser estate.

The case of *Bostwick v. Frankfield*, 74 N. Y. 207, presented a similar feature, although in a different form. Two distinct estates, one a leasehold and the other an equitable fee, were claimed to have been created at different times; but the latter was in substance, although not in form, a mere option, since the effect of nonperformance by the vendee was stipulated to make the contract of purchase null and void.

It must be remembered that the present is not so much a question of merger, resulting from the meeting in one ownership of two distinct estates, but whether two estates were created at all; and if they were, whether the two taken together and constituting the complete right of the lessee and vendee did not leave in it such a reversion as made possible the relation of landlord and tenant between it and its alleged and intended lessee.

It is not clear that two estates were created. Substantially it is possible to say there was but one, and that growing out of the contract of purchase and sale. What is called rent may be deemed, for the first three years, but legal interest upon the agreed cost to Stewart; and for forty-seven years that interest, with 8 per cent additional, to be added to the cost in making up the full purchase price. While the agreed percentage is called rent, it is substantially interest and in part purchase money, and is called "rent or interest."

If, however, in view of its language, notwithstanding that but one possession was to be taken under it, and that to be continuous and forever, we must still say that there were two estates, separate but succeeding each other without break or altered possession, we are obliged to change the beginning of the equitable estate from the date of the contract to the end of the fifty years; a construction which violates the legal effect of the instrument and postpones the equitable estate unduly.

If, however, we do that and, compelled by seeming difficulties, say that the original lessee had a legal estate for years and at its close an equitable estate in fee, then for the first time up springing, so that the two estates were in no manner concurrent but strictly successive, I doubt whether even then the rule which makes an intended lease an assignment of a prior one would have any just application.

If one has a lease for five years and then afterwards takes an additional lease for five years more to commence at the end of the first one, may he not make a valid sublease for nine years? Would we hesitate to do as the lessor did, and add the consecutive estates together, in determining whether such a reversion existed as would support the nine year lease as a whole and during its entire term, in accord with the plain purpose of the parties? Or would we feel bound to cut the new lease into fragments, and make it give two landlords instead of one, and split it into two leases, especially where the amounts and modes of payment for the term were different and conflicting? And ought we to apply the rule here invoked to any case where a lawful reversion of any kind, legal or equitable, survives the end of the original lease and remains in the primary lessee?

The substantial bearing of these inquiries, even if we admit the theory of independent successive estates, which we have sought to show is unsound, is apparent in the present case. The defendant reserved the right to pay its rent by paying the Flushing Company's rents and bonded interest. It did not agree to do so, but lest the permission should be misconstrued, it expressly provided that such rents and interest should not exceed its own maximum of rent. If for the first fifty years it is bound to pay all the Flushing Company's rents for leased lines, those sums added to the bonded interest may exceed its maximum rent, and it may be forced to make default on the bonds, and bear a foreclosure or pay a greater rent than it stipulated, and find its quarterly payments falling due at times different from its own stipulations.

It seems to us, therefore, that the courts below were right in their determination that the defendant's contract was a single, complete lease and not an assignment of one lease and

a creation of another and shorter one. No equity of the plaintiff compels us to a different conclusion. Her rights remain undisturbed, precisely as they were originally fixed. Simply, she does not acquire a second new and unexpected tenant after having already acquired a first one by operation of law.

It is argued, in view of the difficulties we have suggested, that this lease may be treated as such between the parties to it, and as an assignment relatively to the rights of Stewart. There seems to be some authority for that doctrine, although it is said to be exceptional. Wood, Land. & T. § 847.

If it be conceded, it goes upon an effort to preserve unbroken the intention and the rights of the parties, and should not apply where it would or might substantially change or affect them. We have seen that such might be the result in the case at bar, by compelling payment of a greater rent than that reserved, through the peril of a default on the mortgage bonds.

We do not know how the fact is, but that such a possibility was contemplated is apparent from the provision in the lease intended to protect the defendant in just that emergency. Probably the doctrine referred to goes no further than in case of an assignment to preserve to the assignor some of his contract rights, but does not make him at the same time a landlord and not a landlord.

The final result of the argument may be thus stated: The intention of the parties plainly disclosed, to make a lease, is not to be thwarted, except in a case where for want of a reversion such a lease, under the logic of the law, is impossible; and wherever such a reversion exists, sufficient to support a lease, and whether legal or equitable, the intention of the parties can be carried out, and should therefore be enforced.

The contrary conclusion plants itself upon a venerable fiction which has outlived its usefulness. A fiction in law is never to be admired, although it may sometimes be endured; but a needless and harmful fiction should go the way of its numerous fellows which have fallen before the preference for truth. The contract of lease which the parties make, which they intended to make and to which alone they bound themselves, may perhaps be resolved into a different contract, involving new liabilities, and to a party unknown to the original agreement, where some pressing need or some strong justice compels; but where there is no such compulsion, where the contract can stand as it was made, and so ought to stand as it was made, and neither necessity nor justice requires it to be thwarted or modified, I doubt the wisdom of summoning to that work an antiquated fiction which the authorities in this State have been slowly stripping of its possessions, and preparing for burial.

The cases of *Collins v. Hasbrouck* and *Garrison v. Tift*, *supra*, denied its application where there was any reversion in the sublessor; where there was a right of re-entry; reserved in the under lease, and where its rental terms differed from those of the primary letting. Only where it was immaterial to the new tenant under which lease he paid the same rent and possessed the same rights was the fiction of an assignment tolerated.

But in the present decision it regains its old

power and begins a new reign. The doctrine which I thought should be dethroned invites to its coronation. I must be permitted to decline. Agreeing with the courts below, that the instrument in question is a sublease and not an assignment, I must vote for an affirmance of the judgment.

Mary B. LYON, *Erx. etc., et al., Appls.*,

Charles W. HERSEY *et al., Respds.*

In a case where the right to damages because of an injunction is not disputed, and there is some evidence that all the items of damages were sustained by reason of the injunction, and that the damages were as much as allowed, this court (having nothing to do with the weight or cogency of evidence) will not interfere with the result reached in the court below.

(Decided December 8, 1885.)

APPEAL from an order of the Supreme Court at General Term in the Fourth Department, affirming an order modifying and confirming as modified the report of a referee appointed to ascertain the amount of damages sustained by the defendants by reason of a temporary injunction order, granted in the cause. *Affirmed.*

Reported below, 32 Hun, 258.

The executors of Lyman R. Lyon entered into a contract with the owners of the Moose River Tannery for the sale of hemlock bark on the tree, situated on lands formerly belonging to decedent Lyon. The parties of the second part were to have the right to enter upon the land to cut and remove the bark, which was to be used in carrying on the Moose River Tannery. Defendant Hersey became the owner of the tannery and also of the right to cut bark under the contract. He erected another tannery near the Moose River Tannery. The old tannery was destroyed by fire and the executors notified Hersey that the contract was thereby terminated and forbade him to enter upon their land to cut bark.

Hersey claimed that his right to enter upon the land under the contract had not terminated, and that he had a right both to remove the bark already cut and to cut more. Thereupon suit was brought to have the contract declared to be at an end; to have the defendants enjoined from entering upon the lots to fell trees or peel bark, and from removing bark already peeled; that a receiver be appointed; and that an account be taken. A temporary injunction was granted; one motion to dissolve this injunction having been denied, the court subsequently dissolved it, and the case was referred to a referee to ascertain and report the damages sustained by reason of the injunction. Exceptions having been filed to the master's report, the court modified it and affirmed it as modified. Upon appeal to the general term, this order was affirmed and plaintiffs appealed to this court.

Mr. C. D. Adams, for appellants.

Mr. N. E. Kernan, for respondents.

Per Curiam:

The right of the defendant to damages on

account of the injunction is not disputed; and we see no reason to interfere with the result reached at the general term. There is some evidence that all the items of damages were sustained by reason of the injunction and that the damages were as much as allowed. We have nothing to do with the weight or the cogency of the evidence.

The order should be affirmed, with costs.

All concur.

Alonzo G. PADDOCK, *Respt.*,

v.

Peter Z. KIRKHAM, *Exr., Appt.*

A commission to take testimony out of the State can, under Code Civ. Proc. § 888, subd. 5, issue in a reference of a disputed claim against a decedent's estate under R. S. pt. 2, title 3, art. 2, §§ 86, 87.

(Decided June 25, 1886.)

APPEAL from an order of the Supreme Court at General Term in the Second Department, affirming an order of the Special Term directing the issuing of a commission to take testimony. *Affirmed.*

This is a reference of a disputed claim against the estate of the decedent, by consent and with the approval of the surrogate as provided by sections 86 and 87, article 2, title 3, chap. 6, part 2, R. S.

On affidavits and due notice plaintiff made his motion for a commission to take testimony of witnesses in Utah with a stay of proceedings, etc. The application was opposed upon the ground that there was no power in the court to grant the order directing a commission to issue and that the same was unauthorized by law. The order having been granted defendant appealed to the general term where it was affirmed and he appealed to this court.

Mr. Abram J. Miller, for appellant:

I. This commission does not come within either of the cases provided for by the Code. Section 888 provides: "Such a commission may issue in either of the following cases" making five subdivisions, the fifth being: "Where an issue of fact has been joined, in an action pending in a court of record, and the testimony is material to the applicant, in the prosecution or defense thereof."

II. An action is an ordinary proceeding in a court of justice; every other remedy or prosecution is a special proceeding.

Old Code, §§ 2, 3; Code Civ. Proc. §§ 3333, 3334.

This is not an action but a special proceeding under a special statute. Proceedings on the reference of a claim against an estate do not constitute an action.

Robert v. Ditmas, 7 Wend. 525; *Linn v. Clow*, 14 How. Pr. 508; *Boyd v. Bigelow*, 14 How. Pr. 511; *Radley v. Fisher*, 24 How. Pr. 405; *Coe v. Coe*, 37 Barb. 233; *Somerville v. Crook*, 9 Hun, 666; *Young v. Cuddy*, 23 Hun, 250; *Roe v. Boyle*, 81 N. Y. 306; *Mowry v. Peet*, 88 N. Y. 456.

III. This being a strictly statutory proceeding no power is inferred; and except it is expressly conferred by statute no proceeding can be had therein.

N. Y.

Roe v. Boyle, and *Mowry v. Peet*, *supra*; *Re Attorney*, 88 N. Y. 164.

IV. The claimant herein has no right to a commission. A commission is not a common-law right.

Re Whitney 4 Hill, 533; *Brown v. Southworth*, 9 Paige, 351; *McCotter v. Hooker*, 8 N. Y. 504; *Re Attorney*, *supra*.

The power to issue a commission depends upon the statute.

Code Civ. Proc. §§ 887, 888; *McColl v. Sun Mut. Ins. Co.* 50 N. Y. 334; *Re Attorney*, *supra*; *Champlin v. Stodart*, 64 How. Pr. 379.

V. A commission can issue in actions only. *Wood v. Howard Ins. Co.* 18 Wend. 646; *Re Whitney*, *supra*; *Graham v. Colburn*, 14 How. Pr. 52; *McColl v. Sun Mut. Ins. Co.*; *Champlin v. Stodart* and *Re Attorney*, *supra*.

VI. The provision of the statute, 2 R. S. 2d ed. 80, which is the same as the present statute, "that the same proceedings shall be had in all respects, the referee shall have the same powers * * * and be subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference," relates to the proceedings after the report of the referee is made.

Comstock v. Olmstead, 6 How. Pr. 79.

Such Act gives no right to a commission; and being in derogation of the common law it should not be enlarged by indulging in a liberal construction.

Re Denny, 2 Hill, 220.

The language of the Act is nearly identical with that of those providing for the adjustment of the affairs of insolvent insurance companies (Laws of 1836, chaps. 3, 24); and the granting of a commission in the case of a reference under such Acts was denied.

Wood v. Howard Ins. Co., *supra*; *Re Whitney*, *supra*.

VII. The order granting a commission with stay is appealable.

Rathburn v. Ingersoll, 2 Jones & S. 211.

Mr. William P. Cantwell, for respondent:

I. This order is not appealable. It does not affect the substantial right within the meaning of section 190 of the Code of Civil Procedure, which is in substance the same as section 11 of the old Code. It is merely an intermediate order relating to the procedure, and the appeal should be dismissed.

Van Slyke v. Hyatt, 46 N. Y. 259, 262; *Arthur v. Griswold*, 60 N. Y. 143; *Whittlesey v. Hoguet*, 66 N. Y. 353.

The appeal should be dismissed, either because this is an action and therefore the court had a conceded power to order the commission; or, on the other hand, if it is not an action, because the Code has given no right of appeal in such a case.

Section 190, subds. 2, 3. See *Roe v. Boyle*, 81 N. Y. 305, 307.

II. This case is clearly within the definition of the word "action" given in section 3333 of the Code.

An issue of facts has been joined within the meaning of subdivision 5, § 888.

The cases in 83 N. Y. 165; 81 N. Y. 305; and 13 Abb. N. C. 1, were undisputably special proceedings.

III. Even if this is considered a special proceeding, the plaintiff is entitled to a commission.

927

Section 37, art. 2 title 3, chap. 6, pt. 2, R. S. provides that "The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference."

Rapallo, J., delivered the opinion of the court:

The power to issue a commission to take testimony out of the State depends entirely upon statutory provisions and is regulated now by section 888 of the Code of Civil Procedure, which is in substance a re-enactment of a like provision of the Revised Statutes.

Section 888 provides for the issuing of such a commission only "where an issue of fact has been joined, in an action pending in a court of record."

The appellant contends that this reference was not an action but a special proceeding; citing *Roe v. Boyle*, 81 N. Y., 305, 308, and *Mowry v. Peet*, 88 N. Y., 453; and that consequently the power to issue a commission in an action did not extend to it.

Roe v. Boyle decided that such a reference being a special proceeding, an appeal from an order made therein was governed by the provisions of the Code expressly applicable to orders in special proceedings.

In *Mowry v. Peet* it was held that in such a proceeding there was no power in the referee or in the court to render an affirmative judgment against the claimant on a counterclaim, for the reason that on such a reference the only question submitted to the referee was whether the claimant had a just claim against the estate of the deceased over and above all offsets; and although in trying and adjudicating upon those matters which were within the scope of the reference, the statute (2 R. S., 88, § 36) conferred upon the referee and the court the same powers as if the reference had been made in an action, yet the proceeding was not an action and no power was given to render an affirmative judgment for the executors against the claimant or to certify a balance in their favor.

As to the powers of the court and referees in such a proceeding with respect to the determination of the matter in controversy, the terms of the statute are very broad.

Section 36 provides for the entry of a rule in the supreme court or court of common pleas referring the matter in controversy; and section

37 provides that "The same proceedings shall be had in all respects, the referees shall have the same powers * * * as if the reference had been made in an action in which such court might by law direct a reference;" and the judgment of the court on the report of the referees "shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process."

We think this provision is sufficiently broad to authorize the issue of a commission to take testimony out of the State. The necessity for such process is quite as great as in an action, and neither the executor nor the claimant should be deemed to have forfeited that advantage by consenting to such a reference. It is to a certain extent compulsory, so far as costs are concerned. § 41.

The cases of *Wood v. Howard Ins. Co.*, 18 Wend. 646, and *Re Whitney*, 4 Hill 533, are cited as authorities for the proposition that the provision that in cases of reference of disputed claims against executors, etc., the same proceedings shall be had in all respects and the referees shall have the same powers as if the reference had been made in an action (2 R. S. 89 § 37) is not sufficient to authorize the issuing of a commission.

We do not think that the cases cited sustain the proposition. The references in those cases were governed by the statute in relation to the powers and duties of trustees and assignees of absconding and insolvent debtors (2 R. S. p. 40).

That statute authorized the reference of controversies relating to demands against or debts due to the debtor, and it provided (2 R. S. 45, § 24) that the referees so appointed should have the same powers as referees appointed by the supreme court in personal actions. That provision clearly did not affect the power of the court to issue a commission. It related solely to the powers of the referees.

The statute in respect to references of disputed claims against executors, etc., is much more comprehensive. It not only provides that in cases of such references the referees shall have the same powers, but it contains the further express provision that "the same proceedings shall be had in all respects" as if the reference had been made in an action. We think this includes the proceeding by commission to obtain the testimony of absent witnesses.

The order should be affirmed with costs.

All concur.

CASES
DETERMINED IN THE
COURT OF APPEALS OF NEW YORK.
1886.

CHIEF JUDGE,

HON. WILLIAM C. RUGER.

ASSOCIATE JUDGES,

HON. CHARLES ANDREWS,
HON. CHARLES A. RAPALLO,
HON. THEODORE MILLER,

HON. ROBERT EARL,
HON. GEORGE F. DANFORTH,
HON. FRANCIS M. FINCH.

HON. H. E. SICKELS, *State Reporter*.

James MURRAY, *Appt.*,

William H. BEARD *et al.*, *Respts.* *

A, learning that B was about to advertise for bids for furnishing certain articles, induced each of several dealers separately to promise him a commission on his securing a sale from such dealer to B. A did not inform any one of such dealers of the name of the intending purchaser, or that the sale was to be by competitive bidding, or that he had effected a similar understanding with other dealers. Thereafter A himself and several of said dealers submitted bids, and A brought suit for commission against the dealer who obtained the contract. Held, that he was properly nonsuited; that there was no consideration for the promise to pay him a commission; and that the agreement therefor was void by reason of the fraudulent suppression of material facts on his part, and as *contra bonos mores*.

(Decided June 1, 1886.)

APPEAL from a judgment of the General Term of the City Court of Brooklyn, affirming a judgment dismissing the complaint in an action for services. *Affirmed*.

The facts are stated in the opinion.

Mr. Henry D. Hotchkies, for appellant:

The agreement between the plaintiff and defendants was not invalid. The case is manifestly distinguishable from that of *People v. Lord*, 6 Hun, 390, and is within *Marsh v. Russell*, 66 N. Y. 288; *Dutch v. Harrison*, 5 Jones & S. 306; *Jones v. North*, L. R. 19 Eq. Cas. 428.

Agreements in restraint of free competition at public sales and the like are held void, because they operate as a fraud upon another person.

People v. Lord, *supra*, 394.

* A motion for reargument is pending herein, the result of which will be duly reported in case it in any way changes or modifies the reasoning or result of the present opinion. [Ed.]

The actual intent of the parties is the test. If it appears that the agreement was for a lawful purpose and from honest motives, it will be upheld.

Marsh v. Russell, 66 N. Y. 288-294.

The law will not presume an agreement void or illegal or against public policy, when it is capable of a construction which will make it valid.

Curtis v. Gokey, 68 N. Y. 300.

The agreement between these parties was not intended, nor could it have had any tendency, to reduce the number of bidders or prevent the work from being let to the lowest bidder.

See *Kearney v. Taylor*, 15 How. 494 (56 U. S. bk. 14, L. ed. 787).

The agreement, at the most, made the parties joint bidders; and a joint proposal, the result of honest co-operation, although it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy.

Atcheson v. Mallon, 43 N. Y. 151.

In the cases of *Doolin v. Ward*, 6 Johns. 194, and *Wilbur v. How*, 8 Johns. * 444, the opinions were *per curiam*, and not well considered. These decisions have been greatly modified by the later cases.

Kearney v. Taylor, 15 How. 494-519; (56 U. S. bk. 14, L. ed. 787-797).

The above decisions are distinguished from the present case in *Marsh v. Russell*, *supra*.

No matter how slight the service performed by the plaintiff, such service was good consideration for the defendants' promise to pay.

Lamplough v. Brathwait, 1 Smith, Lead. Cas. Part 1, * 222.

Messrs. Morris & Pearsall, for respondents:

In order to entitle plaintiff to recover, he should prove his authority to act for defendants and that his agency was the procuring cause of the sale; *i. e.*, that he discovered the purchaser, started the negotiations between the parties and closed the bargain as the result of his agency.

Stillman v. Mitchell, 2 Robt. 528; *Chilton v.*

Butler, 1 E. D. Smith, 150; *Goodspeed v. Robinson*, 1 Hilt. 423; *Holley v. Townsend*, 16 How. Pr. 125; *Cushman v. Gori*, 1 Hilt. 356; *Pierce v. Thomas*, 4 E. D. Smith, 354.

Plaintiff does not even prove that he first called defendants' attention to the matter; and therefore it was proper for them to act as they did.

Wylie v. Marine Nat. Bank, 61 N. Y. 415; *Frazer v. Wyckoff*, 63 N. Y. 445; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378.

The arrangement, as alleged by plaintiff, for both parties to bid the same amount, was void as being against public policy, there being no valid consideration on plaintiff's part for the payment to be made him.

Doolin v. Ward, 6 Johns. 194; *Wilbur v. How*, 8 Johns. * 444; *Woodworth v. Bennett*, 43 N. Y. 278; *Atchison v. Mallon*, 43 N. Y. 150.

Ruger, Ch. J., delivered the opinion of the court:

The claim in this case presents a novel industry and one which, if successfully carried out, would seem to become the source of profit to its prosecutors without much expenditure of time or money.

The plaintiff, a timber broker, learning that the Hamburg American Packet Company was about to build a pier requiring a large number of piles in its construction, and to advertise for bids from timber merchants to supply them, visited the several dealers in such materials in New York and Brooklyn and obtained prices therefor; and, under the inducement that he would act for them respectively in securing a sale of piles, obtained promises from each that if he secured a sale for such dealer, he should receive a commission of twenty-five cents on each pile sold. He did not inform the dealers of the name of the intending purchaser, or of the fact that a contract could be obtained only by competitive bidding, or that he had effected a similar understanding with other dealers.

The company soon thereafter issued proposals for the supply of the piles and sent invitations to dealers generally, among whom were the defendants, to compete for a contract for the piles required.

A number of persons, among whom were the plaintiff, the defendants and other dealers, submitted bids for such contract, and after a canvass of such proposals by the company's engineer, he awarded the contract to the defendants.

The defendants having refused to pay the plaintiff's claim for commissions, this action was brought to recover them.

Upon the trial, the plaintiff was nonsuited by the court below, upon the ground that there was no consideration for the promise to pay commissions.

We think the judgment was properly ordered upon that ground, and that it can also be sustained upon the ground of the fraudulent suppression of material facts by the plaintiff in

making the contract, as well as that it was *contra bonos mores*.

The plaintiff, while assuming to act for the defendants in obtaining the contract of sale, was in fact under equal obligation to competing dealers to assist them in effecting the same sale. Thus, if the plaintiff's services could have been of advantage to anyone he was under the necessity of being treacherous to one employer or another. An agent is held to *uberrima fides* in his dealings with his principal; and if he acts adversely to his employer in any part of the transaction, or omits to disclose any intent which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services. *Story, Agency*, §§ 31, 334; *Story, Eq. Jur.* § 315; *Ewell, Evans, Agency*, 268; *Dunlap, Paley, Agency*, 105, 106; *Carman v. Beach*, 63 N. Y. 97, 100.

It is an elementary principle that an agent cannot take upon himself incompatible duties and characters or act in a transaction where he has an adverse interest or employment. *New York Cent. Ins. Co. v. Nat. Prot. Ins. Co.* 14 N. Y. 85; *Ewell, Evans, Agency*, 14; *Greenwood v. Spring*, 54 Barb. 375; *Neuendorff v. World Mut. Life Ins. Co.* 69 N. Y. 389.

In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals are conflicting and incapable of faithful performance by the same person.

The plaintiff in this case was a bidder for the same contract; and if he succeeded in obtaining it himself and had not the piles to fulfill it, he was under equal obligations to several different persons to employ their piles in its performance. Some or all of his principals must have been disappointed by him and he would have been under the necessity of violating his obligations to some of his employers. Such conduct is violative of the plainest principles of morality and fair dealing and cannot be sustained by a court of justice.

Neither does the proof show that he rendered any service to the defendants in effecting the sale. His situation rendered him incapable of serving the defendants to advantage, even if he had desired to do so; but the evidence fails to show any effort on his part to sell the defendant's property. He did attempt to sell his own property or secure the contract for furnishing piles, but whether this was done for the defendants' benefit or not does not appear.

As we have seen, he was under contract obligations to others as well as to the defendants; and it does not lie in his mouth to allege that he intended to defraud others for the benefit of defendants. There was no evidence showing a performance by the plaintiff of the obligations of his contract with defendants, and he was therefore properly nonsuited on the trial.

The judgment should be affirmed.

All concur.

NEW JERSEY.
COURT OF CHANCERY.

John WYCKOFF, Complainant,
v.
Alfred GARDNER et al., Exrs.

1. **Payment by one surety on a sheriff's bond, of the amount of a judgment recovered thereon, under a statutory order directing the prosecution of the bond, and enforced by execution, will entitle him to contribution from his solvent cosureties.**
2. **The estate of a deceased cosurety is liable to make contribution, whether he died before the liability arose or after.**
3. **Where the surety seeking contribution holds a claim against the principal, he need not realize thereon in the first instance, but may proceed against his cosureties at once, and if he does realize anything on the claim he must share it with the cosureties who have contributed.**
4. **The surety seeking contribution need not make demand, nor give notice, before filing his bill.**
5. **A discharge in bankruptcy, prior to the accruing of the liability on which contribution is sought, will not avail a cosurety sued for contribution.**

(Filed September 24, 1886.)

BILL filed by a surety on a sheriff's bond to obtain contribution from his cosureties.

The facts are stated in the conclusions of the Vice Chancellor.

Mr. L. De Witt Taylor, for complainant.

Mr. W. H. Morrow, for executors of Wm. Gardner, deceased.

Mr. J. G. Shipman, for executors of Jos. Vliet, deceased.

Bird, V. C., filed the following conclusions: John Gardner was elected sheriff in 1875. He gave bond with William Gardner, John Wyckoff, Samuel Frame, Joseph Vliet and Joseph B. Cornish, as his sureties thereon. He entered upon the duties of his office. April 19, 1877, W. obtained a judgment against five persons for \$1,152.63, and costs \$87.11. An execution was issued thereon and placed in the hands of said John Gardner as sheriff. The money was not made, although from no want of goods. The sheriff was in fault. His bond was prosecuted, and February 19, 1884, judgment was entered thereon against John Gardner, John Wyckoff (the complainant), and Samuel Frame. Prior to this action, William Gardner and Joseph Vliet had died and Joseph B. Cornish had been discharged in bankruptcy. The judgment on the bond fixed the damages and costs of W. at \$1,727.28. Execution issued thereon and the complainant, one of the defendants in that suit, paid to the sheriff in discharging that writ, \$1,805.83. This bill has been filed by the complainant to compel the executors of the last will of William Gardner, and the executors of the last will of Joseph Vliet, to contribute, one third each of the amount so paid by him. John

N. J.

Gardner, the principal, and Samuel Frame, one of the sureties, are shown to be insolvent.

It is first objected that there is no amercement against the defendants in the action on the bond, but only a judgment, although there was actually an order for an amercement signed. It seems quite clear to my mind, after reflection, that the judgment and execution and payment of the amount thereof are quite enough to sustain the cosurety who asks for contribution.

The bill alleges that an order was made directing the prosecution of the bond according to the statute. The answer neither admits nor denies the truth of the allegation. It is objected to as a decree because the said order is not produced and proved. If such proof were essential in a proper case, after judgment, I conclude that the answer is not of a character to put the complainant to proof.

Then again, it is objected that the twelfth section of the Act (Revis. 1100) has not been complied with, in entering the judgment. However this may be, it is not a void judgment. It may be irregular. It is a judgment on the bond given by the sheriff who was in default. It plainly determines the liability of him and his sureties who were joined in the action. The solvent surety so joined was bound, and was obliged to pay and did pay. This being done, and the proof being clear as to the relations of the parties, a claim accrued to him against his cosureties. This was according to their contract. The mutual agreement in every such case is that if one pays, all the rest will contribute. Brandt, Suretyship, §§ 246, 247.

It is urged that the bill is defective as to parties, in not bringing in the executors of William Gardner, as individuals as well as executors, and in not bringing in the administrator of a deceased legatee, instead of the legatee. It seems to have been settled that the estate of a deceased cosurety is liable to contribute whether he died before the liability arises or after. Brandt, Suretyship, § 246.

This view of the case applies alike to the executors of William Gardner and of Joseph Vliet.

It is also objected that this complainant holds a judgment which was recovered in favor of John Gardner, the principal debtor, which is of value and which the complainant has not applied as he should towards the reduction of the claim, now before the court. The evidence does not make it clear that the judgment is of any considerable value. But it seems that the complainant is not obliged in the first place to realize on such judgment. According to the weight of authority, he may proceed against his cosurety at once, and if he does realize anything, he must share it with those who have contributed. Brandt, Suretyship, § 238.

Still another objection is, that the complainant made no demand and gave no notice before filing his bill. This objection is not sustained by the authorities. Brandt, Suretyship, § 257.

The point was made that the discharge in bankruptcy of Joseph B. Cornish could not avail him in this suit, because the liability in this case did not accrue until after his discharge and, consequently, was not provable. As I read the cases, this is the law. Brandt, Suretyship, § 240 and references in note. Bump, Bankr. 6th ed. § 524. *Glenn v. Howard*, 3 Cent. Rep. 643.

In that case, the court held "That where the subscription price of the stock of an incorporated company is only to be paid in such installments and at such times as it may be called for, and at the time of the bankruptcy of a stockholder, and his discharge in bankruptcy, no call for the payment of his subscription has been made, a call subsequently made for an unpaid installment thereof is not a provable claim against the bankrupt's estate in the bankruptcy proceedings; therefore the bankrupt's discharge is no bar to an action for such unpaid installment." Many cases are referred to in the opinion in this case, among others that of *Riggin v. Maguire*, 15 Wall. 549 [82 U. S. bk. 21, L. ed. 232], in which *Mr. Justice Bradley*, says: "But the better opinion is that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the Act of 1841." I can perceive of no method by which to take the case of *Mr. Cornish* out of these decisions. I therefore conclude that he is liable to contribute as cosurety.

It follows that the executors of *Mr. Gardner*, the executors of *Mr. Vliet*, and *Mr. Cornish*, must join in relieving the complainant. They will each be charged with one fourth of the amount paid by the complainant, with interest on such one fourth from the time of payment. But *Mr. Cornish* is not a party and no steps can be taken against him to compel payment. The others will pay one fourth each, and each will pay one half of the costs. I make this disposition as to costs, because it was the duty of each to share his part of the burden without suit.

I will so advise.

Nora E. COUDERT, Complainant,

Louis L. COUDERT *et al.*

1. Every last will made when testator had no issue living, wherein any issue he might have is not provided for or mentioned, shall be void if, at the time of his death, he leave a child or children or issue, or leave his wife *en ventre* of a child or children which shall be born; and such testator shall be deemed to die intestate.
2. On the death of a purchaser of real estate, who had assumed the payment of an outstanding mortgage thereon securing a debt created by another, the land, and not the personal estate of the decedent, is primarily liable.

(Filed September 20, 1886.)

BILL in equity to have money paid by complainant to free, from a mortgage, land of a decedent, of which complainant, through misapprehension of the effect of the will of decedent, believed herself to be the owner, declared a lien upon the land. *Decree advised.*

Messrs. Babbitt & Lawrence, for complainant.

Bird, V. C., filed the following conclusions:

The complainant is the widow of *Lewis L. Coudert*, who died in 1882, leaving a will, in which he gave, after the payment of his debts, all the rest, residue and remainder of his estate, real and personal, to the complainant "for herself and her heirs, absolutely and forever." It was dated and executed March 26, 1864. They had issue, seven children, five of whom are still living and were born after the making of said will and without any provisions for them in said will. Although one child was born prior to the date of the will, it died before such date; so that the testator had no child living at the time he made the will. It would therefore appear that the testator died intestate. See *Revis. 1246, § 20*.

At the time of his death the husband owned real estate which, when he took the title, was incumbered by a mortgage for \$8,000, which mortgage he expressly assumed the payment of as part of the purchase money. The complainant, believing herself to be the owner of the land, as devisee under said will, April 1, 1864, paid said mortgage out of her own moneys, there being due thereon \$8,880.44. She alleges that since then she has learned that her husband died intestate and that said lands descend to his heirs at law. Nothing else is shown.

The complainant asks the court to declare that the money so paid by her in discharge of said mortgage shall be a lien upon said lands and that the lands shall be sold to pay and satisfy her for the sum so paid. Can this be done as the case is made? It must be remembered that three or four of the defendants are infants and that it is the first duty of the court to deal in strict justice as to them, protecting their rights on every hand.

It will be seen that the debt or obligation became a personal one; *Mr. Coudert* by his assumption and promise to pay, made it so. Although the mortgage remained a lien on the land, and the maker of the bond was not discharged, still, under the law, *Mr. C.* was primarily liable. The debt was thus made a simple contract debt. *Klapworth v. Dressler*, 18 N. J. Eq. 68, and cases cited.

To the same effect is *Hoy v. Bramhall*, 19 N. J. Eq. 568; *Stillman's Exrs. v. Stillman*, 21 N. J. Eq. 126.

It will not be denied that *Mr. C.* could have been compelled to pay the amount due out of his personal estate. So, too, an action would lie on his promise against his administrator.

Therefore the debt became personal. *Mr. C.* became personally liable. And the rule is almost universal that the personal estate of the decedent is first liable to discharge his debts. This is admitted in every case and in every book, where the question has been discussed. Yet it has been held that when the debt is not created originally by the decedent, but by another, and a mortgage on land is given as security and the decedent assumes and promises to pay it, then the personal estate is not first liable.

This doctrine was announced by *Chancellor Kent*, in *Cumberland v. Cochrington*, 3 Johns. Ch. 229, following the English authorities to which he refers. And the same doctrine has been declared in this State, in *McLenahan v. McLenahan*, 18 N. J. Eq. 101.

Although neither the case decided by *Chan-*

cellor Kent nor the one decided by *Chancellor Zabriskie* shows that the purchaser assumed and expressly promised to pay the debt, yet both cases seem to be put upon the broad ground that the land remains liable primarily, notwithstanding such assumption or any other promise or obligation short of a direct one to the mortgagee, which shows to a demonstration that it was the intention of the purchaser to charge his personal estate.

In 2 *White & Tudor's Lead. Cas. Eq. 841-845* is a reference to the doctrine and to some authorities which seem to go not quite so far; but it is my duty to take the law as I find it declared and settled; and Mrs. C., having paid the mortgage debt, under the impression that she owned the entire estate, and out of her own private funds and in ignorance of the law, I think she ought not to be prejudiced thereby; but that she should have a lien on the land for the money so paid by her, and that the land should be sold to pay and satisfy such lien.

I will so advise.

John TAYLOR, *Complainant,*
v.

Franklin J. WOOD *et al.*

Although the maker of a chattel mortgage may, as between himself and the mortgagee, be estopped from denying the indebtedness purporting to be secured thereby, yet on proof that the consideration expressed in the mortgage was greater than the real indebtedness, and that the mortgage was taken to protect the maker's property from his creditors, it may be held fraudulent as to creditors.

(Filed September 29, 1886.)

SUIT by a creditor, to obtain priority over a chattel mortgage alleged to have been made by the debtor in fraud of creditor. *Decree for complainant advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. W. D. Holt, for complainant.

Messrs. Howell & Bro., for defendant Mrs. Wood.

Bird, V. C., filed the following conclusions:

This is a suit by a creditor. His insinuation is that a chattel mortgage, prior in date and of record, is fraudulent. He says the fraud consists in Mrs. Wood taking her mortgage for more than was really due her, and also for the purpose of hindering and delaying the other creditors of Franklin J. Wood, the debtor.

First, as to the consideration. The debtor, Franklin J. Wood, is a son of Sarah A. Wood, one of the defendants, and the holder of the mortgage complained of. The son and mother met in the office of a highly respectable counsel, and asked to have the mortgage drawn. When asked for what amount, it appeared to be quite uncertain what the real amount due was. After being told that Mrs. Wood would be obliged to swear the amount, and after consultation between Mrs. Wood and her son they agreed that the amount due was \$900. The

mortgage was drawn accordingly. There were no accounts, or notes or other memorandum kept by the mother to show the extent of the son's obligations. But C. N. Taylor was sworn. He had held some money for Mrs. Wood, and says that he paid her over \$1,000 in the presence of Franklin, and understood that it was for Franklin, although it was not paid to Franklin by him, nor in his presence. He paid the money to the mother by check. But he says when he paid her the last \$300 he charged her against loaning Franklin any more, and said to her in Franklin's presence that he owed her \$300 already, and that he never would be able to pay that. It does not appear that Franklin then denied owing his mother that sum. Franklin, however, does now deny owing his mother this sum or anything like it. Thus upon two very important occasions the son was confronted with the charge of owing his mother; once by C. N. Taylor, of owing her over \$300, and once by his mother, when she swore to the truth of the consideration expressed in the chattel mortgage, and when he was present encouraging the act by signing such chattel mortgage and conveying his goods. Clearly, as between him and his mother he is effectually estopped and bound.

But there is a charge that the mother has told another story besides the one she gave under oath, and that she too is effectually estopped and bound as to creditors. The day the mortgage was made she said to a witness that she wanted him to draw a receipt for her to sign for \$350 against the mortgage, so that in case of her death his sisters could not make him pay the whole amount, because that was more than he owed her. The next day the receipt was drawn and signed by Mrs. Wood for Franklin. And in her answer, she only claims \$550 as due on the mortgage. And this evidence is very clearly supported by the wife of Franklin, to whom Mrs. Wood stated that the mortgage was taken for more than was due. This statement she made to Franklin's wife the same day the mortgage was made, and very soon after.

This testimony forbids any doubt but that the mortgage was made for \$350 more than the mother considered really due from her son. He may have had the money, but the mother lived with the son a good deal of the time; and no doubt upon a strict accounting the charges would not all have been on one side.

Second, as to the actual intention upon the part of the mother and son to hinder and delay the creditors of Franklin. She told her friend, who drew the receipt, that she did not want anyone to come in and take Frank's goods away from him; she said it was "to keep his creditors from selling him out." Franklin's wife says, that right after Mrs. Wood had the mortgage made, "she said that she got the chattel mortgage drawn up for \$900; she said she knew it was more than Frank owed her, but she thought it would keep his creditors off; she said \$900 would cover his stock and farming utensils, and if his creditors came to sell him out, her chattel mortgage claim would come in ahead." There is nothing in the case to impeach or qualify the character of these witnesses for truth.

Therefore I must conclude that the mortgage was not taken *bona fide*, and is fraudulent as to

creditors. *Sayre v. Fredericks*, 1 C. E. Green, 205; *Demarest v. Terhune*, 8 C. E. Green, 532; *De Witt v. Van Sickle*, 2 Stew. 209; *Schmidt v. Opie*, 6 Stew. 188; *Holt v. Creamer*, 7 Stew. 181; *Bump, Fraud. Convey.* 230.

It is said that the complainant is not honestly prosecuting his claim, but is pursuing Mrs. W. only to aid Franklin. There is nothing in the testimony to justify this insinuation. It is true the son became very willing (or at least it appears so) to aid the complainant; but that does not justify the charge of a conspiracy or understanding that the litigation should be carried on for the benefit of the son.

I will advise a decree giving the mortgage of the complainant priority over that of Mrs. Wood. The complainant is entitled also to his costs.

McKEAN

v.

McKEAN.

The **taking** and retention, by a husband, of their engagement ring from his wife is, in connection with other facts, strong proof of a determination on his part to desert her.

(Filed September 25, 1886.)

PETITION for divorce, on the ground of desertion. *Divorce advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. C. G. Garrison, for petitioner.

Mr. J. M. E. Hildreth, for defendant.

Bird, V. C., filed the following conclusions:

Mrs. M. filed her petition for divorce, upon the ground of desertion. The period of conjugal felicity which these parties enjoyed was measured by a few months. Mr. M. then left for Virginia, his wife and child remaining in New Jersey. He sent her a few dollars on three or four occasions; in all less than \$50. He then went to Baltimore and after being there a while, he wrote Mrs. M. to come to him and sent her money for that purpose. They remained in Baltimore a short time, when she returned to her parents in New Jersey. To this period there is some uncertainty as to the true relations between them, except as to the charge by the wife that Mr. M. frequently accused her of infidelity. But after her return to her parents, he called on her and had a private interview with her. This was in November, 1882. During this interview, he asked her for her engagement ring and promised her upon his honor to return it to her. He did not return it. He left her then and took the ring with him. He says that he told her she could have it again, if she would live with him. She says that he took and kept it without any qualification whatever.

In my judgment this act of the husband in taking this ring and carrying it away, without any subsequent efforts at reconciliation, is most ample proof of a determination to separate himself from his wife and to desert her, unless it is made to appear that she was first in fault and had taken some step to sever the marital rela-

tion. I find no such fault in her conduct, although not in all respects of the highest rectitude. Why did the husband want a private interview? He asked her father for such interview. I conclude it was for the sole purpose of securing the engagement ring and of thus proving to her the entire absence of all affection or regard.

Now, in addition, see how this view is sustained by his previous conduct. He accused her repeatedly of infidelity, without the slightest proof. He repeated this charge to his and her neighbors and friends. He wrote her a vile and most insulting letter, in which the charge was again made.

But now he says he loves her and is willing and anxious to live with her as his wife. This is profession, but I am satisfied without genuine repentance. He never has gone to his wife and offered to restore the engagement ring; nor has he ever withdrawn the foul charges made both to her face and her friends. I need not go farther.

I will advise a decree according to the prayer of the petitioner, with costs.

READING

v.

READING.

In a suit for **divorce on the ground of adultery** committed by the wife, she may set up by way of recrimination **cruel treatment** on the part of the husband.

(Filed September 18, 1886.)

BILL for divorce. Motion to strike out parts of answer. *Denied.*

The questions presented are stated in the conclusions of the Vice Chancellor.

Mr. Schultz, for complainant.

Bird, V. C., filed the following conclusions:

The bill is for divorce for adultery by the wife. The motion to strike out rests on the ground of impertinence and irrelevancy.

First. It is said that the allegation in the answer that the wife had two children by a former marriage and lived at Mauch Chunk are irrelevant. Not so in this case, since the subsequent allegation is that the husband, after his marriage with defendant, endeavored to have sexual intercourse with one of the daughters.

Second. It is said that the allegations in the answer that the husband was cruel to the defendant, not only in his open solicitations to the step-daughter, but in beating the defendant and in other cruel treatment, are impertinent and irrelevant, and, if true, constitute no defense. Not so; for how can the court grant a divorce to him who is himself liable to a charge which, if true, is the foundation for a divorce. It would be very inconsistent for the court to proceed according to the views of the complainant. It is true, the acts set up by way of defense are not such as the acts of the wife that are complained of in the bill; the bill says the wife committed adultery; the answer says the husband committed various acts of cruelty.

Under our statute both are grounds for divorce, one from the bonds of matrimony, the other from bed and board; and it seems most plain to me that, the Legislature having placed these offenses nearly on the same level, the one can as well be pleaded by way of recrimination as the other. See *Grant v. Grant*, 9 Stew. 502; and especially 2 Blah. Mar. & Div. chap. 5, Recrimination.

If the husband, by his treatment of his wife, has been the cause of her downfall, he should not be permitted to acquire any legal advantages thereby. He does not stand before the court with clean hands.

I think the motion to strike out should be denied.

Benjamin PEARMAN, Complainant,

v.

Thomas GOULD *et al.*

1. Where a fire insurance company which has insured mortgaged premises purchases and takes an assignment of a first mortgage thereon within a year after a loss on the premises by fire, it cannot, in a suit by a purchaser of the premises under a second mortgage, brought to have the first mortgage declared paid and removed as a cloud upon his title, set up as a defense that suit was not brought upon the policy within a year, as limited therein; the company having taken the place of the holder of the first mortgage, whose duty it was to recover the money due on the policy to the amount of his mortgage.
2. A purchaser of real estate at a judgment sale obtains no title until delivery of the deed.
3. An execution sale, subsequently declared void and set aside, is not within a provision of a policy against sales "under a levy under execution."
4. A provision in a policy, that it shall be void upon "the passing or entry of a decree of foreclosure," refers to a decree of strict foreclosure, which is an alienation; not to a decree for sale in a suit for foreclosure, which is not an alienation.
5. Where a policy is obtained by the owner of the equity of redemption, with an agreement with the first mortgagee that the money collected by him should go in satisfaction of his mortgage, the money paid by the insurance company on taking an assignment of the first mortgage must be regarded as paid on account of the insurance; and the company is not entitled to subrogation to the rights of the first mortgagee.

(Decided September 23, 1886.)

BILL to quiet title. On final hearing on pleadings and proofs. Decree canceling mortgage.

The facts of the case and the questions presented are stated in the opinion.

Mr. J. F. Cahill, for complainant.

Mr. J. S. Barkalow, for defendants.

Ranney, Chancellor, delivered the following opinion:

This suit is brought under the Act "to compel the determination of claims to real estate in certain cases and to quiet the title to the same." The complainant purchased from Richard Van Ess a lot of land upon which were a dwelling house and barn. The property was conveyed to him by warranty deed dated April 26, 1882. Van Ess got his title from Mary Beebe, who with her husband conveyed to him by deed dated March 1, 1882. She got her title from Albert A. Van Voorhies, late sheriff, by deed dated February 21, 1882, under foreclosure proceedings upon a second mortgage held by her upon the property. The premises were owned in 1872 by John Koman, who on the 4th of April in that year gave a mortgage thereon (the first mortgage) for \$1,000 and interest, to Thomas Gould. The complainant's title, it will be seen, is derived from the sale under foreclosure of the second mortgage. In 1880 (before the foreclosure) Harriet Pearsall owned the property. She conveyed it by deed dated March 8 in that year, to Catherine Coleman, who was the owner of it when the foreclosure took place.

On the 12th of August, 1881 (the foreclosure sale did not take place until February 10, 1882), the German American Insurance Company of New York issued a policy of insurance to Catherine Coleman against loss or damage by fire upon the dwelling house and barn and chattels, for one year, for \$2,000. By the terms of the policy the loss, if any, was to be payable, first to Thomas Gould, and second to Mary Beebe (the two mortgagees) as their mortgage interests might appear. The policy was delivered to Mr. Gould, the holder of the first mortgage, and was held by him until and after February 10, 1882, the day on which the foreclosure sale took place. In the morning of that day (the sale took place in the afternoon) the house was destroyed by fire. The complainant, as before stated, bought the property April 26, 1882, about two months after the fire. Mrs. Coleman made proof of loss on or about the 18th of February, 1882, about eight days after the fire. On the 18th of July, 1882, the company through Elias Osborne, its agent and trustee in the matter, obtained from Mr. Gould an assignment of his mortgage, in consideration of the payment by it to him of the whole amount then due thereon for principal and interest; and received the mortgage and the bond and policy from him accordingly. Mr. Osborne took the assignment in his name but in trust for the company. The bill, alleging that the Gould mortgage was paid off by the company with the money due under the policy, prays a decree against Gould and Osborne and the company, declaring that they and each of them have no estate, interest or right in or to the property. In fact the suit is brought to compel the company to cancel the mortgage, upon the ground that it ought to have paid the insurance money; in which case part of it would have gone to the satisfaction of the Gould mortgage. The company insists that the complainant, who bought the property after the fire, subject to

the Gould mortgage, would have no claim to the application of the insurance money, if any were due; and it also insists that no money is recoverable upon the policy, on the ground that in 1880, before the policy was issued, the property was sold and conveyed under a judgment against Catherine Coleman, to one Bridget Ann Coleman, who thenceforward until the sale was the owner thereof (so that the company insists Catherine Coleman did not own the property when the policy was issued) and that on February 10th, 1882, after the policy was issued, the property was again sold under the foreclosure proceedings to Mrs. Beebe; whereas, the policy provides that immediately upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust or levy under execution, or if the insured shall be adjudged a bankrupt, or if the property insured shall be assigned under any bankrupt or insolvent laws, or if any change shall take place in the title or possession of the property, whether by sale transfer, conveyance, legal process or judicial decree, or if the policy before loss shall be assigned without the consent of the company indorsed thereon, or if the assured shall not be the sole, absolute and unconditional owner of the property, then and in every such case the policy shall be void. The company defends upon the further ground that the policy provides that in any case there shall be no liability on the part of the company unless suit be brought within one year from the time of making proof of loss; and the company alleges that no suit was in fact brought upon the policy within one year from February 18, 1882, when the proof of loss was made. There is proof that by a recent decree of this court, made September, 7, 1885, the deed to Bridget Ann Coleman was with the judgments, execution and levy on which it was founded, set aside, annulled and declared void; and it appears by the foregoing statement of facts that the house was destroyed by fire before the sale under the foreclosure. The complainant also offers evidence that an agent (now deceased) of the company in Paterson after the proof of loss promised to pay the loss. He insists that he is entitled to a decree declaring the mortgage satisfied. The company denies that the agent referred to had any authority to bind it to pay the loss.

The company obtained the Gould mortgage by purchase thereof from Gould, for the amount of the principal and interest due thereon. But it took with it Gould's responsibilities as holder of that mortgage towards the complainant as a subsequent purchaser of the premises for value and with warranty. When the assignment was made, which was July 18, 1882, the complainant was the owner of the property and had been such since April preceding. Mr. Gould testifies that the complainant called upon him and asked whether he, Gould, held a mortgage upon the property; and he told him he did and that he held a policy of insurance as collateral and that he supposed the policy would be paid and advised the complainant not to buy until the policy had been paid or some settlement had been made about it. He says he thinks this was before the complainant bought the property and that it was soon after the fire. But the complainant swears that he never knew

that there was a mortgage upon the property until after he bought it. The conversation then, to which Mr. Gould testifies, must have taken place after the complainant had obtained title to the property and while as yet Mr. Gould held both mortgage and policy; and the question as to whether payment would be made or not under the latter was unsettled. The company then, about five months after the proof of loss had been made, purchased the mortgage and got it and the policy from Gould and has held them ever since. The complainant had no notice either from Gould or anyone else that the assignment had been made, but appears to have supposed that the mortgage had been satisfied out of the insurance money. The company, under the circumstances, cannot set up as against the complainant the defense that suit was not brought upon the policy within the year limited in the policy, because within that period the company took the place of Gould, whose duty it was to take steps to recover the money due upon the policy to the extent of the amount of the mortgage. He could have brought suit in his own name. *State Ins. Co. v. Maackens*, 9 Vroom, 564.

By the loss his right to so much of the insurance money as was necessary to satisfy his mortgage became vested. Nor is there anything in the case to show that the right of recovery had then been lost by the conduct of the mortgagor. The conveyance by the sheriff to Bridget Ann Coleman, although dated November 6, 1880 (the day of the sheriff's sale), was not delivered until October 7, 1881. It has, as already stated, been set aside and annulled by proceedings in this court. But apart from that fact, until the delivery of the deed, Bridget Ann Coleman had no title to the property. *Den v. Steelman*, 5 Halst. 193.

So that when Catherine took out the policy in 1881 she had title to the property and she had both title and possession up to the time of the fire. Under the circumstances, neither the sale nor the conveyance to Bridget Ann Coleman was a change of title, within the meaning of the condition of the policy. Nor was it a sale "under a levy under execution" within the meaning of the policy. The sale was invalid and so was the execution and the judgments on which they were founded. A void sale manifestly is not within the terms of the policy; and so too a "change of the title or possession by legal process or judicial decree," which is void, is not within its provisions. See *Wood, Ins. § 326*; and *Strong v. Myrs. Ins. Co.* 10 Pick. 40.

Catharine Coleman when she took out the policy was the legal as well as equitable owner of the property. She acquired title to it as already stated, by deed from Harriet W. Pearl to her, March 8, 1880. There is no evidence that any false representation, either verbal or written, was made to the company or its agent by her before or at the time of taking out the policy.

The policy provides that immediately upon the passing or entry of a decree of foreclosure the policy shall be void. The decree referred to in the provision is not a decree for sale in a suit for foreclosure but a decree of strict foreclosure. A decree of strict foreclosure is an alienation but a decree in ordinary foreclosure is not. It

was so held in *Kane v. Hibernia Mut. Fire Ins. Co.* 9 Vroom. 441, in which the policy provided that a judgment in foreclosure proceedings should be deemed an alienation of the property. Under the decree in the Beebe foreclosure suit the defendants in that suit were not foreclosed until the sale, which did not take place until after the destruction of the house by fire.

No other ground of defense against liability upon the policy has been shown except those above considered. The mortgage must be held to be satisfied. The money paid for it must be regarded as so much paid on account of the insurance money. The company was not entitled to subrogation to Gould's rights on making the payment; for the policy was obtained by the owner of the equity of redemption and the premiums paid by her. The contract between her and the mortgagee was that the insurance money collected by him should go in satisfaction of his debt. There is no ground for equitable subrogation of the company. The cases in which it has been held that such right exists are either those in which the insured has himself insured his special interest as mortgagee, etc. in the property and is not bound to apply the insurance money to the payment of the debt, or cases in which although the policy was taken out by the mortgagor, the company by reason of subsequent peculiar circumstances was held to stand in the relation of a surety and to be entitled to subrogation accordingly.

Sussex Co. Mut. Ins. Co. v. Woodruff, 2 Dutch. 541, is a case of the former kind. There the mortgagee himself insured for his own benefit his interest as mortgagee, and it was held that the company on paying the loss was entitled to subrogation to his rights as mortgagee.

In *Kernochan v. N. Y. Bowery Fire Ins. Co.* 17 N. Y. 428, where a building was insured in the name of the mortgagee for his own security and that of the mortgagor, the latter paying the premium, it was held that the company was not on payment entitled to subrogation to the rights of the mortgagee.

In *Matter of Kip*, 4 Edw. Ch. 86, subrogation was decreed where the mortgagor had obtained the policy and assigned it to the mortgagee; but in that case the mortgagor had before loss sold the property subject to the mortgage which the purchaser had assumed to pay as so much of the consideration money of the conveyance and the purchaser had taken no assignment of his grantor's interest in the policy. See *Wood, Ins.* § 471; and *Sheld. Sub.* § 236.

In *Graves v. Hampden Fire Ins. Co.* 10 Allen, 281, the owner of the equity of redemption of land in pursuance of a provision in the mortgage procured a policy of insurance upon the buildings at his own expense, payable to the mortgagee in case of loss; and the policy contained a written provision that no sale of the property should affect the right of the mortgagee to recover in case of loss under the policy. The equity of redemption was afterwards sold and a loss occurred. The insurance company took an assignment of the mortgage and policy, upon paying the amount of the mortgage to the mortgagee. It was held that the purchaser of the equity of redemption was entitled to the

benefit of the money so paid by the insurance company, to the amount of the policy; and might redeem the land upon paying to the company the balance due upon the mortgage after deducting the amount of the policy.

The complainant in this case is entitled to a decree that the mortgage be canceled, and he is entitled to costs.

BOUNDBROOK MUTUAL FIRE INS.
ASSO., Complainant,
v.

Emily A. NELSON et al.

*A vendor held a policy of insurance on the dwelling house standing on the premises sold; she took a mortgage for a part of the purchase money which was in excess of the amount due on the policy; she did not assign the policy at the time of the conveyance nor until after the house was burned; the company tendered the amount due on the mortgage and demanded an assignment of it, which was refused. Held, that the company was entitled to the mortgage. Held, also, that in order to carry costs it was not necessary that the company should tender the whole amount of the unpaid purchase money.

(Filed September 3, 1886.)

BILL in equity for the assignment of a mortgage. Decree advised.

Heard on bill, answer and proofs.

The facts are stated in the opinion.

Messrs. Gaston & Bergen, for complainant.

Messrs. R. V. Lindabury and J. D. Bartine, for defendants.

BIRD, V. C., delivered the following opinion:

Mrs. N. was the owner of a tract of land. The dwelling house thereon was insured in the complainant Company for \$1,200. December 17, 1884, she sold and conveyed the premises to her sons George and Albert by deed with full covenants of warranty. At the same time the sons executed to her a purchase money mortgage for \$1,500, being one half of the consideration money. The deed was placed in the clerk's office for record, immediately after its execution and delivery. The mortgage was executed by Albert and wife and by George, but not by George's wife, she not being present.

There is some dispute as to the precise disposition of the mortgage after it was so executed; the defendants claiming that it was delivered to Albert to be retained by him until George's wife could be produced, to join in the execution of the mortgage, and until George could raise a small portion of the consideration money to be paid by him. I do not think there is any room for doubt on this branch of the case. Without hesitation I find that the mortgage was delivered to Mrs. N. In her proof

*Head note by BIRD, V. C.

of loss she swears that she took such mortgage as part of the consideration. Having been delivered to her the transaction was complete. She being the mortgagee, she could not hold it in escrow.

The mortgage having been given for a part of the purchase money, it was not essential that the wife of the mortgagor should join in the execution.

An effort was made to sustain this branch of the defense by showing that the consideration money was not all paid by the one son or the other and that the parties intended to suspend its completion until such payment could be made. But the conduct of the parties and their relations to each other, at the time and before the delivery of the deed, very satisfactorily prove that what they did was complete in itself; and that, for what remained to be done there was the same implicit confidence that it would be done as had been exhibited before between them. For example, the mother was indebted to the one for about \$700, and the other about \$250, without security to either. These claims were canceled or intended to be at the time of the transaction.

The testimony is that Albert gave up his note at the time. George says that the exact amount due him from his mother was \$239, and that she was to give him a note for it, but never did. He says that was to go as part payment on the farm and the balance he was to pay his mother. I repeat that to my mind it seems clear that in the law the transaction was complete between the parties.

The deed and mortgage were delivered on December 17, 1884; the house was burned on the 25th of the same month. At that time Mrs. N. held both the mortgage and the policy of insurance. The complainant admits that she had an insurable interest in the premises, to the extent of the unpaid purchase money, and from the time of proof of loss has been willing to pay her the amount of the policy. The complainant tendered to her the amount of money due upon the policy and demanded of her an assignment of her interest in the mortgage, to that extent; but she refused to make such an assignment. Upon such refusal, the Company tendered to her the amount due upon the policy, with such additional amount as represented the balance due upon the mortgage, and demanded an assignment of her interest in the bond and mortgage, which Mrs. N. also refused.

Was Mrs. N. justified in this refusal? In other words, had the Company a right, upon payment of the amount due according to the proof of loss upon the policy and the additional amount between that sum and the amount due upon the mortgage, to stand in her place? Independent of the rights of others there seems to be no doubt of its right to subrogation. *Sussex Co. Mutual Ins. Co. v. Woodruff*, 2 Dutch. 541; *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389; 17 N. Y. 428; 16 Wend. 385; 13 Wall. 367 [80 U. S. bk. 20, L. ed. 594]; 70 N. Y. 19.

But it is said in this case that the rights of the sons, in equity, prevent the application of the doctrine of subrogation. The claim is that the sons have the right to stand in the place of the mother, and not the Company; and that although they did not have the policy assigned

and transferred to themselves and have such assignment approved, they intended to do so. The testimony leads me to the conclusion that so far as there was any intention on the part of the sons to have the policy transferred to them and then retransferred to their mother as collateral security, it was but a faint or uncertain intention. If there was any intention whatever, it was not so followed up or prosecuted as to justify the court in aiding the defendants George and Albert.

It may well be said that it is the duty of the court to aid those who otherwise suffer, when an accident intervenes and prevents them from the accomplishment of an object which they are honestly in the pursuit of diligently. But with honest intentions there must be diligence; otherwise the court will frequently aid in the commission of the greatest injustice; otherwise it will only be necessary in such cases for parties to say: "We will complete or execute the transfers by and by or at some other time" and be perfectly safe, because under the protection of the court. The doctrine contended for is salutary; but the Company against which it is sought to be applied is certainly entitled to protection, from laches.

In this case there were no steps taken by the sons, until after the house was burned, to have the policy transferred and such transfer approved. One of the by-laws of the Company is that "No transfer of any policy of insurance of the said Company shall be valid until approved by an insurance committee and certified by the secretary on the policy; in all cases of transfer new notes shall be given." These requirements were in no sense complied with and not a single step taken to show an honest and *bona fide* intention to comply with them. When the deed and mortgage were executed and delivered, the parties were with their counsel, at the county seat of the county in which the complainant Company is established and has always had its offices.

It seems to me that while it is competent for the court to listen to the sworn statements of parties in such cases, that it was their intention to do this or that, unless such intention is manifested and supported by some act done with all due diligence, the chances that the court will do injustice will greatly preponderate, if it be governed by such declarations. Hence, I conclude that this defense in behalf of the sons also fails.

My attention was called to the doctrine of subrogation as laid down in *Wood on Fire Insurance*. After a careful examination of Wood's exposition of the law and of the cases on which he rests his conclusions, I find myself unable to place these parties within either the one or the other.

Again; it was urged that the complainant, in case it was otherwise entitled to recover, was not entitled to costs as against Mrs. N. for the reason that it did not tender to her the whole amount due to her. The claim is that the amount of the mortgage, and also the difference between \$239, with interest thereon for a short time, and \$750 (being the whole balance of the purchase money unpaid and unsecured), should have been tendered.

As I understand the evidence, Mrs. N. made her claim for the benefit of the insurance be-

cause she held the mortgage, and not because of any vendor's lien. Making her claim on this ground, she could not expect the Company to treat or deal with her on any other ground. She might perhaps refuse to accept only a portion of her security. But it is certainly different when we consider her rights under the law respecting vendor's lien, where applied to this case. Not that there would be any difference between the rights of a mortgagee and a vendor, which I am not discussing.

But in this case Mrs. N. has herself done an act which I think prevents her from insisting that she shall not pay costs. That act was the taking of a mortgage for a portion of the unpaid purchase money, which in this case was in excess of the amount due on the policy. In so doing she had divided her lien or claim. She is now no worse off in any sense than she then was. If it was her intention to retain her lien as vendor, she still has it, notwithstanding the court may order the assignment of the mortgage to the complainant.

I think the complainant is entitled to a decree with costs, as against all of the defendants.

STATE of New Jersey

v.

SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES.

1. The **Society** for Establishing Useful Manufactures is **exempt from the tax** imposed by the Act of April 18, 1884, upon the capital stock of corporations.
2. The **exemption** from taxation conferred by the **charter** of said Society **extends to property** of the Society, **acquired under a subsequent Act** of the Legislature empowering it to extend its operations by condemning additional lands for the same purposes as those provided for in its charter.

(Filed September 24, 1886.)

PETITION for an injunction to restrain defendant Corporation from exercising its franchises, on failure to pay taxes assessed against it under the Act of April 18, 1884. *Dismissal of petition advised.*

The Society for Establishing Useful Manufactures was incorporated in 1791, "for the purpose of establishing a company for carrying on the business of manufactures in this State." Soon after the granting of the charter the Society was organized, and in 1792 a situation at the Great Falls of the Passaic River was chosen as a suitable place for its operations; and by acquiring land, appropriating water rights, building dams and constructing canals it has established the immense water power which has created and supported the manufacturing interests of the City of Paterson.

The fourth section of the Society's charter (R. S. 108) is as follows: "Sec. 4. And the more effectually to encourage so useful and beneficial an establishment, *Be it further enacted by the authority aforesaid*, That all the lands, tenements, hereditaments, goods and chattels, to the said Society belonging, shall

be and they are hereby declared to be free and exempt from all taxes, charges and impositions whatsoever, under the authority of this State, whether for state or county uses or for any other use whatsoever; *Provided always*, That the said exemption shall not be construed to extend to the private or separate property of any member of the said corporation, in his or her individual capacity; and, as touching the lands, tenements and hereditaments of the said Society, shall continue in force for the term of ten years only, after which term it shall be lawful to lay such taxes, for the use of the State, upon the said lands, tenements and hereditaments as shall be laid upon other lands, tenements and hereditaments of like value, nature or description; *Provided, nevertheless*, That in case the said taxes shall be laid by way of assessment, it shall be according to a certain rate per centum, to be prescribed in the law laying such taxes, of the true and absolute value of the lands, tenements or hereditaments whereupon the same shall be laid or assessed; and shall not extend, directly or indirectly, to the moneys, goods or chattels, whether in possession or action, or to the profits real or supposed, of the said Society."

The questions raised are stated in the conclusions of the Vice Chancellor.

Mr. William Y. Johnson, for the State:

All taxation must relate to one of these subjects, viz.: persons, property or business.

The sovereign power of the State in respect to taxation may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Federal Constitution.

State Tax on Foreign Bonds, 15 Wall. 819 (82 U. S. bk. 21, L. ed. 179); *Hagar v. Reclamation District*, 111 U. S. 709 (Bk. 28, L. ed. 572); *State v. Parker*, 3 Vroom, 426; *Stratton v. Collins*, 14 Vroom, 564; *Tatem v. Wright*, 3 Zab. 440; *State v. Newark*, 2 Dutch. 519.

The State has the right to impose a tax on the business of a corporation, graduated by a percentage of the business done.

Erie R. Co. v. State, 2 Vroom, 533.

Private corporations are as much subject to the taxing power of the State as individuals, unless excepted by some paramount law or the franchise of the corporation.

Society for Savings v. Coite, 6 Wall. 607 (78 U. S. bk. 18, L. ed. 908); *State v. Berry*, 2 Harris. 80; *Camden & Amboy R. R. etc. Co. v. Comrs. of Appeals*, 8 Harris. 72.

Double taxation is not unconstitutional; yet this power of taxation extends only to the right to subject the property of a corporation to such taxation as by the general laws of the State may be imposed on the kind of property of which it is the owner, or subject it to such taxation as corporations, as a class, are made liable.

State v. Parker, 3 Vroom, 435; *Stratton v. Collins*, 14 Vroom, 564.

A State has the right to tax its own citizens for the prosecution of any particular business or profession within the State.

Nathan v. La. 8 How. 73 (49 U. S. bk. 12, L. ed. 992); *Paul v. Va.* 8 Wall. 168 (75 U. S. bk. 19, L. ed. 857); 1 Desty, Tax. 225-228.

The Legislature possesses the power to impose such a burden by way of a tax or license fee.

Freeholders of Essex County v. Barber, 2 Halst. 64; *North Hudson County R. Co. v. Hoboken*, 12 Vroom, 71; *Memphis Gas Light Co. v. Tax Dist. Shelby County*, 109 U. S. 898 (Bk. 27, L. ed. 976).

This Act does not violate the fundamental law as imposing an arbitrary sum upon a single corporation or making invidious distinctions.

State v. Parker, 8 Vroom, 435; *State v. Yard*, 18 Vroom, 357.

The Act does not contravene the Federal Constitution.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (Bk. 29, L. ed. 158).

The legislative provision that "The charter of every corporation shall hereafter be subject to alteration, suspension or repeal, in the discretion of the Legislature," did not bind subsequent Legislatures so that they could not grant irrevocable contracts or charters; but it created a law which can never justly be put out of sight in determining whether any charter granted was designed to be irrevocable.

New Jersey v. Yard, 95 U. S. 104 (Bk. 24, L. ed. 352); *Little v. Bowers*, 17 Vroom, 304; *Greenwood v. Freight Co.* 105 U. S. 18 (Bk. 26, L. ed. 961).

In order to establish a legislative contract exempting from taxation, the statute must be explicit and unmistakable and without doubtful words.

Memphis Gas Light Co. v. Tax Dist. Shelby Co. supra.

Every charter granted since the passage of the sixth section of the Corporation Act is subject to alteration, amendment or repeal, although it contains no express words so declaring.

State v. Pearson, 8 Vroom, 134-566; *State v. Douglass*, 5 Vroom, 83; *Story v. Jersey City, etc. Plank Road Co.* 1 C. E. Green, 13; *State v. Miller*, 1 Vroom, 869; *State v. Miller*, 2 Vroom, 521.

The sovereign power may resume the grant of a franchise before it has been accepted and rights acquired under it.

State v. Blake, 6 Vroom, 209-215; *State v. Blake*, 7 Vroom, 442.

This clause has since been engrafted into the Constitution and is now the paramount law, so that even the Legislature cannot grant irrevocable charters.

Const. of New Jersey, art. IV, § VII, ¶ 11.

Property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

The word "property" is a generic term. It includes real and personal property, tangible and intangible, visible and invisible, in its broadest sense. But it leaves to the discretion of the Legislature the designation of the particular subject or kind of property which it will select for the purpose of taxation. The selection of the subject or class having been made, the law must be general as to that class; the rule must be uniform and the assessment made according to true value.

Trustees of Public Schools v. Trenton, 3 Stew. 677, 678; *State v. Newark*, 10 Vroom, 390; *Stratton v. Collins*, 14 Vroom, 564; *State v. Yard*, 18 Vroom, 863; *State v. Runyon*, 12 Vroom, 98; *Dundee Mort. Trust Invest. Co. v. School District No. 1*, 19 Fed. Rep. 871.

The court will find a class of cases reported

in the New York Reports, on an Act similar to the one under consideration.

People v. N. Y. Float. Dry Dock Co. 63 How. Pr. 451; *People v. N. Y. Float. Dry Dock Co.* 92 N. Y. 487; *People v. Fire Assn. of Phila.* 92 N. Y. 811; *People v. Home Ins. Co.* 92 N. Y. 329; *People v. Spring Val. Hydr. Gold Co.* 92 N. Y. 385; *People v. Equitable Trust Co.* 96 N. Y. 337.

Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is impossible.

State Railroad Tax Cases, 92 U. S. 612 (Bk. 23, L. ed. 673).

The tax is uniform when it operates with the same force and effect in every place where the subject is found.

Head Money Cases, 112 U. S. 594 (Bk. 28, L. ed. 802); *Stratton v. Collins*, 14 Vroom, 565; *Dundee Mort. Trust Invest. Co. v. School District No. 1*, 19 Fed. Rep. 869.

A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.

Gallin v. Turboro, 78 N. C. 119; *Burr. Tax*. 147-9.

The decision in *Worth v. Wilmington & Weldon R. R. Co.* 89 N. C. 291, is based upon the idea that you cannot tax the same sort of corporations by two different rules: the one by gross receipts and the other upon the amount of its capital stock.

The Constitution provides that "property" shall be taxed, of which franchises are a valuable kind, although it does not require the Legislature to tax franchises, and provides no way in which franchises may be valued. A franchise has a value independent of the property actually used for the enjoyment of it, and it is possible to set a value on it.

Wilmington C. & A. R. R. Co. v. Board of Comrs. of Brunswick Co. 72 N. C. 10-15; *State v. Metz*, 2 Vroom, 386.

The amount of a franchise tax upon a corporation may be graduated or measured by an appraisal of the whole or any portion of the corporate property, without thereby making it a property tax. Possessing the power to impose a franchise tax to any amount it deems proper, the Legislature may measure the amount by any standard it pleases.

State v. Maine Cent. R. R. Co. 74 Maine, 383.

A franchise measured by its net earnings represents the value of the franchise or the extent of its exercise.

Phila. Contributionship, etc. v. Commonwealth, 98 Pa. 53. *State v. Metz*, 2 Vroom, 386.

A franchise under the English decisions is considered a "hereditary;" and is liable to taxation under the Acts for granting a land tax, etc.

Reg. v. Cambrian R. Co. L. R. 6 Q. B. 427; *Vauxhall Bridge Co. v. Saucyer*, 6 Welsb. Hurl. & G. 503; *Reg. v. Great North. R. Co.* 68 E. C. L. 24.

In the case of *Reg. v. London, etc. R. Co.* 41 E. C. L. 671, it was held that the company was rateable for the land improved by the profits accruing from the railway, etc.

Reg. v. Mile End Old Town, 59 E. C. L. 218.

The tax imposed by this Act is in its nature a franchise tax by way of a license fee and not a property tax.

A corporation is something besides franchises,

for it has a capacity to hold as a natural body; and although it may cease to be *in actu exercito*, yet it may be *actu signato*. A corporation is an artificial body constituted of several members, like a natural body; it is united by its franchises.

Rez. v. Mayor of London, 12 Mod. 18; *Sir James Smith's Case*, 4 Mod. 56; *London v. Vancare*, 12 Mod. 271.

A corporation, as defined by the ancient common law, is a franchise created by the King and is a body constituted by policy, with a capacity to take or to do.

4 Comyn. Dig. 465, Title, *Corporation*.

The ordinary signification of the word "franchise," as defined by Webster, is "a particular privilege or right granted by a prince or sovereign to any individual or to a number of persons; an exemption from a burden or duty to which others are subject."

In a legal sense, franchise and liberty are used as synonymous terms; and the kinds are various and almost infinite.

2 Bl. Com. 87; *Central R. R. & Bkg. Co. v. State*, 54 Ga. 406-409.

It is quite too narrow a definition of the word "franchise" used in this statute, to hold it as meaning only the right to be a corporation. The word "franchise" is generic, covering all the rights granted by the Legislature.

Atlantic & Gulf R. R. Co. v. Georgia, 98 U. S. 385 (Bk. 25, L. ed. 187).

Immunity from taxation is not a franchise. *Chesapeake, etc. R. Co. v. Miller*, 114 U. S. 185-6 (Bk. 29, L. ed. 124).

The test, whether the tax in any given case is a franchise as distinguished from a property tax, is that a tax according to a valuation is a tax on property; whereas, a tax imposed according to nominal value, or measured by some standard of mere calculation, as contrasted with valuation fixed by law itself, may be a franchise tax.

Kittanning Coal Co. v. Commonwealth, 79 Pa. 104; *People v. Comrs. of Taxes of N. Y. City*, 2 Black, 620 and *Bank Tax Case*, 2 Wall. 200 (67 and 69 U. S. bk. 17, L. ed. 451, 798); *Society for Savings v. Coite and Provident Sav. Inst. v. Mass.* 6 Wall. 594, 611 (78 U. S. bk. 18, L. ed. 897, 907); *Commonwealth v. Standard Oil Co.* 101 Pa. 127; *Gloucester Ferry Co. v. Pa.* 114 U. S. 196 (Bk. 29, L. ed. 158); *Hamilton Mfg. Co. v. Mass.* 6 Wall. 682 (78 U. S. bk. 18, L. ed. 904); *State v. Maine Cent. R. R. Co.* 74 Maine, 388; *People v. Home Ins. Co.* 92 N. Y. 829; *People v. Equitable Trust Co.* 96 N. Y. 887; *Phila. Contributionship, etc. v. Commonwealth* 98 Pa. 53; *State v. Berry*, 2 Harris. 80; *Camden & Amboy R. R. Co. v. Hillegas*, 3 Harris. 11; *Camden & Amboy R. R. etc. Co. v. Comrs. of Appeals*, 3 Harris. 72; *Gardner v. State*, 1 Zab. 561; *State v. Leester*, 5 Dutch. 542.

The corporations required to pay a tax under the Act in question are all corporations not hereinbefore provided for, except the ones specifically excepted from its provisions.

The exception is in the nature of a proviso, which is defined to be "something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactment."

Minis v. U. S. 15 Pet. 423 (40 U. S. bk. 10, L. ed. 791); *Potter, Dwar. Stat.* 118; *People v. Equitable Trust Co.* 92 N. Y. 897.

The license fee or tax shall be measured by the amount of capital stock of such corporations.

Such corporations as have organized, but have failed to commence business, are still liable to pay the tax, although they receive no profit or benefit from the franchise granted.

State v. Railroad Comrs. 12 Vroom, 246; *Rudderow v. State*, 2 Vroom, 519.

It is contended, although the corporation has been duly organized and thereby acquired a legal existence, yet if there has been a non-user, misuser, abandonment or surrender of its corporate privileges, that it is not liable to pay the tax levied by the Act.

A nonuser or misuser will not forfeit a charter.

Atty-Gen. v. Stevens, Saxt. 389; *Society, etc. v. Morris Canal & Bank Co.* Saxt. 157.

If a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights; but it must be shown by the answer and proved.

Slee v. Bloom, 19 Johns. 456; *In Matter of Highway*, 2 Zab. 301. See also *Rez. v. Mayor of London*, 12 Mod 19; *Sir James Smith's Case*, 4 Mod. 57, and *Dean & Chapter of Norwich's Case*, 3 Co. 76.

No tax shall be set aside for any irregularity or defect in form or illegality in assessing, laying or levying any such tax, in respect of the purposes for which such tax is levied, assessed or laid, if the person against whom or the property upon which such tax is assessed or laid is, in fact, liable to taxation.

Conover v. Honce, 17 Vroom, 847.

The tax is payable annually.

People v. N. Y. Float. Dry Dock Co. 63 How. Pr. 451; *People v. Spring Val. Hydr. Gold Co.* 92 N. Y. 888; *State v. State Board of Assessors*, 18 Vroom, 36.

Mr. J. D. Bedle, for respondent.

Bird, V. C., filed the following conclusions:

This being a public matter and demanding the first attention of the courts, it is proper that I should say it was not presented to the court until August 8, when it was heard, although in the midst of the summer vacation.

In 1884 the Legislature passed a law providing for the imposition of state taxes upon certain corporations, and for the collection thereof. Different corporations are enumerated and classified and the imposition to be made is fixed. Then is added: "All other corporations incorporated under the laws of this State and not hereinbefore provided for shall pay a yearly license fee or tax of one tenth of 1 per centum on the amount of the capital stock of such corporations; *Provided*, That this Act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing companies, or mining companies carrying on business in this State."

The State imposed a tax on the respondent, which is resisted on two principal grounds: because it is exempt by charter, and because it is a manufacturing corporation doing business in this State. This resistance seems to be fully sustained by the several decisions of the supreme court when this same Corporation was

asking to be relieved from similar burdens. See *State v. Flavell*, 4 Zab. 370; *State v. Powers*, 4 Zab. 400, 406; *State v. Blundell*, 4 Zab. 402. Also 3 Stew. 145, note.

However, the State claims that these decisions are no longer of force, for the reason that in 1868 the Legislature extended to the Corporation the right and power to extend its operations by condemning other lands and raising its dams, etc. There is no change in the character or attributes of the Corporation by this Act. The purpose is the same as before. It is like a railroad or canal company procuring a charter to lengthen its line. Yet the insistence upon the part of the State is that this is a new franchise; and not being exempted, it is necessarily subject to the assessment imposed under the Law of 1884. By no method can I come to this conclusion.

I think the order to show cause why an injunction should not issue restraining said Corporation from doing business should be discharged and the petition dismissed. I will so advise.

STATE of New Jersey

v.

AMERICAN GLUCOSE CO.

1. The exemption from taxation, under the Act of April 18, 1884, of manufacturing companies "carrying on business in this State" does not apply to a manufacturing company which has all its factories in other States, but maintains an office, sells its products and holds its business meetings in this State.
2. Under the corporation tax law, the court of chancery has only authority to grant or refuse an injunction against a corporation's continuing business after failure to pay the tax assessed against it; and a proper case for such injunction appears when the court is satisfied that the State is not wholly in the wrong.

(Filed September 24, 1886.)

PETITION for an injunction to restrain the defendant Corporation from exercising its franchises after failure to pay a tax assessed against it under the Act of April 18, 1884. *Injunction advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. W. Y. Johnson, for the State.

Mr. J. D. Bedle, for respondent.

Bird, V. C., filed the following conclusions:

In 1884 the Legislature passed a law providing for the imposition of state taxes upon certain corporations and for the collection thereof. Different corporations are enumerated and classified and the imposition to be made on each is fixed. Then is added: "All other corporations incorporated under the laws of this State and not hereinbefore provided for shall pay a yearly license fee or tax of one tenth of 1 per centum on the amount of the capital stock of such corporations; *Provided*, That this Act shall not apply to railway, canal or bank-

ing corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this State."

The State imposed a tax on the capital stock of the respondent of one tenth of 1 per centum of its capital stock. Its capital stock, according to its certificate on file is \$15,000,000. The same is divided into 150,000 shares. The par value of each share is fixed at \$100. The certificate then adds: "The amount with which said Company will commence business is \$1,000, which is divided into ten shares of the par value of \$100 each." The whole amount of its capital stock being \$13,225,000 worth on the face of its own certificate, the assessment was \$13,225. This tax has not been paid within the time limited by the Act. Hence, the Attorney-General asks for an injunction restraining said corporation from exercising its franchise, as by said Act he may.

The two principal objections to an order for the injunction are: that the Company is a manufacturing company and actually carrying on its business within this State and therefore exempt; and that the tax imposed is unconstitutional, because imposed upon the entire amount of capital stock named in the certificate (\$13,000,000 worth) when the amount of stock actually issued is only 132,250 shares.

First: Does it carry on business in this State within the meaning of the Act? It is a manufacturing corporation. Its own statement is: "The Corporation carries on business in the State of New Jersey, and has at all times, within one year last passed; that is to say, it has a factory for the manufacture of grape sugar and glucose at Buffalo, in the State of New York, another at Leavenworth, Kansas, another at Peoria, Illinois, another at Iowa City, Iowa, and another at Tippecanoe City, Ohio. It sells the products of these factories, or some of them, at divers points within the State of New Jersey, making the sales within that State; it holds its business meetings at Camden, within the State of New Jersey, and has regularly since its organization; and it maintains an office at which to transact its business in the State of New Jersey. It purchases materials for its business within the State of New Jersey, and from time to time transports goods within the State of New Jersey, and in other ways carries on business within that State, and has from time to time since its organization."

I can see nothing in all this to bring the Company within the exception. Can the object of the law be frustrated by the agents of the Company opening an office in this State and transacting the ordinary official business of the Company there, registering the same, keeping accounts and having other agents making sales of their merchandise in the State, while all of its real or tangible capital or property of every description is far beyond the reach of the tax collector, in distant States? I think not. Doing business in this State in the legislative mind could not have been anything short of carrying on the principal work or business of the Corporation within this State; carrying on its business here in the plain and ordinary acceptance of the term, just as our bankers, potters, iron, cotton, woolen, leather and shoe manufactur-

ers, with all their capital and all their assets here, carry on business.

If any other view than this is taken, the Legislature has indeed struggled in vain with the numerous corporations which our laws foster and protect; and its work can and doubtless will be rendered absolutely nugatory by every such institution opening an office within this State. The Legislature meant to say: if the manufacturer establishes his factory in this State, and brings here his raw material and converts it into wares, then he shall not be subject to this Act. If these things be done, then the State has other laws by which its revenues can be supplied by direct tax upon such factory or buildings, lands, goods and the like.

But it is claimed that both the Act of the Legislature and this assessment are in conflict with that provision of the Constitution which declares that "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value." I am not prepared to say that the Act in question violates the fundamental law. I am not prepared to say but that if this Corporation had gone to the supreme court by *certiorari* and raised this question, that that tribunal would not have declared the law constitutional; and if it ascertained that the assessment was too great, being upon stock that had no actual existence, would not have taken steps to ascertain the true value and so secure to the State the tax justly due.

I find no authority conferred upon this court to proceed further than to grant or refuse an injunction. The statute says "That in addition to other remedies for the collection of such tax, it shall be lawful for the Attorney-General * * * whenever any tax due under this Act from any company shall have remained in arrears for the period of three months * * * to apply to the court of chancery for an injunction to restrain such corporation from the exercise of any franchise or the transaction of any business within this State until the payment of such tax and interest due thereon * * * The said court is hereby authorized to grant such injunction, if a proper case appears."

The power of this court is expressly limited to the granting of an injunction. "If a proper case appear" it may grant the writ. It seems to me that a proper case appears when the court is satisfied that the State is not wholly in the wrong. In other words, if it be doubtful whether or not, in a proper tribunal, the tax imposed, or some part of it, might be collected, then the writ should go. This leaves the parties to their legal remedies, and the Corporation can have the tax set aside if illegal or unconstitutional, and the State can have the just amount due paid if the law be sustained.

I will advise an order that an injunction do issue according to the prayer of the petition.

Re Taxation of FAURE ELECTRIC LIGHT & FORCE CO.

An injunction will not be granted under the Act of April 18, 1884, to restrain a corporation from exercising its franchises in case of nonpayment of tax,

N. J.

where the corporation has only kept up a formal organization without transacting any business.

(Filed October 5, 1886.)

PETITION for an injunction to restrain defendant Corporation from exercising its franchises on failure to pay taxes assessed against it under Act of April 18, 1884. *Denied.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. W. Y. Johnson, for the State.

Messrs. Dudley & Son, for respondent.

Bird, V. C., filed the following conclusions:

The Statute of 1884 provides for the assessment of certain corporations, and then adds: "All other corporations incorporated under the laws of this State and not hereinbefore provided for shall pay a yearly license fee or tax of one tenth of 1 per centum on the amount of the capital stock of such corporations; *Provided*, That this Act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this State." The respondent has been assessed under this clause. It has not paid the tax.

The same statute provides "That in addition to other remedies for the collection of such tax, it shall be lawful for the Attorney-General * * * whenever any tax due under this Act, from any company, shall have remained in arrears for the period of three months after the same shall have become payable, to apply to the court of chancery by petition in the name of the State * * * for an injunction to restrain such corporation from the exercise of any franchise, or the transaction of any business within this State until the payment of such tax and interest due thereon, and the costs of such application. * * * The said court is hereby authorized to grant such injunction if a proper case appears."

A petition has been filed in this case.

When can the court interpose? Only when a proper case is presented. Have we a case now which calls for the aid of this court by way of injunction? I think not. The facts are that although the Company has been organized for more than three years it has not transacted any business in this State or out of it. It has only attempted to preserve its organization by the election of officers as provided by law. It has gone no further than this, because it has been prohibited by injunction from other courts against the use of patents under which it expected to manufacture its wares. There is nothing in the Act that seems to carry it to such a case. In my view, the Legislature did not intend to assess the mere right or franchise independently of the business, to carry on which the franchise was granted. It is the exercise of the privilege thus granted that justifies the assessment or at least the interference of this court. The Legislature did not mean by one Act to create a corporation, or to allow a body corporate to be created, and then by another to give this court, a court of equity, the power to strangle it, while still struggling for existence.

I will advise that the order to show cause be dismissed.

Re Taxation of NEW YORK FILE & SHARPENING CO.

An injunction will not be granted under the Act of April 18, 1884, against a corporation, on failure to pay the tax assessed under that Act, where the corporation has simply preserved its organization, but is not in active operation.

(Filed October 8, 1886.)

ON petition by the Attorney-General for an injunction to restrain the New York File & Sharpening Company from exercising its franchises on failure to pay the tax assessed against it under the Act of April 18, 1884. *Dismissal of petition advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. W. Y. Johnson, for the State.

Mr. C. M. Stabler, for respondent.

Bird, V. C., filed the following conclusions:

I do not think the State has made out what the statute contemplates as a "proper case" for the interference of this court to aid in the collection of the assessments imposed on this Company. I think the court should move cautiously, for what it can do under the statute, in aid of the law courts, in collecting taxes, is in the nature of a penalty or forfeiture; that is, it can only interfere by enjoining the delinquent from transacting any business within this State. The statute confers no other power.

The facts are that this company carried on the business of manufacturing within this State, so long as it could find a market for its wares, since when it has manufactured nothing in this State or elsewhere. It was not manufacturing at the time of this assessment. It has preserved its organization, but has transacted no other business. In my judgment these facts take the case out of the statute, and consequently, the parties must be left to their ordinary remedies at law.

See also conclusions in cases of *State v. American Glucose Co.* filed Sep. 24, 1886 [ante, 142], and *State v. Faure Electric Light & Force Co.* filed Oct. 5, 1886 [ante, 148].

I will advise an order that the petition be dismissed.

David P. MEASURALL

v.

Thomas C. PEARCE et al.

A parol agreement to extend the time of payment of a mortgage for one year is good.

(Filed June 17, 1886.)

BILL to foreclose a mortgage. Rehearing on motion to strike out answer. *Denial of motion advised.*

The case is stated in the conclusions of the Vice Chancellor.

Mr. S. M. Schanek, for complainant, for the motion:

Part payment of a debt overdue is not a valid

consideration for an agreement to postpone or discharge the payment of the residue.

Conover v. Stillwell, 5 Vroom, 54.

A bargain without a consideration is a contradiction in terms and cannot exist.

Myddleton v. Kenyon, 2 Ves. Jr. 408.

The general rule is thus stated in Chitty on Contracts, 8th Am. ed. p. 25: A valid and sufficient consideration or recompense for making, or motive or inducement to make the promise upon which a party is charged, is of the very essence of a contract not under seal, both at law and in equity; and such consideration must exist, although the contract be reduced into writing; otherwise the promise is void, and no action can be maintained thereon.

Mr. S. M. Dickinson, for defendant, *contra*.

Bird, V. C., filed the following conclusions:

The defendant, by his answer, sets up a parol promise made by the complainant to extend the time one year for the payment of the bond which the mortgage was given to secure, to foreclose which this suit is brought, which period had not elapsed when the bill was filed. The complainant moved to strike out all that part of the answer because it showed no proper defense.

On the former hearing it seemed to me that the motion ought to prevail because the allegation exhibited no mutuality. If there was a promise on the part of the complainant to wait, on his part, there was no allegation on the part of the defendant that he also promised to wait; in other words, that he promised not to pay within the year. A further examination of the authorities, including others as well as those cited in my former* opinion, satisfies me that my former opinion was wrong.

It is my duty to advise an order setting aside the former order and denying the motion to strike out, with costs.

*The authorities cited in the former opinion are: *French v. Griffin*, 8 C. E. Green, 279; *Cox v. Bennett*, 1 Green, 171; *King v. Morford*, Saxt. 280; *Vanhouten v. McCarty*, 3 Green, Ch. 141; *Stryker v. Vanderbilt*, 1 Dutch, 485, 498; *Wilson v. Bird*, 1 Stew. 352; *Bell v. Romaine*, 3 Stew. 28; *Kane v. Cortes* (N. Y.) 1 Cent. Rep. 245; *Dodge v. Crandall*, 30 N. Y. 307. [Ed.]

Re Petition of Mariah L. CRAVEN for the Appointment of a New Trustee.

A note of hand, made by one having a contingent interest in remainder in a trust fund, secured only by an agreement between the maker and the person who has a life estate in the income of the fund, pledging all their interest in the fund to the payment of the note, is a doubtful security such as a new trustee will not be compelled to accept from his predecessor.

(Filed October 5, 1886.)

ON exception to master's report. *Overruled.*

The facts are stated by the Vice Chancellor.

Mr. Frank B. Colton, for petitioner.

Mr. John D. Bartine, for respondent.

Bird, V. C., filed the following conclusions:

The master in this case reports that four of the six investments made by the former trustee are good and that two are not, and that the former should be accepted by the new trustee, but that the former trustee should be charged with the whole amount due on the two other securities. One of these two was disposed of during the hearing of the exceptions to the master's report. The other security is a note of hand for \$700, given by Alfred E. Craven in 1878 and without any security whatever, except that which it is claimed arises from the agreement of said Alfred and the said Mariah L. Craven, whereby they pledge, it is said, all their interest in the fund to the payment of this note.

If the statute which directs trustees in making loans had been complied with, no question could have arisen. The statute has been disregarded. And while all courts go a great ways to protect trustees, I can find no authorities which will sustain this transaction. The loan seems to have been made to one who has a contingent interest in remainder, in the funds, upon his individual note. He was then, when he gave the note, and I think still is, insolvent. The agreement relied upon as securing the payment of the note was executed by him and the person who has the life estate, which estate is the interest on the funds held in trust.

Supposing this agreement or pledge to be valid and binding on the parties executing it, it may prove totally inadequate to secure the liability. When Mrs. Craven dies there is no longer any support for this trustee from that direction, for I understand she has no estate but the interest on these funds. And is the pledge of the remainderman adequate? It seems that all he had to pledge was this fund. And if he was insolvent when he made this pledge or agreement, may not his necessities have induced him to pledge it before, to others?

But if we take it as wholly free from such interpretation, can we say that at the time his interest falls due, it will be equal to the amount which may be due upon the note? And, supposing this too, be sufficiently answered, by what rule can any court make the protection a certainty, since the testament creating the gift gives the fund to those "who shall be living at the time of the death of the survivor" of the life tenants? These considerations would seem to be quite enough to sustain the master.

But it is reasonably doubtful whether the agreement is binding, even in a court of equity. One of the parties proposed to be bound thereby did not execute it. However this may be, I am very clear that the responsibility of enforcing it ought not to be cast on the new trustee.

To show the duty and also the liability of trustees in such a case, I refer to Perry, Trusts, § 453; *Sherman v. Lanier*, 12 Stew. 249; *Lathrop v. Smalley's Errs.* 8 C. E. Green, 192; *Tucker v. Tucker*, 6 Stew. 239; *Ward v. Kitchen*, 38 Stew. 35; *Nancrede v. Voorhis*, 5 Stew. 524.

I can discover no way by which the court can compel the new trustee to take this doubtful security. I will therefore advise that the master's report be sustained and the exception be overruled, with costs.

SUPREME COURT.

STATE, *ex rel.* Board of COMMISSIONERS OF MATAWAN,
v.

James B. HORNER, Collector.

1. Where the voters of a township have, at their regular election, fixed the amount to be raised for highways in the township for the ensuing year, and the township committee has appropriated the money, to be raised by taxation, to the several road overseers, and thereafter a part of the township votes to become an incorporated borough, the commissioners of such new borough are not entitled to the possession and control of the portion of such money raised by taxation upon the part of the township incorporated in the borough; but the same is to be expended by the township overseer as apportioned by the township.
2. The terms of the Borough Act of March 7, 1882, in relation to taxes for road purposes should be construed to extend to assessments for road purposes where no previous appropriation has been made by legal authority.

(Decided September 20, 1886.)

ON motion for *mandamus* to compel payment of part of taxes collected for roads in Matawan Township, to the relators. *Refused.*

Argued before Scudder and Magie, JJ.

The facts of the case and the provisions of the Act construed are set forth in the opinion.

Mr. R. W. Dayton, for relators.

Mr. J. P. Applegate, for defendant.

Scudder, J., delivered the opinion of the court:

March 10, 1885, at the regular spring election of Matawan Township in the County of Monmouth the voters of the township fixed the sum of \$700 as the amount to be assessed, collected and raised for the expenses of working the highways within the township, according to the statute, Rev. 1003, § 39.

Notice of the result of the election was posted March 11, 1885. On March 13, the township committee met and, among other business transacted, assigned and apportioned to the overseers of the highways, respectively, their several limits and divisions of the highways within the township, for opening, clearing out, working, amending and repairing. At the same meeting the money to be raised by taxation was apportioned to each district road overseer.

On March 17, part of the Township of Matawan voted to become an incorporated borough, pursuant to an Act entitled "An Act for the Formation of Borough Commissioners," approved March 7, 1882, Laws, p. 48.

This Act authorizes the inhabitants of any township or part of a township in this State, embracing an area not exceeding two square miles and containing a population not exceeding 8,000, to become a borough commission

whenever a majority of the qualified voters shall so decide at a special election to be called for that purpose. It provides for the election of seven commissioners who shall have the general supervision, management and control of the public streets, sidewalks and roads of said borough, the lighting of the streets and the supplying water for extinguishing fires, with special powers given for these purposes.

April 7, 1885, commissioners were elected under section 7 of the statute, and entered on the discharge of their duties. The assessment for road tax in the Township of Matawan was made and collected by the officers of the township in the usual time and manner; and the collector of the township having these funds in hand, the Commissioners demanded that the sum of about \$400, part of these taxes, be paid to their treasurer; and on refusal to pay, ask the mandatory writ of this court to compel such payment.

The only question raised by the parties is whether the Commissioners of the Borough are entitled to a portion of taxes claimed by them, or whether the overseer of the roads in the township shall have all the road money according to the apportionment made by the township committee on March 13, 1885.

Although this apportionment was made on March 13, while a notice was posted for a meeting of the inhabitants on March 17, to decide whether there should be a borough incorporation, there is nothing shown, beyond this fact, to prove that the township committee was seeking an advantage by anticipating the result of such election. Friday or Saturday following the township election is the usual time for the first business meeting of the township committees in our State. Bonds and oaths of office are then presented, road districts assigned and money apportioned to the overseers of the district. As oaths of office in some cases are required to be taken within six days after notice of election or appointment (Rev. p. 1196, § 19) and provision for special meetings to be called to fill vacancies in offices, for any cause (§ 13), is sometimes necessary, an early meeting of the township committee has been usual.

Besides this, it appears and is admitted that in the preceding year of 1884 there had been a like call for a special election, for the purpose of becoming incorporated under the Act of 1882, when the result was adverse. There was no apparent reason therefore for the officers of the township to change their customary action, or stop in the discharge of their duties, until the result of the election was known. Having taken the legal and usual proceedings in settling and apportioning the road tax for the township highways, the question to be determined is, whether the subsequent action of part of the inhabitants of the township in separating themselves from the others and establishing a borough commission annuls the act of the township committee in dividing the township into road districts and apportioning the money to be raised for road purposes to the several districts.

The legislative power to make the changes in townships, dividing them for municipal purposes, cannot be doubted. This Act is general in its application to all the townships of the State; and is not within the constitutional prohibition of passing private, local or special

laws, regulating the internal affairs of town and counties. Neither is the act of the township committee, in apportioning money to the several road districts, a contract with the road districts or their respective overseers which cannot be impaired by subsequent legislation. It is merely a convenient form of providing funds for a special purpose, by legislative authority, governed entirely by the terms of the Act giving the power, which may be at any time changed or repealed, at the will of the Legislature. The remedy for any loss or inconvenience caused by such change or repeal must be sought from that body. That the Legislature may, independent of any constitutional prohibition, incorporate towns or villages within townships, for special or limited purposes, without separating the territory within the prescribed limits from the rest of the township in other respects, has been recognized in our courts. *State v. Troth*, 5 Vroom, 377.

We must look therefore to the words of the Act, to learn what powers the Legislature intended to confer on this new Corporation, within the limits of the larger township corporation; and how far it will supersede the prior forms of governing the entire township. If the whole township had been incorporated as a borough commission, there would be little conflict or embarrassment in adjusting the rights and duties of the borough and township officers; but as part only has been set off, a serious difficulty has arisen. The Borough Commissioners are unwilling that the township overseers of highways shall receive and expend the taxes assessed for roads on the taxable inhabitants in the Borough. The Act by which they were incorporated, read in connection with the general laws relating to townships, must govern these opposing interests.

Section 10 of the Act of 1882 defines the limitation of powers, the source and application of taxes raised for road purposes applicable to this case, in these words: "That the taxes which shall hereafter be assessed, levied and collected upon and from the taxable inhabitants of said borough, and upon the real estate therein, for roads or for the improvement or repairs of roads by the officers of the township in which said borough is situate, shall not be applied to the roads without the boundaries of said borough; but that the assessor and collector of the said township shall hereafter assess and collect upon and from the taxable inhabitants of said borough, and on all lands liable to be taxed therein, the road tax which shall have been ordered to be raised at the previous annual township election, in the same manner as the same has been heretofore assessed, levied and collected; and it shall be the duty of the collector or collectors of the township to pay over the amount of the road tax by him or them received, which shall have been assessed and collected upon the taxable inhabitants of said borough and upon all lands liable to be taxed therein, to the treasurer of the said board of commissioners, to be expended and applied by them in carrying out the purposes of this Act," etc.

The words "hereafter" and "heretofore" used in this section do not refer to the date of the enactment of the statute, but to the time when the Act becomes effective by the adoption of its terms in the several townships or parts of

townships that elect to establish borough commissions.

By section 8 the clerk and the inspectors of the election shall, if a majority of votes be cast for a borough commission, "forthwith certify the result of said election and the number of votes cast for and against, under their hands, to the clerk of the county wherein said borough is situated, to be filed in his office; and from the time of filing said certificate in the office of the clerk of the county as aforesaid, the inhabitants of said borough shall be a borough commission in fact and in law, under the name," etc.

The result of the election in this case held March 17, 1885, was thus certified, and the Borough was in legal effect incorporated from that time.

Commissioners were elected on the first Tuesday of April (7th) as designated in the Act, and the sum fixed to be raised by tax for the general purposes of the Act, and within the limitation, was \$500. After the date of the incorporation the taxes were assessed and collected at the usual times by the township assessor and collector.

It thus appears that prior to the incorporation of this Borough and the election of its officers, the money voted to be raised by taxation for roads had been apportioned and appropriated to the respective road districts; and that these relators, being voters, were actors in such appropriation.

Acting not for the whole township but for a portion of its inhabitants, who by their voluntary action and charged with full knowledge of what had been done by the public officers, had become incorporated, they seek to keep from the road district overseers the taxes raised for them by the votes of the entire township, and set apart for them by officers representing them.

This they should not be permitted to do unless the statute includes this case and is imperative in its terms.

In *Callahan v. Township of Morris*, 1 Vroom, 160, at 166, the court after citing the sections of the statute which impose duties on the township committee and other township officers, says: "It thus becomes the duty of the committee to apportion the money raised for the highways among the several overseers, to be expended in their respective districts as the committee or a majority thereof deem expedient."

It is true that it says that such apportionment should not be made within twenty days after the order for raising the money shall be passed, because the individual taxpayers have twenty days to give written notice of their election to work out the tax; but this is for the benefit of the taxpayers who make such election, and it is not competent for others to object. The court, at 167, further says: "Money may often be properly apportioned before it is in fact collected; and although the overseer is not bound to incur the expense of opening and repairing a road by hire until he has the money in hand, yet, if he thinks proper to act upon the faith of such an appropriation, he may do so. This is often done in many parts of the State without dispute or difficulty, and, with a reasonable disposition to do right, such a course is generally safe and expedient."

N. J.

This must often be done, because penalties are imposed on overseers of highways for neglect to perform the duties of their office; and by the statute (§ 57) working on the roads between the first day of October and the first day of April, except so far as may be necessary to make the road passable when obstructed by snow or rain (§ 94), is prohibited. As taxes are not collected and available before October 1, the overseers will often be without the means of repairing unless they have in hand money from the preceding year for road purposes. The apportionment of money to the road districts is therefore commonly made promptly, to ascertain the amount for each district and give assurance to the overseer upon which he may act in making and repairing roads.

As the act of the township committee of Matawan was lawful when done, it fixed the right of the road overseers to this money in controversy; and the relators being themselves actors in this appropriation by their agents, the township committee, they are not now in a position to revoke this action. The terms of the Act do not include this case and should be construed to extend to assessments for road purposes where no previous appropriation has been made by legal authority.

The mandamus is refused.

STATE, CHRISTIE, *Prosecutor*,

v.

MCNEAL, Collector of Bayonne.

The Act of April 25, 1884 (P. L. 1884, p. 265), providing that certain firemen "shall be entitled to have and receive the same and no other advantages in respect to taxes and jury duty as now are or hereafter may be allowed to members of the National Guard of this State," without setting out the Acts in relation to the exemption of members of the National Guard, is within the inhibition of the Constitution, that "No Act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the Act, or which shall enact that any existing law or any part thereof shall be applicable, except by inserting it in such Act."

(Decided October 1, 1886.)

ON *certiorari* to bring up taxes assessed on the real and personal estate of the prosecutor, and also the poll tax. *Assessment affirmed.*

The case is stated in the opinion.

Argued before Depue and Scudder, JJ.

Mr. C. Parker, for plaintiff in *certiorari*.

Mr. W. D. Edwards, *contra*.

Depue, J., delivered the opinion of the court:

The prosecutor claims an exemption from taxation under the provisions of an Act of the Legislature approved April 25, 1884 (P. L. 1884, p. 265).

Section 72 of the Act entitled "An Act for

the Organization of the National Guard of the State of New Jersey," provides that all general and staff officers, field officers, commissioned and noncommissioned officers, musicians and privates of the national guard shall be exempt from jury duty and poll and military tax during the time they shall perform military duty; and every person who shall have served seven years and been honorably discharged, shall forever after be exempt from jury duty. Rev. 691, § 71.

By section 8 of a supplement approved April 4, 1873, it was enacted that in addition to the exemption from general and special poll tax, the members of the national guard above named should be exempted from state, county and municipal taxation upon \$500 during the period they should be actually serving in the national guard. Rev. 696, § 114.

The Act of 1884 is entitled "An Act to Give Certain Active and Exempt Firemen the Same Advantages in Respect to Taxes and Jury Duty as Now Are or Hereafter May Be Allowed to Members of the National Guard of this State." It enacts that all persons enrolled as active or exempt members of any fire or hose company, or hook and ladder organization, etc., who do not receive more than \$150 per annum for their services, "shall be entitled to have and receive the same and no other advantages in respect to taxes and jury duty as now are or hereafter may be allowed to members of the national guard of this State."

Paragraph 4, section VII, of article IV of the Constitution as amended in 1875, provides that "No Act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of the Act, or which shall enact that any existing law or any part thereof shall be applicable, except by inserting it in such Act."

The prosecutor is an exempt fireman within the terms of the Act of 1884. The question arising is whether the Act conforms to the constitutional provision above cited.

The object of the constitutional provision was not to curtail or embarrass the Legislature in the enactment of laws; but the purpose was to obtain a fair and intelligent exercise of the law-making power. It has, therefore, been decided by this court and the court of errors that an Act of the Legislature which is complete and perfect in itself, the purpose, meaning and full scope of which is apparent on its face, is valid, although it may provide for actions or means for carrying its provisions into effect by reference to a course of procedure established by other Acts of the Legislature; *Campbell v. Board of Pharmacy*, 16 Vroom, 241, 245; *S. C. sub. nom. Campbell v. Holzauer*, 18 Vroom, 173; and that an Act which in itself is a complete and perfect Act of legislation may provide for ancillary proceedings to accomplish the purposes expressed in the Act, by a reference to general laws on the subject, without violating the constitutional provision. *De Camp v. Hibernia R. R. Co.* 18 Vroom, 43, 49.

But the Act now in hand does not come within range of the principle on which the cases cited were founded. It is an imperfect and incomplete Act of legislation. The privileges intended to be conferred are not in any manner specified in the body of the Act. No member

of the Legislature called upon to cast his vote on the passage of the Act would be informed by inspection what particular rights or privileges were designed to be conferred; nor would the public by inspection be informed of the nature of the legislation about to be adopted. The Act itself grants no exemption from taxation. It simply provides that the persons designated in the Act shall be entitled to the same and no other advantages in respect to taxes as may be allowed to members of the national guard of this State. Turning to section 72 of the Act organizing the national guard and section 8 of the supplement of 1873, it will be found that members of the national guard are entitled to no exemption as members of the national guard. They are entitled to such exemption only during the time they "shall perform military duty," or "shall be actually serving in the national guard."

The Act of 1884 is not a supplement to the Act organizing the national guard, nor is the object of the Act in any sense germane to the object of the latter Act, so that the provisions of the Act of 1884 could have been inserted in the National Guard Act or in any supplement to it. The Act of 1884 stands wholly apart from the National Guard Act, in title, object and substance. It can be made efficacious only by making parts of the National Guard Act part of it. If it had provided that the seventy-second section of the Act concerning the national guard and the eighth section of the supplement of 1873 should be part of the Act or be applicable to the persons designated, the legislation would have been within the letter of the constitutional provision. In the shape in which it is placed these sections are made part of the Act, as much as if they had been expressly referred to; and such legislation is within the spirit and reason of the constitutional provision.

For this reason we think the assessment of taxes should be affirmed, with costs.

COURT OF CHANCERY.

James H. LEEDS

v.

Livingston GIFFORD.

- *1. A prior mortgagee who has had possession of the mortgaged premises must account for rents and profits to the subsequent incumbrancer; but a subsequent incumbrancer in possession is not bound to account to the prior incumbrancer.
2. A mortgage which does not by its terms pledge the rents and profits of the mortgaged premises for the payment of the mortgage debt gives the mortgagee no lien on them; and the mortgagee may take them or assign them, without liability to account to the mortgagee for them.
3. Under the rule now in force, a prior incumbrancer has a right, as against the mortgagor and subsequent incumbrancers, in case his security is precarious.

•Head notes by VAN FLEET, V. C.

ous, to have the rents of the mortgaged premises (accruing subsequent to the appointment of a receiver) sequestered for his benefit.

4. Taking possession of the mortgaged premises is a means to which a mortgagee may resort to obtain payment of his debt; and a payment obtained in this way is subject, in respect to its appropriation, to the legal rules governing the appropriation of other payments.

5. A debtor who makes a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt the payment shall be applied; if he simply hands the money over to his creditor, without direction as to its application, his creditor may apply the money as he pleases; and if neither party has exercised his right of appropriation, and a dispute subsequently arises, the court will make the appropriation; and in doing so, will, as a general rule, apply the payment to the debt which is least secure.

(Filed September 24, 1886.)

APPLICATION for an order to reverse the action of a master in chancery, by changing a credit of rents from a first to a last mortgage. On hearing on petition and affidavits, and answer and affidavits. *Granted.*

The facts of the case and the questions presented are stated in the opinion.

Mr. William Brinkerhoff, for application.

Mr. John Linn, *contra.*

Van Fleet, V. C., delivered the following opinion:

This is a foreclosure suit, and the question on which the parties are at variance is, What are their respective rights in certain rents of the mortgaged premises? The premises are subject to five mortgages. The first two and the last two are held by the defendant. The complainant holds the third, being the one standing midway between the defendant's first two and last two. The defendant took possession of the mortgaged premises, under all four of his mortgages, on the 31st of January, 1885, pursuant to an arrangement with the mortgagor. The premises were at that time in the possession of tenants under demises made by the mortgagor. The arrangement under which the defendant took possession was, so far as it is material to the question now before the court, to the following effect: the tenants were to at-torn to the defendant, he was to collect the rents, make new demises, if necessary, and out of the rents pay taxes, insurance and the cost of necessary repairs, and apply the balance to the payment of his mortgage debts in such order as he might elect. He was given power to apply the balance of the rents to either or all of his debts as he saw fit.

The complainant filed a bill to foreclose his mortgage January 7, 1886, and on the first of April following took a decree *pro confesso* against all the defendants, with an order of reference to a master. On the 13th of May following, he gave the defendant notice that he

would on the 18th of the same month apply for the appointment of a receiver; but the master, to whom the reference had been ordered, having on the 15th of May made his report, crediting the balance of the rents remaining in the hands of the defendant on the first of May, 1886, against the amount due on the defendant's first mortgage, the notice was not pursued and no application was made.

The defendant, as was natural under the circumstances, such being the dictate of his interest, elected that the balance of rents remaining in his hands should be applied to his last mortgage; and he, accordingly, on the 6th of May, 1886, credited the same on the bond accompanying his last mortgage. The rents accruing since May 1, 1886, he concedes should be credited on his first mortgage. The complainant's mortgage does not give him a lien on the rents of the mortgaged premises, nor pledge them for the payment of the debt secured by it.

The defendant applies for an order reversing the action of the master, by changing the credit of the rents from his first mortgage to his last.

The rule is settled that a mortgagee, who takes possession of the mortgaged premises, thereby renders himself liable to be charged with their rental value; and this liability attaches to him whether he actually receives rent or not, for by taking possession he assumes the position of owner and is, in consequence, chargeable with the profit a prudent owner could have made. *Dawson v. Drake*, 3 Stew. 601; *S. C.* on appeal, *Id.* 733.

And it has also been held that where a mortgagee, after having taken possession, suffered the mortgagor to take the profits, without requiring him to keep down interest, although in such case he could not be charged with rents and profits, yet, inasmuch as his conduct had resulted in favor to the mortgagor and in prejudice to the subsequent incumbrancers, he should not, as against them, be permitted to recover interest on his mortgage debt during the period he had allowed the mortgagor to take the profits of the mortgaged premises. *Bentham v. Haincourt*, Finch, Prec. in Chan. 30; *S. C.* 1 Eq. Cas. Abr. 320; *Loftus v. Swift*, 2 Sch. & Lef. 655; *Demarest v. Berry*, 1 C. E. Green, 481.

But even in such a case, *Lord Redesdale* says there must be something of contrivance in the conduct of the mortgagee, or some positive misconduct on his part, to justify the court in depriving him of interest. *Loftus v. Swift*, 2 Sch. & Lef. 656.

A mortgage which does not, by its terms, pledge the rents and profits of the mortgaged premises for the payment of the mortgage debt, creates no lien on them and gives the mortgagee no right to them. The mortgagor, while he remains in possession, may take them and apply them to his own use, without being liable to account for them. And he may also make a valid assignment of them, in favor of a subsequent incumbrancer as against a prior incumbrancer. This was expressly decided by *Chancellor Halsted*, in *Best v. Schermier*, 2 Halst. Ch. 154.

There the mortgagor made a mortgage to one Ballentine, on lands which were already subject to prior mortgages and judgments; and also assigned the rents of the mortgaged prem-

ises to Ballentine, with authority to collect and apply them in discharge of his mortgage debt. A prior mortgagee subsequently filed a bill, alleging that the rents assigned to Ballentine should in equity be applied to the satisfaction of the prior mortgages; and praying that Ballentine be restrained from collecting them and that a receiver be appointed, in order that they might be applied as the court should thereafter direct. An injunction was granted and a receiver appointed. Ballentine, after filing his answer, moved the discharge of both orders, and they were discharged; the court holding that a mortgagor, while he remains in possession, either by himself or by his tenants, is entitled to the rents and profits of the mortgaged premises; and that, inasmuch as in this case the mortgagor himself could not have been restrained, neither would the court be justified in restraining his assignee. It is obvious that this case, as to the rents which accrued subsequent to the appointment of the receiver, was not correctly decided, according to the principle which now controls the action of the court in such cases. According to the rule now in force, a prior incumbrancer has an unquestionable right, as against the mortgagor and subsequent incumbrancers, in case his security is uncertain or precarious, to have the rents of the mortgaged premises, accruing subsequent to the appointment of a receiver, sequestered for his benefit. The case, however, in other respects is well decided and stands in perfect accord with the present course of judicial decision.

It would seem then to be entirely clear that the complainant, at the time the balance of the rents remaining in the hands of the defendant was applied by the defendant towards the satisfaction of his last mortgage, had no right to or interest in the money in controversy. It was as absolutely free from all lien or other claim on the part of the complainant as it would have been if the mortgagor had derived it from some other source than the mortgaged premises.

As between the complainant and the mortgagor, the money was the property of the mortgagor as completely and as unconditionally as it would have been if the relation of mortgagor and mortgagee had not existed between them. I regard it as entirely free from doubt that if the defendant had taken possession under either of his last two mortgages, the complainant could not have deprived him of the rents, except by the appointment of a receiver.

And so too, if the mortgagor had collected the rents himself and paid them over to the defendant, either with direction to apply them to his last mortgage or without direction, leaving the defendant free to make such application of them as his interest might dictate, there can be no doubt that the defendant would have had an unquestionable right, not only as against the mortgagor but also as against the complainant, to apply them to his last mortgage.

This case is unlike any previous case which has come under my observation, in this respect: the defendant holds mortgages both prior and subsequent to that of the complainant, and took possession under both. In all the previous cases which I have examined, the contest has been between a subsequent incumbrancer out of possession and a prior incumbrancer in pos-

session; and not, as here, where an intermediate incumbrancer is seeking to charge an incumbrancer who took possession under liens standing both prior and subsequent to his.

The rule is well settled that a prior incumbrancer who has had possession of the mortgaged premises must account to the subsequent incumbrancer; but the converse is not true. A subsequent incumbrancer in possession is not bound to account to the prior incumbrancer. So that the case stands thus: if we treat the defendant as in possession under his first two mortgages, he is bound to account; but if we treat him as in possession under his last two, he is not. But being in under all four, the case, so far as I am aware, is without a precedent.

And yet, I think the question in dispute may be satisfactorily decided by the application of a familiar rule. Taking possession is simply a method of payment. It is one of the remedies a mortgagee may resort to, to obtain payment of his debt. It is, in its essence, a means of payment. As already remarked, if the mortgagor had remained in possession and collected the rents himself and then paid them over to the defendant he would have had a right to control their appropriation; and if he failed to exercise such right, the right of appropriation would have then belonged to the defendant, and he might have exercised it in such manner as would best protect his security. A debtor who makes a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt the payment shall be applied; if he simply hands the money over to his creditor, without direction as to its application, his creditor may apply the money as he pleases; and if neither party has exercised his right of appropriation, and a dispute subsequently arises, the court will make the appropriation; and in doing so will, as a general rule, apply the payment to the debt which is least secure. *Terhune v. Colton*, 1 Beas. 232; *S. C.* on appeal, *Id.* 312.

And the reason this course is pursued is that the law intends that all men shall be honest and fully perform their just obligations. The court, therefore, in making the appropriation, does that which an honest man would do. In this case, however, the mortgagor did retain possession, collect the rents and pay them over to the defendant; the mortgagor went out and the defendant entered; but the same object precisely was accomplished by that course which would have been accomplished if the other had been pursued. The rent of the mortgaged premises was applied to the payment of the mortgage debt, and to that debt which the parties desired should be first discharged. The cases do not differ in a single essential point, and the legal rule which would control the one should, in my judgment, be applied to the other. In legal substance the rents were paid to the defendant, under authority from the mortgagor, and with permission from him to the defendant to apply them as he saw fit; and the complainant, at the time the defendant made an appropriation of them, having neither a lien on them nor any right to them, has no right to have such appropriation changed.

The master's report should be corrected, by changing the credit of the rents from the defendant's first mortgage to his last.

DISTRICT OF COLUMBIA.
SUPREME COURT.

Richard H. PORTER
v.
Stephen V. WHITE.

1. Where a bill in equity is not required by law to be sworn to, the fact that it is nevertheless sworn to does not render the party so swearing liable to the penalties of perjury for false statements contained therein.
2. In an action for malicious prosecution there must be proof of malice and a want of probable cause.
3. In such an action malice is a matter exclusively for the jury; but the question of probable cause is one of mixed law and fact, and the proper practice is for the judge to assemble such facts as in his judgment would, if proved, establish probable cause, and to say to the jury if they find these facts then probable cause existed.
4. The fact that one swears falsely does not, alone, amount to probable cause on which to base a prosecution for perjury; but that fact taken with the fact that the prosecutor acted on advice of counsel that perjury had been committed, will amount to probable cause.
5. Where the prosecutor acted upon probable cause, although from motives of malice, he is not liable for damages.

(Decided July 13, 1886.)

ON plaintiff's exceptions, taken at a trial which resulted in a verdict for defendant. *New trial ordered.*

Action for malicious prosecution.

The facts are stated in the opinion.

Messrs. S. S. Henkle and J. J. Johnson, for plaintiff:

Perjury cannot be assigned upon an answer in chancery, unless the bill calls for the answer under oath.

Silver v. State, 17 Ohio, 365.

An oath to a bill in chancery must be either required or authorized by the common law or the statute or the rules of court; and any verification to a bill without such requirements would be wholly extrajudicial, and perjury cannot be assigned upon it.

People v. Gaige, 26 Mich. 32; *Plath v. Braunsdorff*, 40 Wis. 111.

The prosecution of a person with any other motive than that of bringing a party to justice is a malicious prosecution in law.

Stevens v. Midland Counties R. Co. 26 Eng. L. & E. 410.

In conformity with all common-law authorities, where it is proved the prosecution is without reasonable or probable cause, the jury may infer malice.

Kirksey v. Jones, 7 Ala. 622; *Thompson v. Force*, 65 Ill. 371; *Chapman v. Cawrey*, 50 Ill. 562; *Israel v. Brooks*, 23 Ill. 575.

The refusal of the court to grant the second instruction was error. To constitute perjury the oath or verification must be material, or be required, or have some effect in law.

4 Bl. Com. 137; *People v. Fox*, 25 Mich. 496; *Commonwealth v. Byron*, 80 Mass. 31; *U. S. v. Curtis*, 107 U. S. at 672-3 (Bk. 27, L. ed. 535); *U. S. v. Coons*, 1 Bond, 1.

The examination and discharge of the prisoner is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary.

The discharge of a prisoner, by a committing magistrate, or the refusal of the magistrate to hold the prisoner over for trial is *prima facie* evidence of the want of probable cause, although counsel may have advised that plaintiff was liable to a criminal charge; and although the defendant may have communicated to counsel all the facts bearing upon the guilt or innocence of the plaintiff which he knew or by reasonable diligence could have ascertained, the prosecution was malicious.

The refusal of a grand jury to hold the accused over until trial must necessarily be very persuasive evidence that the prosecution was groundless.

Straus v. Young, 36 Md. 254; *Cooper v. Utterbach*, 37 Md. 316; *Callahan v. Caffarata*, 39 Mo. 136; *Brant v. Higgins*, 10 Mo. 728; *Frost v. Holland*, 75 Me. 112; *Chapman v. Dodd*, 10 Minn. 350; *Thompson v. Morris*, 2 Murphy, 248; *Bostick v. Rutherford*, 4 Hawks, 83.

Where the facts are peculiarly within the knowledge of the prosecutor.

Cole v. Curtis, 16 Minn. 182.

In order for the defendant to shield himself on the ground that he obtained the advice of counsel, it must appear in evidence that he stated to counsel all the facts bearing on the guilt or innocence of the defendant which he knew or by reasonable diligence could have found out. The advice of counsel cannot be accurately said to amount to probable cause in the face of the grand jury ignoring the indictment. The ablest and most recent as well as the most ancient authorities require the utmost good faith in procuring the advice and commencing or carrying on the prosecution against another. Neither is there any conflict as to what constitutes good faith in such matters.

Sappington v. Watson, 50 Mo. 84; *Sharpe v. Johnston*, 76 Mo. 674; *Skidmore v. Bricker*, 77 Ill. 164; *Cole v. Curtis*, 16 Minn. 203; *Stewart v. Sonneborn*, 98 U. S. 187 (Bk. 25, L. ed. 116).

Mr. John Paul Jones, for defendant:

The only question is: Was the oath authorized, *i. e.*, permitted? not, Was it required by law?

If the usage of the court was such as to permit the administration of an oath in the given instance, it is not extrajudicial.

The case of *People v. Gaige*, 26 Mich. 30, relied upon by the plaintiff, is not inconsistent with this view. That was an information for falsely swearing to a bill in equity, and the court held it bad, both at common law and under the statute. The court, however, held (p. 33) that if the presentment had shown "that the oath was authorized, if not required by the law," it would, the other averments being sufficient, have been good. The word "authorized," as here used in distinction from "required," can only mean by the "permission of or by the sanction of the law."

The same word "authorized" is used in section 5293 R. S., which defines perjury; and as

there are few instances in the statutes where an oath is prescribed, it must refer to the general power of the courts to administer oaths where the ends of justice require it or the integrity of their proceedings are involved.

As to the second proposition, it is not necessary to refer to the elementary principles relating "to probable cause," "malice," etc., which are involved in this case. They are familiar to all. Attention is, however, called to the recent case of *Stewart v. Sonneborn*, 98 U. S. 197 (Bk. 25, L. ed. 120), in which those principles are applied to a case in which the circumstances were singularly similar to those in the case at bar, excepting that one was a civil and the other a criminal proceeding. In that case the supreme court held that the defendant, having acted upon the advice of counsel learned in the law, was not liable.

The defendant in this case is himself a lawyer; but before instituting the proceedings complained of, the record shows that he consulted counsel learned in the law, and was advised that it was his duty as a law-abiding citizen to bring a charge of perjury against the plaintiff.

This alone constitutes a perfect defense to an action of this character.

Cooper v. Utterbach, 37 Md. 282; *Turner v. Walker*, 3 Gill & J. 877; *Stewart v. Sonneborn*, *supra*; *Wicker v. Hotchkiss*, 62 Ill. 107.

Mr. Justice **Hagner** delivered the opinion of the court:

This was an action for malicious prosecution. The plaintiff Porter alleges that White falsely and maliciously and without probable cause brought against him a charge of perjury and procured his arrest; that he was taken before the police court and that his case was afterwards examined by the grand jury, who ignored the bill; and he was discharged.

At the trial of the case the plaintiff introduced evidence to show the zealous and, as he claimed and insisted, the malicious manner in which the defendant proceeded. He then introduced the subject matter of the alleged perjury, which was a bill in chancery, filed by Porter against White and others. That bill was filed to procure from the court in equity a decision that a certain assignment which Porter had made of his interest in a claim before the Mexican Commission, which was an absolute assignment, should be decreed to be but a conditional assignment. In his bill he stated that he had made an assignment to White, in form absolutely, but that really it was a security for a sum of money which White had loaned him.

The bill prayed for an answer and prayed for a decree but it did not pray for an injunction or a receiver or *ne exeat*. Nevertheless, it was sworn to before the clerk of the court, and that was the matter which White alleged was perjury. White's contention was that this was an absolute out and out assignment; and when he came to his defense he showed that in another controversy between all these parties Porter had sheltered himself from that suit by saying he did not have any money; that it had all been absolutely assigned. He then introduced evidence to show that the particular proceeding in which this bill was filed had been carried to a conclusion and the bill

had been dismissed; and also evidence to show that he had acted on the advice of counsel in causing the arrest of the plaintiff; and disclaimed all malice whatever.

The case was sent to the jury, upon the prayers offered by both sides. As the matter stands we are obliged to rule upon the correctness of all these prayers and to give our decision accordingly, although in this case different action might have been had if the case had been differently presented.

The plaintiff asked the court first to instruct the jury that neither the law nor the rules of the court required the bill in the equity cause to be sworn to; and hence, the charge of the crime of perjury could not be assigned upon the oath thereto, although it might have been false. If the prayer had stopped there it should have been granted, as it recited a correct proposition of law. So of the third prayer. The plaintiff asked the court to instruct the jury that the oath made by the plaintiff to the bill filed in the equity cause was not required by law and, being extrajudicial, perjury could not be based upon it.

The second prayer is nearly right, but is lacking in technical accuracy. It is presented here in the form of an abstraction, as follows:

"The jury are instructed that to constitute the crime of perjury there must be an oath authorized by law in an issue or cause to which the facts were material, and a false statement regarding such facts upon such issue or in such cause."

The principle intended to be set forth in the second and third prayers and in the first part of the first prayer was correct. We are all of the opinion that that was not perjury. Perjury in this District may be either at the common law or it may be under that section of the statute which provides for punishment for the false swearing of any person to anything which by the statute is required to be sworn to. But neither the common-law principle nor the statute would embrace such a case as this. There is no obligation whatever on the part of a litigant to swear to a bill in equity, unless that bill asks for an injunction, *ne exeat* or the appointment of a receiver. Therefore it was an oath of which perjury cannot be predicated.

There is a plain reason for this. In some of the definitions of the law of perjury it appears that the oath must be an oath in injury of the rights of another. There is no way in which a false oath to a bill such as this can be considered an injury of the rights of another. If it had been a bill asking for an injunction, on which an injunction might have been granted by virtue of the bill having been sworn to, or even these other great processes granted in virtue of the bill being sworn to, then it might have been said that there was something the effect of which would result in injury to the other party.

We think it was proper, therefore, in the judge below, to reject the second and third prayers, although the second might well have been correct, because, as I say, it is a mere abstraction.

The last part of the first prayer was of such a character that the judge was authorized to reject the whole of it. After saying that per-

jury could not be predicated of this oath, the prayer continues:

"And if the jury find that the defendant in this cause instituted and carried on the prosecution, and that in doing so he was influenced by motives other than the bringing of a criminal to justice, they may find from these facts both want of probable cause and malice."

It seems to us that that is an improper statement of the law of the case, because it authorizes the jury to find want of probable cause from the existence of malice. Putting it the other way, if the want of probable cause appeared, then the jury might, although they are not bound to do so, infer malice but not the reverse.

The law on the subject is very well settled. It is not enough, of course, that this defendant, without authority, had the plaintiff arrested for perjury when it turned out afterwards that there was no perjury. That does not necessarily entitle the arrested man to recover. A great many prosecutions fail because the offense was not committed by the person charged or because the offense was of a character different from that charged. The failure of conviction is not of itself evidence which would subject the party who moved in the prosecution to punishment. If it were so, people would be extremely careful how they undertook to bring criminals to justice, and a great many would escape. There must be proof of malice on the part of the person who instituted the proceedings, and the jury must find a want of probable cause.

Malice is a matter exclusively for the jury; but the question of probable cause is one of mixed law and fact, and the proper practice is for the judge to assemble such facts as in his judgment would, if proved, establish probable cause; and to say to the jury if they find these facts, then probable cause existed and the defendant is exonerated, because the two, malice and probable cause, must concur in the case.

We pass to the prayers of the defendant which were granted. The first is as follows:

"To entitle the plaintiff to recover, the jury must find that in causing the plaintiff's arrest the defendant was actuated by malice; and that he acted without probable cause."

That was a perfectly correct statement of the law. The second prayer is:

"The oath taken by plaintiff on which he was arrested for perjury was in effect that the assignment of September 20, 1876 of the Parsons claim, and that of June 14, 1877, of the Standish claim, although absolute by their terms, were not intended as a sale of the claims, but as a mortgage or pledge of them as a security for money; and if the jury find that such transfers were intended as sales, then there was probable cause for the plaintiff's arrest, and he cannot recover in this action."

The effect of that prayer is that if Porter swore to what was false, then that fact alone amounts to probable cause. That is not so. It is not sufficient, as we have seen, for charging a man with perjury, to show simply that he swore to a lie. We think the court in its instruction omitted an all-important matter, namely: that although this defendant made a

blunder in supposing perjury had been committed, yet if he was led into it by the advice of counsel, that placed with the fact of the false swearing would together have amounted to probable cause.

The third prayer is as follows:

"If the jury find from the evidence that before the arrest the defendant made a fair and full statement to the United States Attorney for this District, and to his counsel, learned in the law, of the facts in the case and of the oath which plaintiff had taken to the bill in chancery, and that defendant exhibited a written and sworn statement made by plaintiff, which contradicted the oath taken; and if the jury further find that the said District Attorney and counsel advised the defendant to swear out a criminal information for perjury against the plaintiff, then these circumstances may be considered by the jury as tending to show the absence of malice."

This prayer sets forth an excellent defense as to probable cause, but not as to malice.

In the case of *Stewart v. Sonneborn*, 98 U. S. 197 [Bk. 25, L. ed. 120], *Mr. Justice Strong*, after stating the facts of a case where a prosecuting party had received advice from his counsel, goes on to say that those facts, if believed by the jury, were a perfect defense to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, is, in view of the decisions, beyond doubt. *Snow v. Allen*, 1 Stark. 502; *Ravenga v. Mackintosh*, 2 Barn. & Cress. 693; *Walter v. Sample*, 25 Pa. 275; *Cooper v. Utterbach*, 37 Md. 282; *Olmstead v. Partridge*, 16 Gray, (Mass.) 381.

"These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide* upon legal advice, their defense is perfect."

The fourth prayer is as follows:

"The finding of the general term of this court, December 24, 1883, that the assignments of Parsons against Mexico, and of Standish against Mexico, were sales and not mortgages, is evidence between these parties, until reversed, that there was probable cause for the prosecution instituted by the defendant."

If this meant that it could be so considered, the instruction was correct. If, however, it meant that the finding of the General Term was conclusive evidence of probable cause, then the instruction was incorrect.

When we come to the charge of the court to the jury we find it must have been meant in the latter sense, because at the conclusion of the charge by the court and before the jury had retired, one of the jurors asked the court: "If the jury should find that the assignments mentioned in the bill in chancery were absolute, did that constitute probable cause?" And the court answered: "In my opinion it does." That is to say that if the jury found that there was an assignment, then this defendant was justified in having the plaintiff arrested for perjury, even though it turned out afterwards that there was no perjury.

We are obliged to observe these errors and to demand the case for a new trial.

UNITED STATES, *ex rel.* Joseph A. SMITH,
v.
Willam C. WHITNEY *et al.*

This court has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court-martial.

(Decided September 25, 1885.)

PETITION for writ of prohibition. *Dismissed.*

The relator having been, by the Honorable William C. Whitney, Secretary of the Navy, ordered under arrest and to appear before a court-martial for trial on certain charges and specifications, applied to this court for a writ of prohibition to arrest the proceedings of the court-martial, upon the ground of want of jurisdiction in that tribunal to try and determine the matter and things charged against him.

Messrs. Hunton & Chandler, for relator.
Mr. W. A. Maury, for respondents.

Mr. Chief Justice Carter delivered the opinion of the court:

The court is of the opinion that it ought not to intervene in this case. In coming to this conclusion we have not entered into the merits or demerits of the case. The relator petitions this court to stretch forth its restraining power to prevent a naval court-martial from discharging what it esteems to be its duty. The reason assigned for this request is that that duty, or whatever it is to be called, is in excess of its jurisdiction under the law and the Constitution.

Now it may be true, as argued by his counsel, that the relator has committed no offense against military propriety or authority. Whether he has or not is not the question that we are called upon to decide. The question is whether we have the power to intervene and arrest the deliberations of this naval court-martial.

The Supreme Court of the United States, in the case of *Wales v. Whitney*, 114 U. S. 570 [Bk. 29, L. ed. 278], which was a case in strict analogy to the case at bar, has said, in terms as explicit as the English language permits, that neither they nor we have any such jurisdiction; that while this court can deal with the consequences of a usurped jurisdiction on the part of a military tribunal, and enlarge a prisoner suffering from its extra jurisdictional power, yet we are limited to dealing with the consequences of its action and not with the process by which the consequence is produced. This is predicated on the fact that the action of that tribunal is a usurpation of authority.

It is true, as was ingeniously argued by counsel, that although this doctrine was announced by the supreme court in that case, yet it was

not the central subject of issue before the supreme court, or before this court from which the appeal was taken; that the real question was whether the man was imprisoned or restrained of his liberty, not what the correlative relations of the courts were. There is a good deal of force in that argument. But still the expression of the supreme court, even though it may border upon *dictum*, is so elaborated in the opinion in the case that it comes to us with advisory force, and, with some of us at least on this bench, reinforced by a reason lying behind it.

In the case referred to, the supreme court says: "But neither the Supreme Court of the District nor this court has any appellate jurisdiction over a naval court-martial nor over offenses which such court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of a court, only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere."

(It is confessed that there is none here.)

"Its power then extends no further than to release the prisoner. It cannot remit a fine, or return to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction." *Wales v. Whitney* [*supra*].

There the supreme court establishes the doctrine, if what I have quoted is to be regarded as judicial, that the correlation of these courts is such that we may not interfere, and even as *dictum* it has very good reason behind it. The English cases cited by counsel do not conflict with it, for there the tribunal appealed to had supervision of all the courts in England; it was the court of last resort and every other court was esteemed inferior to it in dignity and authority.

It is otherwise here; we have no jurisdiction over these naval tribunals, although we have jurisdiction over the consequences that they entail. They do not sit for this jurisdiction; they are not in the road of judicial bodies for this jurisdiction; they sit for the United States wherever the Secretary of the Navy ordains.

We feel that, under all the circumstances, *we ought to dismiss this relation, and it is so ordered.*

MARYLAND.

COURT OF APPEALS.

Ellen FLYNN and Frederick J. BROWN,
Trustee, *Appts.*,

v.

Kate WALSH *et al.*

1. **Real estate acquired before the Code, by the husband, with money furnished by his wife**, with her consent, and held in his name for many years, will be considered his and not as held by him in trust for the wife.
2. **A married woman must bring herself clearly within the provisions of section 7 of article 45 of the Code, to entitle her, as a feme sole trader, to hold money protected from the debts of her husband.**
3. **A bona fide purchaser of real estate from a married woman, with knowledge that it was acquired by her from her husband and that a suit is pending against the husband as surety on a guardian's bond, is sufficiently affected with notice to render the property in his hands liable for the amount of the judgment subsequently recovered in such suit, after the exhaustion of other property improperly acquired from her husband remaining in the hands of the wife.**
4. **A guardian cannot charge his wards with advancements, made by him before his appointment, to their mother, out of his own funds.**
5. **A guardian, who is also administrator of the estate of the deceased father of his wards and who has paid claims against the estate out of his own funds, cannot charge such payments against the wards and heirs, unless the claims were duly proved against the estate and the personal estate of decedent is inadequate thereto.**

(Decided March 10, 1886.)

A PPEAL from a decree of the Circuit Court of Baltimore City in favor of complainants, in a suit to set aside certain deeds alleged to be in prejudice of the rights of creditors. *Reversed.*

Argued before Alvey, *Ch. J.*, Robinson, Bryan, Ritchie and Irving, *JJ.*

The facts are stated in the opinion.

Messrs. E. J. D. Cross and Frederick J. Brown, for appellants:

He who seeks equity must do equity.

1 Pom. Eq. Jur. §§ 385-396, and cases cited.

He who comes into equity must come with clean hands.

1 Pom. Eq. Jur. §§ 397-404, and cases cited.

There is an equitable estoppel upon the plaintiffs, who have acquiesced in and ratified the beneficial expenditure of money upon their property.

2 Pom. Eq. Jur. §§ 801-806.

Although when a judgment at law is rendered against A and B, equity will not afford relief against it in their favor, yet when the

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judgment is made the basis of proceedings in equity against X and Y, strangers to the judgment, equity will, in their favor, relieve against it if it was rendered fraudulently, collusively or for an erroneous amount. The judgment is only *prima facie* correct when made the ground of proceedings against strangers. The failure of defendants, in the action on the guardian's bond, to come into court and make defense was equivalent to a collusive and fraudulent consent to the judgment against them.

Chase v. Manhardt, 1 Bland, Ch. 383, 350; *Kent v. Ricards*, 3 Md. Ch. 392, 397; *Gott v. Carr*, 6 Gill & J. 812; *Dilly v. Barnard*, 8 Gill & J. 170; *Thomas v. Mason*, 8 Gill, 1, 7, 10; *Young v. Reynolds*, 4 Md. 375, 384; *Griffith v. Clarke*, 18 Md. 457, 464; *Niller v. Johnson*, 27 Md. 6; *Siak v. Garey*, Id. 401; *Starr v. Heckart*, 32 Md. 267; *Kearney v. Sasser*, 37 Md. 264, 282; *Ewing v. Nickle*, 45 Md. 413; *Hill v. Reifsnider*, 46 Md. 555; *Kirby v. Pascault*, 53 Md. 531; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 382 (11 U. S. bk. 3, L. ed. 362); *Webster v. Reid*, 11 How. 439 (52 U. S. bk. 13, L. ed. 762); *Bandon v. Becher*, 3 Cl. & Fin. 479; *Sargent v. Salmond*, 27 Me. 589; *Caswell v. Caswell*, 28 Me. 232, 237; *Cunningham v. Gushue*, 73 Me. 417; *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110; *Nason v. Blaisdell*, 12 Vt. 165; *Atkinson v. Allen*, 12 Vt. 619, 624; *Pierce v. Jackson*, 6 Mass. 242; *Inman v. Mead*, 97 Mass. 814; *Stanton v. Embury*, 46 Conn. 595; *People v. Townsend*, 87 Barb. 520; *McParland v. Bain*, 26 Hun, 38; *Anderson's Assignees v. Tuttle*, 26 N. J. Eq. 144; *Cairo, etc. R. R. Co. v. Titus*, 27 N. J. Eq. 102; *Mackey's Admr. v. Coates*, 70 Pa. 350; *Second Nat. Bank's App.* 85 Pa. 528; *Coles v. Allen*, 64 Ala. 98; *King v. Tharp*, 26 Iowa, 238; *Bibend v. Kreutz*, 20 Cal. 110.

That judgment against principal is only *prima facie* evidence against surety, see Baylies, Sureties & Guarantors, pp. 398, 399.

Lovell v. Parker, 10 Met. 309 (Shaw, C. J.); *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275; *McKellar v. Bowell*, 4 Hawks, 34; *Munford v. Overseers*, 2 Rand. 313; *Atkins v. Bailly*, 9 Yerg. 111. And see also *Bradwell v. Spencer*, 16 Ga. 578; *Iglehart v. State*, 2 Gill & J. 235; *Kearney v. Sasser*, 37 Md. 264, 282; *Kerr, Fraud & Mistake*, p. 293 and cases cited; *Bump, Fraudulent Conveyances*, 3d ed. p. 576, 2d ed. p. 558.

Guardians' (and administration) accounts are, in Maryland, only *prima facie* evidence of their correctness.

State v. Baker, 8 Md. 44; *Scott v. Fox*, 14 Md. 388; *Re Stratton's Est.* 46 Md. 551; *Ruby v. State*, 55 Md. 484; *Sevell v. Slingsuff*, 62 Md. 592.

A wife may be a creditor of her husband and may be preferred by him like any other creditor.

Crane v. Barkdoll, 59 Md. 534 and the many earlier cases there cited.

The facts here show, overwhelmingly, that Mrs. Flynn is entitled in equity to be treated as creditor of husband. Her specific lien upon the property bought with her money has priority in equity over the general lien of the judgment in *State, Use of Walsh, v. Walsh; Wharton v. Wilson*, 60 Ind. 591.

The deed to F. J. Brown, trustee, is good against the complainants, who did not obtain their judgment until afterwards.

Plummer v. Jarman, 44 Md. 639.

Equity will not relieve against a *bona fide* purchaser for a valuable consideration.

Story, Eq. Jur. § 64, c.

The equity is equal between persons who have been equally innocent and equally diligent.

Id. See also §§ 108, 484.

As to Walsh's mistake as to his rights and liabilities in the guardianship matter, and the relief which a court of equity would have given to him against the vexatious proceedings either in the orphans' court or in the superior court, see 2 Story, Eq. Jur. §§ 885, 887, and cases cited, and 2 Pomeroy, Eq. Jur. §§ 847, 849. "Mistake as to Legal Rights," and cases cited.

Mr. M. R. Walter, for appellees:

The deed from Thomas Walsh to Ellen Flynn (being voluntary and made when Walsh, as is conceded, was insolvent) is void.

Williams v. Banks, 11 Md. 198, 227; *Goodman v. Wineland*, 61 Md. 451.

Mrs. Flynn claims under the deed from Thomas Walsh, and she is estopped from contradicting its recitals. She can set up no consideration other than that in the deed.

Glen v. McNeal, 3 Md. Ch. 849; *Thompson v. Corrie*, 57 Md. 200; *Sewell v. Baxter*, 2 Md. Ch. 454. See also *Ellinger v. Croel*, 17 Md. 374, 375.

In a contest between the creditors of the husband and the wife, there is a presumption against her; and transfers of property to her are regarded with suspicion.

Bayne v. State, 62 Md. 103; *Hinkle v. Wilson*, 53 Md. 288.

Conceding that Mrs. Flynn earned the money, she permitted her husband to take the title in his own name, and never pretended that she made any claim to the property until this controversy arose; and there is no evidence in the case that her husband ever promised to repay her. She had a perfect right to give him the money if she pleased.

Kuhn v. Stansfeld, 28 Md. 215.

Brown stands in the place of Mrs. Flynn, and has no better title than she had. He is not a *bona fide* purchaser for value without notice, for he knew all the circumstances under which Mrs. Flynn obtained her title.

Price v. McDonald, 1 Md. 408.

This case comes clearly within the decision of *Green v. Early*, 39 Md. 223.

Irving, J., delivered the opinion of the court:

The bill in this cause was filed by the appellees and their sisters as judgment creditors of Thomas Walsh, Patrick Flynn and John Vaughn, to get certain deeds from Patrick Flynn to his wife set aside because they were alleged to be in prejudice of the rights of his subsisting creditors. The record shows that in January, 1871, Thomas Walsh was appointed guardian for the appellees and others (children of his deceased brother, Edmond Walsh) by the Orphans' Court of Baltimore County, and, as such guardian, that he gave bond, with Patrick Flynn and John Vaughn as his securities, in the penalty of \$8,000. Subsequent to such appointment and qualification as guardian, it appears that the proceeds of certain real estate sold under a decree of the Circuit Court for Baltimore County, distributed to his wards as

children of his brother (whose real estate was sold), came to his hands as such guardian, and that as such guardian he charged himself therewith.

In the Orphans' Court of Baltimore County, and on the 12th day of June, 1878, by guardian accounts, passed by the court, he admitted there was then due to his wards each the sum of \$814. Suit was afterwards brought on the guardian's bond against him and his sureties, and judgment was duly recovered for the sum of \$814, with interest from the 21st of October, 1878, in favor of each of the wards. An execution on this judgment realized nothing out of Thomas Walsh, who had become insolvent, and only made a small part of the judgment by sale of property of Patrick Flynn and John Vaughn. The rest of the property of Patrick Flynn being alleged to have been conveyed to his wife voluntarily, and in prejudice of the rights of Flynn's subsisting creditors, and particularly the appellees, the bill in this case was filed to subject the property thus conveyed to the payment of the appellees' judgments.

On the 17th day of April, 1877, Patrick Flynn and wife executed to Thomas Walsh a deed for two pieces of property: one a house and lot conveyed to Patrick Flynn by John McManus in 1858, and the other a lot bought of Messrs. Hinkley and King, trustees, in 1870; and on the same 17th of April, 1877, Thomas Walsh, for an alleged consideration of \$2,000, conveyed the same properties to Ellen Flynn, wife of Patrick Flynn. This consideration of \$2,000 is conclusively proven never to have been paid, and that the conveyance was purely voluntary, although the grantee most singularly swears to having paid it to the grantor, and how it was done. These transfers were made before suit was actually brought on the guardian's bond, that suit not having been instituted until July 2, 1878. On the 27th of September, 1878, after suit was brought, but before judgment was rendered, F. J. Brown, one of the appellants, for a consideration of \$1,500 actually paid Mrs. Flynn, bought and took conveyance of the property sold to Mr. Flynn by Hinkley and King, trustees, from Patrick Flynn and wife; it being alleged that Mr. Brown bought this property with a full knowledge of all the facts impeaching the validity of Mrs. Flynn's title, viz.: with a knowledge that the property came to Mrs. Flynn from her husband when he was indebted as charged in the bill, and in prejudice of creditors then subsisting, and with special knowledge of his suretyship on this guardian's bond and of the pending suit thereon. It is also claimed that he is not such a purchaser for value and without notice as will be protected in his purchase, and that the property held by him under the title described is liable to the appellees' claim. This bill was not filed until March 31, 1880, although it appears that a previous bill for the same purpose was filed in October, 1878, immediately after judgment obtained, but the same was dismissed on demurrer, because it was filed in the name of the State of Maryland.

The appellants contend,—*First*, that Mrs. Flynn's title is good, and is not obnoxious to the charge of having been acquired from her husband in prejudice of subsisting creditors, their contention being that both pieces of prop-

erty were bought with the separate earnings of Mrs. Flynn, and that, the title having been taken in the husband's name, there was a constructive trust in her favor, and that the deed from the husband to the wife in this case was therefore but putting into her name what actually belonged to her, and was erroneously in her husband's name. *Secondly*, it is contended that the judgment is not conclusive as against the securities on the guardian's bond if the amount ascertained by it be actually due; and it is insisted that in fact there was nothing due the wards when the guardian's accounts were passed; that their whole estate had been expended on them or for them; and that in truth they were overpaid, and, if not overpaid, that a much smaller sum than the amount of the judgment was really due, and that the sureties are therefore entitled to have the judgment abated accordingly.

As to two of the complainants in the court below, the guardianship was contended to have been created without authority of law, they being above the age requiring a guardian when one was appointed. This point was decided in favor of the appellants in the court below, and the bill for that reason was dismissed as to them, and, as there is no appeal, we have only to deal with the appellees in whose favor decree was rendered, and the questions raised as affecting them.

John McManus conveyed to Patrick Flynn, on the 9th of April, 1858, the property in which they were living when this bill was filed. The deed calls for a consideration of \$1,000 paid by the grantee. Conceding that the \$1,000 used in paying for this property was Mrs. Flynn's, it was before the Code, and her husband had the right to appropriate it; and, at least with her consent, having been used in buying property in his own name, which he held in his own name for nineteen years, it must have been supposed to have been his in fact. The Code had not then been adopted, and unless money and property was expressly made separate property by the title under which it was acquired, it was not sole and separate property, and there is no proof that it was so acquired as to make it such. After having been treated as his property for so many years it would be inequitable to decide now that it had been all this while held in trust for her.

The property which was conveyed to Mr. Brown was conveyed to Patrick Flynn on the 15th of June, 1870, by Messrs. Hinkley and King, trustees. It remained in his name until the conveyance in April, 1877, to Walsh by Flynn and wife, and then immediately by Walsh back to Mrs. Flynn. The consideration for this deed is \$1,200. The notes therefor were given by Flynn himself; but it is contended that the money of the wife really paid for it. This contention is attempted to be maintained by proof that the husband was rheumatic and unable to work, and that the wife's earnings went to pay for this property. It is said she kept a grocery and liquor store, and also kept boarders, and in this way she supported the family and raised the money by which her husband was enabled to buy this property. It is no doubt true that Mrs. Flynn has been a very energetic and hard-working woman, and that she has been the main prop of her husband

and family, but it does not follow that all that was earned was her own and not her husband's.

By section 7 of article 45 of the Code, a married woman who, by her personal industry, skill and labor, shall earn \$1,000 or less, is permitted to hold the same to her sole and separate use, protected from the debts of the husband, and that is made liable to attachment for any debt of such married woman; that is, when a married woman is trading as a *feme sole*. *Bradstreet v. Baer*, 41 Md. 28.

Under this section, at the time when the property was bought of Hinkley and King, she could only acquire and hold in that way, by her separate earnings, \$1,000. Under the Act of 1882 this limitation has been taken off. In this instance, money in excess of \$1,000 is sought to be declared her separate property. Manifestly, when this transaction took place, there was no thought of its being separate property. It is true, she was keeping boarders in connection with the grocery and liquor store, which was attended to by the husband and the daughter, who was large enough to attend to the store, and who did keep it, as the testimony shows, in connection with the father. It was conducted in his name and over his sign. Flynn says his wife took out the license, but it was not produced; and objection was made, and properly, to such proof without production of the license. There is not the slightest proof that she was dealing in her own name, or making debts in her own name, and that purchases were not made in the name of the husband. The sign over the door gave notice to the public that he was the proprietor, and credit was no doubt given accordingly to the person in whose name it appeared to be conducted, and in whose name the title to the property stood. The law entitles a man to the services and help of his wife and of his children, and it is only when the wife brings herself clearly within the exception that the law will protect her. The proof does not satisfy us that she was a *feme sole* trader, or intended to be so regarded. But if it was her money, and she allowed the husband to use it, as she might, without agreement for its restoration, she would be bound by it. *Kuhn v. Stansfield*, 28 Md. 215.

In this case, not only was the property bought by Mr. Flynn, and the title taken in his own name, and so continued until 1877, a period of seven years, but a lease of it for ninety-nine years, renewable forever, at a rent of \$90 per year, which was to be paid to the husband, with whom also all the covenants in the lease were made, was executed. She united in that lease. If she had rights, she ought to have asserted them sooner, and not to have allowed Patrick Flynn, her husband, to obtain credit on faith of his title all this time.

That which is said in *Bayne v. State*, 62 Md. 107, with reference to the claim there set up on the part of the wife, is particularly applicable here. There the court said that the title being in the husband gave him credit, and formed a ground, no doubt, for accepting him as security on the guardian's bond which was then involved. That case is singularly in point, even to being a controversy over a suretyship on a guardian's bond, as this is. There is not the slightest doubt that when the transfer was made, it was requested by Mrs. Flynn for no

other reason than for the purpose of saving trouble and expense in the Orphans' Court in the event of her husband's death, which she said the doctors said might come at any time. Under all the evidence, we agree with the court below that it would be an unwarrantable stretch of equitable powers to declare this property to be Mrs. Flynn's sole and separate property. If it was not hers in equity and of right before the conveyances to her through Walsh from her husband, then its acquisition from him was in prejudice of the rights of subsisting creditors, and was to such extent invalid. Code, art. 45, § 1; *Williams v. Banks*, 11 Md. 198; *Hinkle v. Wilson*, 53 Md. 288; *Goodman v. Wineland*, 61 Md. 451; *Bayne v. State*, 62 Md. 102.

We do not think that the case of *Keller v. Keller*, 45 Md. 269, in which a resulting trust was held to have obtained in favor of the wife, has any application here. There the money used in the purchase was the proceeds of property, undoubtedly the wife's, and the sale and exchange was made at her request. In this case, we have been unable to find that the wife's undeniable property went into any of the property bought by the husband and which was conveyed to him. All the facts and circumstances, to our apprehension, repel such an idea.

Mr. Brown bought the property in perfectly good faith, and for a valuable consideration, and believing no doubt that Mrs. Flynn's title was good, and that this claim of the appellants was no cloud on the title. Still, under all the facts, we cannot say that he was a purchaser without notice. He knew Mrs. Flynn acquired the property from her husband. That, of itself, was a suspicious fact. *Green v. Early*, 39 Md. 282.

This case is directly applicable. He knew of the claim of these appellants against Flynn, and knew that he was actually sued at the time on account of it. His attention was called to the fact, and judgment was obtained the next month. He certainly had enough to put him on inquiry, and that was equivalent to notice. *Price v. McDonald*, 1 Md. 403.

Under such circumstances, we see no escape from holding him sufficiently affected with notice to render the property in his hands liable after the exhaustion of that which actually remained in the hands of Mrs. Flynn.

We must now consider the second contention of the appellants, that, as against the securities, the appellants' claim was fully paid when judgment was obtained, or, if not, is entitled to abatement in equity in favor of the securities.

Edmond Walsh, the father of the appellees, died in Washington in May, 1867. He left a widow and four children. The children, at his death, were all minors. His widow, Mrs. Ellen Walsh, administered in Washington on his personal estate. He left a will as follows: "I give and bequeath to my wife, Ellen Walsh, the whole management of my whole property, to sell and dispose of it as she thinks proper, for the use of my four children and herself." This was all of it. Thomas Walsh, who lived in Baltimore, a bachelor brother of the deceased, and seemingly a prosperous man in business at that time, with commendable affection, stepped into the family, and, as counsel for appellants put it, acted *in loco parentis*. The de-

ceased left a farm in Baltimore County, of which he took sole charge, receiving the rents, and expending, as he says, large sums of money upon it. He also, during the period of four years before he was appointed guardian, was from time to time advancing money to Mrs. Walsh; and the claim for abatement of the appellants' judgment, even to extinguishment thereof, is made up in large part of these dealings with their mother, rents of the farm, expenditures on it, and payments to her while she was in effect entitled to do with the whole estate just as she chose. Her discretion was certainly unfettered by the will. These dealings, from 1867 to 1871, between Thomas Walsh and his brother's widow, were before the sale of the farm under decree in the Circuit Court for Baltimore County, and the distribution of the proceeds between her and the children, when Mrs. Ellen Walsh's application was made.

We entirely agree with the circuit court that such dealings cannot be the legitimate subject of set-off to the appellees' claim. It might have been very generous in Walsh to do as he did; but if he was so dealing, with the expectation of subsequent reimbursement from the sale of the farm, he was not acting wisely. There is no intimation that a sale of the farm was contemplated; and if he expected to be paid at all, we do not know from the proof that he did, or how. Guardians will not be allowed to invade their ward's principal without the special authority of the courts; yet the claim here is that Thomas Walsh ought to be allowed for advances to the mother, and payments on her account, before he was appointed guardian, and before there was any property belonging to them individually and subject to guardianship. In fact, the charges are not against the appellees, but against the mother. His conduct is properly characterized by appellants' counsel as blundering; but we can see no principle upon which we can relieve him, as to what antedated the guardianship, at the cost of the appellees. Some of these claims for payments by him are alleged to be debts due by his brother at the time of his death. If the personal estate in the hands of the administrator, Walsh, was not adequate to the payment of such debts, the real estate would have been answerable; but, to entitle himself to subrogation, the debts should have been properly established, and there is no proof that they were established or proven. The heir cannot be chargeable without such proof. An account made out years ago by a person now dead, from vouchers not now produced, and exhibited with the unsatisfactory statements of Thomas Walsh about the items it contains, is the main reliance of the appellants in support of their theory of over payment by the guardian before judgment obtained. That account, as a whole, is unreliable. Large errors are conceded to be found in it; and large amounts, on account thereof, appellants confess, must be deducted from it. If it were admissible as original evidence, as it is not, we could not depend upon it for that certainty which it ought to supply as the basis of final adjustment between the parties.

The memory of Thomas Walsh with respect to the various transactions it professes to detail is dim and unsatisfactory. As to amounts and dates, appellants' counsel concede he is not clear. The very account now relied on is shown

to have been before the orphans' court, and was rejected as improperly charging the wards, and the guardian account in the record was sworn to and passed instead; yet Walsh does not remember it, and says it was never before the court or examined. Mrs. Walsh, the mother of the appellees, to whom the money was paid from time to time, seems to have a much clearer recollection, and corrects Mr. Walsh in some very important particulars. She remembers certain payments distinctly, and with equal clearness denies others.

Analysis of the various items and proofs respecting them will serve no useful purpose. Acting upon the commendable concession of appellees' counsel that any payments satisfactorily proven to have been paid their mother shall be regarded as proportionately paid on their behalf, and the clear proof of payments, we will endeavor to reach the real equities between the parties since the relation of guardian and ward has existed. To do this, however, will require a new statement of the account, and on a somewhat different principle from the guardian's account.

Charging the guardian with appellees' share of real estate proceeds which came to his hands substantially when appointed,.....	\$1,628.00
Add interest, two years and two months,.....	211.64
	<hr/> \$1,839.64
Deduct one half of \$500, then paid (May 18, 1873),.....	250.00
	<hr/> \$1,589.64
Add interest to eleventh of August, 1874 (say 14 months and 20 days),.....	116.86
	<hr/> \$1,706.00
Deduct one half of \$300 cash, \$140.40 interest paid, \$440.40,.....	220.20
	<hr/> \$1,485.80
Add interest three months 20 (to December 11, 1874),.....	27.23
	<hr/> \$1,513.03
Deduct one half of \$700, then paid, ..	850.00
	<hr/> \$1,168.03
Add interest to date of judgment, twenty-first of October, 1878 (3 years, 10 months, 10 days),.....	269.09
	<hr/> \$1,437.12
Deduct one half of sundry payments, amounting to \$298.50.....	149.25
	<hr/> \$1,282.87
Deduct, also, cost of guardianship and commissions as allowed by the court, \$74, and one half fee paid counsel, \$20,.....	84.00
	<hr/> \$1,198.87

This sum of \$1,198.87 was the true amount, as against the securities, which was due when the judgment was rendered. In addition to the credits already applied, the sum of \$348.47 was collected under *fi. fa.*, on the judgment obtained. One half of that amount, or \$174.23½, must be applied in part extinguishment of the sum already found as due when judgment was obtained, and interest accrued thereon.

The decree will be reversed, and the cause will be remanded, to the end that the appellants shall only be required to pay the sum of \$1,198.87, with interest from the date of the judgment, and the costs of the judgment, less the sum of \$174.23½, part of the money realized on the *fi. fa.*, and applicable to these appellees; and that in default of payment, the property conveyed to Mrs. Flynn, and still possessed by her, be first sold for its payment, and then, if that prove insufficient to pay the same and the costs of sale, the property conveyed to F. J. Brown, trustee of Waters' estate, shall be sold to pay the balance. A short day shall be named for the payment, and, in default, that the trustee proceed to sell in the order indicated.

Reversed and remanded.

Samuel WHITE, Exr. of Elizabeth Kauffman, *Appt.*,
v.

John C. KAUFFMAN *et al.*

1. The law conclusively presumes that a **legacy** is to be **paid only out of the personality**; and if that is insufficient the legacy is lost unless a contrary intention is shown on the face of the will.
2. **Where a will directs a legacy to be paid out of testator's estate by the executor**, and no realty is devised to the executor, **payment of the legacy will be confined to the personality; no inference to charge the realty can be drawn from a subsequent residuary clause** devising all the remainder of testator's estate, "real, personal and mixed," to a third person.

(Decided October 9, 1886.)

A PPEAL from a decree of the Circuit Court of Baltimore City, in favor of complainants in a bill in equity to subject devised real estate to the payment of legacies. *Reversed.*

Argued before Alvey, *Ch. J.*, and Robinson, Yellott and Bryan, *JJ.*

The case is stated in the opinion.

Mr. John M. Carter, for appellant:

There is nothing in the word "estate" to compel it to include realty. On the contrary, this court has held that even the words "all the residue of my estate" may be readily restricted to personality.

Walters v. Walters, 3 Harr. & J. 205; *Beall v. Holmes*, 6 Harr. & J. 205, 228; *McCheaney v. Bruce*, 1 Md. 347.

In the leading case of *Stevens v. Gregg*, 10 Gill & J. 143-147, the language of the will was almost identical with that in the case at bar; yet the court held that the bequest was not a charge upon the realty, although the testator left no personality out of which it could be paid; and the remainder of the estate was devised to the executor himself.

The appellees claim, not only that the realty must be sold to pay their legacies, but that they are also to be paid interest thereon out of its rents and profits. But these are the property of

the residuary legatee under any circumstances.

Guyer v. Maynard, 6 Gill & J. 420; *Getzandaffer v. Caylor*, 38 Md. 283.

Messrs. Sidney C. Long and A. F. Muselman, for appellees:

The cash legacies given by the testatrix are all pecuniary demonstrative legacies, to be paid at all events; and this being the intention of the testatrix the real estate is liable.

Bank of U. S. v. Beverly, 1 How. 134, 149 (42 U. S. bk. 11, L. ed. 75, 81); *Fenwick v. Chapman*, 9 Pet. 462 (34 U. S. bk. 9, L. ed. 194); *Smith, Eq.* 522, ed. 1832.

To constitute a legacy a charge on lands it is sufficient that lands are devised after payment of debts and legacies, or debts and legacies first having been paid, or other similar language.

Spence v. Robins, 6 Gill & J. 516; *Graves v. Graves*, 8 Sim. 54-56.

Here was allegation and proof of insufficiency of personal estate.

Lewis v. Darling, 16 How. 1 (57 U. S. bk. 14, L. ed. 819).

The same words in a will that charge debts will also charge legacies. Bequeath means to devise also.

Smithers v. Hooper, 23 Md. 273.

The mingling of realty and personalty into one fund makes legacies payable out of such fund.

Pott v. Gardner, 12 Wheat. 498 (25 U. S. bk. 6, L. ed. 706); *Gardner v. Gardner*, 3 Mason, 178; *Wilcox v. Wilcox*, 13 Allen, 252; *Taft v. Morse*, 4 Met. 523; *Taylor v. Dodd*, 58 N. Y. 335; *McLoughlin v. McLoughlin*, 30 Barb. 458; *Doubling v. Hudson*, 17 Beav. 248; *Archer v. Deneale*, 1 Pet. 585 (26 U. S. bk. 7, L. ed. 272); *Hammond v. Hammond*, 8 Gill & J. 436; *Chamberlain's Case*, 80 Md. 447.

Stevens v. Gregg, 10 Gill & J. 143-147 does not apply here. It is not like this case in the most essential points. The will did not contain the direction "to pay legacies out of my estate." There was no allegation and proof of insufficiency of personal estate.

In *Cox v. Corkendall*, 2 Beas. (N. J.) 133, the will was similar to this one, and the realty held charged with payment of pecuniary legacies.

In regard to legacies charged on land, courts of equity have exclusive jurisdiction.

Story, Eq. Jur. 12th ed. § 602; *Cornish v. Willson*, 6 Gill, 299; *Lockett v. White*, 10 Gill & J. 480.

There must be allegation and proof against the executor that there was personal estate; that it was applied and exhausted, and not sufficient to pay debts and legacies.

Evans v. Eglehart, 6 Gill & J. 171; *Hoye v. Brewer*, 3 Gill & J. 153; *Piper v. Tuck*, 26 Md. 208.

In equity the executor is trustee of all assets.

Hinkley, Test. Law, § 1210; *Hagthorp v. Hook Admrs.* 1 Gill & J. 270.

When real estate is devised, contingently subject to be sold for payment of debts and legacies, the devisee is entitled to the rents and profits until the estate is sold.

Guer v. Maynard, 6 Gill & J. 420.

Costs in such case are usually paid out of the fund, by order of this court.

Smithers v. Hooper, 23 Md. 273; *Chamberlain v. Owings*, 80 Md. 447.

270

The terms of will give implied power of sale.

Magruder v. Peter, 4 Gill & J. 323; *S. C.* 11 Gill & J. 217; *Peter v. Beverly*, 10 Pet. 532, 538, 565 (35 U. S. bk. 9, L. ed. 522, 532, 535); *Bank of U. S. v. Beverly*, 1 How. 134 (42 U. S. bk. 11, L. ed. 75); 2 Story, *Eq.* §§ 1058, 1061, 1063.

A redeemable lease for ninety-nine years will take away the devise of land which is converted into personalty. Here the large ground rent was redeemable into personalty, at the pleasure of White.

Bosley v. Wyatt, 14 How. U. S. 390 (55 U. S. bk. 14, L. ed.).

There is no case against *Cox v. Corkendall*, 2 Beas. (N. J.) 133, ruling that the words "pay out of my estate" are an express charge upon realty.

Bryan, J., delivered the opinion of the court:

The question in this case is whether certain legacies in the will of Elizabeth Kauffman, deceased, are charged upon her real estate. The clauses in the will, which are important to notice are as follows:

"I will and direct my executor, hereinafter named, to satisfy and pay all my just debts and funeral expenses out of my estate. * * * I give and bequeath unto my nephew John C. Kauffman the sum of two hundred dollars; and I direct my executor, hereinafter named, to pay the same to him as soon as convenient after my decease, out of my estate. * * * I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever, at the time of my decease, unto my niece Margaret Jane White, to her own sole and separate use, * * *," describing this last devise and bequest so as to exclude all right and interest in the same on the part of her present or any future husband.

Samuel White, the husband of the residuary devisee and legatee, was appointed executor by the will. There were several other legacies which were given in words almost identical with those which were used in the case of John C. Kauffman's legacy. It was stated that they were all to be paid, by the executor, out of the estate. The personal assets were not sufficient to pay the legacies in full; and a bill in equity was filed by the legatees, to subject the devised real estate to the payment of the deficiency.

It will be observed that in directing the payment of her debts, the testatrix uses the same language as that which is applied to the payment of the legacies. She directs her executor to pay both debts and legacies out of her estate. This court has given its approval to the authorities which hold that words which charge debts upon the realty will have the same effect when applied to legacies. *Ogle v. Tayloe*, 49 Md. 175.

In considering the cases which have been decided in England and in the States of this country which have followed the English authorities, we must bear in mind an important difference between the law of this State and the common law, on the subject of the payment of debts due by decedents. By the common law, the real estate of a deceased person was not liable for his simple contract debts; nor even for his specialty obligations, except where the

heir was expressly bound. Hence, there was a natural and laudable desire on the part of the judges to construe wills so as to bind the lands of the testator for the payment of his debts, wherever such construction could possibly be made. They were astute in giving a meaning to general and ambiguous expressions, in order to carry into effect the just and rational purpose of paying the debts of a decedent out of his property.

But in Maryland such constructions would not be justifiable. The Act of 1785, chapter 72, makes the real estate of a deceased liable for the payment of all his debts on failure of the personalty; and it makes no difference whether he leaves a will or not, or what provisions it may contain. We have the authority of decided cases in this court for holding that words in a will declaring that the testator's debts are to be paid before devises and bequests must be regarded as immaterial and inoperative, and as not furnishing any evidence of an intention to charge the real estate; inasmuch as they simply provide what the law has determined shall be done, with or without such a clause in the will. *Cornish v. Willson*, 6 Gill, 815; *Piper v. Tuck*, 26 Md. 220.

This statute may also sufficiently explain the reason why our law on the subject of charging legacies on real estate does not adopt the decisions in England and some of the other States of the Union. It being held that the same words which would charge debts would also charge legacies, a radical difference in construction in one case would cause a corresponding difference in the other. It has been decided in New Jersey that where a legacy is directed to be paid out of the estate, it is charged on the realty. *Cox v. Corkendall*, 2 Beas. (N. J.) 188.

And it has been decided, in England and elsewhere, that where a testator gives legacies, and then devises and bequeaths the rest and residue of his real and personal estate, the real estate is charged with the payment of them.

The personal estate is the natural and primary fund for the payment of debts and legacies; and even when the real estate is expressly charged, no resort can be made to it until the personalty is exhausted, unless it has been exonerated by the terms of the will. If the testator gives a legacy, the law conclusively presumes that it is to be paid only out of the personalty; and if that is insufficient the legacy is lost, unless a contrary intention is shown on the face of the will. If he wishes it to be paid out of the realty, he must so state, either by express words or by fair and reasonable implication. When we look at the clauses of the will giving these legacies, we see that the executor is directed to pay them out of the estate. No portion of the real estate is devised to him; and consequently the only portion of the estate over which he has any control is the personalty. It would not be reasonable to construe the will as requiring him to pay out of the realty, when the same will has placed it beyond his reach.

It seems to us, therefore, clear that if payment is to be made by the executor it must be made out of the personalty. If we now turn our attention to the clause devising the real estate, we find that it is given to the devisee unconditionally; there is no direction or request or intimation that she shall pay the legacies. There is no ref-

erence whatever to them, except so far as it is made by the terms "rest, residue and remainder of the estate, real, personal and mixed." Giving to these words their natural interpretation, the residue of the personal and mixed estate would mean such portion of it as might remain after the debts and legacies were paid. The residue of the real estate would be a separate devise, altogether unconnected with the legacies. We do not see, therefore, how a natural construction of this clause should require us to hold that the devisee is charged with the payment of the legacies.

In *Stevens v. Gregg*, 10 Gill & J. 143, this court established the rule of construction which is binding on us. Certain legacies were alleged to be charged on land by virtue of the following clause in a will: "After my just debts and funeral charges are paid, to my grandsons Thomas Stephens and John Allen Stephens five hundred dollars each; to be paid unto them by my executor when they shall respectively arrive at the age of twenty-one years, and no more of my estate; the remainder of my estate, consisting of real and personal, situated, etc. * * * to my beloved son Mordecai James Allen, and to his heirs and assigns forever."

This court, adopting a decision of *Chancellor Kent*, in 2 Johns. Ch. 628, held that the legacies were not charged on the land. It was said: "In this case it is, we think, very clear that there is nothing in the language or disposition of the will, from which an inference can be drawn that the testator intended to charge the real estate in the hands of his devisee with the payment of these legacies. They both appear to have been equally the objects of his bounty, and it does not appear to have been his intention to incumber his lands with the payment of them." Quoting from *Chancellor Kent*, where he was considering the effect of a clause disposing of all the rest, residue and remainder of real and personal estate not before devised and bequeathed, it was said: "The real estate is not as of course charged with the payment of legacies. It is never charged, unless the testator intended it should be; and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and disposition of the will. This general rule does not seem to admit of dispute. If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause and a kind of formula in wills."

The court below passed a decree that the real estate should be sold for the payment of the legacies. It will be seen that we take a different view of the case.

Decree reversed and bill dismissed, with costs in both courts.

William M. NEALE, Admr., *Appt.*,
v.

Johanna HERMANN, by Her Husband
and Next Friend,

1. To entitle a married woman to recover as her separate property, under the provisions of the Code, money due for services, she must show that she rendered the services as an inde-

pendent person, on her own account, and not conjointly with her husband or for his benefit.

2. In a suit by a married woman through her husband as her next friend, the latter, being a nominal party to the suit only, is a competent witness for the plaintiff.
3. In an action of assumpsit against an administrator, his bond not being in suit, judgment should be entered for the damages laid in the declaration simply, and not for the penalty of the bond.

(Decided June 23, 1886.)

A PPEAL from a judgment of the Court of Common Pleas of Baltimore City, in favor of plaintiff, a married woman, in an action to recover for personal services in her own right. *Reversed.*

The facts are stated in the opinion.

Mr. Thomas G. Hayes, for appellant:

The court has neither the right nor power to permit a party to alter, change or amend a bill of exception, in a material part, after the same is signed, sealed and filed, and the term has passed.

Kitchen v. Moyer, 17 Ala. 394; *Heard v. Heard*, 8 Ga. 380; *State v. Powers*, 14 Ga. 388.

There was a variance between the contract declared on in the declaration and the one proven by the husband, and hence his testimony was clearly inadmissible. The *allegata* and *probata* must always agree.

Hoke v. Wood, 26 Md. 453.

If the contract with deceased, upon which a recovery was sought, was with Lewis Hermanns and others, as is clearly shown to be the case by the evidence of Lewis Hermanns, the latter was not a competent witness in the case, under our Evidence Act.

Act 1876, chap. 222.

A notice to produce an original receipt when given at the trial, where the party had five days to comply with it, is sufficient. The witness in fact dispenses, by his own testimony, with the necessity of any time, because he says he never received such a receipt.

2 Poe, Pl. & Pr. 98, §132.

The Code provides that the administrator shall not be liable for a debt he returns good, or "separate," unless collected.

1 Code, art. 98, § 222.

Mr. Benjamin Kurts, for appellee:

What premises or what portion of premises the plaintiff's husband occupied after Mrs. Burger's death, and what rent he paid therefor to the defendant, as the agent for the owners, after her death, was matter clearly impertinent and irrelevant to the issues in this case; and contradictory evidence thereto could not be introduced for the purpose of impeaching the witness.

1 Greenl. Ev. § 449; *Goodhand v. Benton*, 6 Gill & J. 481; *Sloan v. Edwards*, 61 Md. 105.

This immaterial testimony was elicited from the witness Hermanns, upon his cross examination, by the defendant, and it is not competent for the defendant to contradict him; the defendant is bound by his answer.

2 Poe, Pl. & Pr. § 277; 6 Gill & J. 481.

In an action against an administrator by a

married woman, suing by her husband as her next friend, the husband is a competent witness in her behalf, he being only a nominal party within the meaning of the Evidence Act.

Trahern v. Colburn, 68 Md. 99.

Irving, J., delivered the opinion of the court:

This suit was brought by Johanna Hermanns, by her husband and next friend, Lewis Hermanns, against the appellant, administrator *c. t. a.* of Margaretha Burger, deceased. The declaration contains the money counts for goods bargained and sold, work and material provided, for money lent, for money paid for decedent, for money had and received by decedent to plaintiff's use, and for money found to be due on accounts stated between them; and also a special count for washing and ironing done by the plaintiff for the deceased, and for services as nurse and attendant from the first of October, 1872, to the thirty-first of March, 1884. Appended to the *narr.* is an account in which plaintiff claims from the first of October, 1872, to April 16, 1880, at \$2 per week; and from April 16, 1880, to March 31, 1884, at \$5 per week.

The 7th section of article 45 of the Code says: "Any married woman who, by skill, industry and personal labor, shall earn any money or other property, real, personal or mixed, shall hold the same, and the fruits, increase and profits thereof, to her sole and separate use, with power of a *feme sole* to invest and reinvest, sell and dispose of the same."

At common law the husband is unqualifiedly entitled to his wife's services, and the profits of her labor. By this section of the Code a married woman may engage in business independently of her husband, or may, apart from him, do any kind of work or labor on her own account, and for her separate benefit, so that the proceeds of her business and the wages of her labor shall become her sole and separate property. For the recovery and protection of such property she may, by other provisions of the Code, sue by next friend. This suit proceeds on the theory that what is claimed is due the wife as separate property, and the suit is brought by the husband as next friend. To recover, the plaintiff must show that she was rendering the service sued for as an independent person, on her own account, and not conjointly with or for her husband's benefit.

The first exception is to the admission of evidence which it is claimed has no tendency to establish the plaintiff's claim. Issues have been joined upon pleas that the defendant was never indebted, and that the decedent was never indebted, and never promised, as alleged; that the action did not accrue within three years before suit brought, and that the assets of the estate are not sufficient to pay all the decedent's debts in full. To be admissible the testimony must tend to prove some one of these issues. The witness is Lewis Hermanns, the plaintiff's next friend and husband. Being merely the next friend, he was a nominal party only to this suit, and competent under the Evidence Acts. The question is, Do his statements tend to sustain the claim as made on any of the issues framed? Hermanns states that he rented the house from Mrs. Burger, the defendant's tes-

tatrix, at \$13 per month, and that Mrs. Burger was to move out and give him possession of the whole house; but that she did not move out, and afterwards agreed to pay him \$4 per month for the rooms she retained. He further states that he paid her for the rent of the whole house, and for two months she paid him for the rooms occupied by her, and then that she was taken sick, and when he went to pay the rent, "she tells us she would pay us for good and well if we take care of her; I let the rent slip." It is evident that this testimony can have no bearing on any of the issues, unless it be the indebtedness; and we think it plain that it does not tend to show that Mrs. Burger contracted with the wife to do anything for her, or that the wife did render any service for her or on her own account and independently of the husband. It tends to show that Mrs. Burger was to receive full pay for house rent, and was to remain in it and be cared for by witness and somebody else, and that she promised witness to pay them well for such attention. It may be assumed that by "we" and "us," in his statement, he means himself and his wife. According to this evidence, he was furnishing a home and shelter for Mrs. Burger at his cost, and certain care and attention was to be rendered, for which he says she said she would pay "us." It was the husband's right that the wife should work with and for him, and it was natural that she should; and if she did he was entitled to pay. In such case there is no division of proceeds, as between partners in business. It was lawful for the wife to engage in labor for her own benefit, and independent of her husband, if she chose; but unless she did so, and intended the proceeds for her own separate use, the husband was entitled to the profits of her labor. This is certainly the common-law rule. 1 Chit. Pl. 80, and authorities there cited.

If the wife desires to bring herself within the exception and provisions of the seventh article of the Code, the evidence must be such as to bring her strictly within its meaning and protection. *Flynn v. Walsh, [ante, 155.]*

This seventh section certainly did not intend to divorce husband and wife, whether they would have it so or not, and to make all that the wife did inure to her own use only, without any regard for the husband's rights. From their relation as husband and wife she is personally working for him, and in his interest. Though she has the privilege, if she wishes, to work for herself, circumstances should show that she had so elected.

Nothing in the evidence of Hermanns tends to show that his wife was to be paid for the services to be rendered in her own right. If he meant by "we" and "us" himself and his wife, as we suppose he did, then it was a joint service that was to be paid for, and the promise was to pay accordingly; and the husband would be entitled, and not the wife in her own and separate right. Upon this evidence, if true, certainly if the wife were dead, the husband could recover in his own right; whereas, if what was due belonged to the wife as separate property, his absolute right to it would depend on "her having died without children." There would seem to be no doubt that the testimony of Hermanns did not tend to support any of

the issues as made, and there was error in admitting it.

This exception embodies another ruling of the court adverse to the appellant, of which he complains, but as it was the exclusion of certain evidence intended to discredit Hermanns, an exclusion of all that Hermanns said as included in this exception renders that ruling wholly unimportant, and we need not consider it.

As to the second exception, it is only necessary to say that the defendant, being administrator, and a party to the suit, was clearly incompetent as a witness, under the express language of Evidence Acts of 1864 and 1868. The ruling of the court upon that question was clearly right.

Under the view we take of the case upon the first exception, it became entirely needless to consider the question raised as to the power of the court to amend the bill of exceptions after the same has been signed and filed. The amendment did not prejudice the plaintiff's case in any degree. Having suffered no injury by it, it is rendered immaterial, and we express no opinion upon it.

The record shows that the judgment in this case was not properly entered, and it is proper that we should notice it in the interest of correct practice, although it is not before us regularly for review. It is entered for the penalty of the bond; whereas, no bond was in suit. The twenty-first section of article 29 of the Code provides that in any suit against an administrator "the court shall enter up judgment against the defendant for the penalty of the bond or damages laid in the declaration, and costs of suit, if the court shall so direct, to be released upon the payment of the sum ascertained to be paid by the verdict," etc. If the bond is in suit, then the judgment is for the penalty of it; and if not, then for the damages laid in the declaration, to be released on payment of amount of the verdict.

Judgment reversed, and cause remanded for a new trial.

William M. ISAAC *et al.*, Trustees of the Townsontown Station of the Methodist Episcopal Church, *Appts.*,

v.

D. Hopper EMORY *et al.*

1. A trust cannot be upheld unless it be of such a nature that the *cestui que trust* are defined and capable of enforcing its execution by proceedings in a court of chancery.
2. A deed conveying property in trust "for the use of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial appointments of said Church," is too vague and indefinite, and the trust cannot be upheld.

(Decided November 20, 1885.)

APPPEAL from a decree in equity of the Circuit Court for Baltimore County, in favor of complainants. *Appeal dismissed.*

Bill to subject certain real estate, with the church building thereon, to an equitable lien for moneys used in the erection of the building. The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, Yellott, Miller, Irving and Ritchie, *JJ.*

Messrs. Orville Horwitz and S. Parker Bosley, for appellants.

Messrs. William S. Bryan, Jr., and Arthur W. Machen, for appellees.

Miller, J., delivered the opinion of the court:

The motion to dismiss this appeal must prevail.

The decree appealed from provides for the sale of the lot of ground in controversy with the improvements upon it, consisting of a church building, in order to pay certain claims of the complainant and others, which the court below held to be an equitable lien thereon. The appellants, seven in number, calling themselves the "Trustees of the Towson Station of the Methodist Episcopal Church," were not made parties to the bill, but came in by petition, after the testimony had been taken but before the case was heard, praying to be made parties defendants, with leave to answer the bill; and this prayer was granted by the court upon certain conditions expressed in its order making them defendants. In their petition and answer the appellants claim that as trustees as aforesaid they are the holders of the legal title and the real owners of the property in dispute; and the appeal is taken by them as such trustees.

It appears from the record that Mary Ann Shealey, the then owner of the lot in question, for the consideration of \$1,000, conveyed the same, by deed dated the 24th of February, 1870, to five named individuals "to have and to hold the same unto the said grantees, in trust that the said premises shall be used, kept, maintained and disposed of as a place of divine worship, for the use of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial appointments of said Church, as from time to time authorized and declared by the General Conference of said Church, and the Annual Conference, in whose bounds said premises are situate."

On the 14th of October, 1870, an attempt was made to incorporate a religious society under the general law upon that subject, by the corporate name of "The Trustees of Towson Station of the Methodist Episcopal Church;" and on the same day the grantees in the deed of the 24th of February, 1870, conveyed the property in fee to this corporation by its corporate name. But the validity of this attempted incorporation came before this court in the case of *Boyce v. Trustees, etc. of the M. E. Church*, 46 Md. 359; and it was there held to be inoperative, because essential requirements of the corporation law had not been complied with. The result was that no title passed to this pretended corporation by the deed of the 14th of October, 1870, and this the appellants concede. They indeed admit and aver in their answer that there was no good or effective grant of the property to this corporation, but they insist

that the property had in fact vested in the Methodist Episcopal Church of Towson Station, under the original deed of the 24th of February, 1870; and that they now represent that Church, as the duly elected trustees to succeed those named in that deed; and it is upon this ground alone that they claim the right to intervene in this case and appeal from the decree.

But we are unable to give to that deed any such construction or effect as will support this claim. It is not pretended that the grantees in that deed were the trustees of any incorporated religious society. The grant is to them as individuals, and the *habendum* is in the same terms, and not in either case to them and their successors in office, to be appointed by any religious society then or thereafter to be incorporated.

There are no words to be found in these parts of the deed which can have the effect to pass the title to such successors. Nor is there anything in the trust clause which can possibly have that effect. The appellants are not named in it as *cestuis que trust*, nor is it the effect of that clause to make them such. The purpose of that clause was to prevent the property from being used for secular purposes, or by any other Christian sect or denomination than the one described by general terms therein. The *cestuis que trust* or beneficiaries, if any, are not the appellants, but the ministry and membership of the Methodist Episcopal Church in the United States, who are or shall be subject to the discipline, usage and ministerial appointments of that Church, of voluntary ecclesiastical organization, as such discipline, usage and appointments may from time to time be authorized and declared by the General Conference of that Church, and by the Annual Conference, in whose bounds the property is situated.

But this designation of beneficiaries is too vague and indefinite to be sustained by the courts. According to the uniform course of decisions in this State, a trust cannot be upheld unless it be of such a nature that the *cestuis que trust* are defined, and capable of enforcing its execution by proceedings in a court of chancery. *Church Extension of M. E. Church v. Smith*, 56 Md. 397.

It is not necessary to cite the numerous cases in which this doctrine has been applied, for we hold it to be quite clear that when applied in this case the trust contained in this deed must fail.

It was no doubt the purpose of the parties who engaged in the commendable work of purchasing this lot and erecting a church thereon, to have the title thereto held by these grantees temporarily until a corporation could be formed under the law, capable of legally taking and holding the property, and that then these grantees should convey the same to such corporation. As we have shown, this was attempted; but the attempt, unfortunately, failed; and we are constrained to hold that under the original deed to these grantees, the appellants have no such interest, legal or equitable, in the property as would entitle them to intervene in this litigation and appeal from the decree which the court below has passed.

Appeal dismissed.

NEW YORK.
COURT OF APPEALS.

PEOPLE of State of New York, *Repts.*,
v.

Henry W. JAEHNE *Appt.*

1. The crime of bribery committed by a member of the Common Council of the City of New York is punishable under section 72 of the Penal Code, providing for imprisonment for not more than ten years, etc.; that section having superseded section 58 of the New York City Consolidation Act (Laws of 1882, chap. 410), providing for imprisonment not exceeding two years, etc.
2. By section 2143 of the Consolidation Act, the Penal Code (although enacted before the Consolidation Act) is to have the same effect upon that Act as if it had been passed after it. This provision does not transcend the legislative power; and it subordinates the Consolidation Act to the Penal Code wherever the two are in conflict.
3. The general Bribery Act embodied in the Penal Code covers the whole subject of bribery; and was intended to furnish the only rule governing the crime and punishment of bribery.
4. Section 72 of the Penal Code, being a later statute covering the same subject matter as section 58 of the Consolidation Act, and embracing new provisions, operated to repeal the prior Act, although the two are not in express terms repugnant.
5. Section 725 of the Penal Code, providing that that Code shall not affect "Acts incorporating municipal corporations, or Acts amending Acts of incorporation, or charters of such corporations," is to be construed as saving only those penal provisions of charter Acts which are not covered by the provisions of the Penal Code.
(*Rapallo and Earle, JJ., dissenting.*)
6. When, in addition to the confession of the party on trial for a crime, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the requirement of section 395 of the Code of Criminal Procedure, that the confession of a defendant "is not sufficient to warrant a conviction, without additional proof that the crime charged has been committed."
7. It seems that, under said section 395 of the Code of Criminal Procedure, the confession of the defendant is to be treated as competent proof of the *corpus delicti*, although insufficient, with-

out corroboration, to warrant a conviction.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of Oyer and Terminer for the City and County of New York, convicting defendant of the crime of bribery. *Affirmed.*

In the year 1884 the defendant was a member of the board of aldermen of the City of New York and, as such, a member of the common council of that city. The indictment charged in substance: that in August of that year there was pending before the board of aldermen an application or petition of a corporation known as the Broadway Surface Railroad for the consent of the board, as provided by chapter 252 of the Laws of 1884, to construct and operate a railroad on Broadway in the City of New York; and that, at the time aforesaid, the defendant agreed with some person, to the grand jury unknown, to receive for his vote and influence in favor of said petition the sum of \$20,000.

The indictment was in two counts, and on the trial it was assumed that one count was framed under section 72 of the Penal Code and the other under section 58 of the New York City Consolidation Act (Laws 1882, chap. 410); and the district attorney, being required to elect upon which count he would proceed, stated that he elected to go to trial on the first count, under section 72 of the Penal Code.

The defendant was convicted and sentenced to imprisonment for the term of nine years and ten months. The questions presented and the statutes relating thereto are set forth in the opinions.

Messrs. Roger A. Pryor and Richard S. Newcombe, for appellant:

I. The contention is that the crime of bribery, committed by a member of the common council of the City of New York, is punishable by the Consolidation Act, and not by the Penal Code.

The Penal Code was passed July 26, 1881. The Consolidation Act July 1, 1882.

The Penal Code expressly provides that the Consolidation Act shall be deemed to have been enacted after the Code (as was the fact) and shall be unaffected by the Code. This being so, it results that the Consolidation Act, as the later statute, supersedes the Penal Code, in so far as the two statutes are inconsistent.

The Consolidation Act makes special provision for the crime of bribery by a member of the common council of the City of New York (§ 58), and defines the crime in different terms, and imposes a different penalty from that announced in section 72 of the Penal Code. Being of repugnant provisions, the two Acts cannot stand together; and upon a familiar principle, the former, the Penal Code, is superseded by the latter, the Consolidation Act.

But by section 2143 of the Consolidation Act "The Penal Code is to have the same effect as if it was passed after this Act." Thus the Penal Code prescribes that the Consolidation Act shall be deemed the later law; while the Consolidation Act provides that the Penal Code shall be deemed the subsequent statute.

If, in this conflict of provision, we accept the prescription in the last enacted statute, *i. e.*, the Consolidation Act, as the operative and obligatory mandate, then the Penal Code is the later law; and that law requires that the Consolidation Act shall "have the same effect as if enacted after this Code;" and so again we are conducted to the conclusion that the Penal Code is superseded by the Consolidation Act.

The two Acts are not inconsistent, for one is special and local and the other general. A posterior general Act does not repeal a prior local or special Act, unless the legislative intent to repeal be unequivocally apparent.

People v. Quigg, 59 N. Y. 83; *Matter of Del. & Hud. Canal Co.* 69 N. Y. 209; *Gloversville v. Howell*, 70 N. Y. 287; *Matter of The Evergreens*, 47 N. Y. 216; *Matter of Goddard*, 94 N. Y. 544. Again, the Consolidation Act is excepted from the operation of the Penal Code in express words, by section 725.

It is argued that section 725 applied only to statutes then existing and that the Consolidation Act was an after amendment. There are two objections to this: 1, it would involve the conclusion that the Consolidation Act supercedes the Code; 2, when the Penal Code was passed, the New York charter of 1873 was in force and it contained the identical provision against bribery found in the Consolidation Act.

In *People v. N. Y. Catholic Prot.* 38 Hun, 127, the court says: "By no construction can this provision of the Penal Code repeal the provisions of the Act of 1863, inserted in and made a part of the Consolidation Act of 1882; for one Act of the Legislature is not allowed to repeal another by implication when both can be maintained and enforced together, as these several statutory directions very clearly can be. *Hankins v. Mayor*, 64 N. Y. 18, 22. The provisions contained in the Consolidation Act are local and special; while that made by this subdivision of section 291 of the Penal Code is general; and it is a rule of construction that 'A special statute, providing for a particular case or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the Legislature to repeal or alter the special law is manifest, although the terms of the general Act would, if taken strictly and but for the special law, include the case provided for by it.' *Van Denburg v. Greenbush*, 66 N. Y. 1, 3, 4. Under this rule, also, the special provisions on this subject should still be maintained."

A later statute in the affirmative shall not take away a former Act; and *eo potius* if the former be particular and the latter general.

Gregory's Case, 3 Ooke, part 6, 19 b.

General legislation on a particular subject must give way to special legislation on the same subject.

State v. Mayor, 33 N. J. L. 61; *State v. Brannin*, 3 Zab. 484; *People v. Quigg*, 59 N. Y. 88.

When the Legislature passes a particular Act, and declares under what circumstances, in what manner and to what extent individuals shall be liable under that Act, the intentment is that they are liable under those provisions only, and do not fall within the provisions of former general Acts. Subsequent general Acts, although their language is sufficiently

comprehensive for such purpose, will not control the provisions of prior special statutes unless the Legislature so intended.

Rochester v. Barnes, 26 Barb. 662; *Dexter & Limerick Plank Road Co. v. Allen*, 16 Barb. 15; *Werner v. Bank*, 2 Daly, 406; *Perry v. Bank of Cent. N. Y.* 15 How. Pr. 450; *Commonwealth v. Kimball*, 21 Pick. 375; *Re Goddard*, 16 Pick. 504; Dill. Mun. Corp. § 54, note 1.

If the Legislature manifests an unmistakable intent that the County of New York is an exception to the general law, that law does not apply.

Hankins v. Mayor, 64 N. Y. 21.

If the subsequent statute be not repugnant to a prior one, yet if the later one was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original Act.

Sedg. Stat. & Const. Law, 124.

If the provisions of a special charter or a special authority, derived from the Legislature, can reasonably well consist with general legislation whose words are not absolutely inharmonious with it, the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case.

State v. Stoll, 17 Wall. 425 (84 U. S. bk. 21, L. ed. 650); *Townsend v. Little*, 109 U. S. 504; (Bk. 27, L. ed. 1012).

Again, section 726 is a clause of repeal; and since a repeal is possible only of a statute then in existence, and since the Consolidation Act was not in existence when the Penal Code was passed, it follows necessarily that the Consolidation Act is unaffected by section 726.

II. By section 395, Code Crim. Proc. the confession of the defendant is not sufficient to warrant a conviction, without additional proof that the crime charged has been committed.

A confession is no evidence of the *corpus delicti*, but only of the connection of the defendant with the crime. The *corpus delicti* must be established by evidence independently of the confession.

State v. Guild, 5 Halst. 163; *State v. Dubois*, 54 Iowa, 363; *May v. State*, 92 Ill. 343; *Pitts v. State*, 43 Miss. 472; *Gray v. Commonwealth*, 101 Pa. 386; *Priest v. State*, 10 Neb. 393; *U. S. v. Searcey*, 26 Fed. Rep. 435; *People v. Porter*, 2 Park. 14; *Hope's Case*, 1 City H. Rec. 150; *People v. Badgley*, 16 Wend. 53; *People v. McGloin*, 91 N. Y. 242; Whart. Crim. Law, § 638; Bish. Crim. Law, § 1071; 1 Greenl. Ev. § 217.

Conceding, for argument, that the confession was competent evidence of the *corpus delicti*, still the additional evidence is insufficient to warrant the conviction. The corroborative evidence must go to prove the entire crime, and not only one or more of its constituent elements; and proof of one element is no proof of another.

People v. Plath, 100 N. Y. 590; *S. C. 1 Cent. Rep. 772*.

"There must be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it."

People v. Plath, 100 N. Y. 598; *S. C. 1 Cent. Rep. 772*.

Such evidence as merely raises a suspicion of

guilt is insufficient to satisfy the requirement of section 899; the evidence must carry conviction to the minds of the jury.

People v. Williams, 1 N. Y. Crim. Rep. 844.

The corroboration of any witness needing support ought to be by some fact, the truth or falsehood of which goes to prove or disprove the offense charged.

Frazer v. People, 54 Barb. 810.

The additional evidence here, if any, being purely presumptive, it is important to bear in mind the principles by which the probative force of circumstantial evidence is determined and measured.

People v. Kennedy, 32 N. Y. 145.

All proof must begin at a fixed point. The law never admits of an inference from an inference. Two imperfect things cannot make one perfect. The circumstance itself, from which the inference is to be drawn, is never to be presumed but must be substantially proved; for who can prove one doubtful thing by another?

Phillips, Theory of Presumptive Proof; Lawson, Presumptions, 569.

To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, is an entire misapprehension of the doctrine of presumptions.

Evans v. Evans, 1 Hagg. Consist. 105.

In determining a question of fact from circumstantial evidence, there are two general rules to be observed; first, the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all; second, the evidence must be such as to exclude, to a moral certainty, every hypothesis but that of the prisoner's guilt of the offense imputed to him; or, in other words, the facts proved must be consistent with and point to his guilt not only, but they must be inconsistent with his innocence.

People v. Bennett, 49 N. Y. 187; *People v. Stokes*, 2 N. Y. Crim. R. 332.

If the facts be consistent with innocence, they are not proof of guilt.

Ormsby v. People, 53 N. Y. 475; *People v. Courtney*, 23 Hun, 598; *Frazer v. People*, 54 Barb. 809; *Commonwealth v. Holmes*, 127 Mass. 424.

Conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral.

Port v. Port, 70 Ill. 484; *Mason v. State*, 32 Ark. 239; *Carroll's Admr. v. Quynn*, 13 Md. 379.

Where the facts of the case are consistent with honesty and dishonesty, a judicial tribunal will adopt the construction in favor of innocence.

Greenwood v. Lowe, 7 La. Ann. 197.

If a fair construction of the acts and declarations of an individual do not convict him of an offense, if the facts may all be admitted as proved, and the accused be innocent, he should not be presumed guilty. He may be guilty, but he may be innocent.

U. S. v. The Brig Burdett, 9 Pet. 682 (84 U. S. bk. 9, L. ed. 278). See also *Frazer v. People*, 54 Barb. 806.

When a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that the act was done with that intent.

Lawson, Presumptions, 271; *People v. Plath*, 100 N. Y. 590; *S. C. 1 Cent. Rep.* 772.

III. The court erred in refusing to strike out the testimony of Inspector Byrnes, in proof of the confession of defendant; or, if the motion were too late, in admitting the evidence of Rogers.

A confession, obtained either by threats or promises from anyone having authority over the accused or concerned in the administration of justice, is uniformly held to be inadmissible.

People v. McMahon, 15 N. Y. 386; *Rev. v. Moore*, 5 Cox, C. C. 555; 1 Phill. Ev. 461.

Confessions under the influence of threats of arrest for the crime accused, or to an officer upon promises of escape are inadmissible.

People v. Ah How, 84 Cal. 218.

A confession to a magistrate before examination, on his saying "It would be better for the accused to make a full confession," held, inadmissible.

People v. Ward, 15 Wend. 281; *Commonwealth v. Nott*, 29 Alb. Law. J. 97; *S. C.* 135 Mass. 269; *State v. York*, 37 N. H. 175; *Rev. v. Partridge*, 7 Carr. & P. 551; *Rev. v. Shepherd*, 7 Carr. & P. 579; *Reg. v. Coley*, 10 Cox, C. C. 536; *Rev. v. Kingston*, 4 Carr. & P. 387.

Independently of the strict rule of law invalidating a confession, it is a grave question whether the courts will sanction the device by which the inspector of police entrapped the defendant. The maxim is *Nemo tenetur seipsum accusare*; and it was not within the competency of the court, with all its power, to compel the defendant to an implicative admission.

N. Y. Const. art. 1, § 6.

Messrs. Randolph B. Martine, Dist. Atty. and De Lancey Nicoll, Asst. Dist. Atty., for respondents:

I. The Penal Code was passed July 26, 1881. By section 727 it was to take effect on the first day of May, 1882; and it was further provided in the same section that "When construed in connection with other statutes it must be deemed to have been enacted on the 4th day of January, 1881, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code." By an amendment, chap. 102, Laws 1882, passed April 28, 1882, the date of its taking effect was postponed to December 1, 1882.

The New York City Consolidation Act, chap. 410, Laws 1882, was passed July 1, 1882. It was not a new body of law. Its title describes it as "An Act to consolidate into one Act, and to declare the special and local laws affecting public interests in the City of New York." By section 2148, it was provided that it should take effect on the first day of March, 1883.

In 1883, section 2148 was amended (chap. 276 Laws 1883); but the original and amended sections contained this provision: "For the purpose of determining the effect of this Act upon other Acts, except the Penal Code," and the effect of other Acts, except the Penal Code upon this Act—"this Act is deemed to have been enacted on the first day of January, 1882; all Acts passed after such date, and the Penal Code, are to have the same effect as if they were passed after this Act."

The Legislature thereby plainly declared that the Penal Code, in respect to the Consolidation Act, should be a subsequent Act.

The rule that a local statute is not repealed by a later general statute, even though the general law contains a general repealing clause as to inconsistent legislation, is subject to the qualification that where there is a manifest intent to repeal the former local statute, derivable either from the provisions of the general law, or from the fact that the two Acts are so repugnant and inconsistent that they cannot be reconciled, the later statute prevails.

Potter, Dwarr. Stat. 155; *Heckmann v. Pinkney*, 81 N. Y. 211.

And even though the later statute is not entirely repugnant to a prior one, if it was intended to furnish the only rule in the case, the prior statute is repealed.

Heckmann v. Pinkney, 81 N. Y. 211.

It was the purpose of the Code to provide the only rule for the punishment of the same offense, in whatever part of the State committed. Secs. 2, 7, 11, 719.

Where a new statute covers the whole subject matter of an old one, and adds offenses and prescribes different penalties from those enumerated in the old law, it is, by necessary implication, a repeal of the former statute.

Norris v. Crocker, 13 How. 429 (54 U. S. bk. 14, L. ed. 210); *Rex v. Cator*, 4 Burr. 2026; *Nichols v. Squire*, 5 Pick. 168; *Commonwealth v. Kimball*, 21 Pick. 878; *Adams v. Ashby*, 2 Bibb, 96; *State v. Whitworth*, 8 Porter (Ala.) 484; *Heckmann v. Pinkney*, 81 N. Y. 215; *People v. Gold & Stock Telegraph Co.* 98 N. Y. 78. See also *U. S. v. Tynen*, 11 Wall. 88 (78 U. S. bk. 20, L. ed. 153); *Sacramento v. Bird*, 15 Cal. 294; *Sicann v. Buck*, 40 Miss. 268; *Weeks v. Walcott*, 15 Gray, 54; cases cited in Sedg. Stat. 2d ed. p. 100.

The intention of the Legislature to repeal the prior local statute is expressed in the Penal Code itself.

Sections 2, 7, 11, 719, 726.

The Consolidation Act, in express words, makes the Penal Code a later statute than the Consolidation Act. Section 72 of the Penal Code is a law subsequent to section 58 of the Consolidation Act.

II. The test of the admissibility of confessions, as defined in section 395 of the Code of Criminal Procedure, is whether they were made "under the influence of fear, produced by threats, or upon a stipulation of the district attorney that the defendant should not be prosecuted therefor."

All other confessions, however procured, are admissible.

People v. Wentz, 37 N. Y. 303; *People v. Cor*, 80 N. Y. 500; *People v. McGloin*, 1 N. Y. Cr. R. 154; *People v. McCallam*, 3 N. Y. Cr. R. 189; *People v. Chacon*, 2 Cent. Rep. 910; Bishop (1 Crim. Pro. and E. § 1058) says: "Confessions alone, uncorroborated by other evidence, are inadequate to establish the *corpus delicti*." To say that they are inadequate alone to establish the *corpus delicti* implies that they are some evidence of the *corpus delicti*. And to say in the language of the Code (§ 395) that they are not "sufficient to warrant conviction without additional proof that the crime charged has been committed," means that the confessions are some proof that the crime charged has been committed.

Section 395, Code Crim. Proc. as to proof by

confessions was construed in the following well considered cases:

People v. Kelly, 3 N. Y. Cr. R. 414; *People v. Carr*, 3 N. Y. Cr. R. 578; *People v. Mondon*, 4 N. Y. Cr. R. 1.

Andrews, J., delivered the opinion of the court:

The principal question on this appeal is whether the crime of bribery, committed by a member of the common council of the City of New York, is punishable under the Penal Code, or only under the New York City Consolidation Act of 1882.

The materiality of the question presented lies in the fact that the defendant was indicted and convicted of bribery, as a member of the common council of the City of New York, under section 72 of the Penal Code, and was sentenced to imprisonment in the state prison for the term of nine years and ten months, pursuant to the provisions of that section; whereas, if he was punishable under the Consolidation Act of 1882, the maximum punishment by imprisonment could not have exceeded two years in the penitentiary.

After a careful consideration we have reached the conclusion that section 58 of the Consolidation Act is superseded by section 72 of the Penal Code; and that the crime of bribery, committed by a member of the common council of the City of New York, is defined and made punishable by that section.

In determining this question it is to be assumed that the Penal Code was the later enactment, although in point of fact it was passed prior to the Consolidation Act. The Penal Code was passed July 26, 1881, and took effect December 1, 1882. The Consolidation Act was passed July 1, 1882, and took effect March 1, 1883. But section 2143 of the Consolidation Act expressly declares that "For the purpose of determining the effect of this Act upon other Acts, except the Penal Code, and the effect of other Acts, except the Penal Code, upon this Act, this Act is deemed to have been enacted on the first day of January in the year 1882; all Acts passed after such date, and the Penal Code, are to have the same effect as if passed after this Act."

By the express prescription of the Legislature, therefore, the Penal Code, although enacted before the Consolidation Act, is to have the same effect upon the Consolidation Act as if it had been passed after that Act.

This provision, although somewhat anomalous, does not, as we can perceive, transcend the legislative power. It subordinates the Consolidation Act to the Penal Code, wherever the two statutes are in conflict; and moreover, what is material to notice, the provision affords the plainest implication that in the sense of the Legislature there were, or might be penal provisions in the Consolidation Act in conflict with the Penal Code.

For the purpose of construction the Legislature has declared in what order of time the two statutes shall be deemed to have been enacted; and there being no question of legislative power, it is the plain duty of courts to construe the two statutes in accordance with this direction.

Section 58 of the Consolidation Act is a re-enactment of section 100 of the Charter of 1873,

which in turn was a re-enactment of section 114 of the Charter of 1870.

It is sufficiently specific for our present purpose to state that the section makes it a felony for any person to give or promise to any member of the common council or any municipal officer, any money or valuable thing with intent to influence his official action; or for any such officer to accept any such gift or promise, under any agreement or undertaking that his vote, opinion, judgment or action shall be influenced thereby; and subjects the bribe giver, upon conviction, to imprisonment in the penitentiary for a term not exceeding two years, or to a fine not exceeding \$5,000, or both, in the discretion of the court; and the bribe taker, on like conviction, to the same punishment by fine or imprisonment or both; and in addition subjects him to a forfeiture of his office; and disqualifies him from holding any office under the City of New York.

Section 72 of the Penal Code is in the following language: "§ 72. A judicial officer, a person who executes any of the functions of a public office not designated in titles 6 and 7 of this Code, or a person employed by or acting for the State or for any public officer in the business of the State, who asks, receives or agrees to receive a bribe or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years, or by fine of not more than \$5,000, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the State."

It is material at the outset to inquire whether the offense of bribery committed by municipal officers is, as a general rule, embraced within and punishable under this section of the Penal Code.

If the section does not apply to the bribery of a municipal officer in any case, then plainly there is an end of the argument in support of this conviction. If, on the other hand, the section applies in general to this class of officers, then it becomes necessary, in order to reverse the conviction, that it should be found that the special case of bribery committed by municipal officers in the City of New York is excepted, or in some way taken out of the operation of this section.

The comprehensive character of the provisions of the Penal Code relating to bribery, both in respect to the definition of the offense and the officers by whom it may be committed, is apparent upon the most cursory reading. They form to a great extent the subject of three titles. Title 6 relates to crimes against the executive power of the State, and prescribes the punishment for giving or offering bribes, or for the asking or receiving of bribes by executive and administrative officers. Title 7 relates to crimes against the legislative power of the State, and contains provisions for the punishment of bribery of members of the Legislature. Title 8 is entitled "Of Crimes Against Public Justice."

N. Y.

Section 71 prescribes the offense of giving or offering a bribe to a judicial officer and certain other persons enumerated, either connected with the administration of justice, or who exercise quasi judicial functions.

Section 72, which prescribes the offense of receiving bribes, is not thus limited. It specifies judicial officers, but the specification is followed by words of the most comprehensive meaning, intended apparently to include in this final provision, all public officers within the State, of whatever character or grade, not included within the previous titles. It in terms not only embraces a judicial officer, but also "a person who executes any of the functions of a public office," not designated in titles 6 and 7.

That it was not the intention to confine the section to judicial officers is manifest also from the subsequent designation in the same section of "a person employed by or acting for the State or for any public officer in the business of the State;" and also from section 78, which supplements section 72 and prescribes the offense of giving or offering a bribe to "a person executing the functions of a public office," although the bribery of a judicial officer is specially provided for by section 71.

It is plain that a member of a common council or other municipal officer is a person "who executes the functions of a public office;" and we cannot doubt that municipal officers are within the purview of section 72. If this was less plain on the language of the section itself, there are cogent reasons for giving it this construction in view of the antecedent legislation and the presumed intention of the Legislature.

A reference to the successive statutes on the subject of bribery, commencing with the statute, chapter 181 of the Laws of 1806, re-enacted by the Revised Laws of 1873, shows a constant tendency on the part of the Legislature to extend the statutes against bribery to persons not embraced in previous laws. The Statute of 1806 included only state officers and members of the Senate and Assembly. The Revised Statutes (2 R. S. 760) enlarged the enumeration of state officers in the previous statutes, and for the first time included judicial officers.

The amendment of 1853 (chap. 539) still further extended the enumeration to any member of the common council or corporation of any city in the State, or to the mayor, recorder, chamberlain, treasurer or comptroller of such city, or any department of the government thereof.

The Act of 1869 (chap. 742) departed from the practice of special enumeration adopted in the previous statutes, and substituted words of general description: "Any person holding office under the laws of this State," and the law of 1869 was in force until the enactment of the Penal Code.

It will be noticed that members of a common council were specially included in the Act of 1853; and there can be no reason to suppose that when, in 1869, the Legislature substituted a general and comprehensive description in place of a specific enumeration, it intended to exempt municipal officers from the operation of the Statute of Bribery.

It would seem, moreover, that there could

be no general policy upon which an omission of municipal affairs from the provisions of the general statute against bribery, could proceed. The cities of the State embrace a large share of its population and wealth. Municipal governments exercise by delegation, within a limited sphere and under certain restrictions, sovereign power. They create debts binding upon the municipality, and wield the power of taxation. The danger to which public rights and private property are exposed, from dishonest municipal administration, is certainly as great as from corruption on the bench or in the Legislature.

It is inconceivable that a Bribery Statute of general application should be enacted, which did not embrace bribery of municipal officers. We find no difficulty in reaching the conclusion that section 72 of the Penal Code applies in general to the offense of bribery committed by municipal officers.

We are therefore brought directly to the main question, whether section 58 of the Consolidation Act is in force and takes the case of bribery, when committed by a member of the common council of the City of New York, out of the operation of section 72 of the Penal Code, thereby requiring a different procedure and a different punishment, in the special case, from that prescribed by the general law governing the same offense when committed by a member of a common council in other cities of the State.

The Penal Code, as its title implies, is an institute of criminal justice, of general application; and was enacted in harmony with the tendency of recent legislation, for the purpose of embodying in a single statute the system of criminal law applicable to the State, and substituting the statute so enacted in place of the great number of statutes and amendments of statutes which together, before the enactment of the Code, constituted the body of the criminal law.

In the seventh section it is declared that "This Code specifies the classes of persons who are deemed capable of crimes and liable to punishment; the nature of the various crimes; and prescribes the kind and measure of punishment to be inflicted for each;" and it is declared in the second section that "No act or omission begun after the beginning of the day on which the Code takes effect as a law shall be deemed criminal and punishable, except as prescribed or authorized by the Code, or by some statute of this State not repealed by it."

It is a plain inference from these provisions that the Penal Code was intended as a revision of the prior laws in respect to crimes and their punishment, and as a substitute for the scattered and fragmentary legislation which preceded it.

The Penal Code contains no general clause repealing prior statutes covering the subjects embraced in its provisions. It, however, defines and prescribes the punishment for murder, larceny, burglary and all the generally recognized offenses; and it cannot be doubted that its provisions on these subjects were intended as a substitute for similar provisions in the prior laws.

On comparing the offense of bribery, as defined by the Consolidation Act and by section 72 of the Penal Code, it will be found that all the elements of the crime, as defined in the

Consolidation Act, are included in the definition of the same crime in the Penal Code, although the definitions in the two statutes are not identical in language. By the Consolidation Act every officer enumerated therein, "who shall accept a gift or promise," etc., with the agreement or understanding that his vote or action shall be influenced thereby, is declared guilty of a felony. By section 72 of the Penal Code, the words "receives or agrees to receive a bribe," etc., are used in place of those in the Consolidation Act. But the words in both statutes are of equivalent meaning.

It was assumed on the trial that the indictment was found under the provision of the Penal Code. In point of form we think the indictment was good under either statute. It is not necessary that an indictment should follow the precise language of a statute, but words of equivalent import are sufficient; and this rule of the common law is now declared by statute. Code, Crim. Proc. § 283.

We have then first, a special provision in the charter of the City of New York, making bribery committed by a city officer a crime, and declaring its punishment; and next, a general law later in date (for so it must be deemed), containing provisions defining with great minuteness the crime of bribery by executive, legislative and judicial officers; and in the final section including every "person executing the functions of a public office."

The learned counsel for the defendant insists that the two Acts are not necessarily repugnant, and they invoke the application to this case of the general rule in respect to the repeal of statutes by implication, that a posterior general Act does not repeal a prior local Act, unless the legislative intent to repeal be unequivocally apparent.

Whether a subsequent statute repeals a prior one, in the absence of express words, depends upon the intention of the Legislature; and one of the tests frequently resorted to to ascertain whether there is a repeal by implication is to inquire whether the special and general Acts may both be executed without involving repugnancy of rights or remedies. In some cases the question has been solved by holding that the general Act was intended to declare a general rule governing cases not already provided for; and that a prior special statute on the same subject, operating upon a single person or class of persons or within a limited territory, should be treated as if specially excepted from the operation of the general law.

It will be found I think, on examining the cases in which the courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are as a general rule cases where the Legislature was not dealing directly with the subject of the prior law; and it was not in the mind of the Legislature when the general law was enacted; or where the special law was part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special Act, notwithstanding the enactment of a subsequent general rule covering the same subject.

The General Bribery Act not only covers the whole subject, but was we think plainly intended to furnish the only rule governing the

crime and punishment of bribery. It includes by enumeration and description all officials of every grade, town, city, county and state officers; provides a uniform punishment, but gives to the court a discretion in applying it within the limit described, to meet the circumstances of the particular case.

The crime of bribery is not local, affecting only a particular locality. No matter in what place the crime is committed, or whether by a town, city, county or state officer, it is an offense, in the punishment of which the whole public is interested. It is peculiarly a crime against society at large. It impairs public confidence in the integrity of official administration; a confidence most necessary to be maintained.

It is impossible to suppose that the Legislature, when it enacted the Penal Code, intended to exempt officials in the City of New York from the operation of the bribery sections. No public policy can be assigned for such a discrimination; and we think the case is within the rule that "A later statute covering the same subject matter and embracing new provisions operates to repeal the prior Act, although the two Acts are not in express terms repugnant." See *Norris v. Crocker*, 18 How. 429 [54 U. S. bk. 14, L. ed. 210]; *Bartlet v. King*, 12 Mass. 545; *U. S. v. Tynen*, 11 Wall. 88 [78 U. S. bk. 20, L. ed. 158]; *Heckmann v. Pinkney*, 81 N. Y. 215; *People v. Gold & Stock Tel. Co.* 98 N. Y. 78.

The construction we have given to the Penal Code in connection with the Consolidation Act is generally strengthened in view of the inconsistencies which would result from holding that section 58 of the Consolidation Act is still in force.

At the time of the enactment of the Penal Code, the charters of the Cities of New York, Brooklyn and Long Island City, contained provisions for punishing bribery committed by municipal officers in those cities. Laws 1873, chap. 535, § 100; *Id.* chap. 863, tit. 19, § 22; Laws of 1871, chap. 760.

But no such provisions were contained in the charters of Albany, Poughkeepsie, Troy, Syracuse, Rochester, Buffalo or Elmira. The General Bribery Act of 1869, which was in force until the enactment of the Penal Code, made bribery a crime when committed by "any person holding office under the laws of this State."

The Statute of 1869 was unquestionably superseded by the provisions of the Penal Code. Unless, therefore, municipal officers are punishable for bribery under section 72, it follows that bribery committed by municipal officers in New York, Brooklyn and Long Island City is punishable under the special provisions of the charters of these cities; but is not an offense and is not punishable when committed by officers of the same class in the other cities of the State.

If, on the other hand, section 72, as we have endeavored to show, includes municipal officers, the contention that nevertheless the crime and punishment of bribery by municipal officers in the City of New York is still governed by section 58 of the Consolidation Act, leads to an equally absurd result; it involves the necessity of ascribing to the Legislature an intention to discriminate in the punishment of bribery when committed by a municipal officer in the City of

New York, and when committed by municipal officers in other cities; and also the further intention to punish the crime when committed in the smaller municipalities, with far greater severity than when committed by municipal officers of the most populous and important city of the Union.

Such legislation is absurd in theory, and leads to injustice. It regulates punishment according to the locality of the crime, instead of by the nature of the offense. It is repugnant to the principle that laws should be equal and impartial, and ignores a natural sentiment which requires even-handed justice, even in the punishment of crimes. A law punishing homicide in the City of New York by imprisonment in the state prison, and in Brooklyn by hanging, would shock the general sense; but it would not be different in principle from a law punishing bribery in one city by imprisonment in the penitentiary for two years, and in the other by imprisonment in the state prison for ten years.

It is the duty of courts, in construing statutes, to avoid if possible a construction which leads to absurdity or manifest injustice; and the case before us calls for the application of this principle. The fact that prior to the Penal Code the same inconsistency existed between the punishment for bribery under the charter provisions and the General Bribery Statute does not, we think, make it less the duty of the court to seek to place such a construction upon the Penal Code as will remedy such an anomalous and unsatisfactory condition of the law.

The argument so far has proceeded upon the assumption that the Penal Code contains no express provision saving the bribery provision in the Consolidation Act from its operation. But it is claimed by the counsel for the defendant that section 58 of the Consolidation Act is continued in force by section 725 of the Penal Code.

That section is as follows:

"§ 725. Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code, except so far as they have been repealed by subsequent laws:

1. All Acts incorporating municipal corporations, and Acts amending Acts of incorporation, or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers and duties of such officers.

2. All Acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in section 626 of this Code.

3. All Acts for the punishment of intoxication or the suppression of intemperance, or regulating the rule or disposition of intoxicating or spirituous liquors.

4. All Acts defining and providing for the punishment of offenses not defined and made punishable by this Code."

The claim is that this section excepts from the operation of the Penal Code all penal provisions in charter Acts; and that as section 58 of the Consolidation Act is a penal provision of that character, it is excepted from the operation of the Penal Code.

Notwithstanding the generality of the lan-

guage of section 725, it is apparent from other provisions, both of the Consolidation Act and of the Penal Code, that it was not intended that all penal provisions in charter Acts should remain in force unaffected by the Penal Code. The provision in section 2143 of the Consolidation Act, that the Penal Code should have the same effect upon the Consolidation Act as if it was passed after that Act, has no signification except upon the assumption that in the sense of the Legislature the Penal Code contained provisions which, if deemed to have been enacted after the Consolidation Act, would or might modify the penal clauses in that Act.

Moreover, it was the evident intention of the Legislature to establish by the Penal Code a uniform rule of punishment for crimes of the same grade throughout the State. It is enacted in section 719 that an offense specified in the Code, committed after it has taken effect, "must be punished according to the provisions of this Code, and not otherwise."

The claim that section 725 was intended to apply to and preserve unimpaired all penal provisions in charter Acts is clearly disproved by section 726. That section, which contains the only express repealing provision in the Code, is as follows:

"§ 726. All Acts and parts of Acts which are inconsistent with the provisions of this Act are repealed, so far as they impose any punishment for crime, except as herein provided."

The true meaning of the phrase, "except as herein provided," would, I apprehend, have been more clearly expressed by the words, "other than as herein provided." The Consolidation Act does impose a punishment for bribery, inconsistent with that prescribed by the Penal Code; and section 726, if it goes no further, clearly conforms the punishment for bribery under the Consolidation Act to that prescribed by the Penal Code, and so to that extent affects the charter provision.

In this view it is not very material whether section 58 is regarded as wholly repealed, or only as modified in respect to the punishment. If modified only, the result would be that there are two statutes identical in substance, both as respects the definition of the crime and its punishment, under either of which an indictment would lie; a judgment under one barring proceedings under the other.

But we are of opinion that section 725 is to be construed as saving only those penal provisions of charter Acts which are not covered by the provisions of the Penal Code; and this limitation of the generality of the language of that section is required, upon construing it in connection with other provisions and in view of the general purpose of the Legislature in enacting the Penal Code, to consolidate into one Crimes Act the various statutes relating to crimes, and to prescribe a uniform rule of punishment.

The main evidence produced on the trial, to sustain the charge of bribery, was that of a police inspector and other police officers, who testified to confessions of the defendant. It did not appear that they were made under the influence of fear produced by threats, or upon any stipulation for immunity from prosecution, so as to make them inadmissible under section 895 of the Code of Criminal Procedure.

But it is claimed that there was no proof in addition to the confessions, as required by statute, to warrant a conviction. By section 895 of the Code of Criminal Procedure, it is declared that the confession of a defendant "is not sufficient to warrant a conviction, without additional proof that the crime charged has been committed."

There was evidence given on the trial, showing that the Broadway Railway Grant was passed under circumstances which, while they may possibly have been consistent with an innocent intention on the part of the defendant and others, nevertheless indicated the operation of unusual motives and influences; and when interpreted in the light of the confession are strongly corroborative of its truth.

It is insisted that, under the statute, the *corpus delicti* must be proved or evidence given tending to prove it wholly independent of the confession; and that no evidence was given which, disconnected from the confessions, had a legal tendency to prove the body of the crime. It would be a sufficient answer to this point that it is not raised by any exception on the trial, and it clearly was not raised by the exception to the denial of a motion for a new trial, made after verdict.

But we are of opinion that when, in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a noncompliance with the requirement of the statute. The words of the statute, "additional proof that the crime charged has been committed," seem to imply that the confession is to be treated as evidence of the *corpus delicti*; that is, not only of the subjective criminal act, but also the criminal agency of the defendant; in other words, as competent proof of the body of the crime, although insufficient without corroboration to warrant a conviction.

"Full proof" said Nelson, *Oh. J.*, in *People v. Badgley*, 16 Wend. 59 "of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient."

We are of opinion that there was evidence in addition to the confession, which constituted "additional proof" within the statute.

We have examined the other questions raised, but we have reached the conclusion that no error is disclosed in the record, and that the judgment should be affirmed. The case was carefully tried. No evidence in favor of the defendant was excluded, and none admitted against him of doubtful competency. The charge was full and explicit upon all the points to which the attention of the court was directed.

We have been greatly aided in our examination of the case by the arguments of the respective counsel, from which nothing on either side was omitted, legitimately bearing upon the questions presented.

The judgment should be affirmed.

All concur, except *Rapallo, J.*, who reads dissenting opinion for reversal and *Earl, J.*, who concurs therein.

Rapallo, J., dissenting:

The important question in this case is whether the offense of which the prisoner was convicted was punishable under section 72 of the Penal Code or under section 58 of the Consolidation Act of 1882.

Section 72 of the Penal Code provides as follows:

"A judicial officer, a person who executes any of the functions of a public office not designated in titles 6 and 7 of the Code, or a person employed by or acting for the State or for any public officer in the business of the State, who asks, receives or agrees to receive a bribe, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years or by a fine of not more than \$5,000 or both. A conviction also forfeits any office held by the offender and forever disqualifies him from holding any office under the State."

This Code was passed July 26, 1881, and section 727 declares: "This Act shall take effect on the first day of December, 1882. When construed in connection with other statutes it must be deemed to have been enacted on the 4th day of January, 1881, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code."

The Consolidation Act was passed July 1, 1882, and is entitled "An Act to Consolidate into One Act, and to Declare the Special and Local Laws Affecting Public Interests in the City of New York." It contains the charter of the corporation and provides for the local government of the city. It continues the board of aldermen and the various departments of the city government.

Section 58, so far as relates to the question now at issue is in the following words:

"§ 58. Every person who shall promise, offer, or give, or cause, or aid, or abet in causing to be promised, offered or given, or furnish or agree to furnish in whole or in part, to any other person, to be promised, offered or given to any member of the common council, or any officer of the corporation, or clerk, after his election or appointment as such officer, member, or clerk, or before or after he shall have qualified and taken his seat, or entered upon his duty, any moneys, goods, right in action, or other property, or anything of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment, or action, on any question, matter, cause or proceedings which may be then pending or may by law be at any time brought before him in his official or clerical capacity, shall be deemed guilty of a felony; and shall, upon conviction, be imprisoned in a penitentiary for a term of not exceeding two years; or shall be fined not exceeding \$5,000; or both, in the discretion of the court."

Every officer in this section enumerated who shall accept any such gift or promise, or undertaking to make the same under any agreement or understanding that his vote, opinion,

judgment or action shall be influenced thereby, or shall be given in any question, matter, cause or proceeding then or at any time pending, or which may by law be brought before him in his official capacity, shall be deemed guilty of a felony, and shall, upon conviction, be disqualified from holding any public office, trust or appointment under the City of New York and shall forfeit his office, and shall be punished by imprisonment in the penitentiary not exceeding two years or by a fine not exceeding \$5,000; or both, in the discretion of the court.

The prisoner was indicted for the crime of bribery committed by him in August, 1884, as a member of the common council of the City of New York. It was assumed upon the trial that one count of the indictment was framed under section 72 of the Penal Code, and the other under section 58 of the Consolidation Act. On the trial the court, on motion of the counsel for the prisoner, required the district attorney to elect upon which count of the indictment he would proceed, and thereupon the district attorney stated that he elected to go to trial on the first count, under section 72 of the Penal Code.

The counsel for the prisoner thereupon moved to dismiss the indictment or direct an acquittal, upon the ground that no conviction could be had under that count. The motion was denied and an exception taken, and the trial proceeded.

The jury rendered a verdict of guilty. A motion in arrest of judgment was made and denied; and the prisoner was then sentenced to be imprisoned in the state prison at hard labor for the term of nine years and ten months.

It will be observed that the Penal Code is a general statute, operative throughout the State; and that section 72 provides for the punishment of the crime of bribery, committed by any person who executes any of the functions of a public office not designated in titles 6 and 7 of the Code (which relate to state officers); and fixes the maximum punishment at imprisonment in the state prison for ten years, and \$5,000 fine, or both; while section 58 of the Consolidation Act is a local Act, applying only to the City of New York, and relates only to a special class of officers, viz.: members of the common council of said city, officers of the corporation and clerks; and fixes the maximum punishment for the crime committed by such officers at imprisonment in the penitentiary for two years and \$5,000 fine, or both.

The Penal Code, as has been stated, was passed in July, 1881, and the Consolidation Act in July, 1882. The Consolidation Act provides for the punishment of the same crime for which the prisoner was indicted; he was one of the officers specially referred to in that Act, and it being the later statute in point of time, would unquestionably control where it differed from the Penal Code, and the present controversy would never have arisen but for a peculiar provision of the Consolidation Act, contained in section 2143 of that Act in the following language:

"For the purpose of determining the effect of this Act upon other Acts, except the Penal Code, and the effect of other Acts, except the Penal Code, upon this Act, this Act is deemed to have been enacted on the first day of January, 1882. All Acts passed after such

date, and the Penal Code, are to have the same effect as if they were passed after this Act. This Act shall take effect on the first day of March, 1883."

The effect of this section is the question now before us. It is claimed on the part of the prosecution that the provisions of section 58 of the Consolidation Act are inconsistent with those of section 73 of the Penal Code; and that section 2148 (by declaring that the Penal Code, although in fact passed first, is to have the same effect as if passed last), operates to repeal section 58 of the Consolidation Act, and to put in its place section 73 of the Penal Code.

This argument puts the Legislature in the remarkable position of carefully framing and enacting the provisions of section 58, and in the same breath and by the same Act, declaring that they shall have no effect whatever, but shall be deemed repealed and superseded by an Act passed the previous year.

Such a self stultification cannot be attributed to the Legislature, if there is any rational theory upon which its enactment can be reconciled.

In the first place it should be assumed that in giving to the Penal Code the position of the later statute, the Legislature had in mind the familiar and firmly established rule for the construction of statutes, that general legislation on a particular subject must give way to special legislation on the same subject, and that laws special and local in their application are not deemed repealed or modified by general legislation on the same subject, although the terms of the general Act are broad enough to include the cases embraced in the special law, unless the intent to change the local law is clearly manifested. *Matter of Comrs. of Central Park*, 50 N. Y. 498; *McKenna v. Edmundstone*, 91 N. Y. 281; *People v. Quigg*, 59 N. Y. 88.

Whatever purpose the Legislature may have had in view therefore in the enactment of section 2148, it is clear that it could not have been intended to operate as a repeal of section 58; for they well knew that even if the Penal Code had in fact been passed after the Consolidation Act, it would not have affected the provisions of section 58, which are special and local in their application, being applicable only to members of the common council and other municipal officers of the City of New York; and that to repeal these provisions, special reference to them or some other manifestation of the intent to repeal them than merely giving to the Penal Code the position of a later statute was necessary. They were not therefore guilty of the absurdity of enacting section 58 and inserting in the same Act a provision which would prevent its operation.

But looking a little further into the subject, we find that at the time of the passage of the Penal Code there was and for many years had been in force a special local statute, for the punishment of bribery of members of the common council and other municipal officers of the City of New York, which differed materially from the general law on the subject of bribery; and that this special local statute was not only unaffected by the Code, but was retained in force by an express provision of the Code itself.

Prior to the adoption of the Penal Code the general provisions of law on the subject of

bribery were contained in the Act of 1853, chap. 539, entitled "An Act to Amend the Existing Laws Relative to Bribery," and Laws of 1869, chapter 742, of the Act entitled "An Act for the More Effectual Suppression and Punishment of Bribery."

The Act of 1853 amended the Revised Statutes and enumerated the various officers who might commit the crime, including the Governor, state officers, members of the Legislature, judiciary, and also members of the common council or corporation of any city in this State; and imposed a maximum punishment on the offending officer of ten years' imprisonment and \$5,000 fine, besides forfeiture of office and disqualification.

The Act of 1869 was more general in its terms. It did not enumerate the officers, but applied to "any person holding office under the laws of this State" who should receive or consent to receive a bribe. It imposed upon the party convicted a maximum punishment of five years' imprisonment in the state prison, and \$5,000 fine. It omitted the punishment of forfeiture of office and disqualification from holding office, which was contained in the Revised Statutes and in the Act of 1853, and it contained this remarkable provision:

"§ 2. No person who has heretofore paid or offered, or shall hereafter pay or offer a bribe to any person holding office under the laws of this State, which has been or shall be accepted in whole or in part, shall be liable to criminal prosecution therefor."

This was the general law of the State on the subject of bribery when the Penal Code was adopted; but at the same time there were in force special and local statutes on that subject, applicable to members of the common council and other municipal officers of the City of New York and some of the other cities of the State, which differed from the general law.

The Act to amend the charter of the City of New York (Laws of 1853, chap. 217, § 14) contained a provision substantially in the same form as section 58 of the Consolidation Act, making the acceptance of a bribe or of a promise of a bribe by any member of the common council or officer of the corporation, a felony punishable by forfeiture of office and disqualification from holding office under the city, and by imprisonment in the state prison for ten years, or a fine of \$5,000, or both; thus conforming to the general law of 1853 on the subject of bribery.

The charter of 1857 (Laws 1857, chap. 446), entitled "An Act to Amend the Charter of the City of New York," section 52, re-enacted the foregoing provision of the charter of 1853, but reduced the maximum punishment to two years' imprisonment in the penitentiary and \$5,000 fine, besides being disqualified from holding any office under the City of New York.

This was the first enactment which imposed a punishment for bribery on a member of the common council of the City of New York different from that established by the general law.

This provision was re-enacted in the charter of 1870 (Laws 1870, chap. 137, § 114); and was again re-enacted in the charter of 1873 (Laws 1873, chap. 335, § 100) in the same language; and was in force at the time of the passage of the Penal Code.

Thus it will be seen that for nearly twenty-five years before the passage of the Penal Code, it had been the law, under the charters of the City of New York, that the maximum punishment which could be inflicted upon a member of the common council of that city for accepting a bribe was two years' imprisonment in the penitentiary and \$5,000 fine, and a disqualification from holding any office or public trust under the city.

The general provision in the Penal Code for the punishment of bribery did not, under the general rule for the construction of statutes before adverted to, operate to repeal or alter this local provision contained in the charter, even if the Penal Code be treated as the last enactment. It would be assumed in conformity with that rule that the general law was not intended to affect the local law, unless the intention that it should affect it plainly appeared.

But so far from there being any appearance of such intention, the precise contrary is made manifest by section 725 of the Penal Code, which provides: "§ 725. Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force notwithstanding the provisions of this Code, except so far as they have been repealed or affected by subsequent laws." Then follows an enumeration of the laws not affected by the Code, which enumeration includes "All Acts incorporating municipal corporations, and Acts amending Acts of incorporation or charters of such corporations."

In view of this plain provision of the Code, the Legislature may well have adopted section 2143 of the Consolidation Act, without deeming that by so doing they impaired any provision of the charter of the City of New York, which was embraced in the Consolidation Act. The Penal Code was before the Legislature when the Consolidation Act was passed, the Penal Code having been passed at a previous session. The difference between the punishment prescribed for bribery in that Code and in section 100 of the charter of 1873, and section 58 of the Consolidation Act, was plainly apparent; but at the same time it was provided that nothing in the Code should affect any of the provisions of any charter or Act amending the charter of a municipal corporation. It was obvious, in view of the saving clause, that had the Code been in fact passed after the Consolidation Act, it could have had no effect upon the provisions of section 58.

It is argued that it cannot be supposed that the Legislature intended to provide for the punishment of the crime of bribery in one class of officers by one measure of punishment, and that for precisely the same offense they should prescribe a different punishment for a different class of officers. It is indeed difficult to assign a reason for making the distinction, and especially for making the punishment for bribery comparatively so light in respect to members of the common council of the City of New York, when the magnitude of the interests controlled by that body is considered. But nevertheless the distinction has been made and has existed ever since 1857 in the City of New York, and also in several other cities of the State. By the charter of Long Island City (Laws 1871, chap. 471, title II, § 1), any city officer found

guilty of bribery or corruption is punishable by imprisonment in the state prison for a term not less than three nor more than ten years, or a fine of \$5,000, or both.

In this case it will be observed the provision is more severe than that of the general law, for it prescribes a minimum punishment of three years' imprisonment.

By the Act amending the charter of the City of Brooklyn (Laws 1873, chap. 863, title XIX, § 22) any member or officer of the common council or any city officer receiving a bribe is declared guilty of a felony and punishable by imprisonment in the state prison for a term of not less than three nor more than five years.

These provisions clearly were left in force by the Penal Code; and, after the passage of that Code, in the charter of the City of Albany, adopted in 1883 (Laws 1883, chap. 298, title XVIII, § 6), a provision was inserted that any member of the common council or other officer of the city who should accept a bribe or a promise of a bribe should be disqualified from holding office under the City of Albany and be punished by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding \$5,000, or both; which provision is almost identical with section 58 of the Consolidation Act. There is no ground upon which it can be pretended that the provisions of that Act are affected by the Penal Code which took effect December 1, 1882.

The contention therefore that it was the policy of the Legislature to provide a uniform punishment throughout the State, for the crime of bribery, is not sustained by reference to its Acts. It rather seems to have been the practice to pass local laws, operative in the several municipalities, providing for the punishment of the municipal officers when guilty of bribery.

Several ingenious arguments have been presented by the counsel for the People, for the purpose of avoiding the plain language of these statutes. It is urged that subdivision 1 of section 725 of the Penal Code, which declares that nothing in that Code affects any of the provisions of any Act incorporating a municipal corporation or amending the charter of such corporation, is qualified by subdivision 4 of section 725, which enumerates among the statutes not affected by the Code "All Acts defining and providing for the punishment of offenses not defined and made punishable by this Code."

We fail to perceive how this provision affects subdivision 1. It is an additional exception and covers all enactments, although not contained in any municipal charter, which provide for the punishment of particular offenses not provided for in the Code.

The usual general repealing clause in section 726, of all Acts and parts of Acts inconsistent with the provisions of the Code, is also referred to. But that clause in a general law is not sufficient to repeal a special local law not referred to in terms and which is capable of coexisting with the general law.

Whipple v. Christian, 80 N. Y. 523, 526; *Matter of the Evergreens*, 47 N. Y. 216 and other cases; *Matter of Comrs. of Central Park*, 50 N. Y. 493.

A provision affecting only a certain locality or a specified class of persons is not necessarily inconsistent with a general law, but is an ex-

ception to it. The discussion of that question is however unnecessary, when we find that the general law expressly ratifies and recognizes the exception.

The entire repealing section 726, reads as follows: § 726. All Acts and parts of Acts which are inconsistent with the provisions of this Act are repealed so far as they impose any punishment for crime, except as herein provided.

The words "so far as they impose any punishment for crime" are commented upon in support of the position that so much of the Consolidation Act as prescribes the punishment for bribery was intended to be embraced in the repeal. It is difficult to see how this could be when it is remembered that the Consolidation Act had not then been passed. But to meet that point it is sought to apply the language to the charter of 1878. This is equally impossible when we recall the provision of section 725, that nothing in the Code affects "any provision" of any charter Act of a municipal corporation; and the concluding sentence of section 726 settles the question, by declaring that inconsistent Acts imposing punishment for crime are repealed "except as herein provided," thus recognizing that some Acts inconsistent with the Code, imposing punishment for crime, are excepted from the repeal and are retained in force. The charter Acts referred to come within this category.

The further ground is taken that section 100 of the charter of 1878 and section 58 of the Consolidation Act stand upon the footing of a mere municipal ordinance created by the Legislature, and making that a crime against the corporation which, in some of its features, is also a crime against the State; and that consequently the general law against bribery is in full force, notwithstanding the special law relating to the City of New York.

This argument it is difficult to understand. If, under authority conferred by the Legislature, an ordinance had been passed by the corporation for the punishment of an offense, there would be force in the suggestion that if the same offense were punishable under the general laws of the State, they could be enforced and would not be superseded by the corporation ordinance. But the provision in question was not a corporation ordinance. It was a law of the State, enacted by the same authority as the Penal Code and, although affecting only particular local officers, had all the force (with respect to crimes committed by them) of a law of the State.

Our conclusion is that the judgment of the supreme court and of the court of over and terminer must be reversed and a new trial ordered.

Cornelius VANDERZEE *et al.*, *Respts.*,
v.

William E. HASWELL *et al.*, *Appts.*

1. A devise to one person, of all testator's real estate in possession, without words of inheritance, with a gift over in the event only of the devisee's dying without issue, shows an intention to vest the fee in the primary devisee.
2. Where real estate is devised in terms de-

noting an intention that the primary devisee shall take a fee on the death of testator, followed by a devise over in case of his death without issue, the words refer to death without issue in the life time of the testator; and the primary devisee surviving the testator takes an absolute estate in fee simple.

3. But this rule applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death or other specified event; and slight circumstances will vary their construction and give effect to the language according to its natural import.
4. Hence, where the primary devise was to testator's son, "subject to the proviso hereinafter contained," and the will subsequently provided that "on the death of my son without issue" the estate should go over to testator's grandchildren, and also "that in case my son should die before the provisions of this will becomes an act, the devisees last named (the grandchildren) shall perform and fulfill all the conditions required of my son to the legatees named in this my will" (referring to antecedent specific legacies which the will provided should be paid by the son within two years after testator's death), the intention of the testator appears to have been that the gift over should take effect upon the death of his son without issue, at any time, either before or after his own death.
5. The fact that a devisee of real estate is personally charged with the payment of legacies is not decisive that the primary devise was in fee, when a different intention is disclosed.

(Decided October 5, 1896.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Albany Special Term in favor of plaintiffs in an action for partition. *Affirmed.*

The case turns upon the construction of a will, the terms of which are set forth in the opinion.

Mr. Nathaniel C. Moak, with **Mr. Andrew Vanderzee**, for appellants:

I. The will of Harmon Vanderzee is made upon the theory and basis that the testator had no personal property. In this respect it is unlike the will in *Nellis v. Nellis*, 1 Cent. Rep. 296, where all the testator's personal property was bequeathed to the devisees of the land.

The second clause devises the real estate, not a mere life estate, absolutely to testator's son Cornelius, "subject to the proviso hereinafter contained."

Roseboom v. Roseboom, 15 Hun, 309.

Since the Revised Statutes, this gives the fee without adding the word "heira."

1 R. S. 748, § 1; 1 Edm. Stat. 699; *Roseboom v. Roseboom*, 15 Hun, 314; *Bishop v. Bishop*, 4 Hill, 138; *Kelly v. Kelly*, 5 Lans. 443; *affd.* 61 N. Y. 47; *Kirk v. Richardson*, 32 Hun, 434.

Testator gives the devisee the lands, and not any particular estate in them. No remainder, after a life estate, is given to the children or issue of the devisee; and had he had issue, such issue would have taken no estate in the lands.

Post v. Hoyer, 33 N. Y. 593.

If the devisee should die in the life time of the testator, leaving issue, the devise would by operation of law take effect in favor of such issue; and they would take in consequence of the devise to their father, and not because any estate was devised to them.

2 R. S. 66, § 52; 2 Edm. Stat. 66.

II. The tenth clause, providing for Cornelius' dying without issue, refers to his so dying during the lifetime of the testator only. The clause is one of contingency and not of limitation.

Kelly v. Kelly, 5 Lans. 443-449; *affd.* 61 N. Y. 47, 50, 51; *McLoughlin v. Maher*, 17 Hun, 215; *Gibson v. Walker*, 20 N. Y. 476, 488; *Livingston v. Greene*, 52 N. Y. 124; *Embury v. Sheldon*, 68 N. Y. 283; *Converse v. Kellogg*, 7 Barb. 590; *Goodall v. McLean*, 2 Bradf. 309; *Moore v. Lyons*, 25 Wend. 127, 128; *O'Brien v. Henry*, 2 Edm. Ch. 249; *Croesman v. Field*, 119 Mass. 170, 173; *Abbott v. Bradstreet*, 3 Allen, 389; *Waugh's App.* 78 Pa. 486; *Stone's Est. v. Nicholson*, 27 Gratt. (Va.) 17, 18; *Snell v. Davis*, 28 Grant, Ch. (U. C.) 132; *Leonard v. Kingsland*, 19 N. Y. Week. Dig. 473; *S. C.* 67 How. Pr. 431; *Kerr v. Bryan*, 32 Hun, 51; *Matter of Mahan*, 32 Hun, 78; *Mickleley's App.* 92 Pa. 514; *Voorhees v. Jackson*, 10 Pet. 471 (85 U. S. bk. 9, L. ed. 499); *Scott v. Guernsey*, 60 Barb. 163; *S. C.* 48 N. Y. 106.

None of the cases cited by respondents conflict with the appellants' contention. They are all cases where there were provisions in the will clearly showing that the contingency of death spoken of was a death after that of the testator.

III. Acceptance of the devise imposed upon the devisee a personal liability and duty to pay the legacies given by the testator, without reference to the question whether or not the property devised and accepted was sufficient for that purpose.

Gridley v. Gridley, 24 N. Y. 180, reversing *S. C.* 33 Barb. 250; *Harris v. Am. Bible Society*, 4 Trans. App. 488, 489.

The devise having imposed upon the devisee, and he having accepted therewith a personal liability to pay such legacies, and having paid them, he in consequence took a fee in the land devised, even though he would otherwise have taken only a life estate.

Heard v. Horton, 1 Denio, 165; *Cipperly v. Cipperly*, 40 How. Pr. 271-273; *Dumond v. Stringham*, 26 Barb. 104; *Spraker v. Van Alstyne*, 18 Wend. 200, 204-209, 212; *Harris v. Am. Bible Society*, *supra*; *Barheydt v. Barheydt*, 20 Wend. 576; *Fox v. Phelps*, 20 Wend. 437, 442, affirming *S. C.* 17 Wend. 393; *Mesick v. New*, 7 N. Y. 165, 166; *Olmstead v. Olmstead*, 4 N. Y. 56-58; *Jackson v. Martin*, 18 Johns. 31; *Jackson v. Merrill*, 6 Johns. 185; *McLachlan v. McLachlan*, 9 Paige, 534, 537, 538; *Cook v. Holmes*, 11 Mass. 532.

IV. Where a will gives cross remainders or the estate to a "survivor of two or more persons living," it converts what might otherwise be a fee into a life estate from "the plain and forcible import of the word 'survivor.'" In

such case the time of the death of the first taker is fixed, not with reference to that of the testator but of some other designated person—the first taker. In both cases the term when the estate of the first taker shall cease is definitely fixed by a death other than that of the testator himself.

4 Kent, Com. 201, marg.; *Wilkes v. Lion*, 2 Cow. 392; *Vedder v. Evertson*, 3 Paige, 290; *Waldron v. Gianini*, 6 Hill, 603; *Buel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 1 Cent. Rep. 296; *Wilson v. Wilson*, 32 Barb. 333, 334; *Den v. Allaire*, 20 N. J. L. (Spencer) 6, 11; *Bayless v. Prescott*, 79 Ky. 253.

V. Cornelius Vanderzee, the devisee, took a fee because the attempted gift over was an executory devise.

Coe v. De Witt, 22 Hun, 428; *Lott v. Wyckoff*, 2 N. Y. 355; *Seaman v. Harcey*, 16 Hun, 71; *Van Horne v. Campbell*, 1 Cent. Rep. 582; *Campbell v. Beaumont*, 91 N. Y. 464; *Clarke v. Leupp*, 88 N. Y. 228.

Mr. Edwin Countryman, with *Messrs. Hungerford & Hotaling*, for respondents:

I. Words in a will are in all cases to receive a construction which will give effect to every expression, rather than one that will render any of the expressions inoperative.

1 Redf. Wills, 427; Jarman's Rule, No. 16.

Where the testator uses an additional word or phrase he must be presumed to have an additional meaning, to which some effect must be given.

1 Redf. Wills, 427; Jarman's Rule, No. 18.

In the construction of wills, the intention is to be ascertained by the consideration of the whole instrument. Effect is to be given, if possible, to all of its provisions; and no clause is to be rejected.

Taggart v. Murray, 58 N. Y. 233, 236. See also *Norris v. Beyea*, 18 N. Y. 273, 283; 1 Redf. Wills, 433, No. 17, sub. 2; *Id.* 435, No. 21; *Hoxie v. Hoxie*, 7 Paige, 187, 192.

When it is apparent that particular words have been inadvertently used in an inexact and ambiguous sense, they should be read in the actual sense in which they were employed by the testator, although this may vary from their ordinary and primary import.

Du Bois v. Ray, 85 N. Y. 162, 173; *Prowitt v. Rodman*, 37 N. Y. 42; *Wager v. Wager*, 96 N. Y. 167, 168; *Kelso v. Lorillard*, 35 N. Y. 181; *Hoppock v. Tucker*, 59 N. Y. 208, 209.

II. All the authorities concur, where similar provisions have been construed by the courts, in reaching the same result, thus apparent in this case as the intention of the testator. The testator gave to his son Cornelius a contingent estate in fee, subject to be and which was reduced to a life estate by his death without issue; and the fee then passed to the grandchildren.

Buel v. Southwick, 70 N. Y. 581; *Nellis v. Nellis*, 99 N. Y. 505; *S. C.* 1 Cent. Rep. 296; *Kelso v. Lorillard*, 35 N. Y. 177; *Dumond v. Stringham*, 26 Barb. 105; *Sherman v. Sherman*, 3 Barb. 385; *Britton v. Thornton*, 112 U. S. 526 (Bk. 28, L. ed. 816).

III. The appellants' counsel ignore the condition annexed to the devise, making it subject to the contingency provided for in the tenth item, and assume death to be uncertain or contingent; whereas, its time only is uncertain. One's condition when he may happen to die,

as "without lawful issue", is uncertain; and one having an estate, the duration of which depends upon his dying without issue, has a contingent estate; for upon the happening of the contingency his estate ends; and the death mentioned in the provision creating such estate necessarily refers to the time of his dying without issue whenever he may happen to die, in the condition or under the circumstances expressed.

Kelly v. Kelly, 5 Lans. 448, 448; *S. C.* affd. 61 N. Y. 47.

Where the estate intended to be devised to the first taker is only a life estate, he cannot have a contingent estate in fee, liable to be reduced to a life estate, for no such estate is intended; and it will be seen that most of the cases cited by appellants are of that class, and that in none of those relied upon by the appellants did the testator intend to devise a fee to the first taker, subject to the contingency of his dying without issue, and in that event to devise the estate of the one so dying to others.

But on the other hand, in cases with like features and giving construction to devises subject to like contingencies as here, the courts have uniformly held that the death referred to was a dying without issue, whenever it should happen.

Britton v. Thornton, 112 U. S. 526, 532, 533 (Bk. 28, L. ed. 816, 818); 3 Jarm. Wills, 590, ed. 1881, 5th Am. from 4th Lond. ed.; *Buel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 99 N. Y. 505, 509; *S. C.* 1 Cent. Rep. 296; *Barnes v. Hathaway*, 66 Barb. 452; *Hennessey v. Patterson*, 85 N. Y. 92, 101; *Foley v. Foley*, 17 Hun. 236, 238; *Kelso v. Lorillard*, 8 Daly, 800, 802; *S. C.* affd. 85 N. Y. 177, 181, 182; *Sherman v. Sherman*, 8 Barb. 885; *Moore v. Lyons*, 25 Wend. 119; *Dumond v. Stringham*, 26 Barb. 105; *Denny v. Kettell*, 29 Alb. L. J. 57; *S. C.* 185 Mass. 188; *Hulbert v. Emerson*, 16 Mass. 241; *Re N. Y. L. & W. R. R. Co.* 18 N. Y. Week. Dig. 211.

IV. The charge made, of the payment of the legacies, upon the devisee did not enlarge his estate to an absolute fee. Where the language of the will is clear and definite, and the estate intended to be created can be ascertained from its provisions, such a charge never enlarges the estate thus created.

Nellis v. Nellis, 99 N. Y. 505; *S. C.* 1 Cent. Rep. 296; *Tanner v. Livingston*, 12 Wend. 83, 95; *Denn v. Slater*, 5 Term R. 885, 387; *Doe v. Owens*, 1 Barn. & Ad. 818; *Doe v. Wright*, 2 Barn. & Ald. 710; *Bowers v. Porter*, 4 Pick. 198, 204; *Burkart's Lessee v. Bucher*, 2 Binn. 455, 464, 465; *Dixon v. Ramage*, 2 Watts & S. 142, 144.

V. Where a remainder shall be limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the word "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

2 R. S. 6th ed. 1102, § 22; *Sherman v. Sherman*, 3 Barb. 885; *Norris v. Beye*, 18 N. Y. 274, 280; *Tyson v. Blake*, 22 N. Y. 558, 568; *Rathbone v. Dyckman*, 3 Paige, 9, 30.

Andrews, J., delivered the opinion of the court:

The sole question presented in this case is

whether Cornelius Vanderzee took, under the will of his father, Harmon Vanderzee, an estate in fee simple in the homestead farm, or a fee subject to a conditional limitation in favor of the four grandchildren of the testator, named in the will, in the event of the death of Cornelius without issue.

The testator died in 1840. His son Cornelius entered under the devise and continued in possession of the farm until his death in 1876. The plaintiff Cornelius Vanderzee is one of the four grandchildren named in the will; and his right to maintain this action depends upon the nature and quality of the title which the testator's son Cornelius took under the will of his father.

The will is brief, and is a will of real estate exclusively. The testator in the first clause directs that his debts and funeral charges shall be first paid out of his estate. The second clause is as follows:

"All my real estate as now in my actual possession, being my homestead farm situated in the County of Albany, I devise to my son Cornelius, subject to the proviso hereinafter contained."

The third clause directs that his wife, if she survive him, shall have an ample support from and out of the estate devised to Cornelius, during her life. The fourth, fifth, sixth, seventh and eighth clauses bequeath severally to his three daughters, his son Tunis and his grandson Harmon Slingerland, money legacies amounting in the aggregate to \$1,700. The ninth and tenth clauses are as follows:

"Ninth. The legacies above mentioned are to be paid to the legatees, by my son Cornelius, in consideration of my devising unto him the afore mentioned real estate, to be paid to them respectively within two years after my death. Tenth. In conclusion, my will is that if my son Cornelius dies without issue, that then the estate herein devised to him shall go to my grandchildren hereinafter named: Harmon T. Vanderzee, Cornelius T. Vanderzee, sons of my son Tunis; Harmon Slingerland, son of my daughter Elizabeth, deceased; and Harmon Houghtaling, son of my daughter Eve, share and share alike; and in case my son Cornelius should die before the provisions of this will become an act, the devisees last named shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will."

The whole question is whether the words "if my son Cornelius dies without issue," in the tenth clause, refer to the event of his death before that of the testator, or to a death at any time whether before or after the testator's death. If the former is the true meaning, the gift over to the grandchildren was substitutionary merely, depending on the contingency of the death of the primary devisee in the life time of the testator, and designed to prevent a lapse; and upon that construction, Cornelius having survived the testator, the contingency upon which the grandchildren were to take was gone, and Cornelius took an absolute fee.

If on the other hand the words refer to a death at any time under the circumstances mentioned, then on the death of the testator the grandchildren took a contingent interest under the will, by way of executory devise, which on the death of Cornelius without issue

was converted into a fee in them, thereby displacing and subverting the conditional fee before that time vested in Cornelius. It has been claimed indeed that the devise to Cornelius was of a life estate only. But this is, we think, an inadmissible construction of the devise.

The devise was in terms of all the testator's real estate in possession, and the language is sufficient both at common law and under the statute, without words of inheritance, to embrace the fee (1 R. S. 748, § 1); and the gift over, in the event only of the death of Cornelius without issue, furnishes the strongest ground of implication that the testator intended to vest in Cornelius a title transmissible by descent to his issue.

It is said by Mr. Jarman (2 Jarm. Wills, 752) to be an established rule that where a bequest is simply to one person, and in case of his death to another, the primary devisee surviving the testator, takes absolutely. This rule applies both to real and personal estate, and so far as I know the authorities in this country uniformly sustain the construction that where there is a devise or bequest *simpliciter* to one person, and in case of his death, to another, the words refer to a death in the lifetime of the testator. *Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Whitney v. Whitney*, 45 N. H. 811.

It is said in support of this construction that as death, the most certain of all things, is not a contingent event, but the time only, the words of contingency in a devise of the character mentioned, can be satisfied only by referring them to a death before a particular period; and as no other period is mentioned, it is necessarily presumed that the time referred to is the testator's own death. See *Edwards v. Edwards*, 15 Beav. 357.

We think this construction, although supported by somewhat refined and technical reasoning, stands more strongly, in most cases at least, upon the probable intention of the testator. It prevents the disinheritance of a testator's posterity, which would often happen if a death of the primary legatee at any time, was held to be within the meaning of the devise.

It may be safely assumed that where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate, for the benefit of collateral objects.

There are cases of another class than the one mentioned, in which an alternative limitation, depending upon the death of a primary legatee or devisee, is also held to refer to a death in the life time of the testator, although the cases are not within the reason upon which the construction in the class of cases first referred to is supported.

One of the cases of the second class is where a devise is made to A, and in case of his death without issue or without children or without leaving an lawful heir, then to B. It is manifest that the event on which the gift over is to take effect is distinctly pointed out and is uncertain and contingent, viz.: death without issue, etc.; and it is not necessary in order to give effect to the words of contingency, to refer the death to one happening before the death of the testator. So also such a construction is not

necessary to prevent the disinheritance of issue, for it is only in the event that there is no issue that the gift over is to operate.

It is said by Mr. Jarman (2 Jarm. 783) that the general rule is that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator. It will be observed that the rule as stated by the learned author relates to personal property and is deduced from the later English cases upon the construction of bequests of personalty, coupled with a contingency, which seem to have modified the earlier decisions. But where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has I think been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the life time of the testator; and that the primary devisee surviving the testator, takes an absolute estate in fee simple. *Clayton v. Lowe*, 5 Barn. & Ald. 686; *Gee v. Mayor of Manchester*, 17 Adol. & Ell. N. S. 787; *Woodburne v. Woodburne*, 28 L. J. Ch. 336; *Doe v. Sparrow*, 18 East, 359; *Quackenbos v. Kingsland*, Mss. N. Y. Ct. of Appeals [reported in 2 Cent. Rep. 918]; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Waugh's App.* 78 Pa. 436; *Mickley's App.* 92 Pa. 514. But see *Britton v. Thornton*, 112 U. S. 526 [Bk. 28, L. ed. 816.]

The case of *Quackenbos v. Kingsland*, *supra*, was that of a devise by the testator of the residue of the real and personal estate to "my son Daniel Kingsland, and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike," and it was held in exact conformity with the decisions to which we have referred, that the words referred to the death of the primary devisee in the life time of the testator.

This rule of construction in this class of cases is founded in part upon the disinclination of the courts to cut down a fee once given, except upon clear words; but rests more upon authority and precedent than reason, for it is by no means certain that it was not the intention of the testator to control and provide for the ulterior devolution of the title, after it had been enjoyed during life by the primary devisee, in case he then died without issue, and such a construction would, it would seem, give effect more completely to the language used.

But the rule established by the courts applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue or other specified event. Indeed, the tendency is to lay hold of slight circumstances in the will, to vary the construction and to give effect to the language according to its natural import. *Muel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 99 N. Y. 505; [S. C. 1 Cent. Rep. 296]; *Hennessey v. Patterson*, 85 N. Y. 92.

In these and other cases which might be cited

the court found in the context indications of intention which took them out of the operation of the rule to which we have referred.

We are of opinion that there are indications in the will now before us that the testator intended that the gift over to the grandchildren should take effect upon the death of his son Cornelius without issue, at any time, either before or after his own death; and that the rule of construction which applies to the words "death without issue," when standing alone, does not apply to the will in question.

The gift to Cornelius in the second clause of the will, is made "subject to the proviso hereinafter contained." Reading this clause by itself, we should naturally expect to find in a subsequent part of the will, some condition modifying in some contingency the estate given to Cornelius; and while the condition might consistently with the language of the second clause be either precedent or subsequent, the more natural meaning suggested by the words, "subject to the proviso hereinafter mentioned," would be that the testator intended to subject the estate in the hands or possession of Cornelius, when he should take it under the will to some condition.

Looking then at the tenth clause, we find a condition or proviso, which is that on the death of Cornelius without issue, the estate should go over to the grandchildren. This provision in the tenth clause, standing alone, would, according to the general rule of construction, be construed as referring to the death of Cornelius, without issue, during the testator's life. But construed in connection with the natural meaning of the second clause, there is color for a conclusion that it referred to a death either before or after the testator's. But more satisfactory evidence that the testator referred to a death at any time, is found in the last paragraph of the tenth clause, which declares, "in case my son Cornelius should die before the provisions of this will becomes an act, the devisees last named (the grandchildren) shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will."

It seems obvious that the duty imposed upon the grandchildren by this clause was a duty to be discharged by reason of an omission or default of Cornelius to satisfy the legacies. If the only object of this clause was simply to impose upon the grandchildren the duty of paying the legacies in case the alternative gift took effect by the death of Cornelius, without issue, in the life time of the testator, so that thereby they became primary devisees, the testator would naturally have expressed his intention in simple and clear language, as by declaring in connection with the gift over that the grandchildren should pay the legacies, or that they should take the land, subject to their payment.

The phrase "in case my son Cornelius should die before the provisions of this will become an act," is obscure. But it is to be observed that Cornelius had by the terms of the ninth clause, two years in which to pay the legacies. The testator must be assumed to have had in mind two contingencies: 1, that Cornelius might die before him, without issue; or 2, after him, but within the two years and before he had paid the legacies.

The last paragraph of the tenth clause, was inserted we think to provide for both contingencies; and the burden of paying the legacies was imposed upon the ulterior devisees, in case of the death of Cornelius either before the testator, or after his death and within the two years, in case the direction for their payment should then be unexecuted.

If this is the fair construction of the clause, then it is clear that the words "death without issue" referred to a death at any time, because it is inconceivable that the testator could have intended that the grandchildren should pay the legacies, except in the event of their taking under the devise. The clause is not that in case Cornelius dies before the will takes effect, then the grandchildren shall pay the legacies; but "in case he dies before the provisions of this will becomes an act" *i. e.*, before he shall have paid the legacies. The legacies were an equitable charge on the land. *Harris v. Fly*, 7 Paige, 422.

The fact that they were also personally charged on Cornelius does not we think require us to hold that he took a fee simple. The circumstance that a devisee is personally charged with the payment of legacies is a fact resorted to in doubtful cases, in aid of the construction of a devise; but is never decisive where a different intention is disclosed.

We think the judgment should be affirmed.

All concur.

James J. BELDEN *et al.*, Survivors, etc.,
Appts.,
v.

STATE of New York, Resp't.

1. A judgment in an action of tort to recover money alleged to have been obtained by fraud is **not a bar to a subsequent action to recover the same money**, on the ground that it had been paid under a mistake of fact.
2. Facts offered in evidence to prove an issue are **not themselves in issue**, and the judgment is no evidence in regard to them.
3. When a creditor has received more than was due him from his debtor, the excess is deemed so much money of the debtor in the hands of the creditor for the use of the debtor; and if, on a subsequent transaction between the parties, the debtor becomes again indebted, such excess will be presumed to have been applied by the creditor upon the subsequent indebtedness when it accrued, and the debtor will not be deprived of the benefit of such application by force of the Statute of Limitations, in an action by the creditor for the entire indebtedness.

(Decided October 5, 1886.)

APPEAL from an order and judgment of the Supreme Court at General Term, in the Fourth Department, affirming a decision of the late Board of Audit disallowing and dismissing claimants' claim. *Affirmed.*

Reported below, 81 Hun, 409.

The questions presented by this appeal are stated in the opinion.

The defendants in the case of *People v. Denison*, 80 N. Y. 656, referred to in the opinion, were the same parties as the original claimants in this proceeding, they having been partners in the contracts in suit.

Messrs. E. Nottingham and Martin A. Knapp, for appellants :

I. The reasoning of the general term is "that while it was held by this court in *People v. Denison* that the State could not recover this money in an action in tort for the fraud, it was not held that the State could not have recovered if it had brought an action *ex contractu* on the implied promise; therefore, the adjudication in that action is not conclusive in this case."

This reasoning might be true if the parties in the actions were not the same; but as applied to actions between the same parties, as in the present case, it is clearly erroneous.

Pomeroy, Remedies, §§ 110, 567, 573, 801; 2 Wait, Pr. pp. 858-861; *Rice v. King*, 7 Johns. 20; *Bank of Beloit v. Beale*, 34 N. Y. 478; *Johnson v. Smith*, 8 Johns. 383; *Springstead v. Lawson*, 23 How. Pr. 302; *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498; *Kinney v. Kiernan*, 2 Lans. 492; *Morris v. Rezford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 854; *Bowen v. Mandeville*, 95 N. Y. 287; *Wright v. Pierce*, 4 Hun, 351; *Goss v. Mather*, 2 Lans. 283; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Teall v. Syracuse*, 32 Hun, 332; *Sweet v. Ingerson*, 12 How. Pr. 331; *Krumm v. Beach*, 96 N. Y. 899; *Roth v. Palmer*, 27 Barb. 652; *Dudley v. Scranton*, 57 N. Y. 424.

When the State appealed in the case of *People v. Denison*, from the order granting a new trial, by giving the stipulation for judgment absolute against it in case of affirmance of the order granting the new trial, it forever waived its right to discontinue the action of tort and bring a new action *ex contractu*.

Code of Civ. Proc. § 194; *Hiscock v. Harris*, 80 N. Y. 402; *Cobb v. Hatfield*, 46 N. Y. 533; *Gray v. Bd. Tomp. Co. Supervisors*, 98 N. Y. 603; *Mackay v. Lewis*, 73 N. Y. 382; *Godfrey v. Moser*, 66 N. Y. 253; *Keep v. Kaufman*, 56 N. Y. 332.

II. Where there is a failure to find expressly, upon the issues of fact raised by the pleadings and litigated upon the trial, and in support of which evidence is given, it must be presumed that the court below or the referees have found against the party attempting the affirmation of the issue.

Manley v. Ins. Co. of N. Am. 1 Lans. 24; *Nelson v. Ingersoll*, 27 How. Pr. 1; *Sermon v. Baetjer*, 49 Barb. 362.

A prior adjudication in an action between the same parties and involving the same subject matter is conclusive in a subsequent action, not only as to the main question decided but as to every other question essential to and which was necessarily considered in the decision of the main question; and also as to every question relating to the subject matter of the litigation, and which might have been litigated and decided as incident to or essentially connected with the main question.

Tuska v. O'Brien, 68 N. Y. 447; *Castle v. Noyes*, 14 N. Y. 329; *Church v. Kidd*, 88 N. Y. 8. Y.

652; *Angel v. Hollister*, 38 N. Y. 379; *Dunham v. Bower*, 77 N. Y. 77; *Blair v. Bartlett*, 75 N. Y. 150; *Collins v. Bennett*, 46 N. Y. 491; *Jordan v. Van Epps*, 85 N. Y. 436; *Leavitt v. Wolcott*, 95 N. Y. 213; *Crabb v. Young*, 92 N. Y. 57; *Patrick v. Shaffer*, 94 N. Y. 425; *Clemens v. Clemens*, 37 N. Y. 74; *Harris v. Harris*, 36 Barb. 89.

Assuming that overpayments were made on the contract with claimants, the right of action to recover them was barred by the Statute of Limitations; the debt or counterclaim being one arising out of an implied contract of claimants to repay to the State the alleged overpayments.

Code Civ. Proc. § 382; *Morris v. Budlong*, 78 N. Y. 543; *De Lavallette v. Wendt*, 75 N. Y. 579; *Clinton v. Eddy*, 1 Lans. 61.

The defense of the Statute of Limitations interposed by the State is untenable. The seals attached to the contracts take them out of the six years' limitation.

Mr. D. O'Brien, Atty-Gen., for the State, respondent :

The claim was barred by the Statute of Limitations.

Code Civ. Proc. § 382, subd. 1.

The seal of the canal commissioners was not the seal of the State, and the instruments were executed by them as agents of the State.

Randall v. Van Vechten, 19 Johns. 60, 64.

These contracts were not required to be under seal; and in such cases, where the contract was executed by an agent in behalf of his principal, and the latter has ratified the contract by accepting its benefits, the seal may be rejected as surplusage and a recovery had against the principal in assumpsit, as if it were a simple contract.

Randall v. Van Vechten, *supra*; *Briggs v. Partridge*, 64 N. Y. 364; *Stanton v. Camp*, 4 Barb. 274.

These contracts could not have been specifically enforced, even if the claimants had properly and completely performed their covenant; because no measure of damages was provided for therein. Even had the claimants sought a specific performance thereof, such a suit would not have been a suit upon a sealed instrument.

Peters v. Delaplaine, 49 N. Y. 362; *Bush v. Shaw*, 4 N. Y. Week. Dig. 589; *Loder v. Hatfield*, 71 N. Y. 92. See also *Welles v. Yates*, 44 N. Y. 525.

That this claim is in the nature of an action of assumpsit is clear from an examination of the following cases:

Coleman v. Second Ave. R. R. Co. 38 N. Y. 201; *Gale v. Nixon*, 6 Cow. 445; *Jewell v. Schroepfel*, 4 Cow. 564.

This court is bound to take the facts as they were stated in the case to have been found by the board of audit and compare them with the decision rendered. If the decision is in conformity with the facts as found, it cannot be disturbed; and the court will not review the evidence in the case, in order to ascertain whether such conclusion is or is not erroneous.

Reed v. Antrop, 13 N. Y. Week. Dig. 450; 12 N. Y. 258; 63 N. Y. 8; 19 N. Y. 207; 71 N. Y. 137; *Stilwell v. Mut. Life Ins. Co.* 72 N. Y. 885; *Auburn City Nat. Bk. v. Hunaker*, 72 N. Y. 252; *Van Gelder v. Van Gelder*, 77 N. Y. 446; *Green v. Fortier*, 80 N. Y. 640; *Parker v. Jervis*, 3 Abb. Ct. App. Dec. 449; *Cooper v.*

Eastern Trans. Co. 75 N. Y. 116; *Quincey v. White*, 63 N. Y. 370, 375; *Marvin v. Brewster Iron Min.* Co. 55 N. Y. 538, 547; *Sherwood v. Hauser*, 94 N. Y. 626; *Parker v. Jervis v. Keyes*, 271; *Waters v. Green*, 3 Keyes, 385; *Vermilyea v. Palmer*, 52 N. Y. 471.

There was nothing equitably due the plaintiffs. The moneys paid to the claimants under contract A were paid under a mistake of fact and for that reason could have been recovered back in a direct action for that purpose.

Lawrence v. Am. Nat. Bk. 54 N. Y. 433.

There must be a mistake, and it must also appear that the plaintiff was not under either a legal or moral obligation to pay the money.

Edgar v. Shields, 1 Grant, Cas. (Pa.) 361; *Foster v. Kirby*, 31 Mo. 496.

Where money is paid to another under the influence of a mistake, i. e., on the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue and the money would not have been paid if the fact had been known to the payor, an action will lie to recover it back.

Guild v. Baldrige, 2 Swan (Tenn.) 295; *Mouatt v. Wright*, 1 Wend. 355; *Mayor v. Erben*, 10 Bosw. 189.

The fact that the mistake resulted from carelessness does not preclude a recovery.

Renard v. Fiedler, 3 Duer. 318.

The auditor was the disbursing officer of canal moneys. The state treasurer was obliged by law to pay his warrants without question.

Chapman, Canal Manual, p. 164, § 39.

The auditor determined whether the money was to be paid.

Laws 1869, chap. 877, § 1.

The auditor paid the contractors, relying upon the estimate of the engineers; in ignorance of the over measurements and defective character of the work. As the agent's mistake of fact is the mistake of his principal, the money was paid by the plaintiff, relying upon erroneous vouchers produced by the defendants at the time, and can, even if there was no fraud, be recovered back as money paid by mistake.

Stuart v. Sears, 119 Mass. 143; *Story*, Agency, § 435.

It is no answer to say that the auditor had the means of finding out the mistake.

Wheadon v. Olds, 20 Wend. 174; *Kington Bank v. Eltinge*, 40 N. Y. 391; *Mayer v. Mayor etc. of N. Y.* 63 N. Y. 455.

Had the engineer actually accepted the work, still the State would not be bound, because the proof shows that such acceptance would have been of a class of work inferior to that provided for in the contract.

Glucius v. Black, 50 N. Y. 145; *Swift v. State*, 89 N. Y. 52.

There can be no implied contract on the part of the State to pay for work voluntarily done by the claimants.

Moore v. Moore, 3 Abb. Ct. App. Dec. 303; *Shirley v. Vail*, 3 Abb. Ct. App. Dec. 313, note.

There is no evidence in the case or in the statutes of this State of any legislative action which can be construed as a ratification of these payments.

See *People v. Schuyler*, 69 N. Y. 242.

Danforth, J., delivered the opinion of the court:

On the second of December, 1881, the appellants presented to the board of audit a claim for \$125,406.90, with interest on \$91,044.00 part thereof from December 1, 1881, and on the second of May, 1882, a further claim, by way of amendment to the original claim, of \$28,410.58, with interest from May 1, 1882, making the total amount claimed \$158,817.48; and for this sum, with interest, asked an award in their favor and against the State.

The claim is for money alleged to have been earned under three contracts for canal work dated September 9, 1869, and referred to respectively as A, B and C.

It seems apparent that upon contract B there was unpaid \$7,605, with interest; and on contract C \$9,750, with interest. But the board of audit found that for work done under contract A the claimants were entitled only to \$814,960.70, and had in fact been paid \$417,570.00; leaving due the State, for over payment, the sum of \$102,610.30. It therefore held: 1, that contract A had been fully performed by the State; and 2, that so much of the over payment, under color of that contract, as might be necessary, should be applied to extinguish the amounts otherwise due on contracts B and C; that for the balance, viz.: \$35,368.40, the claimants were indebted to the State, and accordingly dismissed their claim.

There is evidence in the case to support the conclusion of over payment, and the question upon this appeal is whether it is available to the State.

The appellants contend that the decision by this court in *People v. Denison*, 80 N. Y. 656, is conclusive against the State, as to the payments in excess of sums rightfully due under contract A. In that case the State sued to recover back the whole sum of \$417,571.00, upon the sole ground that it had been obtained from its officers by false pretenses and false certificates.

The defendants answered and, among other defenses, set up a certain claim for \$73,674.05, as yet due upon that contract, being, as is now stated, the same moneys claimed before the board of audit under contract A.

The State succeeded upon the trial, but upon appeal both the supreme court at general term and this court held that the action was in tort, and not on contract; and reversed the judgment rendered by the trial court, upon the ground that the plaintiff, having failed to establish the fraud alleged, had not made out its case.

The supreme court had granted a new trial, but the plaintiff stipulated so as to perfect an appeal, and this court, in pursuance of the stipulation, gave judgment absolute against it.

Such a judgment presents no obstacle to the recovery of money paid by the state officers in ignorance that the amount of work and materials in the estimates on which they acted was incorrectly stated and in excess of that really done or furnished, and under a mistake as to those facts.

That question was neither litigated nor decided in the former action, nor could it have been. It was not involved in the pleadings nor presented for determination. Moreover, evidence, however ample to warrant a recovery for money paid under a mistake of fact, would be wholly insufficient to show that its payment

was procured by fraud. The cause of action is not the same.

The judgment relieved the contractor from the imputation and the consequences of obtaining the money fraudulently; but it did not establish the fact of indebtedness, nor confirm a title to the money, if it was otherwise defective. The plaintiff failed because its action was misconceived, and for a cause not warranted by the facts proved. The judgment is no bar to a claim therefore, for a sufficient cause, or where the evidence to sustain the second would not have entitled the plaintiff to recover in the first; where, in other words, there is no identity of the question with that before decided.

It is entirely consistent with the record in that action, that money paid under a mistake of fact may be recovered back. Although the State there failed in its assertion that the money was obtained from its officers by fraud and false pretenses, that question was settled, but not the right of the defendant to retain it.

Nor does that judgment establish the sum due to the appellants under contract. That question was not in issue. It may have come collaterally in question; and as incident to the general charge of fraud, it may have been the subject of evidence and controversy, but it was not in issue within the meaning of the rule which gives effect to the adjudication. That applies to that matter only upon which the plaintiff proceeded by its action, and which the defendants answered by their pleading.

Facts offered in evidence to establish the issue so presented are not themselves in issue, and the judgment is no evidence in regard to them. *Jackson v. Wood*, 8 Wend. 27; *Lawrence v. Hunt*, 10 Wend. 81; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

The appellants contend that the Statute of Limitations barred the right to recover the over payments. Whether time had elapsed sufficient in any view for that purpose, I do not think it needful to inquire. No judgment has gone in favor of the State against the appellants. The money in their hands was in excess of that due from the State when they presented their claims, and a tribunal having the powers of a court not only of law but equity, and expressly charged to allow only such sums as it considered should equitably be paid by the State to the claimants (Laws of 1876, chap. 444, § 2), have adjudged that while retaining it they have no claim which can be allowed. That conclusion has been approved by a court authorized upon appeal to consider both the law and the evidence, "and determine the same between the claimant and the State, as shall be equitable and just." Laws 1881, chap. 211.

A different decision would be a reproach to either jurisdiction. The claimants could ask for only so much as was due to them, and before a court having power to take an account and strike a just balance between the parties it would be a surprising assertion for one to say:

"I obtained the money of my adversary under circumstances which imposed on me an obligation to repay; but in the meantime he became justly indebted to me, and as by lapse of time no action can be brought by him, I now demand that my title to the money so obtained shall not be questioned but be deemed absolute,

and he be required to pay the debt which has accrued."

It might well be answered:

"You shall be deemed to have done your duty, and at the moment of the accruing of the claim, to have applied upon it the money which you have already received from your debtor."

So here, the money received by the claimants in over payment on one contract must be deemed to have been money in their hands for the use of the State, the State entitled to its application, and the claimants be presumed to have applied it in payment of the other obligation the moment it accrued.

The existence of means of payment in the hands of the creditor and the lapse of time are conclusive evidence of the pre-existing fact of an actual discharge of the accruing debt; or are of themselves facts which require a court of equity to adjudge such application to have been made. Equity requires that one demand should extinguish the other, by deducting the less from the greater.

Other propositions are advanced in behalf of the appellants. They are insufficient to disturb the judgment; nor do they answer the opinion of the general term.

As we agree, therefore, with that court and the board of audit in the conclusion reached by them, *the judgment appealed from should be affirmed.*

All concur, except **Andrews, J.**, dissenting, and **Ruger, Ch. J.**, not sitting.

PEOPLE, *ex rel.* EQUITABLE LIFE INSURANCE SOCIETY of the United States, *Appts.*,

v.

Alfred C. CHAPIN, Comptroller, etc., *Resp't.*

After the State Comptroller has made his decision upon an application to cancel a tax sale and conveyance thereunder, he cannot be required, by **mandamus**, to reach a different conclusion.

(Decided October 5, 1886.)

A PPEAL from an order of the Supreme Court at General Term in the Third Department, affirming an order of the Special Term denying a motion for a writ of peremptory *mandamus* requiring the State Comptroller to cancel the sale of certain lands for taxes. *Affirmed.*

The relator is the owner and holder of a mortgage upon certain lands situated in Clinton County, which in 1877 were sold for unpaid taxes for the years 1866-1870 inclusive; and a deed therefor was thereafter in due time given by the Comptroller to the State, as purchaser. In 1881 the lands were again sold for the unpaid taxes of 1871-1876 inclusive; and at the expiration of the time to redeem were again conveyed to the State, as required by law. November 20, 1885, the relator, as such mortgagee, applied to the Comptroller to cancel the sales and conveyances on the grounds:

1. That the oath of the assessors to the assessment roll of 1869 was not in the form required by statute (Laws 1855, chap. 427), in

that the words "the" and "due" are omitted; the words "property" and "one" are substituted for "estate" and "person" respectively; the word "debt" is used instead of "debts," "stock" instead of "stocks," "is" in the place of "are," the words "true and full" instead of "full and true" and the word "information" instead of "judgment."

2. That said oath was sworn to before a notary public, instead of a justice of the peace.

3. That at the sale of 1881, the Comptroller refused to allow relator to bid on said lands, but peremptorily bid them in for the State.

The Comptroller denied the application; and the relator thereupon, at a special term held in Albany County, November 24, 1885, moved for a writ of peremptory *mandamus* to compel the Comptroller to cancel said sales. The motion was denied and an order entered accordingly, which was affirmed by the general term* and an appeal taken to this court.

Mr. Moore with **Mr. Frank E. Smith**, for relator, appellant:

The statute makes it the duty of the comptroller, on discovering the invalidity of any tax sale, to cancel such sale.

Laws 1855, chap. 427, §§ 83, 85; 8 Edm. Stat. at Large 370.

The land owner whose land has been illegally sold for taxes is entitled to invoke the exercise of this power vested in the comptroller.

Laws 1878, chap. 120.

Relator could not bring ejectment nor an action at law in any form against the State.

People v. Dennison, 84 N. Y. 272.

Neither could he resort to equity, to cancel, as a cloud upon his title, the deed based upon an illegal sale; for the State can no more be sued in equity than at law.

Cunningham v. Macon & B. R. R. Co. 109 U. S. 446 (Bk. 27, L. ed. 992).

The statute as to canceling tax sales applies to cases in which the State is the pur-

chaser, as well as to those where the purchaser is an individual.

Laws 1855, chap. 427, § 86, as amended by Laws 1881, chap. 402, § 6, sub. 3.

The remedy by *mandamus* is the proper one. The writ of *certiorari* accomplishes nothing. It simply reverses erroneous action. If the officer persists in saying that he knows the law better than the courts, the party must then seek his remedy by *mandamus*.

See *People v. Supers. of Madison Co.* 51 N. Y. 442, 446; High, Extr. Legal Remedies, § 34, Code Civ. Proc. § 2070; *Clark v. Davenport*, 95 N. Y. 477; *Matter of Clementi*, 92 N. Y. 591; *People, ex rel. Townsend, v. Cady*, 50 N. Y. Supr. (J. & S.) 899; *People, ex rel. Andrews v. Brinkerhoff*, 20 N. Y. Week. Dig. 391; *Bd. of Liquidation v. McComb*, 92 U. S. 531, 541 (Bk. 23, L. ed. 628, 628); *Atty-Gen. v. Boston*, 123 Mass. 460; *Myers v. State*, 61 Miss. 138; *Gilchrist v. Collector*, 5 Hughes, 1; *State v. District Judge*, 34 La. Ann. 611.

Mr. D. O'Brien, Atty-Gen., for respondent:

Even if the Comptroller were wrong in refusing to cancel the tax sales, *mandamus* is not the proper or suitable remedy to afford the relator any relief. A writ of *mandamus* will not be awarded to compel an act by a public officer, in regard to which he may exercise his judgment or discretion.

People v. Troy, 78 N. Y. 33; *Howland v. Eldredge*, 48 N. Y. 457.

Where a subordinate body or officer is invested with power to determine a question of fact, it is a judicial duty.

People v. Troy, *supra*.

Mandamus will lie to compel a public officer to perform a duty imperatively imposed upon him by statute, where he refuses to act at all; but not to direct the manner in which he shall act.

See *Howland v. Eldredge*, *supra*; *People v.*

*The following is the opinion delivered at General Term:

PER CURIAM:

We think that the motion was properly denied. If the relator was entitled to review the Comptroller's decision, he should do so by *certiorari*, as was done in *People v. Chapin*, decided in this court, November, 1885. [See S. C. 2 Cent. Rep. 467.]

Whether in a particular case under the statute the Comptroller decides on the question of fact or on a question of law, in either, his decision is quasi judicial. Section 2070 of the Code, to which the relator cites us, does not determine in what case *mandamus* will lie. It only determines that where *mandamus* is the proper remedy, then if the question be one of law, the *mandamus* may be peremptory in the first instance.

The relator also cites *Matter of Clementi*, 92 N. Y. 591. But it is remarked in that case that the proceeding was not for an adjudication upon the title, but to compel the defendant to perform a statutory duty, the effect of which, in case of dispute, must be determined hereafter. That language would hardly apply to the cancellation of a deed by the Comptroller, under the statute in question.

The remark in *Clark v. Davenport*, 95 N. Y. 477, cited by the relator, was merely *obiter*. It did not state when *mandamus* and when *certiorari* would be the proper remedy.

The *People v. Cady*, 50 N. Y. Supr. Ct. 399, was a *mandamus* simply to compel a clerk of arrears to receive certain taxes, an act wholly ministerial.

In *People v. Brinkerhoff*, 20 Week. Dig. 391, the *mandamus* was refused.

The case of Atty-Gen. v. Boston, 123 Mass. 460, also cited by the relator, contains at page 473 a very

good statement of the matter. Speaking of *mandamus* it says: "It lies, not only to ministerial but to judicial officers. In the former case it contains a mandate to do a specific act; but in the latter, only to adjudicate to exercise a discretion upon a particular subject."

Had the Comptroller refused utterly to consider the relator's application, there would be reason for asking a *mandamus*, not to direct the Comptroller how to act but to require him to exercise his discretion. But the Comptroller has not refused the relator's application. He has considered it and denied it.

The proper use of remedy by *mandamus* is also stated in *People v. Troy*, 78 N. Y. 33, 39.

It is not a remedy for erroneous decisions. It cannot be addressed to a judicial tribunal to require it to decide in a particular manner. And this rule applies to everybody whose action is in its nature judicial.

In chapter 427, Laws 1855, § 83, we find the following: "Whenever the comptroller shall discover * * * that the sale was, for any cause whatever, invalid or ineffectual to give title, etc." Now, this certainly does not describe a ministerial duty. It is for the comptroller to "discover" that is, to decide that the sale is invalid. That decision may depend upon a question of fact or upon a question of law, or upon both. In deciding it the comptroller may err in point of law or in point of fact. But in one case as in the other, the remedy for the aggrieved party is by *certiorari*; that is to say, assuming that there can be a review of the comptroller's action.

Without passing upon the other questions, therefore, the order should be affirmed, with \$10 costs and printing disbursements.

Leonard, 74 N. Y. 448. See also, *People v. Fairman*, 12 Abb. N. C. 252, 263.

The writ will not issue where the aggrieved party has another remedy.

People v. Mead, 24 N. Y. 114; *People v. Dowling*, 55 Barb. 197; *People v. Campbell*, 72 N. Y. 496. See *People v. Thompson*, 99 N. Y. 641.

If the lien created by the Comptroller's deed appears valid on its face, an action will lie to remove the lien as a cloud upon the owner's title.

Scott v. Onderdonk, 14 N. Y. 9; *Marsh v. Brooklyn*, 59 N. Y. 280; *Dederer v. Voorhies*, 81 N. Y. 156.

Certiorari would be the proper proceeding to review the Comptroller's decision in this matter.

Clark v. Davenport, 95 N. Y. 477.

Danforth, J., delivered the opinion of the court:

The Comptroller acted upon the papers presented to him and refused the application, upon the ground that the sales were regular. The matter was for his determination; and we agree with the supreme court, in the opinion that he cannot by *mandamus* be required to reach a different conclusion. *Howland v. Eldredge*, 43 N. Y. 457.

Order affirmed, with costs.

All concur.

Henry NUGENT, *Respnt.*,

v.

Eli B. JACOBS Impleaded, etc., *Appt.*

1. The payment by the purchaser, of a fair consideration, upon a sale of property is strong, although not conclusive, evidence of the good faith of the transaction; and requires clear evidence of fraudulent intent to overcome it.
2. Where, in an action to set aside a conveyance of real estate as in fraud of creditors, the evidence as to the fraudulent intent is not strongly preponderating and the plaintiff has been permitted to introduce, in support of the allegation of fraud, oral testimony as to the making of a chattel mortgage by the grantor in the alleged fraudulent deed, the defendant should be permitted to show what was done with the mortgage after its execution, and the circumstances under which it was given.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Ontario Circuit Court in favor of plaintiff in an action to set aside a deed as fraudulent towards creditors. *Reversed.*

Memorandum of decision below, 34 Hun, 624.

The questions presented by the appeal are stated in the opinion.

Mr. E. W. Gardner, for appellant:

The extinguishment of a valid debt against the vendor constitutes the vendee a purchaser for value, as fully as though the consideration was all paid in money.

N. Y.

See *Seymour v. Wilson*, 19 N. Y. 417; *Bedell v. Chase*, 34 N. Y. 886; *Hill v. Northrup*, 9 How. Pr. 525.

If the transfer is made to a stranger, in order to bring himself within the provisions of the statute as to a purchaser, "he must show that he has an equity which is paramount to that of the vendor; and to do this he must show that he has parted with value and is not chargeable with notice of the fraud. But where the transfer is to a creditor of the vendor, it is not necessary to show a new consideration, as the transaction amounts to nothing more than a voluntary preference of one creditor over another."

See also *Murphy v. Briggs*, 89 N. Y. 451; *Stearns v. Gage*, 79 N. Y. 102; *Farley v. Carpenter*, 27 Hun, 859.

Where the land is conveyed to the grantee as his own, the rule is entirely different from a case where a party makes a general assignment for the benefit of his creditors, and the grantee is a mere trustee; in the latter case fraud of the assignor alone is sufficient; while in the former, as in this case, actual fraud must be shown upon the part of both grantor and grantee.

Laidlaw v. Gilmore, 47 How. Pr. 67; *S. C. affd.* 56 N. Y. 621.

The facts that a suit was pending by plaintiff against Grace, and that Jacobs knew of it, furnish no evidence of fraud.

Beards v. Wheeler, 76 N. Y. 218; *Hall v. Arnold*, 15 Barb. 599.

Where the conveyance or mortgage is taken to secure a debt, even where it is done with the express purpose of preventing the lien of a judgment about to be taken, the conveyance is valid.

Jewett v. Noteware, 30 Hun, 192; *Hale v. Stewart*, 7 Hun, 591; *Archer v. O'Brien*, 7 Hun, 146, 149; *Stover v. Eylesheimer*, 4 Abb. Ct. of App. Dec. 314; *Parker v. Conner*, 93 N. Y. 118-126.

The evidence of Jacobs, the vendee, that he took this conveyance in good faith and without any fraudulent intent, cannot be disregarded arbitrarily; and should be taken as evidence in the case.

Waterbury v. Sturtevant, 18 Wend. 363; *Bedell v. Chase*, 34 N. Y. 886.

Fraud upon the part of the vendee as well as the vendor must be shown.

Dudley v. Danforth, 61 N. Y. 626.

Mr. Henry M. Field, for respondent:

The findings of fact of the trial court were based upon conflicting evidence. They have been affirmed by the general term, and are now conclusive upon this court.

Code Civ. Proc. § 1887; *Davis v. Leopold*, 87 N. Y. 620; *Baird v. Mayor*, 96 N. Y. 567.

The fraudulent intent of the grantor (Grace) is confessed by the record. He did not appear or answer the complaint.

Code Civ. Proc. § 522; *Starin v. Kelly*, 88 N. Y. 418.

A conveyance is void under the statute, if the sale and conveyance was made with intent to hinder and delay creditors.

3 R. S. p. 2320, 7th ed.; *Bump, Fraud. Convey.* p. 36; *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Parker v. Conner*, 93 N. Y. 118; *Coleman v. Burr*, 93 N. Y. 17.

The fact that appellant paid full value, under all the circumstances which appear in this case, did not make the conveyance *bona fide* nor

release the appellant from the consequences of his own fraudulent acts. The fraud was found as a fact.

Bump, Fraud. Convey. 230; *Young v. Heermans*, 66 N. Y. 374; *Davis v. Leopold*, 87 N. Y. 620.

The law and the courts do not protect fraudulent purchasers.

Wait, Fraud. Convey. § 208.

Ruger, Ch. J., delivered the opinion of the court:

This action was brought to vacate and annul a conveyance of certain land made by one Grace to the defendant Jacobs, upon the ground that it was executed and delivered for the purpose of hindering, delaying and defrauding creditors, and particularly the plaintiff, in the collection of a debt owing to him by the defendant Grace.

The findings of the court below show that Jacobs paid Grace the full value of the land upon the transfer; but it is claimed by the respondent and was found by the court below that the evidence established the fact that the conveyance was nevertheless made and received with the intent to hinder, delay and defraud the plaintiff. The evidence upon which this finding was based was not conclusive or even strongly preponderating, upon the facts found and the erroneous admission or exclusion of evidence was likely to effect materially the conclusions reached by the trial court.

The payment, by the purchaser, of a fair consideration upon a sale of property affords strong evidence of the good faith of the transaction and, while not conclusive upon that question, requires clear evidence of the existence of fraudulent intent, to overcome the presumption of honest motives arising from that fact. *Billings v. Russell*, 101 N. Y. 226; [*S. C. sub nom. Billings v. Sawyer*, 2 Cent. Rep. 143].

One of the most prominent circumstances from which a fraudulent intent was sought to be deduced was the execution by Grace on the same day, but after the execution of the deed in question, of a chattel mortgage to his wife, conveying such property as he had remaining after the transfer of his land. This fact was proved upon the oral examination of the alleged fraudulent debtor, produced as a witness for the plaintiff; and although the defendant objected that such evidence was not competent and that the mortgage should be produced, it was allowed by the court.

The defendant, upon cross examination of the same witness, attempted to show what was done with the mortgage after its execution, and the circumstances under which it was given; but upon the objection of the plaintiff the evidence was excluded by the court, and the defendant excepted to the ruling. We see no ground upon which this ruling can be supported.

The mere giving of the mortgage, under the circumstances, did not afford conclusive evidence of a fraudulent intent on the part of the mortgagor; and the circumstances under which it was executed, the existence of a valuable consideration therefor, the fact that it was promptly filed in the town clerk's office, and the publicity attending its execution, were all competent and material facts bearing upon the question

of intent, and should have been received by the court.

In a case where the evidence is not preponderating on one side or the other, such circumstances should be heard and considered; and we cannot say that injustice may not have been done by the exclusion of the proposed testimony.

For this reason, therefore, a new trial should be ordered with costs to abide the event.

All concur, except **Miller, J.**, absent.

Joel WHEELER *et al.*, *Appts.*,

v.

William W. LAWSON, *Respt.*

1. **Actual possession of personal property** by plaintiff at the time of taking is **enough**, without other evidence of title, **to maintain an action in trover** for the conversion thereof, except against the true owner or one connecting himself with the true owner.
2. **Justification** is not admissible under a general denial **in trover**.
3. **Personal property** which has **passed** from its owner by a general assignment, is **not bound**, either actually or constructively, **by an execution** against the original owner issued **subsequent** to the assignment.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment upon the report of a referee, dismissing the complaint in an action for the unlawful taking and conversion of personal property. *Reversed.*

Memorandum of decision below, 34 Hun, 624.

Statement by **Danforth, J.**:

The plaintiffs sue in trespass to recover damages for the unlawful and forcible taking by the defendant from their possession, and the conversion to his use, of certain horses and other personal property belonging to them.

The complaint contains the usual allegations in such cases; and the defendant, after a general denial, sets up by answer that at the time mentioned in the complaint, he was sheriff of Erie County, and in that character did the things complained of, by virtue of certain executions against one Shoemaker; that the property taken by him was not the property of the plaintiffs, but belonged either to the execution debtor or to one Allen as his assignee; and who, the defendant alleges, resides in this State and is a necessary party to the action. He also alleges a lien for \$91 in favor of Allen as such assignee, for the care, etc., of the property, and its payment by defendant.

Some other matters are set out, but they are not material upon this appeal. The record does not contain the evidence, but from the report of the referee it appears that the following facts were found by him: on the first day of January, 1880, said Shoemaker resided in the City of

Buffalo and was engaged in the manufacture and sale of ale and porter. At the same time one Marvin Cline, of the same city, was engaged in the manufacture and sale of malt; and on that day Shoemaker was indebted to Cline in a large sum of money upon certain promissory notes, made by Shoemaker and payable to the order of Cline; and he then, in consideration of said indebtedness, executed to Cline an instrument in writing, wherein he transferred and sold to him certain "goods, chattels, wares and merchandise," and among other things the property described in the complaint, upon the condition, as expressed in said instrument, that "If the party of the first part shall pay, take up and discharge the said promissory notes at the maturity thereof, and if he shall pay any other promissory note or notes, which shall be indorsed by the said Marvin Cline at his request and for his accommodation * * * then and in that event this instrument shall become null and void, and of no effect whatever."

That at the time of its execution and delivery it was agreed by said Cline and understood by said Shoemaker that it would not be filed until Cline should notify him, and that Shoemaker should continue to carry on his business the same as before, which he did until the assignment hereinafter mentioned; and Cline did not take possession of the property, but the same continued in the possession of Shoemaker up to about the 20th day of July, 1880, when he executed a general assignment to one Allen, for the benefit of his creditors, except so far as said property was changed by Shoemaker, in the conduct of his business.

That within a day or two after the delivery of this instrument to Cline, he delivered it to the plaintiffs, "to secure paper of said Shoemaker, which then was or might be in existence;" and on the 11th of June thereafter, executed to them in writing an absolute assignment of all his interest in said bill of sale, and it remained in their possession.

That said instrument and assignment were filed on the 25th day of June, 1880, in the office of the Clerk of Erie County.

That after said instrument was delivered to Cline, he furnished moneys and supplied malt to said Shoemaker, to be used by said Shoemaker in his business; and said Shoemaker gave to said Cline therefor certain promissory notes. Each of the notes was made, by said Shoemaker, payable to the order of said Cline. Cline indorsed and delivered all of them to the plaintiffs herein, in the usual course of business and for a valuable consideration, and they now hold the same.

That on the 20th day of July, 1880, the plaintiffs went to the place of business of Shoemaker, in the City of Buffalo, and there found said Shoemaker and Allen, his assignee, and demanded and took possession of the property described in the complaint herein, under and by virtue of the said instrument, with the permission of said Shoemaker and said Allen, and without objection on the part of either of them; and the plaintiffs thereupon caused said property to be advertised for sale under and by virtue of said instrument.

That after the making and delivery of said instrument, and before the written assignment thereof was made by said Cline to said plaintiffs,

the said Shoemaker made or indorsed to the Third National Bank of Buffalo certain promissory notes; that the same were not paid when they became due, and judgments were duly recovered thereon by said bank against said Shoemaker and others; and executions were duly issued against the property of the judgment debtors to the defendant as Sheriff of the County of Erie.

That the judgments were not recovered until after the plaintiffs had taken possession of the property described in the complaint.

That the defendant, under and by virtue of such execution, thereafter levied upon and took possession of and sold the property described in the complaint, and which was then of the value of \$6,043.75.

And the referee found as conclusions of law:

First, that said instrument executed by Shoemaker was void as against the Third National Bank of Buffalo and as against creditors of and purchasers in good faith from said Shoemaker.

Second, that the plaintiffs cannot maintain the action and the defendant is entitled to judgment dismissing the complaint.

After judgment in pursuance of this report, it was affirmed by the general term of the supreme court, and the plaintiffs appealed to this court.

Mr. Spencer Clinton with Mr. Alonzo Tanner, for appellants:

Possession by the plaintiffs was sufficient to enable them to maintain the action, the defendant being a wrong doer.

Stowell v. Otis, 71 N. Y. 36; *Hendricks v. Decker*, 35 Barb. 298.

The statute (Laws of 1858, chap. 314) by implication gives the assignee a statutory right to property conveyed in fraud of creditors; and this statutory right took the place of the specific lien of individual creditors required by law as a condition of their right to contest the validity of the transfer.

Southard v. Benner, 72 N. Y. 424, 427; *Brackett v. Harvey*, 25 Hun, 502.

The assignee, having taken possession of the property as such, is liable, if he permits any person to remove it from his possession.

McQueen v. Babcock, 41 Barb. 340.

The bank not having made its lien specific, by judgment and execution prior to the filing of the mortgage, cannot attack its validity upon the ground that it was not filed. It is not a creditor within the meaning of the statute.

2 R. S. 70, § 5; *Frisbey v. Thayer*, 25 Wend. 896-898; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Matter of Collins*, 12 Blatchf. 548; *Jones v. Graham*, 77 N. Y. 628; *Kennedy v. Nat. Union Bk.* 23 Hun, 494; *Hicks v. Williams*, 17 Barb. 528; *Hale v. Sweet*, 40 N. Y. 97; *Lane v. Lutz*, 1 Keyes, 203.

The clause in the mortgage covering stock in trade did not vitiate it.

Chatham Nat. Bk. v. O'Brien, 6 Hun, 281; *Brackett v. Harvey*, 91 N. Y. 214, 224.

Mr. Adelbert Moot, for defendant:

The bill of sale or mortgage not having been followed by an immediate change of possession, the continued possession in the mortgagor is fraudulent.

2 Kent. Com. 12th ed. 527; *Tryne's Case*, 1

Smith, L. C. 88, note (a). *Peiser v. Peticolas*, 50 Tex. 688; *S. C.* 82 Am. Rep. 621; *Sturtevant v. Ballard*, 9 Johns. 837.

It at least is *prima facie* evidence of fraud, calling for an explanation.

3 R. S. 136, § 5; *Doane v. Eddy*, 16 Wend. 528; *Randall v. Cook*, 17 Wend. 53; *Griswold v. Sheldon*, 4 N. Y. 597; *Chapin v. Shafer*, 49 N. Y. 407.

So of property to be acquired.

20 Alb. L. J. 506.

The failure to file the bill of sale (which was in reality a mortgage) made it absolutely void as to all persons who became creditors, by contract or otherwise, of Shoemaker, while it was not on file.

3 R. S. 7th ed. 2249; Thomas, Mort. 495; Laws 1883, chap. 279, § 2; 8 R. S. 143, § 9; *Otis v. Sill*, 8 Barb. 102.

This is so as to simple contract creditors who have no judgment.

Clark v. Gilbert, 14 N. Y. Week. Dig. 241.

The Act does not change the effect of not parting with possession, but only adds another ground to those already existing, upon which a mortgage can be declared void.

Wood v. Lowry, 17 Wend. 492; *Smith v. Acker*, 28 Wend. 653.

If the mortgage is not filed and there is no immediate and continued change of possession, it is absolutely void as to all creditors.

Benedict v. Smith, 10 Paige, 126; Thomas, Mort. 495; *Powers v. Freeman*, 2 Lans. 127; *Hathaway v. Howell*, 54 N. Y. 97; *Steele v. Benham*, 84 N. Y. 634.

The mortgage is void because of the agreement that the mortgagor or vendor could continue to use the property as his own.

Potts v. Hart, 99 N. Y. 168; *Smith v. Cooper*, 27 Hun, 565; *Gardner v. McEwen*, 19 N. Y. 123; *Southard v. Benner*, 72 N. Y. 429; *Edgell v. Hart*, 9 N. Y. 213; *Brackett v. Harvey*, 91 N. Y. 214.

This will be the case, although the agreement is not found in the instrument itself.

Potts v. Hart, 99 N. Y. 168; *Delaware v. Ensign*, 21 Barb. 85.

Such an agreement may be inferred from the fact that such sales were made; and if such agreement is inferred, the instrument is absolutely fraudulent and void as to creditors.

Potts v. Hart, 99 N. Y. 168; Thomas, Mort. 482; *Southard v. Benner*, 72 N. Y. 429; *Wagner v. Jones*, 7 Daly, 375; Jones, Chat. Mort. § 401.

Being void as to some of the articles, it is void as to all; because it shows an intent to defraud.

Russell v. Winne, 37 N. Y. 591.

There is no distinction now between bills of sale given as security and chattel mortgages; although formerly a bill of sale was absolutely void if not followed by an immediate change of possession, while the omission to have a change of possession on the part of a mortgagor could be explained.

Doane v. Eddy, 16 Wend. 528; *Randall v. Cook*, 17 Wend. 53.

If the credit is extended in good faith, while the mortgage is not filed or refiled, although the judgment is not recovered and execution issued thereon until the mortgage is filed, still the creditor may successfully attack the mortgage, upon that ground or upon the ground that it is fraudulent.

Thompson v. Van Vechten, 27 N. Y. 568, 582; *Rinckey v. Stryker*, 28 N. Y. 45; *Frost v. Mott*, 34 N. Y. 253, cited in *Parshall v. Eggert*, 54 N. Y. 22; *Dutcher v. Smartwood*, 15 Hun, 81.

Such facts would be available to the sheriff as a defense to a suit of trover.

Rinckey v. Stryker, 28 How. Pr. 75; *S. C.* 28 N. Y. 45; *Frost v. Mott*, 34 N. Y. 253. See also Thomas, Mort. § 345.

The fact that plaintiffs obtained possession, under and by virtue of their void mortgage, one day before defendant's levy on execution, does not give them a cause of action.

Jones, Chat. Mort. § 245; *Stewart v. Beale*, 7 Hun, 405; *S. C.* affd. in 68 N. Y. 629; *Dutcher v. Smartwood*, 15 Hun. 81; *Frost v. Warren*, 42 N. Y. 204.

While the statute gives the assignee the right to maintain an action to set aside a mortgage, given by the assignor, as fraudulent towards creditors, it does not thereby take it away from a judgment creditor.

Crouse v. Frothingham, 97 N. Y. 105; *Devey v. Moyer*, 72 N. Y. 70.

The right way in which to test a pretended title is to sell on execution, indemnify the sheriff and defend him when he is sued.

Dutcher v. Smartwood, 15 Hun, 81; *Wagner v. Jones*, 7 Daly, 375; *S. C.* affd. in 77 N. Y. 590; Jones, Chat. Mort. § 345.

Danforth, J., delivered the opinion of the court:

Upon these facts this appeal should succeed. The plaintiffs were in actual possession of the property when the defendant, against their will, forcibly seized, removed and sold it. This was enough without any other evidence of title to maintain the action (*Stowell v. Otis*, 71 N. Y. 36), except against the true owner or one connecting himself in some way with the true owner.

The general denial does not avail the defendant, for justification is not admissible under it. The only defense is in the affirmative answer, which sets up that the property seized was the property of Shoemaker or the property of Levi Allen, as his assignee.

So far as this answer merely shows title out of the plaintiffs, it is of no consequence. If the title is in fact in Allen, the defendant does not connect himself with it. He must therefore rely on showing title in Shoemaker, against whose property only he has execution. This he does not do. On the contrary, the answer asserts that Allen, as assignee of the goods, etc., of Shoemaker, is a necessary party to the action; but no steps appear to have been taken to bring him in, in accordance with this averment.

The referee in substance finds that on the 20th of July, 1880, and before the judgment against him was obtained, Shoemaker executed a general assignment of all his property, including that in question, to Allen, for the benefit of his creditors; and by necessary implication he also finds that on that day he delivered possession of it to his assignee; for he says Shoemaker continued in possession until he executed the assignment.

The assignee is not a party to the suit, and the defendant's justification fails because he shows that the title is in Allen, against whom he has no claim. It is conceded in the opinion of the court below that if the judgment creditor

was seeking to secure the avails of the mortgaged property by proceedings in the nature of a creditor's bill, and did not attack the assignment as well as the mortgage, then it would not be entitled to relief, because a judgment setting aside the incumbrance by mortgage, would not afford the bank any relief, as the property or the avails of it would belong to the assignee; and so it was held by us in *Spring v. Short*, 90 N. Y. 538.

The form of the action is immaterial where the same facts appear. Here they do. The respondent argues that showing title in Allen will not enable the plaintiffs to sustain the action, without that title has been transferred to them. Doubtless that is so. They did not need to show it. Possession was enough, *prima facie*, to sustain the action; and it does appear, moreover, that possession was taken by Allen's permission. But as the goods when seized by the defendant were in the actual possession of the plaintiffs, the burden was upon the defendant, either to prove title in Shoemaker or to connect himself with Allen's title and show that the taking was by his authority or by virtue of process or right acquired by legal proceedings against him. *Merritt v. Lyon*, 3 Barb. 110; *Demick v. Chapman*, 11 Johns. 132; *Hurd v. West*, 7 Cow. 752.

Neither of these things was accomplished. No invalidity is found as to the assignment, nor any unwillingness on the part of the assignee to perform his duty under it. He stands, not a mere representative of the debtor but of the rights of creditors; and may impeach the assignor's conveyances, although the debtor could not do so. Laws 1858, chap. 314.

So also, as the title to the property passed to him by the assignment, he could doubtless, as the defendant's counsel says, maintain this action in trover. He could do so because he was the general owner. But so also could the plaintiffs, because their possession was, upon the findings of the referee, by the permission of the assignee. They had thus a special property, or interest in the articles, and a recovery by either would be a bar to an action by the other. But it is enough to justify this action that at the time the defendant levied, the judgment and execution debtor had no right or interest in the property, it having passed from him by the prior assignment to Allen. It then ceased to be his property, and as this was before judgment, so of course it was before execution issued; and the goods were neither actually nor constructively bound by it. 2 R. S. 365, § 13; Code, § 1405.

It is therefore unnecessary to consider other questions raised by the appellants, or anticipate how they may stand upon another trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except **Finch, J.**, dissenting; **Andrews, J.**, not voting and **Miller, J.**, absent.

EQUITABLE CO-OPERATIVE FOUNDRY CO., *Resp't.*

Annette C. HERSEE, *Exrx.*, *Appt.*

Knowledge of fraud which will entitle a vendor to rescind a sale is essential to
N. Y.

put him to an election of remedies. Hence where, in an action by vendor in disaffirmance of the contract, there is no finding or request to find that, at the time of bringing a previous action for the contract price of the goods sold, plaintiff knew of the fraud, no error is disclosed in a ruling that the bringing of the action on the contract was not a waiver of the right to disaffirm.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term, in the Fourth Department, affirming a judgment in favor of plaintiff on the report of a referee, in an action of trover. *Affirmed.*

Reported below, 33 Hun, 169.

Trover for certain stoves and stove furniture, claimed to be the property of the plaintiff and to have been converted by one Thompson Hersee to his own use.

Thompson Hersee, the original defendant, died after suit brought, and his executrix has been substituted in his stead.

The property in question was sold and delivered by the plaintiff in the summer and fall of 1876 to the firm of M. Fisher & Co. on credit. The firm was engaged in the business of selling stoves and hollowware in the City of Buffalo, where the defendant resided. At the time of the purchase, the firm was insolvent and was indebted in a large amount, nearly \$10,000 of which was owing to the defendant.

The plaintiff claims that it was induced to sell said goods to said firm, on credit, by false and fraudulent representations made by Fisher as to the means and pecuniary condition of the firm; and that said firm, knowing its insolvency, purchased the said goods with intent not to pay for them.

On the 12th of August, 1876, the original defendant herein commenced an action against the members of said firm, in which he claimed judgment against them for the sum of \$9,471.34, besides interest, upon promissory notes executed by said firm to him, at different dates, from the first of May, 1872 to the 29th of July, 1876. The defendants in that action made default, and Hersee did not enter up judgment against them until the 23d of October, 1876. Most of the goods which form the subject of this action were delivered to Fisher & Co., and received by them after Hersee sued them and before he entered up judgment. Soon after the said judgment was docketed, Hersee, by virtue of an execution issued on the same, levied upon a portion of said property of the value of \$711.50, and bid them off at sheriff's sale, applying the amount of his bid towards the satisfaction of his said judgment. The plaintiff was informed of Hersee's judgment in October, soon after it was obtained.

On the 25th of November, 1876, the plaintiff signed an agreement to compromise its debt against Fisher & Co. at twenty-five cents on the dollar, conditioned, however, that it was not to be binding until all the creditors assented to the same. At the time of signing said compromise, the plaintiff had an oral stipulation with Fisher & Co. for a preference. The conditions of the compromise were not fulfilled and the plaintiff received nothing under it.

On the 28th of March, 1877, the plaintiff commenced suit against Fisher and Whiting on the contract for the purchase of the goods. Fisher and Whiting appeared in the action by attorney but did not answer, and made default.

On the 18th of April the plaintiff's attorney served notice of adjustment of costs, but no adjustment was had and no judgment was docketed; and the suit remained in that condition until after this action was commenced. The defendant herein set up that action as a defense, claiming that the plaintiff had elected thereby to affirm the contract; and thereupon the plaintiff, on the 26th of September, 1879, obtained and entered an *ex parte* order at a special term of the supreme court that the said action be discontinued on payment of defendant's costs. On the same day the plaintiff tendered to the attorney of Fisher and Whiting \$10 for their costs in said action, which he declined to accept.

On May 14, 1877, the plaintiff commenced suit against Hersee, in which Fisher and Whiting were named as defendants; but the summons and complaint were served on Hersee alone, and he alone answered. The allegations in the complaint upon which issue was taken and a trial had were, in substance, that the purchase of said goods was fraudulent and that Hersee participated in the fraud. The action was tried and judgment rendered in favor of Hersee, which was affirmed at general term, in June, 1879.

The present action was commenced the 31st of July, 1879. The referee before whom it was tried found among other things that, in the last of said actions above mentioned, the court decided that the purchase by Fisher & Co. was fraudulent but that Hersee was not a party to the fraud; and also found as conclusions of law that by reason of the fraud so found, no title to the property vested in Fisher & Co.; that as the defendant parted with no value for the goods, he acquired no better right to them than was possessed by Fisher & Co.; that defendant's levy was a conversion; that none of the subsequent acts of the plaintiff constituted a waiver of the cause of action herein, and that the plaintiff is entitled to recover of the defendant the value of so much of said property as was levied on by him, with interest.

Mr. G. A. Scroggs, for appellant:

Fraud being a wrong, and quasi criminal, it is never presumed.

1 Best, Ev. § 314; 2 *Id.* 349.

To make out a case of fraud, two things must be established: 1. The facts and circumstances on which it is predicated. 2. The fraudulent intent of the person. These are questions of fact, and the *onus probandi* is on the accusing party.

1 Best, Ev. § 269; 1 Greenl. Ev. § 74; 1 Starkie, Ev. 418; 8 R. S. 6th. ed. 145, § 4.

Where witnesses are equally credible and the testimony of one contradicts the other, it is a failure of proof.

Allen v. McCrasson, 42 Barb. 662.

The plaintiff having a full knowledge of the fraud alleged in the complaint herein, when it commenced the action against Fisher & Whiting, thereby elected to waive the fraud, affirm the contract and rely on that remedy.

6 Bac. Abr. title, *Election*, 431; *Morris v. Rexford*; 18 N. Y. 552; *Littlefield v. Brown*, 1 Wend.

404; *McElroy v. Mancius*, 13 Johns. 122; *Ransom v. Turner*, 4 Johns. 469. See *Sanger v. Wood*, 3 Johns. Ch. 416; *Masson v. Boet*, 1 Denio, 69; *Wright v. Pierce*, 4 Hun, 351; *Roth v. Palmer*, 37 Barb. 652; *Hughes v. Vt. Copper Min. Co.* 72 N. Y. 207; *Smith v. Knapp*, 30 N. Y. 581; *Lloyd v. Brewster*, 4 Paige, Ch. 537; Bigelow, Est. 578, 581; Pomeroy, Rem. 570, 574, 584, 801; Hermon, Est. 461-464, § 471; 3 Daly, 171.

The plaintiff's delay to disaffirm the contract of sale and follow his property, and his long acquiescence in the purchaser's possession, amounted to a waiver of all right to reclaim it.

Morris v. Rexford, 18 N. Y. 552; *Masson v. Boet*, 1 Denio, 69; *Hennequin v. Sands*, 25 Wend. 640; *Cobb v. Hatfield*, 46 N. Y. 533; *Asa v. Putnam*, 1 Hill, 302; *Wright v. Pierce*, 4 Hun, 351; *King v. Fitch*, 2 Abb. App. Dec. 519; *Steven v. Hyde*, 32 Barb. 171; *Ross v. Titterton*, 6 Hun, 280.

Mr. Geo. H. Humphrey, for respondent.

Rapallo, J., delivered the opinion of the court:

The point is elaborately and ably discussed in the opinion of Smith, *P. J.*, at general term, that the bringing of the action by the plaintiff against Fisher & Whiting, for the contract price of the goods sold to them, was not an election to affirm the contract, which was final and precluded the plaintiff from subsequently bringing this action in disaffirmance of the contract, because the first action was abandoned and discontinued before trial or judgment, and no provisional remedy or other benefit was obtained by the plaintiff therein, nor was the position of the parties changed thereby.

We do not, however, deem it necessary to pass definitely upon that point, for the reason that there appears in the case no finding or request to find that at the time of the bringing of the action on the contract, the plaintiff had knowledge of the fraud which entitled it to rescind the sale. This fact was essential to put the plaintiff to its election of remedies; and it should appear in the findings of fact, to disclose error in the conclusion, that the bringing of the action was not a waiver of the right to disaffirm the contract.

The burden of showing error in the conclusion of the referee is on the appellant; and nothing is better settled than that this court will not, for the purpose of reversing a judgment, look into the evidence to supply a fact not found. It is only for the purpose of affirming a judgment that the court will look at the evidence to supply a fact not specified in the findings.

The mere bringing of the action for the price of the goods, unless it was brought with knowledge of the fraud, was not a binding election, or a waiver of the right to rescind; and no error in the conclusion of the referee is disclosed by the record.

The point made in the dissenting opinion of Baker, *J.*, at general term: that, the finding of the referee that before the commencement of this action the plaintiff demanded of the defendant possession of the goods and the defendant refused to surrender them, is unsupported by the evidence, and is not available to the appellant in this appeal. If the finding was un-

supported by any evidence it was an error of law reviewable in this court; but in order to raise the point here, it was necessary that the finding should have been excepted to, and the case contains no such exception.

The other points are fully discussed and, I think, properly disposed of in the prevailing opinion at general term.

The judgment should be affirmed.

All concur.

Edgar MUNSON *et al.*, *Appts.*,

v.

SYRACUSE, GENEVA & CORNING R. CO. *et al.*, *Repts.*

1. An agreement made, on the purchase of rights of way by a railroad corporation, to pay therefor in bonds of the purchasing corporation, is within the powers of such corporation; and the facts that the line of the purchasing corporation was not formally located on the line proposed to be purchased, and was subsequently located on a different line, do not affect the question of corporate power.
2. A contract made by an individual, in connection with others, with a railroad corporation in which he is a director, binding the corporation to purchase certain property from him and his associates, such director having participated in the action of the corporation in assuming the obligation, is within the rule which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents.
3. Such contract is not rendered valid by the fact that its effect was merely to substitute the corporation for certain of its individual promoters, who had previously contracted for the purchase; nor by the fact that the property consisted of real estate, track, etc., of another railroad corporation which the present vendors had purchased under a mortgage foreclosure; the transaction in question not being an arrangement for the reorganization of an existing railroad within the provisions of Laws 1873, chap. 710.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment in favor of defendant entered upon report of a referee, on the second trial of an action for the specific performance of a contract to deliver railroad bonds. *Affirmed.*

Reported below, 29 Hun, 76.

The facts and the questions presented are stated in the opinion.

Messrs. E. D. Mills, Geo. T. Spencer, B. W. Huntington, Richard Hand and Samuel Hand, for appellants:

1. The contract in question is not against public policy. The scheme embraced in the

contract is such as is expressly authorized by the statutes which permit mortgages of railroad property on foreclosure to become purchasers of and convey the same (Laws of 1857, chap. 444), and the organization of a new company by such purchasers, their assignees and associates.

Laws of 1854, chap. 232, § 1; Laws of 1873, chap. 469, § 1; Laws of 1873, chap. 710, § 1; *People v. Brooklyn, P. & C. I. R. Co.* 89 N. Y. 75.

It is no legal objection to an agreement, otherwise valid and consistent with an honest purpose, that it may incidentally restrict competition at a public sale.

Atchison v. Mallon, 48 N. Y. 147, 151; *Jones v. Caswell* 3 Johns. Cas. 38, note; *Marsh v. Russell*, 66 N. Y. 288; *People v. Stevens*, 71 N. H. 546; *Marie v. Garrison*, 88 N. Y. 14.

Agreements by which one shall bid for the benefit of himself and one or more parties are not opposed to public policy.

Cases cited above: *Bellows v. Russell*, 20 N. H. 427; *Breslin v. Brown*, 24 Ohio St. 565; *S. C.* 15 Am. Rep. 627; *Cornell v. Utica, etc., R. R. Co.* 61 How. Pr. 193.

Generally it may be stated that the rule which invalidates contracts upon the ground of preventing or restricting competition at public sales is limited to cases where that is the primary object, and excludes cases where that effect is merely incidental.

Bame v. Drew, 4 Denio, 287; *Wicker v. Hoppeck*, 6 Wall. 94; (73 U. S. bk. 18, L. ed. 752); *Phippen v. Stickney*, 3 Met. 384; *Garrett v. Moss*, 20 Ill. 549; *Gibbs v. Smith*, 115 Mass. 592; *Smith v. Ullman*, 58 Md. 183; *Jones v. North*, 12 Eng. R. 826; *Marie v. Garrison*, 88 N. Y. 14; *McKenna v. Bolger*, 17 N. Y. Week. Dig. 431; *S. C.* 30 Hun, 384.

The law will not presume a contract illegal or against public policy when it is capable of a construction which will make it consistent with the law, and that construction is to be preferred which will support rather than that which will avoid it.

Ormes v. Dauchy, 82 N. Y. 448, 448; *Curtis v. Gokey*, 68 N. Y. 304; *Bigelow v. Benedict*, 70 N. Y. 202, 204; *Harris v. Tumbidge*, 83 N. Y. 92, 99.

A director or other officer of a corporation may lawfully become its creditor; and when such he has all the rights and is entitled to all the remedies of other creditors.

Duncomb v. N. Y. H. & N. R. R. Co. 84 N. N. 190; *S. C.* 88 N. Y. 1; *Harpending v. Munson*, 91 N. Y. 650; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (Bk. 23, L. ed. 328); *Elliott v. Wood*, 45 N. Y. 71; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Atty-Gen. v. Great Eastern R. Co.* 27 Eng. R. 672.

This is a question in which neither the defendants nor the public have any concern. A contract in violation of a fiduciary relation of the party to it is not void; and it is voidable only at the election of the beneficiary.

Olcott v. Tioga R. R. Co. 27 N. Y. 546, affg. 40 Barb. 179; *Boerum v. Schenck*, 41 N. Y. 182; *Harpending v. Munson*, 91 N. Y. 654; *Thomas v. Brownville, etc., R. R. Co.* 109 U. S. 524 (Bk. 27, L. ed. 1019.)

The Sodus Bay & Corning Railroad Company became insolvent January 1, 1874; and consequently had continued insolvent nearly

eighteen months prior to the date of the contract, and if it was not for all purposes *ipso facto* dissolved, Munson's fiduciary relations to it were at an end.

2 R. S. 463, § 88; *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 387; *Bank of Columbia v. Atty-Gen.* 3 Wend. 595; *Brandt v. Benedict*, 17 N. Y. 99; *Webster v. Turner*, 12 Hun. 264; *Denike v. N. Y. & R. Lime, etc., Co.* 80 N. Y. 599; *Loose v. Bullard*, 79 N. Y. 404.

Neither stockholders nor creditors had any interest in the mortgaged property to protect. The road was insolvent, the mortgage debts amounting to more than its assets. There could be no fiduciary relations in regard to interests having no existence.

Denike v. N. Y. & R. Lime, etc., Co. 80 N. Y. 599, 608; *Hoyle v. Plattsburg & M. R. R. Co.* 54 N. Y. 330; *Harpending v. Munson*, 91 N. Y. 654.

The contract, the assignment of it by Magee, its assumption by the defendant Company, are all admitted by the answer. There is nothing in the complaint showing Munson's relations to the defendant Company. If defendants sought to avoid their contract upon that ground, it was matter of affirmative defense and must have been pleaded.

Bunge v. Koop, 48 N. Y. 225; *Bates v. Rosekrans*, 23 How. Pr. 98; approved in *Clark v. Dillon*, 97 N. Y. 370; *Wright v. Delafeld*, 25 N. Y. 266; *Equitable L. Asso. Soc. v. Cuyler*, 75 N. Y. 515; *Hall v. U. S. Reflector Co.* 30 Hun. 375; *Hudson v. Swan*, 83 N. Y. 552; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 420; *Barnes v. Brown*, 80 N. Y. 535; *Risley v. Indianapolis B. & W. R. R. Co.* 62 N. Y. 240.

The resolution by which the contract was assumed by the company was unanimously passed at a meeting of the directors; making, without Munson, nine of the whole thirteen. A majority constituted a quorum for the transaction of business; and the decision of a majority duly assembled is valid as a corporate act.

1 R. S. 600 § 6.

Munson's vote was not necessary to the passage of the resolution; and it does not appear that the same in any way influenced its passage.

Butts v. Wood, 37 N. Y. 817; *Coleman v. 2d Ave. R. R. Co.* 88 N. Y. 201, 203, 204; *Union Pac. R. R. Co. v. Credit Mobilier*, 135 Mass. 387; *Cole v. Boardman*, 123 Mass. 548.

The directors, not including Munson, who voted for the resolution by which the contract was assumed, owned more than two thirds of the stock. It is the general rule, sanctioned by the policy of the law, that those who have the largest interest in corporations may control them.

Barnes v. Brown, 80 N. Y. 537; *Van Cott v. Van Brunt*, 82 N. Y. 540, 541.

The affairs of a railroad corporation must be managed by its board of directors.

General R. R. Law, chap. 140; Laws of 1850, §§ 1-6.

The fact that Munson, subsequent to the making of the contract, became a director and the president of the new company, in no way relieves defendants from their obligations. The

question of the legality of a contract is to be determined with reference to the time when it was made.

Mayor v. Norfolk R. Co. 30 Eng. L. & Eq. 133; *Hawkes v. Eastern Counties R. Co.* 15 Eng. L. & Eq. 358; affd. 35 Eng. L. & Eq. 8; *Green's Brice*, *Ultra Vires*, 494.

It will be presumed that the purpose of the contract and that of forming the new corporation was lawful, unless the contrary distinctly appears. No inference that a transaction was illegal can be allowed, unless absolutely necessary.

Nelson v. Eaton, 26 N. Y. 410; *Mechanics Bk. Asso. v. Spring Valley S. & L. Co.* 25 Barb. 420; *Farmers L. & T. Co. v. Curtis*, 7 N. Y. 466.

Contracts preliminary to the formation of a corporation by persons acting in behalf of the corporation to be formed, if legitimate, are binding on the corporation when formed. Such persons are the agents to bring the corporation into existence; the contracts are the means by which this is done; and the formation of the corporation is a ratification of the contracts.

Hawkes v. Eastern Counties R. Co. 15 Eng. L. & Eq. 358; *Lindsay v. G. N. R. Co.* 19 Eng. L. & Eq. 87; *Preston v. Liverpool R. Co.* 7 Eng. L. & Eq. 124; *Scottish, etc. R. Co. v. Stewart*, 3 McQ. 382, 416; *Mayor, etc. v. Norfolk R. Co.* 30 Eng. L. & Eq. 120; *Lorillard v. Clyde*, 66 N. Y. 384, 389; *Bommer v. Am. Spiral, etc. Co.* 81 N. Y. 468, 472, 473; *Whitney v. Wyman*, 101 U. S. 392 (Bk. 25, L. ed. 1050).

Of this character are subscriptions for stock in advance of the formation of a corporation, which become binding as soon as it comes into existence.

Reformed Ch. v. Brown, 29 Barb. 338; *Buffalo & J. R. R. Co. v. Clark*, 22 Hun. 363, 364; *Supervisors v. Wisconsin Cent. R. R. Co.* 121 Mass. 472; *Western R. Co. v. Babcock*, 6 Met. 346, 354; *Lawson v. Milwaukee & N. R. Co.* 30 Wis. 597.

II. If the contract of a corporation is such as it had power under any circumstances to make, it must be regarded as made in pursuance of such power; and it cannot be impeached as *ultra vires*.

Farmers L. & T. Co. v. Curtis, 7 N. Y. 466; *Moss v. McCullough*, 7 Barb. 279; *Vose v. Condre*, 49 N. Y. 386; *N. Y. S. L. & Trust Co. v. Helmer*, 77 N. Y. 64.

The rule that the plea of *ultra vires* will not prevail whether for or against a corporation, when it will not advance justice but on the contrary will accomplish a legal wrong, is applicable to the present case.

Whitney Arms Co. v. Barlow, 63 N. Y. 62; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Railway Co. v. McCarthy*, 96 U. S. 267 (Bk. 24, L. ed. 695); *Thompson v. Lambert*, 44 Iowa, 236; *Hurd v. Green*, 17 Hun. 327, 344, 345; *Rome Savings Bank v. Kramer*, 32 Hun. 270, 276.

There is nothing in the contract by which Magee is required or expected, unlawfully or improperly, to control or influence the proposed Company. The contract contemplates nothing more in this respect than the uniform and ordinary exercise of the legitimate powers of the Company for a legitimate purpose.

Laws 1850, chap. 140, § 28, subd. 10; *Barry v. Merchants Exch. Co.* 1 Sandf. Ch. 280, 289;

Curtis v. Leavitt, 15 N. Y. 9; *Legrand v. M. M. Assn.* 80 N. Y. 638.

III. The action is properly brought for a specific performance. The object of the contract was to procure the bonds of the new company to be organized, as an investment. A recovery of money would be no adequate equivalent for the bonds; and judgment for damages could not be collected against the Corporation, which is deeply involved.

Stuyvesant v. Mayor, 11 Paige, 414, 426, 427; *Malins v. Brown*, 4 N. Y. 408; *White v. Schuyler*, 81 How. Pr. 38; *Cushman v. Thayer, etc.* Co. 76 N. Y. 365; *Johnson v. Brooks*, 98 N. Y. 387.

IV. The conveyance by the referee in the foreclosure suit, and that tendered by Munson to defendants, cover all the title, estate, rights and interests which were in contemplation of the parties when the contract was made.

The contract is to be interpreted and applied to the subject matter, by reference to the circumstances and situation of the parties at the time it was made.

Springsteen v. Samson, 32 N. Y. 708; *Blossom v. Griffin*, 18 N. Y. 573; *Hasbrook v. Paddock*, 1 Barb. 637; *White's Bank v. Myles*, 73 N. Y. 335, 338; *Bridger v. Pierson*, 45 N. Y. 601.

The referee's deed to Munson and his to the defendant Company conveyed all the property, rights of way, franchises and interests which were provided for by the contract.

Riggs v. Pursell, 66 N. Y. 193; *White v. Seaver*, 25 Barb. 285; *Tompkins v. Hyatt*, 28 N. Y. 347.

The rule that a purchaser on foreclosure sale may require a perfect title has no application to a case where he purchases only a limited interest that is apparent, either from the mortgage or otherwise.

Brown v. Huff, 5 Paige, 235, 241; *Mills v. Van Voorhis*, 23 Barb. 125; *Bates v. Delavan*, 5 Paige, 299, 306, 307; *Winne v. Reynolds*, 6 Paige, 407, 414; *Boyd v. Schlesinger*, 59 N. Y. 301, 308; *Riggs v. Pursell*, 66 N. Y. 193, 198, 199.

A railroad mortgage executed at the inception of the undertaking, or to procure funds for the construction of the road, is intended only to cover titles and rights as they are procured; and as they are procured they become subject to the mortgage. Titles are necessarily incomplete during the process of construction.

Seymour v. Canandaigua & N. F. R. R. Co. 25 Barb. 284; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Hulett v. Whipple*, 58 Barb. 224; *Dwight v. Newell*, 8 N. Y. 185; *Benjamin v. Elmira R. R. Co.* 46 Barb. 411; *Shaw v. Bill*, 95 U. S. 10, 15, 16 (Bk. 24, L. ed. 333, 335).

V. The plaintiffs' right of action did not depend upon their ability at all times to perform, unless at least the defendants were ready. In actions for specific performance of contracts for purchase of land it is sufficient if vendor is able to make title at the time of the decree. The tender of a deed is not a condition precedent.

Welles v. Smith, 7 Paige, 22; *Pierce v. Nichols*, 1 Paige, 244; *Brown v. Huff*, 5 Paige, 235; *Reformed Protestant Dutch Ch. v. Mott*, 7 Paige, 77; *Viele v. Troy & B. R. R. Co.* 21 Barb. 381; *affd.* in 20 N. Y. 184.

The defendants can take no advantage of the

plaintiffs' delay, unless they have shown themselves ready; of which there is no proof, in the finding of the referee or otherwise.

Merchants Bank v. Thomson, 55 N. Y. 7, 12, 13.

When no certain time is fixed for performance, the party from whom performance is due is not in default until he has been notified or required to perform by the other party; and until some act or notice on the part of the latter indicating the contrary, he must be regarded as consenting to the delay.

Laird v. Smith, 44 N. Y. 618; *Stevenson v. Maxwell*, 2 N. Y. 408; *Van Campen v. Knight*, 68 Barb. 205; *Hubbell v. Van Schoenig*, 49 N. Y. 326, 331; *Adams, Eq.* p. 88.

The defendants, not having given plaintiffs notice that performance was required at any particular time, or objected to delay, cannot now set up delay as an excuse for nonperformance on their part.

Leslie v. Ins. Co. 63 N. Y. 33; *Meyer v. Ins. Co.* 78 N. Y. 516.

By the whole course of conduct of defendants, and especially the action of the directors of defendant Company, when the deed was tendered by Munson and the bonds demanded, omitting as they did to make objection, on the ground of delay or otherwise, they waived such objection.

Wiswall v. McGowan, 1 Hoffman, Ch. 125, 139; *Fry, Spec. Perf.* pp. 308, 324, §§ 703, 745, 746 (Am. ed. pp. 409, 428, 429); *Lawrence v. Dale*, 3 Johns. Ch. 23; *McKay v. Carrington*, 1 McLean, 50; *More v. Smedburg*, 8 Paige, 600, 607.

If the defendants intended to repudiate their contract, upon the ground of delay, they ought so to have advised plaintiffs before the foreclosure sale, so that they need not to have been at the expense of the purchase. By their silence on this point when they ought to have spoken, they are estopped from alleging delay as a ground of defense.

Dougrey v. Topping, 4 Paige, 94; *Thompson v. Blanchard*, 4 N. Y. 303; *Wood v. Sealey*, 32 N. Y. 105; *Hogan v. Brooklyn*, 52 N. Y. 282; *Brown v. Brown*, 30 N. Y. 519; *Meyer v. Knickerbocker L. Ins. Co.* 78 N. Y. 516.

VI. To constitute a novation of the contract which would have the effect of releasing Magee, there must have been an express agreement of plaintiffs to accept the new obligation in satisfaction of the old.

Domat, Civ. Law, p. 914, § 2304, 2306; 1 *Pars. Cont.* 180; *Bouv. Law Dic.* 231, title, *Novation*; *Auburn City Bank v. Hunsiker*, 72 N. Y. 252, 257.

The defenses of *ultra vires*, offense against public policy, and incapacity of Munson to contract, are not available to Magee. The contract was valid between him and plaintiffs; it was not impossible to perform; it was not against public policy for Magee to perform it; nor did the fiduciary relations of Munson to the defendant Company exist at the time of the contract.

Kirschman v. Lediard, 61 Barb. 573.

In the absence of proof of any agreement of plaintiffs to release Magee, the presumption is that his liability continued.

Meridan Britannia Co. v. Zinsgen, 48 N. Y. 247.

As in the common case of the agreement of the purchaser of property to pay the debt of the vendor as the consideration of the purchase, the original debtor is not discharged unless by the express agreement of the creditor upon sufficient consideration. The assumption of a mortgage by the grantee of the mortgagor is an illustration.

Noel v. Murray, 13 N. Y. 167, 1 Pars. Cont. 187; *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Bentley v. Vanderheyden*, 35 N. Y. 677; *Calvo v. Davies*, 73 N. Y. 211.

It is admitted and substantially found by the referee that a large amount of the bonds of the defendant Company have been issued and delivered to Magee. These bonds, being in his hands with notice, are chargeable with the equities of plaintiffs.

Story, Eq. Jur. §§ 833, 422-424, 783, 784, 788, 789; *Sacia v. Berthoud*, 17 Barb. 15; *Coll v. Lasnier*, 9 Cow. 320.

Mr. George F. Comstock, with *Messrs. Halcock, Gifford & Doheny*, for respondents:

I. The contract in question, by preventing bidding and competition at said mortgage sale, was against public policy and illegal and void.

Atchenson v. Mallon, 48 N. Y. 147; *Brackett v. Wyman*, 48 N. Y. 667; *Doolin v. Ward*, 6 Johns. 194; *Slingsuff v. Eckel*, 24 Pa. 472; *Gardiner v. Morse*, 25 Me. 140; *Hawley v. Cramer*, 4 Cow. 717; *Wheeler v. Wheeler*, 5 Lans. 855; *Gray v. Hook*, 4 N. Y. 449.

II. Munson, as director and president of the Syracuse, Geneva & Corning Railway Company, could not purchase for it the property which he sold as trustee of the Sodus Bay, etc., Railroad Company.

Aberdeen R. Co. v. Blaikie, 2 Eq. R. 1281; *S. C. 1 McQueen*, 461; *Flanagan v. Great Western R. Co.* L. R. 7 Eq. 116; *Pom. Cont.* § 285; *Waterman*, Spec. Perf. § 218 and cases cited; *Flint & Pere Marquette R. Co. v. Devey*, 14 Mich. 477; *Thomas v. Brownville, Fort K. & Pac. R. Co.* 2 Fed. Rep. 877; *Barnes v. Brown*, 11 Hun. 315, 319; *Fremont v. Stone*, 42 Barb. 169; *N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.* 14 N. Y. 85. See also *Fish v. Leser*, 69 Ill. 894; *Terwilliger v. Brown*, 59 Barb. 9; *affd.* in 44 N. Y. 287; *Torrey v. Bank of Orleans*, 9 Paige, 650; *Greenwood v. Spring*, 54 Barb. 875.

Munson, while director and president of both the Sodus Bay, etc. Railroad Company, and said Syracuse, Geneva and Corning Railway Company, could not make said contract securing to himself a preference or greater advantage than other creditors.

Bliss v. Matteson, 45 N. Y. 22; *Van Epps v. Van Epps*, 9 Paige, 238. See also *Mitchell v. Reed*, 61 N. Y. 123-136.

Munson, as director and president of the Sodus Bay, etc., Railroad Company, could not sell that road out and terminate its existence and form a new company.

Abbot v. Am. Hard Rubber Co. 33 Barb. 578.

Neither could Munson, as director and president of the Syracuse, Geneva and Corning Railway Company, tack on to it the worthless remains of another railroad company, or bind said Syracuse, Geneva and Corning Railway Company to issue its bonds therefor.

Frothingham v. Barney, 6 Hun, 366; *Hart-*

ford & New Haven R. R. Co. v. Cronwell, 5 Hill, 388; *Union Bridge Co. v. Troy & Lansingburgh R. R. Co.* 7 Lans. 240; *Bissell v. Mich. Southern & Northern Ind. R. R. Co.* 22 N. Y. 258; *Winch v. Birkenhead, L. & C. Junction R. Co.* 13 Eng. L. & Eq. 506; *MacGregor v. Deal & Dover R. Co.* 16 Eng. L. & Eq. 180.

Munson's relations as director and president of the Sodus Bay, etc., Railroad Company were such as not only to make his contract to acquire and convey the absolute title to all its property at least voidable, but also such as to render his alleged title of very doubtful validity.

Colburn v. Morton, 3 Keyes, 296; *Gardner v. Ogden*, 22 N. Y. 327.

Plaintiffs' part of said contract, the procuring of title to and conveyance of the entire property in question, was a condition precedent to defendant's giving its mortgage bonds therefor; plaintiffs' part being the first in the order of performance.

Grant v. Johnson, 5 N. Y. 247, 254; *Jones v. Gardner*, 10 Johns. 266; *Green v. Reynolds*, 2 Johns. 207.

III. Where parties, as defendants in this case, contract for a specified property, courts will not compel them to accept worthless parts thereof, nor entirely different property and pay a large price therefor.

Seymour v. De Lancey, 6 Johns. Ch. 222; *Gibert v. Peteler*, 38 N. Y. 165; *Hinckley v. Smith*, 51 N. Y. 21; *Pom. Cont.* p. 421, § 347; *Story*, Eq. Jur. § 749; *Fry*, Spec. Perf. p. 347; *Richmond v. Gray*, 3 Allen, 25; *Pryke v. Waddingham*, 17 Eng. L. & Eq. 534; *Nicol v. Carr*, 35 Pa. 381; *Starnes v. Allison*, 2 Head, 221; *Speakman v. Forepaugh*, 44 Pa. 368; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Griffin v. Cunningham*, 19 Gratt. 571; *Wilson v. Brunsfield*, 8 Blackf. 146; *Jordan v. Fay*, 40 Me. 130; *King v. Knapp*, 59 N. Y. 462; *Leggett v. Mut. L. Ins. Co. of N. Y.* 64 Barb. 28; *Post v. Weil*, 8 Hun. 418; *Seymour v. De Lancey*, Hopkins, Ch. 436; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234; *Haight v. Child*, 34 Barb. 186; *Bensel v. Gray*, 80 N. Y. 517; *Delavan v. Duncan*, 49 N. Y. 485; *Hillreigel v. Manning*, 97 N. Y. 56, 60; *Post v. Bernheimer*, 81 Hun, 247, 253; *Belknap v. Sealey*, 14 N. Y. 144.

IV. The inadequacy of the consideration in this case, that is, the difference between the real value of the property which could be conveyed by the deed tendered and the value of defendants' bonds which plaintiffs ask to have adjudged to them herein, is so great as to render the contract sued on a hard and unconscionable one, and one therefore which a court of equity will not specifically enforce, as such enforcement would produce injustice.

McCarthy v. Kyle, 4 Cold. 348, 355, 356; *Margraf v. Muir*, 57 N. Y. 155; *Stanton v. Miller*, 58 N. Y. 192, 200; *Shriver v. Seiss*, 49 Md. 384; *Waterman*, Spec. Perf. § 169; *Williston v. Williston*, 41 Barb. 635, 642; *Seymour v. De Lancey*, 3 Cow. 445; 25 N. Y. 202; *Willard*, Eq. 268; *Gasque v. Small*, 2 Strobb. Eq. (S. C.) 72; *Smith v. Wood*, 12 Wis. 383. See also *Oil Creek R. R. Co. v. Atlantic & G. W. R. R. Co.* 57 Pa. 65, 72; *Backus' App.* 58 Pa. 187; *Mississippi & Mo. R. R. Co. v. Cromwell*, 91 U. S. 643 (Bk. 23, L. ed. 368); *Osgood v. Franklin*, 2 Johns. Ch. 1, 28; 2 Kent, Com. 487, and note d; *Lloyd v. Wheatly*, 2 Jones, Eq. (N. C.) 267; *Fish v. Leser*

69 Ill. 394; *Plummer v. Keppler*, 26 N. J. Eq. 481, 482.

V. Should the court do anything in the way of specifically enforcing said contract in question, it could or would of course merely and fully carry out the intention of the parties to it. Story, Eq. Jur. § 791.

Andrews, J., delivered the opinion of the court:

We think it would be difficult to affirm the judgment of the court below, dismissing the complaint, if in order to do so it was necessary to uphold the proposition that the original contract of August 13, 1875, between the plaintiffs and Magee, was invalid either because Munson, one of the plaintiffs, was, at the time of entering into the contract, a director of the Sodus Bay and Corning Railroad Company, or for the reason that the contract violated the rule which prohibits combinations to prevent competition at a judicial or other public sale.

The situation was briefly this: the Sodus Bay & Corning Railroad Company was organized in 1871, to construct and operate a railroad from Corning in the County of Steuben, to Sodus Bay, in the County of Wayne, a distance of about eighty-six miles, passing through the Counties of Schuyler, Yates and Ontario, by way of Savona, Penn Yan and Geneva. Of this road the plaintiff Munson was president and a director.

In 1872 the corporation created a mortgage on its projected road, its franchises and property, for \$1,500,000, to secure a contemplated issue of bonds to that amount, to be used in the construction of the road. It proceeded to secure rights of way over a portion of its line, graded about thirty miles of its track between Savona and Geneva; and expended in the aggregate, in securing titles and in the prosecution of the work, the sum of \$250,000. It issued bonds under the mortgage to the amount of \$257,000, from the proceeds of which the expenditures were made.

At the date of the contract between the plaintiffs and Magee, August 13, 1875, the plaintiffs held and controlled of the bonds \$241,000 in amount, the remaining \$16,000 being in the hands of a former treasurer of the company, whose title thereto seems to have been disputed, but who subsequently received a dividend thereon from the proceeds of the mortgage sale.

The title of the plaintiffs to the \$241,000 of bonds was not questioned; and there is no suggestion that they were not *bona fide* holders for value, or that the bonds did not represent a valid debt against the company for their full amount.

In January, 1874, the company became insolvent. It defaulted in the payment of the interest on its bonds at that date; and in the spring of 1875 all operations on the road were suspended, and the further prosecution of the enterprise was practically abandoned. In short, when the contract of August 13, 1875, was made, the company was hopelessly bankrupt; the work had stopped; the interest on its bonds had been unpaid for eighteen months, and practically its whole property consisted of disconnected rights of way over a portion of its route, and a road bed partially graded between Savona and Geneva; and whatever property it had N. Y.

of any value was acquired through the means furnished by the holders of the bonds.

Under these circumstances the parties entered into the contract of August 13, 1875. It recites that the plaintiffs own and represent \$241,000 of the bonds of the Sodus Bay & Corning Railroad Company, and that Magee, the other party to the contract, represents the persons and interests proposing to organize another railroad company for the construction of a railroad from the vicinity of Corning to Geneva.

The parties of the first part (the plaintiffs) agree to proceed at once to secure the foreclosure of the mortgage, and purchase on the foreclosure sale the property, rights of way, franchises and interests covered thereby; and convey the same to Magee or to the railroad company proposed to be organized. Magee, the other party to the contract, agrees to deliver or cause to be delivered to Munson and his associates, in payment for the said property, rights of way and franchises, first mortgage bonds of the proposed railway company to the amount of 50 per cent of the principal and interest of the bonds of the Sodus Bay & Corning Railroad Company, held by them. The contract contains other stipulations not now necessary to mention.

In the view we take of another question in the case, we deem it unnecessary to determine whether the contract of August 13, 1875, was valid as between the original parties thereto; that is, whether the plaintiff Munson, in entering into the contract, violated any duty owing by him to the corporation of which he was a director, or whether the contract as a whole was, on the part of Munson and his associates, anything more than a legitimate arrangement to protect their interests as bondholders, and to make the mortgage security available for the payment of a part of the mortgage debt.

The contract was not by or with the Sodus Bay & Corning Railroad Company; and assuming that the question as to the validity of the original contract can be raised in this action, we are not prepared without further consideration to condemn the transaction on either of the grounds suggested. *Duncomb v. N. Y. H. & N. R. R. Co.* 84 N. Y. 190; *Marie v. Garrison*, 88 N. Y. 14; *Harpending v. Munson*, 91 N. Y. 650.

But this action is not brought to enforce the contract of August 13, 1875, against the defendant Magee. It is an action to compel the specific performance by the defendant Corporation, of the undertaking of Magee in that contract, to deliver the bonds of the new company as therein provided, founded upon the assumption by the new company of that obligation, by resolution of its board of directors, passed August 13, 1875; and also upon the subsequent contract of September 14, 1875, made between the company and the plaintiffs, which in its primary provision substituted the company in the place of Magee as the party of the second part in the contract of August 13, 1875.

The action in its entire scope is framed to enforce the obligation of the defendant Corporation, under its contract of assumption. It was tried upon this theory, the exceptions point to this as the ground of the action, and Magee is joined as defendant and in the demand of relief, as the custodian of bonds of the company which the plaintiffs claimed he should be adjudged to

deliver to them, by the judgment in the action.

Throughout the trial the action was treated as an action against the defendant Corporation, upon its contract; and in no respect as an action against Magee, to enforce a liability against him under the contract of August 18, 1875. The plaintiffs, therefore, are compelled to meet the question whether upon principles of equity they are entitled to the aid of the court to enforce an executory contract between themselves on the one side, and the defendant Corporation on the other, for the sale of the property of the former, in a case where one of the plaintiffs at the time the contract was made was a director of the purchasing Corporation and took part in making the contract upon which the action is brought.

For a proper understanding of the situation, a few additional facts need to be stated:

On the 26th of August, 1875, Magee and his associates organized a railroad company, to construct a railroad from Corning to Geneva, as contemplated by the contract of August 18, 1875. The plaintiff Munson was one of the promoters, and became a director and stockholder, and was the first president of the corporation.

On the 31st of August, 1875, Magee executed a written assignment to the new corporation, the Syracuse, Geneva & Corning Railway Company, of his rights under the contract with the plaintiffs of August 18, 1875; and the board of directors at a meeting on the same day, in which the plaintiff Munson participated, passed a resolution assuming the contract on the part of Magee, and agreeing to perform it, except in one particular not now material to be mentioned.

On the 14th of September, 1875, the contract before referred to of that date was entered into between the plaintiffs and the new corporation, and was executed individually by each of the plaintiffs, and on the part of the corporation, by the plaintiff Munson, as president. The proceedings of the board of directors indicate that when the resolution of August 31, 1875, was passed, and for two or three months thereafter, the company contemplated building its road to Geneva on the same line substantially as that of the Sodus Bay & Corning Railroad Company, but in December, 1875, it located an entirely new line, not coincident in any part with the line originally contemplated, upon which new line its road was subsequently built. It is found, and the evidence supports the finding, that the best interests of the Company were promoted by adopting its present route.

The plaintiffs procured a foreclosure of the mortgage and purchased the property as they had agreed; and subsequently in 1877, tendered a deed thereof to the defendant Corporation, and demanded the delivery of the bonds, which was refused.

In determining the legal question presented, it is proper to say that there is no evidence of any actual fraud or collusion on the part of any of the parties to the original contract of August 18, 1875, or that the contract of assumption was induced by any improper appliances or motives whatever.

It is plain that Magee and his associates, when they entered into the original contract, contemplated building the proposed road on the

line of the Sodus Bay & Corning Railroad Company, and that the contract was made with a view of acquiring for the new road, the rights of way, and other property of that corporation. It is equally plain that the contract of assumption was entered into by the new corporation with the same expectation, and for the same purpose.

If the contract was otherwise unobjectionable, it could not, we think, be assailed upon the ground that it was a contract outside of the power of the defendant Corporation. The statute authorizes a railroad corporation to acquire land for its track and other necessary purposes, by voluntary purchase or by condemnation (Laws 1850, Chap. 140, §§ 14, 15); and an agreement made on the purchase of rights of way, to pay therefor in bonds of the purchasing corporation, secured by a mortgage on its property, is clearly, we think, within the implied, if not within the express powers of a railroad corporation. § 28, subd. 10.

The contract made between the defendant Corporation and the plaintiffs was, in substance, a contract to purchase rights of way, and although the defendants' line was not formally located on the line proposed to be purchased, and was in fact subsequently located on a different line, this change of purpose does not, we think, affect the question of corporate power.

But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents.

There is no controversy as to the facts bringing the case as to Munson within the operation of the rule.

He and his associates were dealing with a corporation in which Munson was a director; in a manner where the interests of the contracting parties were or might be in conflict. The contract bound the corporation to purchase; and Munson, as one of the directors, participated in the action of the corporation, in assuming the obligation and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner and purchasing as trustee.

The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract.

The contract on its face notified Munson's

associates of his relation to the corporation, and that the contract was subject to be defeated on that ground; and on the other hand a corporation in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action of the board.

The law cannot accurately measure the influence of a trustee with his associates; nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of the trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.

The rule has been declared and enforced in a great variety of cases, but in none perhaps with more vigor and completeness, both upon principle and authority, than in the leading case of *Davoue v. Fanning*, 2 Johns. Ch. 252.

But the case of the *Aberdeen R. Co. v. Blaikie*, 2 Eq. 1281 [S. C. 1 McQ. 461], decided by the House of Lords, is in many of its features similar to the present one. In that case it appeared that the plaintiffs were a manufacturing firm, and that one of them was also a manager of the Aberdeen Railway Company, the defendant, and the chairman of the board. At a meeting of the managers, they by resolution authorized their engineer to contract for iron chairs needed by the company. The agent contracted with the plaintiff's firm. It did not appear that the member of the firm who was also a manager and the chairman of the company, intermeddled with the dealing on either side, further than that it may be assumed he was at the meeting which authorized the engineer to procure a supply of chairs. The plaintiffs brought their suit to enforce specifically the performance of the contract, or in the alternative to recover damages for its nonperformance. After a decision in their favor in the lower court, the company appealed to the House of Lords, where the ruling was unanimously reversed, upon the ground that the contract was condemned by the rules of equity, as having been made between the company of which one of the plaintiffs was a manager, and a private firm of which he was a member. The opinions of *Lord Chancellor Cranworth* and of *Lord Brougham* vindicate, upon impregnable grounds, the general rule and its application to the particular case.

We have designedly omitted, up to this time, special reference to a circumstance which it is claimed takes the case out of the operation of the general equitable rule. That is, that the contract with the defendant Corporation was not on the part of the plaintiffs a fresh dealing in respect to the sale of their interest in the property of the Sodus Bay and Corning Railroad Company; but was simply a substitution, in the place of Magee, of the Corporation organized by him and his associates, for the purpose of carrying out the original arrangement.

N. Y.

But the promoters of a corporation are not the corporation. The legal body is distinct from the individuals who compose it. The statute confers no authority upon the promoters of a corporation to enter into preliminary contracts, binding the corporation when it shall come into existence. Such contracts may bind the individuals who make them. If adopted by the corporation, and they are within the corporate powers, and are not otherwise subject to objection, they may become the contracts of the corporation and enforceable as such.

In respect to contracts of promoters, Judge Redfield says: "The promoters are in no sense identical with the corporation; nor do they represent it in any relation of agency; and their contracts could of course only bind the company so far as they should be subsequently adopted by it, as their successors." 1 Redf. R. R. *9.

But the corporation is at liberty to refuse to sanction them, and if its sanction is obtained by the act or co-operation of directors who have a private interest, we perceive no reason why, under the general rule, the corporation may not resist an action for specific performance, at least in a case where it has not accepted the consideration and taken the benefit.

It is claimed that the general policy of the law in this State, sanctions the contract in question, and we are referred to chapter 710, Laws of 1878, which authorizes the purchaser, or the grantee of the purchaser of the real estate, tracks and fixtures of a railroad corporation, sold under a mortgage or decree, to associate with him other persons and form a new corporation to maintain and operate the road.

But the transaction in question was not in any proper sense an arrangement for the reorganization of an existing railroad. It was not contemplated that the new corporation should operate or maintain the road of the old corporation. The line of the new corporation, by its articles, extended only from Corning to Geneva; whereas, the route of the old corporation was from Corning to Sodus Bay.

When the contract was made, the enterprise of building the Sodus Bay & Corning Road had been commenced, but the road had not been built. Its route had only in part been located, and the great burden and expense of the undertaking was yet to be incurred. The case is not in terms within the Act of 1878, nor, as we think, within its spirit and intent.

These views lead to an affirmance of the judgment.

All concur, except **Rapallo** and **Finch, JJ.**, not voting.

PEOPLE of State of New York, *Respts.*,

ROME, WATERTOWN & OGDENSBURG
R. R. CO., *Appl.*

1. To maintain a peremptory writ of **mandamus**, issued on the application of the Attorney-General in the name of the People of the State, it must appear from the undisputed facts alleged that it was issued to **protect some public right** or to secure some public interest.
2. Assuming that, when a town has been **bonded for the construction of a rail-**

road upon condition that a permanent depot should be erected and maintained at a specified point within the town, a contract is created between the town and the railroad company, such contract can only be enforced by some proceeding on behalf of the town; it is not a matter of public interest in such sense that it can be enforced by *mandamus* on the application of the Attorney-General on behalf of the People of the State.

3. If a contract obligation arises between a railroad company and a town bonded for its construction, for the maintenance of a depot, such obligation does not pass by the foreclosure of a mortgage on such railroad; nor does it devolve upon the successors of such company.
4. The decisions of the state board of railroad commissioners are advisory, merely; and no legal right can be based thereon in a proceeding for a *mandamus* to compel a railroad company to comply with the recommendation of the board.
5. A railroad company owned two lines of track to a certain village; it discontinued running trains upon the more direct line, which it had acquired by consolidation with another company, but ran trains upon the other line, which required the residents of said village to travel about two miles farther than by the more direct line, and to change cars at a different point. It appeared that the company maintained service between the termini of the road acquired by consolidation, and substantially performed its duties to the public at large. Held, that the facts did not warrant the issuance of peremptory *mandamus*, upon the application of the Attorney-General, to compel the company to run trains upon the more direct line.
6. Where a railroad company owns, by consolidation, two lines of road, and can substantially accommodate the People of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, it should not be compelled by *mandamus* to operate both lines at a great sacrifice of money.

(Decided October 5, 1886.)

A PPEAL from an order of the Supreme Court at General Term in the Fourth Department, affirming an order of the Jefferson Special Term, awarding a peremptory writ of *mandamus*. *Reversed*.

Memorandum of decision below, 38 Hun. 640.

Statement by Earl, J.:

The Attorney-General applied to the special term of the supreme court for a peremptory writ of *mandamus*, and the following are the material facts alleged in his petition:

That the Rome, Watertown & Ogdensburg Railroad Company is a railroad corporation organized under the laws of this State and was engaged in the operation of a railroad from

Rome, Oneida County, to Watertown, Jefferson County, and to points north on the St. Lawrence River, passing through the Town of Sandy Creek, and having a station at Washingtonville; that in February, 1868, the Syracuse Northern Railroad Company was incorporated, under the General Railroad Act, to construct, and it subsequently did construct, a railroad from Syracuse to the Rome, Watertown & Ogdensburg Railroad at Washingtonville and there formed a junction with that road; that prior to such construction a map locating the line and termini of the road was duly adopted by the board of directors and filed as provided by law, covering the location of its line and northern terminus as subsequently constructed; that there was also a railroad from Oswego connecting with the Rome, Watertown & Ogdensburg Railroad at Richland, upon which road there was a station called Pulaski Station, about four miles westwardly from Richland; that the Syracuse Northern Railroad also passed through Pulaski Station and thence about one mile to Pulaski Village where it had a station, and thence about five miles in a northerly direction to Sandy Creek Village, where there was a station; and thence about a mile to Washingtonville Station; that while that road was thus operated the travel from Washingtonville Station southerly to Syracuse was through the Villages of Sandy Creek and Pulaski to Pulaski Station and thence southerly; that before that road was constructed the Town of Sandy Creek, under statutory authority, subscribed for \$80,000 of the stock of that company and paid therefor in the bonds of the town issued for that amount; that the statutory consent for the bonding of the town was upon the express condition that the railroad should be constructed through the Town of Sandy Creek and a permanent depot erected at Sandy Creek Village; that a mortgage was given upon that road in 1873, and that mortgage was subsequently foreclosed and the railroad and its franchises were purchased by an individual; that subsequently, in September, 1875, a reorganization of the road was effected under "an Act to facilitate the reorganization of railroads sold under foreclosure, and providing for the formation of new companies," passed April 11, 1874, and a new company under the name of the Syracuse & Northern Railroad Company was organized which was vested with all the rights, privileges and franchises which at the time of the foreclosure sale belonged to or were vested in the Syracuse & Northern Railroad Company; that subsequently the Syracuse & Northern Railroad became consolidated with the Rome, Watertown & Ogdensburg Railroad, under chapter 917 of the Laws of 1869; and the latter Company took possession and assumed control of the road; and until September 5, 1877, operated the same from Syracuse to and through the Villages of Pulaski and Sandy Creek to Washingtonville; that the consolidation agreement recited that the Rome, Watertown & Ogdensburg Railroad Company owned and operated a railroad from Rome to Ogdensburg, and leased a road from Oswego to Richland Junction; that the Syracuse & Northern Railroad Company owned and operated a railroad from Syracuse to a connection with the Rome, Watertown & Ogdensburg Railroad at Wash-

ingtonville, and that thus the railroads formed a continuous line of railroad between the City of Syracuse and the points and places to which the railroads of the Rome, Watertown & Ogdensburg Railroad Company did and were authorized to extend; that soon after the defendant ceased to operate that portion of the Syracuse & Northern Road lying between the Oswego branch of the Rome, Watertown & Ogdensburg Railroad at Pulaski Station and Washingtonville, and removed the track on that section of the road, as well as the station houses at the Villages of Pulaski and Sandy Creek; that since that time such abandonment has continued and still exists; that the junction formerly maintained at Washingtonville has been changed, with its attendant local advantages, to Richland; that such abandonment was and continued to be a matter of serious damage to the People of the State of New York, and especially to that portion of the People of this State who were residents and taxpayers of the Town of Sandy Creek, their property and business interests; and compelling them, when desirous of traveling to the Village of Pulaski and the City of Syracuse, to adopt a circuitous route "involving more or less change of cars, transfer and delay," for which they have no remedy for damages at law; that by chapter 353 of the Laws of 1882, the Legislature enacted that there should be created in this State, in the manner and form therein referred to, a board of railroad commissioners, with certain powers and duties therein mentioned; that in pursuance of the provisions of that Act, complaint in due form (of the abandonment and proceedings above stated) was made against the Rome, Watertown & Ogdensburg Railroad Company, to which complaint the Company filed an answer; that a hearing was had thereon before the board; and after due deliberation it, on the 21st day of April, 1884, adjudged and determined as follows:

"The judgment of the board is that the Rome, Watertown & Ogdensburg Railroad Company had no right or authority to abandon the portion of the Syracuse Northern road in question, and that in so doing it has violated the laws of the State, and has neglected and now neglects to comply with the terms of chapter 140 of the Laws of 1850, and its amendments, under which the Syracuse Northern Railroad was created, that in so doing and in running its trains via Richland Junction, it usurps authority conferred by no Act or law of this State. The board hereby notifies the Rome, Watertown & Ogdensburg Railroad Company of said violation, neglect and usurpation, and recommends that said Company proceed, within a reasonable time, to and do rebuild, restore and operate said abandoned portion of its road, hereinbefore particularly described."

A copy of the determination of the board was thereafter served upon the Rome, Watertown & Ogdensburg Railroad Company, but that it failed to comply with the recommendation of the board, and that thereafter, on or about the 15th day of November, 1884, the board of railroad commissioners transmitted, in pursuance of the provisions of the Act of 1882, to the Attorney-General, a copy of the

proceedings and its determination in the above matter.

The application for the *mandamus* was opposed by the defendant upon an affidavit of its general manager, in which he denied that the alleged abandonment by it of a portion of its former line "has been or continues to be a matter of serious damage to the People of the State of New York, and especially to that portion of the People of the State who are residents and taxpayers of the Town of Sandy Creek, their property and business interests," and stated that, on the contrary the present lines operated by the Rome, Watertown & Ogdensburg Railroad Company furnished greatly increased facilities to the People of the State of New York, as well as to the People of the Town of Sandy Creek, above those which were enjoyed by that community at any time prior to the last two years; that it is now far more convenient for the people of the Town of Sandy Creek to reach their principal markets, the Cities of Oswego, Syracuse, Watertown and Rome, than at any previous time, by means of the lines of the Rome, Watertown & Ogdensburg Railroad Company; that a far greater number of trains, both passenger and freight, are now run than were run before the alleged abandonment, and that it is an absolute fact that the passenger and freight service between the Village of Sandy Creek and the Cities of Oswego, Syracuse, Watertown and Rome is far more convenient, prompt and efficient than before said abandonment; that it would cost about \$70,000 to restore the abandoned track, and that the annual expense of maintaining and operating that portion of the road would be about \$15,000 without any addition whatever to the income of the defendant; that the defendant was engaged in a steady and determined effort to make its road in all respects a serviceable agent of the People of the State of New York and of all the people who have occasion to use its facilities; and that if the restoration were now ordered or compelled by the courts of the State it would result in diminishing the efficiency of the road for all the People of the State, including the people of the Town of Sandy Creek.

It further appears from the papers presented to the court that since the abandonment complained of, passengers and freight going southerly from Washingtonville are carried to Richland Station, thence to Pulaski Station, and thence on to Syracuse; and that passengers and freight from Syracuse are carried to Pulaski Station, thence to Richland and thence to Washingtonville; that the passenger cars on the Syracuse & Northern Railroad all stop at and depart from Richland Station, and that thus the passengers are required to change cars at that station, and that the increased distance from Washingtonville to Pulaski Station by way of Richland Station is about two miles.

Upon the presentation of these facts, the judge at special term granted a peremptory writ of *mandamus* commanding the defendant to proceed to restore the abandoned portion of said road from the point where said track of the Syracuse Northern Railroad intersects the Oswego branch at Pulaski, through the Villages of Pulaski and Sandy Creek to the Washing-

tonville Station, so-called, on the line of the Rome, Watertown & Ogdensburg Railroad Company's road upon the route where said road was formerly operated at the time when said road was abandoned, and to rebuild, restore and operate said portions of such road, and to open and operate said road and route, by running trains over the same at regular intervals for the accomodation of the public in the transportation of passengers and property."

From the order granting the writ, the defendant appealed to the general term, and from affirmance there to this court.

Messrs. Daniel H. Chamberlain and William B. Hornblower, for appellant:

I. The writ of *mandamus* is a common-law remedy and proceeding, and not an equitable one. Tapping, *Mandamus*, pp. 55, 56; § Bl. Com. 110.

The courts never grant this writ except for public purposes, to compel the performance of public duties.

Rez v. Bank of England, 2 Barn & Ald. 620.

A state writ must be issued in behalf of the people of the State.

Code Civ. Proc. § 1994.

The right to the writ, upon the case made at the special term, did not "depend only on questions of law," so as to warrant the judgment there rendered.

Code Civ. Proc. § 2070.

The bonds of the Town of Sandy Creek, which are put forward as a basis to some extent of the present claim, are not valid obligations of that town, and hence cannot be regarded as supporting the present case made by the Attorney-General.

Craig v. Town of Andes, 98 N. Y. 405.

The writ of *mandamus* is never granted, except to compel the performance of a duty owing to the State.

People v. Trustees of St. Patrick's Cathedral, 21 Hun, 184.

Inconvenience to the citizens of the State; want of legal remedy for some supposed injury; existence of private contracts with corporations created to supply a public want, are not grounds for granting this extraordinary remedy.

People v. Green, 66 Barb. 630; *Ex parte Osterlander*, 1 Den. 679; *People v. Dowling*, 55 Barb. 197.

There must exist some duty owing to the State, either specifically imposed by statute or necessarily arising from the circumstances of the case.

People v. Clerk Marine Court, 3 Abb. Pr. 809; *Adriance v. Supervisors*, 12 How. Pr. 224; *People v. Baker*, 14 Abb. Pr. 19.

In England it was once held that a railroad company was so bound by a parliamentary grant of a franchise and its acceptance by the company, that the latter could be compelled to proceed to build the road.

Queen v. York, etc. R. Co. 1 E. & B. 178; *S. C.* 16 Eng. L. & Eq. 299; *Queen v. Lancashire & York R. Co.* 16 Eng. L. & Eq. 327; *Queen v. Great West. R. Co.* 16 Eng. L. & Eq. 341.

But in *York, etc. R. Co. v. Reg.* 1 El. & Bl. 858; *S. C.* 18 Eng. L. & Eq. 199, the exchequer chamber reversed the judgment of the

queen's bench, holding that there was no implied obligation upon the company, either before or after entering upon the work, to complete it.

Where the duty to build or to operate is not made imperative by the charter or laws of the State, *mandamus* will not lie.

People v. Albany & Vt. R. R. Co. 24 N. Y. 261; *Commonwealth v. Fitchburg R. R. Co.* 78 Mass. (12 Gray) 180.

The discretion involved and exercisable in *mandamus* is legal discretion, and is, therefore, reviewable plenary on appeal.

Hovell v. Mills, 53 N. Y. 322; *Tripp v. Cook*, 26 Wend. 143.

Mr. D. O'Brien, Atty. Gen., for respondents: The words in a charter franchise "from a town or city" have been construed to be taken inclusively and to permit the company to enter a town or city.

Tennessee & Ala. R. R. Co. v. Adams, 3 Head, 596.

The words "to" and "at" have been construed to include a city or town.

Moses v. Pittsburgh, Ft. W. & C. R. R. Co. 21 Ill. 516; *Hentz v. Long Island R. R. Co.* 13 Barb. 646; *Mason v. Brooklyn & N. R. R. Co.* 35 Barb. 378; *Mohawk Bridge Co. v. Utica & S. R. R. Co.* 6 Paige, 554.

The Rome, Watertown & Ogdensburg Company, upon consolidation, recognized the terminus of the road as Sandy Creek, and became vested with and entitled to all of the rights, privileges and franchises owned by the Syracuse Northern Company, and subject to all of the duties and obligations of the latter company.

Section 86, R. R. Act of 1850, as amended by Laws of 1867, chap. 49; Laws of 1869, chap. 917; *Peoria & R. I. E. Co. v. Coal V. M. Co.* 68 Ill. 489; *Chicago, R. I. & Pac. R. R. Co. v. Moffitt*, 75 Ill. 524.

The implied condition upon which the franchise was granted, with the extraordinary rights which accompany it, was that the road should be operated to its maximum capacity for public use. In accepting the franchise, the Railroad Company undertook to discharge the duty of operating the road as a condition of the grant.

People v. Albany, etc. R. R. Co. 24 N. Y. 261, 267; approved in *Troy, etc. R. R. Co. v. Boston H. T. and W. R. Co.* 86 N. Y. 107, 129; *Abbott v. Johnstown Horse R. R. Co.* 80 N. Y. 80; *People v. New York Cent. & H. R. R. Co.* 23 Hun, 554; *People v. Troy & B. R. R. Co.* 37 How. Pr. 427; *State v. Hartford & N. H. R. R. Co.* 29 Conn. 538, 547; *Talcott v. Pine Grove*, 1 Flippin, 144, 145; *Farmers Loan & Trust Co. v. Henning*, 17 Am. Law Reg. N. S. 266; *King v. Severn & Wye R. Co.* 2 Barn. & Ald. 646; *U. S. v. Union P. R. R. Co.* 4 Dill. 479.

Mandamus has been awarded:

To compel a company to complete its road. *Farmers Loan & Trust Co. v. R. R. Co.* 17 Am. Law Reg. N. S. 266.

To compel a company to so grade its tracks as to make crossings on a highway convenient and useful.

People v. D. & C. R. R. Co. 58 N. Y. 152.

To compel a railroad company to build a bridge.

People v. Boston & A. R. R. Co. 70 N. Y. 569; *State v. Gorham*, 37 Me. 451; *Cambridge v. Charlestown B. R. R. Co.* 7 Met. 70; *People v.*

T. & B. R. R. Co. Vol. 757, cases Court of Appeals, not reported.

To compel a company to construct and maintain fences and guards.

People v. Rochester & State L. R. R. Co. 14 Hun, 371; 76 N. Y. 294.

To compel it to construct its road across streams so as not to interfere with navigation.

State v. Northeastern R. R. Co. 9 Rich. (S. C.) 247.

To compel the company to deliver to a particular elevator grain consigned thereto in bulk.

Chicago & N. R. Co. v. People, 56 Ill. 365.

To compel the company to run daily trains. *Re New Brunswick & C. R. Co.* 1 Pugs. & Bur. (N. B.) 667.

To compel the running of trains to the terminus of the road.

State v. Hartford & N. H. R. R. Co. 29 Conn. 538.

To compel a company to operate its road as one continuous line.

Union Pac. R. R. Co. v. Hall, 91 U. S. 843 (Bk. 23, L. ed. 428); *Hall v. Union Pac. R. R. Co.* 3 Dill. 615; *U. S. v. Union Pac. R. R. Co.* 4 Dill. 479.

To compel it to re-establish an abandoned station.

State v. New Haven & N. R. R. Co. 37 Conn. 154.

To compel the replacement of a track taken up in violation of its charter.

King v. Severn & W. R. Co. 2 Barn. & Ald. 646.

To compel a bridge company to repair and construct a bridge in conformity with its charter.

State v. Wilmington Bridge Co. 3 Harr. (Del.) 812.

To compel a water-power company to build bridges over its canals, although not required by its charter.

Re Trenton Water Power Co. 20 N. J. Law, 659.

To compel a dock company to maintain a channel.

Reg. v. Bristol Dock Co. 2 Q. B. 64.

To compel a gas company to furnish gas.

People v. Manhattan G. L. Co. 45 Barb. 136; *City of St. Louis v. St. Louis Gas L. Co.* 70 Mo. 60, 117.

To compel a commissioner of a land-office to issue a certificate for lands to which corporation may be entitled.

Houston & G. N. R. R. Co. v. Commissioner, 36 Tex. 382.

To compel county officers to levy a tax on the county to satisfy a judgment rendered on bonds issued as provided by law.

Riggs v. Johnson Co. 6 Wall. 166 (78 U. S. bk. 18, L. ed. 768); *Mayor v. Lord*, 9 Wall. 409 (76 U. S. bk. 19, L. ed. 704).

To compel a corporation to keep a register and insert therein the names of the stockholders.

Norris v. Irish Land Co. 8 El. & B. 525.

To compel a railroad or canal company to build or repair its road or canal.

People v. Troy & B. R. R. Co. 37 How. Pr. 427.

To compel a railroad company to receive and transport freight.

People v. New York Cent. & H. R. R. R. Co. 28 Hun, 543; 80 Hun, 78.

N. Y.

To compel a railroad company to perform any duty towards the public.

People v. Albany & Vt. R. R. Co. 24 N. Y. 261, 267, 269; *Railroad Comrs. v. Portland & O. R. R. Co.* 63 Me. 269; *McCoy v. Cincinnati, I. St. L. & C. R. Co.* 13 Fed. Rep. 378; *Talcott v. Pine Grove*, 1 Flippin (U. S. Circuit), 145.

The rights sought to be enforced are of a public nature, and the application is properly made by the Attorney-General.

Tapping, Mandamus, 54, 56, 288; *Moses, Mandamus*, 194, 199; *People v. Collins*, 19 Wend. 64, 68; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 355 (Bk. 23, L. ed. 482); *People v. New York, L. E. & W. R. R. Co.* 28 Hun, 554; Act creating Railroad Commission, chap. 353, Laws 1882.

A peremptory writ of *mandamus* may be issued in the first instance, when the right depends only on questions of law, and notice has been given to the corporation.

Code Civ. Proc. § 2070.

The State has no other remedy than *mandamus*, unless an action to annul the charter of the corporation; and that remedy ought not to be elected, because it only destroys functions where the public interests require their continued existence and enforcement.

People v. New York Cent. & H. R. R. R. Co. 28 Hun, 554.

Neither does it impair the remedy by *mandamus* that a remedy for damages is given to the party aggrieved. If such an action was given in this case by statute, it would not be exclusive unless declared by the statute; and it would not be inconsistent with the remedy by *mandamus*.

People v. New York Cent. & H. R. R. R. Co. 74 N. Y. 802, 307; *Candee v. Hayward*, 87 N. Y. 658.

The question is, whether there is another adequate and efficient remedy to secure the relief sought to be obtained.

Wood, Mandamus, pp. 56, 111, 114, 115; *Add. Torts*, p. 1486.

There cannot be any question in this proceeding that the State has been guilty of laches in instituting the application against the Company. The damage has been a continuing one. The usurpation of the corporate powers constitutes a continuing cause of action to the People.

Kellogg v. Thomson, 66 N. Y. 88; *People v. Rensselaer Ins. Co.* 38 Barb. 323; *Baldwin v. Calkins*, 10 Wend. 167; *Green's Brice*, Ultra Vires, 7th ed. 714.

Earl, J., delivered the opinion of the court:

In his petition, the Attorney-General prayed for a peremptory writ of *mandamus*, and one was awarded. Such a writ is authorized only "where the applicant's right to a *mandamus* depends only upon questions of law." Code, § 2070.

In determining whether this writ was properly issued, therefore, we must consider only such facts alleged in the petition as were not denied or put in issue, and the affirmative allegations of the affidavit presented on the part of the defendant in opposition to the application for the writ. Where the material allegations of the application for a writ are put in issue, or where the answering affidavits contain

allegations showing that a peremptory writ ought not to be issued, the court should award an alternative *mandamus* in the first instance, in order that the issue of fact may be regularly tried before the proper tribunal.

As this writ was applied for by the Attorney-General on behalf of the People, it must be assumed that it was issued only to subserve a public interest and to protect a public right. If private interests only were involved the application for the writ by the Attorney-General on behalf of the People was not proper. In that case, it should have been applied for by the private parties interested, who should have been relators. In order therefore to maintain this writ and to justify the action of the court in granting it, we must be able to see from the undisputed facts alleged that it was issued to protect some public right or to secure some public interest.

It matters not that the Town of Sandy Creek was bonded for the construction of the Syracuse Northern Railroad, upon condition that a permanent depot should be erected and maintained at the Village of Sandy Creek. If it be assumed that the bonding proceedings created a contract between the town and the Railroad Company, that contract is not one which could be enforced by this writ of *mandamus*, issued on behalf of the People. The contract right and obligation are not in any proper sense a public matter in which the People of the State in their sovereign capacity are interested. If there is a valid contract still in force and operative, it must be enforced by some proceeding taken on behalf of the town; and cannot be enforced by a proceeding instituted by the Attorney-General on behalf of the People of the State.

But the performance of the contract, if there was a valid one, never devolved upon the defendant. The contract obligation was not a charge or lien upon the property of the Syracuse Northern Railroad Company, and remained where the unsecured obligations of the company rested after the foreclosure of the mortgage given by it. It did not pass by the foreclosure sale to, or devolve upon its successors, the Syracuse & Northern Railroad Company and the Rome, Watertown and Ogdensburg Railroad Company.

In a case where the court had a discretion to grant or withhold the writ of *mandamus*, the circumstances attending the bonding of the Town of Sandy Creek could well have been considered in determining that discretion.

Under the Act, chapter 353 of the Laws of 1882, by which the board of railroad commissioners was constituted, the decision of that board has no binding or conclusive authority. No such effect is given to the decisions of that board, by any of the provisions contained in the Act. Its decision in this case was merely advisory and recommendatory; and the defendant was at liberty to obey or disobey it. It was a sufficient justification, however, for the application by the Attorney-General for the writ of *mandamus*; and if the court had had a discretion to withhold or grant the writ, it might properly have had some influence in the exercise of that discretion. But no legal right in this proceeding can be based thereon.

We are left, therefore, to determine simply

whether upon the facts which we must assume to exist in this case, the defendant ought in the public interest, as an absolute duty, to be compelled to rebuild, maintain and operate the small section of road which it abandoned. We have not here the question which would have to be determined if the Syracuse Northern Railroad Company was still in existence and had abandoned the portion of its road between Pulaski Station and Washingtonville Station, so that passengers and freight were carried only to and from the former station. But we have a case where the defendant has succeeded to all the rights and obligations of that railroad company; and the question is whether it is discharging the duty to the public imposed upon it by the consolidation of that railroad company with it.

After the consolidation it had two lines from Pulaski Station to Washingtonville; a direct line about seven miles long; and a circuitous line by way of Richland about two miles longer. It was not absolutely bound in law to stop any of its trains at the Village of Pulaski or the Village of Sandy Creek. It would have discharged its whole duty by running its trains through from the Pulaski Station to the Washingtonville Station without stopping. It would cost it more than \$15,000 annually to maintain and operate its direct road from Pulaski Station to Washingtonville Station without adding one dollar to its income. It could accommodate every passenger and every pound of freight at Washingtonville Station or at the Pulaski Station, by carrying it over a line which it owned, by way of Richland.

Did it not thus substantially perform the duty which devolved upon it as the successor of the Syracuse Northern Railroad Company? It carried all passengers and freight from Washingtonville to Pulaski Station and Syracuse; and all passengers and freight from Syracuse and Pulaski Station to the terminus of the Syracuse Northern Railroad at Washingtonville. How can it be said that it owed a duty to the public to do this over the direct line, rather than over a line near by, but two miles longer?

There is no allegation that any considerable number of people are discommoded; and it does not appear that a single person suffers any harm, except that passengers are obliged to change cars at Richland rather than at Washingtonville Station; and persons taking the cars at Washingtonville Station to go south, are obliged to travel about two miles farther.

But we must take the facts as stated in the affidavits of the defendant's manager, read in opposition to the application for the writ: that it is not true that the abandonment of this small section of road has been and continues to be a matter of serious damage to the People of the State of New York, or especially to that portion of the People of the State who are residents and taxpayers of the Town of Sandy Creek; but that the present line operated by the defendant between Washingtonville Station and Pulaski Station furnishes greatly increased facilities to the People of the State of New York as well as to the people of the Town of Sandy Creek, above those which were enjoyed at the time of the abandonment; that it is now far more convenient for the people of that town to reach their principal markets, the Cities of Oswego, Water-

town, Syracuse and Rome, than at any previous time, and that their railroad service is altogether more efficient and convenient than it was previous to the time of the abandonment.

Under such circumstances we see no reason for saying that the interests of the People have suffered from this abandonment, or that any considerable number of the People of this State were thereby in any way injured or inconvenienced. If a few individuals were discommoded, or private interests were in any way injured, this writ is not the proper remedy for such evils.

We have with great care examined and considered the numerous authorities cited on behalf of the people in support of this writ; but we find none which justify it. Several cases were cited in which it was held that a railroad company could be compelled by *mandamus* to operate its railroad to the terminus specified in its charter. *Farmers Loan & Trust Co. v. Henning*, 17 Am. Law Reg. N. S. 266; *State v. Hartford & N. H. R. R. Co.* 29 Conn. 538; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 843 [Bk. 23, L. ed. 423]; *King v. Severn & Wye R. Co.* 2 Barn. & Ald. 646; *People v. Albany & Vt. R. R. Co.* 24 N. Y. 261.

But the principles of those cases are not controlling in this, because here the railroad service is kept up between the termini of the Syracuse Northern Railroad; and the public duty which devolved upon it at its organization is fully and substantially performed by the defendant.

The present line is a little longer than the one originally adopted, and slightly varying therefrom, but it accommodates the People of the State and the people of the locality, substantially as well as the line originally adopted. Suppose two roads were consolidated and the lines of the two between two places were parallel and near to each other; could the consolidated road be compelled by *mandamus* to operate both lines, or could it discharge its duty to the public by using only one line?

Suppose the New York Central and the West Shore roads, as their lines approach the City of Buffalo were parallel to and near each other; could not the New York Central, which is now substantially the owner of both roads, abandon the West Shore line, and run into the City of Buffalo upon the New York Central line?

We do not determine that in all cases where a railroad company which by consolidation has become the owner of two lines of roads between two termini, and running through different sections of country and different cities or villages, like the two lines between Syracuse and Rochester, could abandon either of its lines; because in such cases it might well be that the public interests and the accommodation of a large portion of the People of the State required that both lines should be operated; but where a railroad company owns by consolidation two lines of road and can substantially accommodate the People of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, we do not believe that it should be compelled by *mandamus* to operate both lines at a great sacrifice of money, upon the fanciful idea that the sovereignty of the State is wounded by its omission to operate both lines.

The defendant does not run its cars at any
x y.

point where it has not the right to; and it does not exercise any franchise which it is not authorized to. It accommodates all the travel and traffic which the Syracuse & Northern Railroad Company was required to accommodate. That road still has a connection with the defendant, and all the travel and traffic over it can still commence and terminate at Washingtonville. There is no public right to protect and no public duty to enforce by *mandamus*.

We are therefore of opinion that the orders of the General and Special Terms should be reversed, and the application for a peremptory writ of mandamus denied, with costs.

All concur, except **Andrews, J.**, taking no part, and **Miller, J.**, absent.

George MARK *et al.*, *Respts.*,
v.

HUDSON RIVER BRIDGE CO., *Appt.*

1. When a **boat** becomes **entangled with a bridge**, without fault on the part of the bridge owner, and becomes a nuisance which the **bridge owner** has a **right to remove**, in exercising that right the bridge owner **must use ordinary care** to do no unnecessary injury to the boat, and will be liable for injury unnecessarily inflicted.
2. In such a case the **bridge owner** is **not liable for want of skill** in the persons engaged in the removal of the boat, **but** only for the omission or commission of some act which an ordinarily prudent man would not have committed or omitted, and **for reckless conduct** on their part.
3. If the bridge owner wrongfully pulled down a span of the bridge upon the boat in extricating it, nothing less than **want of ordinary care on the part of the boat owner** to protect the boat by relieving it of the burden would **absolve the bridge owner from liability** for the damage which ensued.
4. If, as matter of fact, the **boat owner** could, with the exercise of ordinary care and diligence, **have removed the debris** which fell upon the boat in its being extricated from the bridge, and **saved the boat from subsequent injuries**, the **bridge owner** was **not liable** for such injuries.
5. Where the evidence clearly shows some **substantial damages** to which a plaintiff is entitled if the issue as to **negligence** is decided in his favor, the **failure to distinguish** as to all items between damages of that character and those to which the plaintiff is not entitled does **not necessarily confine** plaintiff's **recovery to mere nominal damages**.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Albany Circuit Court in favor of plaintiffs. *Affirmed.* Memorandum of decision below, 26 Hun, 391. The action was brought to recover damages

for injury done to a ferry boat belonging to the plaintiffs, by the servants and agents of defendant, whilst removing it from against and under the defendant's bridge at Albany, against which it had been carried at a time of high water and freshet.

The defendant in its answer set up a counterclaim for damages done to the bridge by the collision of the boat with it. The plaintiffs replied, denying the allegations of the answer constituting a counterclaim.

The evidence shows that on April 8, 1872, the plaintiffs were the owners of the boat George Mark, and were running her upon a ferry between Troy and West Troy; that the ice in the river had broken up some three or four days before, and the river had been practically clear of ice for that length of time, except for an hour or so on the afternoon of the 8th; that this ferry boat had been running safely during all that time, and many other boats had been running during the same time; that this boat had been making trips every fifteen minutes during that time, except for an hour or two Monday afternoon; that she was staunch, strong and in good order, as also was her machinery; and that she had on board a crew of competent men, and on that trip an extra hand; that she had a competent pilot, engineer and fireman; that on the trip immediately preceding the one in question, the river was free of ice, and only a few scattered cakes could be seen as she started on her last trip.

She started on her last trip on said April 8, 1872, at about 9:45 P. M., and ran into a heavy body of ice when she had got half or three quarters of the way across the river. She was carried by this body of ice down the river to Albany, dragging her anchor part of the way and finally parting her hawser; and at about 1 o'clock A. M., she brought up against the bridge of defendant, and caught upon the lower north chord of the bridge by about six inches of the upper part of her gallow's frame, which holds the walking beam; the ice dammed up behind the boat for a considerable distance up the river; the collision broke the lower north chord of the bridge, pulled the timbers of the upper north chord open and broke two or three sticks in the lower south chord; it also broke the upper works of the boat.

Mark, plaintiffs' superintendent, came to Albany as soon as he could after he heard that the boat had gone down, and arrived at about 2 o'clock A. M.; went at once to examine the situation of the boat and, thinking that nothing could be done to relieve the boat or bridge before daylight, left her. At daylight he again went to the boat and found Tanner, the foreman of defendant, on board the boat with a gang of seven to fifteen men with axes, etc., trying to disconnect the upper works of the boat so as to let it pass under the bridge.

The defendant's men, under the direction of Tanner, undertook to depress the boat with jackscrews; in the meantime, Mark had gone to Troy to get help, having no means of removing the boat at Albany, and to consult with his co-owners, and left word at West Troy to have all his men come down. While Mark was gone the defendant's men had got some of the ice away by the use of tugs, at the same time using the jackscrews; while doing this

the boat started and passed under the north chord and down to the south chord, where she caught as she had caught upon the north chord; at that time Tanner, defendant's foreman, deciding that the bridge must come down caused two tugs to be hitched to the ferry boat and with them tried to pull the boat from under the bridge; failing with the two, he caused another boat to be hitched on, and the three succeeded in pulling the span off of the east abutment down upon the boat, smashing the joiner work, upper cabins and machinery. Mark returning at about that time requested Tanner to let his boats draw the span of the bridge up stream and not let the ferry boat sink; Tanner replied "We are now going to dinner and will attend to it afterwards."

The defendant's men then went to dinner, leaving the span on the boat, and the boat in a sinking condition, and in a couple of hours she sank; that afternoon, Mark procured a ferry boat to hitch on to her to draw her into the basin but it was unable to do so; and during the next night she was carried down to the lower end of the city, where she grounded upon a sand bar. The plaintiffs caused the boat to be raised, the machinery to be taken out and repaired, and the boat herself lengthened and repaired.

The action was commenced April 21, 1873, and has been tried three times. The first trial took place in January, 1878. The jury rendered a verdict on that trial in favor of the plaintiffs, for \$15,068.16. A motion was thereupon made upon the minutes, by the defendant, for a new trial; and the motion was granted, upon the ground that the court erred in submitting to the jury the question of the defendant's liability for the damages which occurred from the bridge being allowed to remain upon the boat after its fall.

The order granting a new trial was appealed from and was affirmed by the general term, upon the ground upon which it was granted. The case was again tried in January, 1881, before the same justice, who charged the jury that the case had not been substantially changed from its presentation on the former trial; and that the plaintiffs, upon the evidence, were not entitled to recover anything, upon account of damages occurring after the fall of the bridge upon the boat; and under that charge the jury found a verdict for only \$7,000.

From the judgment entered on that verdict both parties appealed and the general term affirmed the judgment upon the defendant's appeal, but reversed it upon the appeal of the plaintiffs, upon the ground, solely, of error in refusing to permit the jury to find for the plaintiffs for any part of the damage occurring after the fall of the bridge.

The case was tried for the third time in the month of January; 1884, before the same judge; and in accordance with the decision of the general term the court submitted to the jury fully the question of the defendant's liability for the damages occurring after the fall of the bridge, and the jury rendered a verdict in favor of the plaintiffs, for \$15,000, upon which judgment was entered; from the affirmance of which this appeal is taken.

The questions raised are stated in the opinion of the court.

Mr. Matthew Hale, for appellant:

Negligence may consist either in the careless performance of obligations assumed, or in neglecting to undertake the performance of obligations imposed by law.

Shearm. & Redf. Neg. § 4.

Where the proximate cause of the damage is the plaintiff's own supineness or carelessness, he has no ground of action against the defendant, even though the primary and original cause of the damage be the defendant's wrongful act.

1 Add. Torts, 24.

"Proximate" does not mean next or near, in order of time, but near in order of causation; and although all events which are next in the latter order are usually next in the former, they are not always so.

Shearm. & Redf. Neg. §§ 10, 38.

It is not necessary that the plaintiff's negligence should directly contribute to the injury; if it proximately (that is, in the order of causation) so contributes, there can be no recovery.

Shearm. & Redf. Neg. § 33; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428.

The burden of proof was upon the plaintiffs, as well upon the question of damages as upon that of negligence; and if they had failed to show what damages resulted from the alleged negligent acts of defendant, and to distinguish them from damages for which defendant was not responsible, they could recover only nominal damages.

See *Leeds v. Metropolitan Gas-Light Co.* 90 N. Y. 26.

The defendant was not liable in this action, unless there was gross negligence on the part of its servants in the removal of the boat. The existence of degrees of negligence is well settled; and the distinction between such degrees has been the basis of great numbers of decisions, from the leading cases of *Coggs v. Bernard*, 2 Ld. Raym. 909, down to the present time.

Alexander v. Greene, 7 Hill, 533, 546, 560, 574; *Bowen v. N. Y. Cent. R. R. Co.* 18 N. Y. 408; Shearm. & Redf. Neg. §§ 16-18; *Oleghorn v. N. Y. Cent. & H. R. R. Co.* 56 N. Y. 44; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

If one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence.

Shearm. & Redf. Neg. § 22; *Spooner v. Mattoon*, 40 Vt. 800.

Messrs. Isaac Lawson and R. A. Parmenter, for respondents:

Anyone who sustains a special injury from a public nuisance, to an extent that will support an action at law, may abate the same of his own motion, doing no more damage than is necessary to protect his rights and prevent a recurrence of damage from the nuisance.

Wood, Nuis. § 730.

A man has no right to abate any more of a nuisance than is necessary to secure his rights.

Wood, Nuis. p. 764; *Cooper v. Marshall*, 1 Burr. 260; *Rez v. Papineau*, 1 Str. 686; *Harrower v. Ritson*, 37 Barb. 301; *State v. Kernan*, 5 R. I. 497.

A private nuisance injuring a private right may be abated by the person injured, to the
x. y.

extent necessary to secure a reasonable enjoyment of the right injured; any excess of abatement becomes a trespass *pro tanto*; every man is his own judge, and he judges at his peril.

Wood, Nuis. pp. 767-769.

If a party in abating a nuisance does more injury to another than was necessary to effect the legitimate object, he is liable to an action.

Gates v. Blinco, 2 Dana, 158; *Dyer v. Depuis*, 5 Whart. 584; *Wright v. Moore*, 38 Ala. 594; *Moffett v. Brewer*, 1 Ia. 348; *Perry v. Fitzhow*, 8 Ad. & El. 757; *Indianapolis v. Miller*, 27 Ind. 398; *Graves v. Shattuck*, 35 N. H. 257; *Hicks v. Dorn*, 42 N. Y. 47. See also *Babcock v. Buffalo*, 56 N. Y. 268.

A plaintiff may recover notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him.

Tuff v. Warman, 5 C. B. N. S. 573; 2 C. B. N. S. 740; *Davies v. Mann*, 10 Mees. & W. 546; 3 Ohio St. 172; 4 Ind. 94; 43 Mo. 380; 38 Ala. 76; 9 Allen, 557; 3 Allen, 176.

The burden of proof was clearly upon the defendant, in case the jury should find that the defendant was guilty of negligence in pulling the span upon the boat, both upon the question of the plaintiff's negligence in failing to remove the span, and upon the question as to the amount of damages caused by the failure to remove it.

Howard v. Daly, 61 N. Y. 371; *Hamilton v. McPherson*, 28 N. Y. 77; *Costigan v. Mohavek & H. R. R. Co.* 2 Denio, 609; *DeBenedetti v. Manchin*, 1 Hilt. 213; *Thomas v. Kenyon*, 1 Daly, 132.

Under such circumstances, the law does not require strict proof of the exact amount of damages apportionable to each party.

Parkenheimer v. Van Order, 20 Barb. 479; *Van Steenberg v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495.

The jury might have found that the damage from the pulling down of the bridge was caused by gross negligence or willfully; and in that case if the amount of damage sustained could not have been accurately determined, the wrongdoer must bear the burden of such difficulty.

Shearm. & Redf. Neg. § 594; *Leeds v. Amherst*, 20 Beav. 239.

Whether gross negligence is known to and defined in the law is seriously doubted.

See *Perkins v. N. Y. Cent. R. R. Co.* 24 N. Y. 206, 207; *Smith v. N. Y. Cent. R. R. Co.* 24 N. Y. 241; *The New World v. King*, 16 How. 474 (57 U. S. bk. 14, L. ed. 1021); *Hinton v. Dibbin*, 2 Q. B. 646-661; *Wilson v. Brett*, 11 Mees. & W. 113.

But if such a degree of negligence is known to and defined in the law, it is defined to be and is "the want of even slight care and diligence."

Shearm. & Redf. Neg. § 18; *Story*, Bail. § 17. Or it is the want of that care which every man of common sense, howsoever inattentive, takes of his own property.

Edwards, Bailm. p. 44.

The plaintiffs were only bound to the exercise of reasonable care, skill and diligence, and were not bound to incur any hazard or assume unusual risks to obviate the consequences of defendant's acts.

Roberts v. White, 78 N. Y. 380, 381; *Hamilton*

v. *McPherson*, 28 N. Y. 76, 77; *Berier v. Del. & Hud. Canal Co.* 13 Hun, 259; *Shearm. & Redf. Neg.* §§ 29, 31, 32, 34, 598 and notes.

The cost of repairs, the loss of the use of the boat, and interest, furnished the proper measure of damages.

Whitehall Trans. Co. v. N. J. Steamboat Co. 51 N. Y. 369; *Miller v. Express Prop. Line*, 61 N. Y. 812; *Harris v. Delaware, L. & W. R. R. Co.* 61 N. Y. 657; *The Catharine v. Dickinson*, 17 How. 170 (58 U. S. bk. 15, L. ed. 233); *The Granite State*, 3 Wall. 810 (70 U. S. bk. 18, L. ed. 179); *The Blossom*, Olcott, 188; *Buffalo, etc. Turnpike Co. v. Buffalo*, 58 N. Y. 639.

Rapallo, J., delivered the opinion of the court:

The first point made by the appellant on this appeal is that the trial court erred in refusing to direct the jury that the plaintiffs, upon the evidence in the case, were not entitled to any recovery against the defendant.

The injury done to the plaintiffs' boat by coming in contact with the defendant's bridge was not shown to have been occasioned by any fault of the defendant; and whether it was owing to any fault on the part of the plaintiffs was, upon the evidence, a fair question for the jury. That question was material, however, only with respect to the defendant's counterclaim, for if as claimed by the plaintiffs, after the boat had become entangled in the bridge the method adopted by Tanner, the superintendent of the Bridge Company, for extricating it, was reckless and displayed a want of ordinary care, and caused unnecessary injury to the boat, the defendant was liable for the unnecessary injury, even if the plaintiff was in fault in getting its boat in that position.

Although the defendant was not to blame for the situation in which the boat was placed, and it became a nuisance which the defendant had a right for its own protection to remove, yet in exercising that right it was its duty to use ordinary care to do no unnecessary injury to the boat. *Hicks v. Dorn*, 42 N. Y. 47.

It was claimed on the part of the plaintiffs that the act of Tanner in causing the boat to be pulled by main force through the bridge so as to break it and pull the span of the bridge down upon the boat was a reckless act, evincing a want of ordinary care and prudence, whereby unnecessary injury was done to the boat as well as to the bridge. This charge, if substantiated, was sufficient to constitute a cause of action for the damage thus unnecessarily inflicted. There was evidence sufficient to authorize the submission of the question to the jury; and consequently the court committed no error in refusing to charge the jury that the plaintiffs, upon the evidence in the case, were not entitled to any recovery against the defendant.

The claim that the uncontradicted evidence in the case showed that Tanner and the men working under him, in attempting to effect the removal of the boat from under the bridge, were acting at the request or with the consent of the plaintiffs is not sustained by a reference to the testimony. The trial judge charged the jury distinctly that if Tanner and his men proceeded to remove the boat, either upon the request of George Mark (who represented the plaintiffs) or with his consent expressly or im-

pliedly given by a failure to object to their proceedings, the defendant was not liable; that the men who did the work, although generally in the employ of the defendant, became for that service the servants of the plaintiffs, and for their conduct the defendant was not responsible.

Without recapitulating the testimony, we think that upon the evidence it was a fair question for the jury whether Tanner and his men were acting at the request of Mark and as his agents or in the exercise of the right of the defendant to free the bridge from the obstruction, and in its service. The verdict necessarily determined that question in favor of the plaintiffs.

Exception was taken to the refusal of the judge to charge the jury, at the defendant's request, that the defendant was not liable in this action unless there was gross negligence on the part of its servants in the removal of the boat.

It is true that the judge declined, in his instructions to the jury, to use the term "gross negligence" in explaining to them the degree of negligence necessary, under the circumstances of the case, to render the defendant liable. But without using that term he charged them very fully upon the point, and described to them in his own language what kind of negligence was necessary to charge them with damage. He charged that the boat being against the bridge, so as to impede and obstruct its use, and being there without any fault on the part of the defendant, it was the duty of the plaintiffs to remove it at the earliest possible moment and to be extraordinarily diligent in that removal; that if they failed in that duty the defendant had the right to remove the boat; that in that removal the defendant was not bound to use the highest skill; that it was not bound to have skilled workmen and the best appliances to meet the emergency; that it was only bound to have ordinarily careful men in its employ, and such appliances as the statute creating the Company required it to have; and that to render the defendant liable they must find that the injury was caused by such acts of carelessness and negligence as ordinarily careful and prudent men, intent on doing their work properly, would not have committed or failed to perform; that if they found that the defendant's servants were not doing the work at the request of the plaintiffs but in the service of the defendant, they were to determine whether or not the boat was so carelessly and recklessly removed that the careless and reckless removal caused the injury.

It was several times repeated throughout the charge that the defendant was not liable for want of skill in the persons engaged in the removal of the boat, but only for the commission or omission of some act which an ordinarily prudent man would not have committed or omitted, and for reckless conduct on their part.

We think that this was a sufficient definition of the degree of negligence necessary to be shown, and was probably more intelligible to the jury than would have been the term "gross negligence." As said by Allen, J., in *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 295, the term is incapable of precise definition. It depends very much upon the circumstances to which the term is to be applied. It has been

most frequently used in cases where a gratuitous bailee has been sought to be made liable for loss or damage of property intrusted to him, the general rule being that a gratuitous bailee is liable only for gross negligence. In such cases the term has been defined to mean the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. *Gibbin v. McMullen*, L. R. 2 P. C. Cases, 327.

In other cases it is said that a gratuitous bailee is held only to that degree of diligence which a person of common sense, not a specialist or expert in any particular department should exercise in such department; and sometimes it is defined as the want even of slight care or such as even a habitually careless person would take. 2 Whart. Neg. § 470.

In 2 Kent, Com. 560, gross neglect is defined to be the want of that care which every man of common sense, under the circumstances, takes of his own property; citing *Jones*, Bailm. 118, and *Coggs v. Bernard*, 2 Ld. Raym. 913.

In many cases the term itself has been condemned as incapable of being usefully applied in practice and incapable of being accurately defined. *Hinton v. Dibbin*, 2 Q. B. 650; *Austin v. Manchester, etc. R. Co.* 11 Eng. Law & Eq. 513; *The New World v. King*, 16 How. 474 [57 U. S. bk. 14, L. ed. 1021]; *Storer v. Gowen*, 18 Maine. 177; *Wilson v. Brett*, 11 Mees. & Welsb. 113.

It seems to us that the jury were correctly instructed as to the rule of liability in this case, and that under the circumstances the exercise of such ordinary prudence as would be expected, even of unskilled persons, was not too stringent a requirement, in view of the serious consequences liable to ensue from a reckless performance of the work in which the defendant's servants were engaged.

In *Hicks v. Dorn*, 42 N. Y. 47, where a boat had become an obstruction in the canal, it was held that it was the duty of the superintendent to remove it, and that he had no right, even if it had become a nuisance, to destroy it unless such destruction was necessary, and that the question was whether the defendant discharged his duty as a reasonable, prudent and careful man.

According to the testimony of the plaintiffs, Tanner was warned that by attempting to force the boat through he would bring down the bridge; but that, nevertheless, after having failed with two tugs to get her through, while her gallows frame was in contact with the south chord of the span, he obtained a third boat and with the united power of the three broke through, bringing the span of the bridge down upon the boat and crushing her joinder work, upper cabins and machinery.

The verdict established that this damage was caused by the acts of Tanner and his assistants; and that these acts were such as even unskilled men of ordinary prudence would not have committed, but were reckless. A cause of action was thus made out.

But further questions are raised which affect the amount of the recovery. There was great conflict in the evidence as to what was done after the span of the bridge had been brought down upon the boat. The defendant contends that it removed the debris and made the boat

fast to the wharf; and that she afterwards drifted away and sank; and that it is not liable for the damages accruing after the falling of the span; while according to the plaintiff's testimony the defendant took no measures to remove the span but left it on the boat; and she was sunk thereby, and in the night drifted down the river.

The court charged the jury that if the facts were as claimed by the defendant it was not responsible for the subsequent damages but only for those which flowed directly from the fall of the bridge; but that if the span was permitted to rest upon the boat until it sank by the weight of the structure and then drifted down the stream, the plaintiffs could recover for the subsequently accruing damages, provided that they themselves, by the use of ordinary diligence, could not have relieved the boat.

The only exception, taken on the part of the defendant to this portion of the charge, related to the degree of diligence which the plaintiffs were bound to exercise for the purpose of freeing the boat from the span of the bridge after it had fallen upon the boat; defendant claiming that the plaintiffs were bound to use extraordinary diligence for that purpose and the court holding that they were bound to use ordinary care and attention in protecting their property.

It seems to us that if the jury found that the defendant had wrongfully pulled the span of the bridge down upon the boat, nothing less than want of ordinary care on the part of the plaintiffs to protect their boat, by relieving it of the burden, would absolve the defendant from liability for the damage which ensued.

The court was requested by the defendant to charge with reference to this point that the plaintiffs could not recover for any damages done to the boat, after a portion of the bridge was pulled upon her, for the reason that such damage, on the uncontradicted evidence in the case, might have been prevented by the plaintiffs.

After the first trial of this case the trial judge so held, on a motion for a new trial; and the general term affirmed this holding. It was mainly based on the testimony of the plaintiff Mark. Upon a new trial this ruling was adhered to and a verdict was rendered for those damages only which accrued from the fall of the span, and before the sinking of the boat. On appeal by the plaintiffs to the general term, the judgment entered on that verdict was reversed and a new trial ordered, upon the ground that on the second trial Mark had so modified his testimony given on the first trial, as to raise an issue of fact as to whether he could have relieved the boat of the fallen span; and on the third trial, which is the one now under review, his testimony was such as, in our judgment required the submission of that question to the jury, and it was accordingly submitted to them, with the instruction that if they found that Mark could, with the exercise of ordinary care and diligence, have removed the debris from the boat and saved her from the subsequent injuries, the defendant was not liable therefor.

We think this branch of the case was properly disposed of by the court. It appears that after the boat had sunk, she was raised at considerable expense and all her injuries repaired,

as well those arising from her original collision with the bridge as those accruing afterwards; and she was also lengthened beyond her original length, and much time was consumed in all these operations, they having extended over 200 days, during which period the plaintiffs lost the use of their boat, the value of which was proved to be \$40 per day. The gross amount of the expenditures was shown. The expense of repairing the injuries from the collision, and the expense of lengthening the boat, was excluded. The jury were, under the charge, left at liberty to allow interest on the damages; and this seems, by the defendant's request to charge, to have been assented to by it.

The defendant requested the court to charge that the burden of proof was upon the plaintiffs, as well upon the question of damages as upon the question of negligence; and that if plaintiffs had failed to show what damages resulted from the alleged negligent acts of the defendant, and to distinguish them from damages for which defendant was not responsible, they could recover only nominal damages.

The court refused to charge this request, and we think properly. It was too broad. The first part of the proposition was undoubtedly correct, but the testimony clearly showed some substantial damages to which the plaintiffs were unquestionably entitled, if the issues as to negligence were decided in their favor; and the failure to distinguish as to all the items between damages of that character and those to which the plaintiffs were not entitled could not be visited on the plaintiffs, under the circumstances, by confining their recovery to mere nominal damages.

The same remark is applicable to the exception to the refusal of the judge to charge that there was no evidence in the case from which the jury could determine how long the plaintiffs were deprived of the use of their boat, by reason of any negligence of the defendant; and that therefore the plaintiffs were not entitled to recover any damages for the supposed loss of the use of the boat. If the request had been to charge that the jury could only allow such damages, either for expense of repairs or loss of time, as were affirmatively shown by the evidence to have been caused by the acts for which the defendant was responsible, a different proposition would have been presented.

It is very evident from the verdict that the jury must have distinguished between the damages for which the defendant was responsible and those which were attributable to the misfortune of the plaintiffs in getting their boat into the perilous position in which she was. According to the testimony the total expense of the raising of the vessel, and of the repairs, was from \$9,700 to \$9,800; and the total loss of time, 200 days, which at \$40 per day amounted to \$8,000.

These two items, with interest to the time of the trial, would have amounted to nearly \$80,000; and all that was specifically shown to be included therein for damages, for which the defendant was not responsible was \$2,400 for lengthening the boat and about \$900 for repairs of damages caused by the collision with the bridge, and some small items.

It is obvious from the amount of the verdict that the jury did not proceed upon the theory

of charging to the defendant in the first instance the total loss, and then deducting the items for which the defendant was shown not to be responsible, thus shifting the burden of proof. They were not instructed by the court to pursue that course.

After examining the numerous other exceptions in the case we are of opinion that there is none which requires a reversal of the judgment; and it should therefore be affirmed, with costs.

All concur.

Henry A. GADSDEN, *Respt.*,

v.

Edward H. WOODWARD, Impleaded, *Appt.*

Douglass DIXON, *Respt.*,

v.

SAME, *Appt.*

An action seeking to make a trustee of a manufacturing corporation personally liable for a debt of the corporation, on the ground of failure to make the annual report required by statute, is an action for a penalty; and therefore, under sections 523 and 837 of the Code of Civil Procedure, the verification of the answer therein may be omitted.

(Decided October 5, 1886.)

A PPEALS from orders of the Supreme Court at General Term in the First Department, affirming orders of Special Term denying motions to compel plaintiffs to accept unverified answers in actions seeking to make a trustee of a manufacturing corporation personally liable for a debt of the corporation. *Reversed.*

Reported below, 33 Hun, 548.

Mr. James B. Dill, for appellant.

Messrs. Wilmot & Gage, for respondents.

Rapallo, J., delivered the opinion of the court:

Section 523 of the Code of Civil Procedure provides that the verification of an answer may be omitted (where not otherwise expressly prescribed) where the party pleading would be privileged from testifying as a witness, concerning an allegation or denial contained in the pleading.

Section 837 declares that a witness shall not be required to give an answer which will tend to expose him to a penalty or forfeiture.

This action is brought against the defendant, to recover a debt due by a manufacturing corporation of which he was a trustee; and he is sought to be made liable therefor, upon the ground that he failed to make the annual report required by the General Manufacturing Law. The action is not to recover a debt which he owes, but to impose upon him, as a penalty for his default, the payment of the debt of the corporation.

We have repeatedly held that such an action is an action for a penalty or forfeiture. Any admission which he might make in his answer, in support of the plaintiff's allegations, would therefore necessarily tend to expose him to a penalty. *Merchants Bank v. Bliss*, 35 N. Y. 412;

Veeder v. Baker, 83 N.Y. 156; *Stokes v. Stickney*, 96 N. Y. 826.

The liability sought to be enforced against the defendant does not arise out of any contract obligation, but is imposed by the statute as a penalty for disobedience of its requirement.

The distinction between the nature of this liability and that of stockholders under the same statute is clearly pointed out in *Wiles v. Suydam*, 64 N. Y. 173; *Veeder v. Baker*, 83 N. Y. 155-160.

This action is not founded upon any debt owing by the defendant. The debts owing by the company are made the measure of the penalty.

The orders should be reversed and the motions granted, with costs in the court below and one bill of costs in this court.

All concur, except **Miller, J.**, absent.

Harry ROZELL *et al.*, Commissioners of Highways, *Resp'ts.*,

v.

Eliza ANDREWS, *Appt.*

1. A dedication of land to the public can not be inferred from the mere removal of a fence, by the owner.
2. Commissioners of highways are confined to the procedure prescribed by statute, for the removal of obstructions to a highway; and cannot maintain a suit in equity to compel the removal of such an obstruction or to enjoin future obstructions.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Dutchess Special Term in favor of plaintiffs in a suit to prevent the reclaiming of land alleged to be dedicated to public use as a highway. *Reversed.*

Memorandum of decision below, 81 Hun, 173.

The facts are stated in the opinion.

Messrs. William D. Guthrie and Alexander Harvey, for appellant:

To constitute a highway by dedication, it is essential not only that there shall exist an explicit and absolute intention on the part of the owner of the land to permanently set apart and surrender it to the public use; but also that such dedication shall be accepted by the proper public authorities; or that the highway so dedicated shall have been actually used by the public.

Holdane v. Cold Spring, 21 N. Y. 474; *Niagara Falls Susp. Bridge Co. v. Bachman*, 66 N. Y. 261, 269, and cases there cited.

The mere act of setting back defendant's fence, in order to improve the appearance of her property, and substituting a row of trees therefor, is not the deliberate, unequivocal and decisive act referred to in the authorities.

Gowen v. Phila. Exchange Co. 5 Watts & S. 141, 144.

In *Davis v. Clinton City*, 58 Iowa, 389, it appeared that the owner of land adjoining a

road agreed to recognize it as of a certain greater width than was actually used; and it was held that such agreement would not constitute a dedication of the adjoining land to the public.

See also *Mansur v. State*, 60 Ind. 357; *Harding v. Town of Hale*, 61 Ill. 192, 200.

Aside from the question of intent to dedicate, it was equally essential in this case to establish user by the public, in the absence of any acceptance by the proper authorities. Moreover, the user in such case ought to be for such a length of time that the public accommodation and private rights might be affected by a revocation.

McMannis v. Butler, 51 Barb. 436, 449; *Cincinnati v. Lessee of White*, 6 Pet. 431, 439 (31 U. S. bk. 8, L. ed. 452, 456).

If a dedication be conceded, still it was revocable by the defendant.

Holdane v. Cold Spring, *supra*; *McCarthy v. Whalen*, 87 N. Y. 143, 151.

The plaintiffs as Commissioners of Highways had no legal power to accept the dedication of a highway or any part thereof, except in the manner particularly prescribed by law.

The powers, duties and functions of commissioners of highways in this State are expressly defined by statute.

People v. Bd. of Supervisors, 93 N. Y. 397, 401; *Rochester v. Town of Rush*, 80 N. Y. 302, 311.

They are virtually state officers, discharging duties imposed for general public purposes for the benefit of the whole community.

People v. Town Auditors, 74 N. Y. 310, 315.

The alleged widening of this road was evidently an alteration of it.

People v. McNeil, 2 Thomp. & C. 140.

The only authority the plaintiffs had as public officers to thus alter the road was either with the consent of the owner in writing, or by the special proceeding prescribed in chapter 465, Laws of 1877.

The plaintiffs as Commissioners of Highways had no power to commence a suit in equity; and therefore had no cause of action in the premises. The people of the State by the Attorney-General alone could sue to abate such a nuisance.

Coykendall v. Durkee, 13 Hun, 260, 262; *Putnam v. Valentine*, 5 Ohio, 187.

Mr. H. H. Hustis, for respondents.

Danforth, J., delivered the opinion of the court:

We think there is nothing in the record to show that the strip of land in question was not left open for the pleasure or convenience of the owner, rather than the accommodation of the public; but, assuming the act of the owner to be equivocal and consistent with a dedication to the public, it is plain there has been no acceptance on its part, nor such actual user as might take its place.

The plaintiffs do not aver acceptance, and the only one of them who testifies states that he never heard of any dedication of the land. The Act relied upon as an act of dedication, is the setting back of her fence by the defendant, and placing trees on the old line. The alleged user is for a highway with her knowledge and consent. We are referred to no evidence of this and find none.

An owner of land cannot, by the mere removal of his fence, impose upon the public a strip of land as a street; nor can the public deprive the owner of any right or interest in or control over it by that circumstance. Here there was nothing more. There was neither an actual gift by the owner of the land, nor a user by the public; no evidence by word, or by any decisive act, of an intent even to give or dedicate; and the motion to dismiss the complaint should have been granted.

We are also of opinion that the action is misconceived. It is in equity; and the only relief sought is that the defendant be compelled to remove so much of her fence as she has already restored to its former position and be restrained by injunction from replacing the rest. The plaintiffs sue as Commissioners of Highways. The statute has defined their duty and vested them with power to execute it.

Upon the plaintiffs' theory the defendant has obstructed the highway. The statute prescribes the method of procedure on their part. That she threatens still further to obstruct it can give them no cause of action. If she executes the threat, they have in a proper case the power of summary removal of the fence at her expense; but if the encroachment be denied, the issue must go before a jury. 1 R. S. title 1, pt. 1, chap. 16, art. 5, as amended by Laws of 1878, chap. 245; *Coykendall v. Durkee*, 18 Hun, 260.

The plaintiffs can have no other remedy by this action; and it is needless therefore to grant a new trial.

The judgment is reversed and the complaint dismissed, with costs.

All concur, except **Miller, J.**, absent.

Re Judicial Settlement of Accounts of William H. SNYDER, Exr.

1. The failure of an executor to pay over the amount found against him on judicial settlement, a decree requiring payment, service of decree, and an ineffectual attempt to enforce the decree by execution, make out a case of **contempt, punishable by the surrogate**, under section 2555 of the Code of Civil Procedure.
2. The surrogate is not necessarily concluded by the uncorroborated affidavit of the executor alleging his inability to comply with the decree; and as the **decision of the surrogate imposing punishment for the contempt** involves conflicting evidence and the exercise of discretion, it will **not be reviewed** by the court of appeals, where the discretion has not been unfairly exercised.

(Decided October 5, 1886.)

APPEAL from an order of the Supreme Court at General Term in the Third Department, affirming an order of the Surrogate's Court of Rensselaer County, adjudging an executor guilty of contempt, etc. *Appeal dismissed.*

Reported below, 34 Hun, 302.

The appellant was executor of the estate of

Jabez Olmstead, deceased. The order appealed from adjudged him to be in contempt for refusing and neglecting to pay over certain sums of money as directed by a decree made upon the settlement of his accounts as executor, and imposing, as his punishment, a fine equal to the amount found due from him, and committing him to the county jail until the same should be paid.

The facts connected with the questions presented are further stated in the opinion.

Mr. James Lansing, for appellant:

Not every case of failure to obey a surrogate's decree, directing an executor to distribute funds with which he stands charged, is punishable as a contempt under section 2555 of the Code.

Baucus v. Stover, 89 N. Y. 1.

The decree in this case states a specific fact, to wit: that the conversion of the fund occurred before the passage of section 2555, which withdraws the case from the operation of the statute, and protects the appellant from punishment thereunder.

The general rule is that the character and consequences of particular acts are to be determined by the law which was in force when the acts were done.

Sanford v. Bennett, 24 N. Y. 20; Code, § 3352.

In other words, statutes must be construed prospectively only, unless the intention of the Legislature to make them retrospective in their operation is very clearly and unequivocally expressed.

People v. Supervisors of Columbia Co. 43 N. Y. 130; *People v. McCall*, 94 N. Y. 587.

There is no provision of the Code giving section 2555 a retrospective application and we insist that it should not be so applied, especially since it is in its nature and remedy quasi criminal and highly penal, so that such construction would have the effect of an *ex post facto* law.

There cannot be a refusal or willful neglect to pay money unless the recusant has it.

Redf. Surv. Pr. p. 755.

The former law (8 R. S. 5th ed. p. 204) empowered the surrogate to enforce all lawful orders, process and decrees of his court, by attachment against the person of those who should neglect or refuse to comply with such orders and decrees, or to execute such process, which attachment should be in form similar to that used by the court of chancery in analogous cases.

2 R. S. 221, § 6, subd. 4; *Watson v. Nelson*, 69 N. Y. 536.

Among the principal adjudications upon this statute were *Estate of John Sherry*, 7 Abb. N. C. 890, in which Surrogate Calvin held that an attachment could not be issued unless it be shown that the executor had the fund in hand at the time of the decree.

See also *People v. Concles*, 3 Abb. Ap. Dec. 507, in which case the fund had been found to be actually in the hands of the executor.

Also *Timpson's Estate*, 15 Abb. Pr. N. S. 230, decided in 1872, as explained in *People v. Marshall* 7 Abb. N. C. 380, in both which cases it appeared that the executor had the fund in his hands sufficient to pay the decree at the time it was made.

See also the case of *Doran v. Dempsey*, 1 Bradf. 490, in which it was held that unless the executor willfully retains the assets in his hands, or refuses to pay when he has the means to do so, an attachment will not be issued.

This doctrine is cited with approval in *Matter of Latson*, 1 Duer, 696.

A remedy, ample in its provisions, is given by statute, applicable to exactly this class of cases.

Laws 1877, chap. 208.

Mr. J. A. Cipperly, for respondents:

Where, as in this case, the delinquent is an executor, and the decree relates to the fund or estate, it may be enforced by punishing him with or without issuing an execution, as the surrogate thinks proper.

Code, § 2555, subd. 4.

This provision of the Code applies to all proceedings after September 1, 1880, and gives the surrogate power to enforce his decree by proceedings for contempt.

Code § 3347, subd. 11; *Matter of Dissoway*, 91 N. Y. 235; *Woodhouse v. Woodhouse*, 5 Redf. 131; *Joel v. Ritterman*, 5 Redf. 136; Redf. Surr. Pr. 754 and notes, also p. 755; Abb. Ann. Dig. 1882-3, p. 85.

Section 2550 of the Code provides that the final determination of the rights of the parties to a special proceeding in the surrogate's court is styled indifferently a final order or decree.

The proceeding by order to show cause, made on the 9th day of May, 1883, was a special proceeding to which the Code is specially applicable.

Matter of Dissoway, 91 N. Y. 235.

The surrogate's court is a court of record.

Code, § 2, subd. 20.

It has the same power to punish for contempt as a court of record, and to require an executor, etc., to perform any duty imposed upon him by statute, or by the surrogate's court, under authority of a statute.

Code, § 2481.

The decree directing payment by the executor, except upon an appeal therefrom, is conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay.

Code, § 2552.

A surrogate's decree directing the payment of money may be enforced by punishment as for a contempt of court.

Code, § 2555.

Inability to perform the duty, if resulting from the act or omission of defendant himself, is not a defense.

7 Abb. Dig. 398 and cases cited. *Timpson's Estate*, 15 Abb. Pr. N. S. 230; *People v. Bergen*, 15 Abb. Pr. N. S. 97; 53 N. Y. 404; *Joel v. Ritterman*, 5 Redf. 136; *Gillies v. Kreuder*, 1 Dem. 349; Redf. Surr. Pr. 755 and cases cited.

The provisions of the Code, § 2555, giving the surrogate power in certain cases to enforce decrees for the payment of money, is similar to the provision of section 1241 of the Code, which gives the supreme court power to enforce judgments in certain cases by punishing for contempt of court. The exercise of such power is in the discretion of the court to which application is made; and that discretion, when exercised is not reviewable on appeal.

N. Y.

Cochranes v. Ingersoll, 78 N. Y. 613; *Mount v. Mitchell*, 31 N. Y. 356.

The decree of final settlement of March 29, 1882, directing the payment of this money by the executor is a determination by the surrogate; and is conclusive evidence that there are sufficient assets in the executor's hands to satisfy the sum which the decree directs him to pay, such decree not having been appealed from.

Code, § 2552 and cases cited above. *Gillies v. Kreuder*, 1 Dem. 349.

Redfield in his *Surrogate's Practice*, p. 755, says: "If one, who is directed to pay a sum of money, claims and admits that he cannot pay, for the reason that he has appropriated to his own use trust funds, which would otherwise have been applicable, his neglecting to pay under such circumstances is a willful neglect and punishable as a contempt."

Danforth, J., delivered the opinion of the court:

The receipt of money by the executor in his official capacity, a judicial accounting, showing a balance against him of \$2,975.70, followed by a decree requiring payment to those entitled to it, and an ineffectual attempt to enforce the decree by execution, are conceded facts.

Upon a petition stating these things, and alleging that after demand made, the executor neglected and refused, "and now willfully neglects to obey the decree," he was, by order of the Surrogate of Rensselaer County, required to show cause why he should not be punished for his alleged offense and contempt.

In answer thereto, he made two affidavits, the averments of which the Surrogate held insufficient; and, imposing a fine to the extent of moneys unpaid by him, ordered that the executor be imprisoned in the common jail of the county, until the fine and the costs of the proceeding were paid.

The general term has affirmed the order in face of the dissent of one of its number. I do not understand that any member of the court doubted the jurisdiction or power of the Surrogate to make the order appealed from; but, in view of the alleged insolvency of the executor and of his declaration of inability to pay, thought he ought not to be punished for not paying.

The contempt charged was in violating the decree or order which directed payment; and the investigation before the Surrogate might properly have been limited to the matter contained in it; i. e., the service of the decree and the facts of the neglect constituting its violation. To those matters there was no answer. The truth of them was admitted, and the case clearly brought within the provision of section 2555 of the Code of Civil Procedure, under which the Surrogate made the order in question.

The argument of the learned counsel for the appellant is placed upon the particular words of the affidavits of the executor. In effect they assert an early conversion of the trust funds to the exigency of his private and individual business; next the transfer of his business and his stock in trade and real estate to his wife, upon no present consideration, but in application upon an old debt, and followed by no apparent change in possession or management;

81

then, in consequence of this transaction, insolvency and inability to comply with the decree.

The learned judge at general term has sufficiently pointed out that the Surrogate was not necessarily concluded by these bald and uncorroborated assertions of the defaulting executor; and as the question is not only one to be determined upon evidence, at least conflicting, but also rests in discretion which has not been unfairly exercised, we find no ground on which we can review his decision. Code, § 1837; *Cochrane's Exr. v. Ingersoll*, 78 N. Y. 618.

The appeal should therefore be dismissed.

All concur except *Miller, J.*, absent.

Elnathan SWEET, Jr., *Reept. and Appt.*,
v.

Dorilus MORRISON *et al.*, *Appts. and Repts.*

- 1 An agreement between copartners, that one of them shall conduct the financial settlements of the firm, should not be construed as abrogating or dividing the general partnership authority and as giving the one partner absolute control of such branch of the business, unless such intention is clearly shown.
- 2 One partner appointed to conduct financial settlements of the firm cannot substitute one of his copartners in his place, to the exclusion of the others; but when he surrenders control, it goes back to the firm as a whole; and a settlement made by his copartners binds the firm.
- 3 If certain members of a firm make a settlement of a firm claim which will be binding as between the firm and the party with whom it is made, a member of the firm who had no part in making the settlement, and who was defrauded thereby, may nevertheless maintain an action for damages for the fraud; such damages being limited to the diminution of his partnership share produced by the waste of partnership assets in the fraudulent settlement.
- 4 The amount of such damages due the defrauded partner can only be ascertained in a proceeding for an accounting between him and his copartners; and thereafter the third party with whom the fraudulent settlement was collusively made can be compelled to pay him only what is required, after the exhaustion of the firm assets, to make up to him such loss as can be traced to the waste of the disputed asset by his copartners in collusion with said third party.

(Decided October 5, 1886.)

CROSS appeals from a judgment of the Supreme Court at General Term in the Second Department, modifying and affirming as modified a judgment of the Kings County Special Term. *Reversed.*

Memorandum of decision below, 33 Hun, 665.

This action was brought by plaintiff against his copartners, composing the firm of Fleming, Kennedy & Co., the Northern Pacific Railroad Company, and the persons composing the firm of Payson, Canda & Co. In his complaint the plaintiff alleged that in March, 1872, the Northern Pacific Railroad Company entered into a contract with Payson, Canda & Co. for the construction of a part of its railroad, at certain specified prices for the respective classes of work required; that thereafter Payson, Canda & Co. sublet the grading of said portion of the road to plaintiff's firm; that plaintiff's firm performed the work undertaken by them in a proper manner; that the estimates of said work made by the chief engineer of the railroad company, as provided in the contract and subcontract, were incorrect and grossly partial to the company, and underestimated the work done by plaintiff's firm; that Payson, Canda & Co., knowing these facts and acting in collusion with plaintiff's copartners, procured from the latter, against plaintiff's consent and after notice from him to the contrary, a relinquishment of the claim of plaintiff's firm, for the amount actually due them for the work done by them, and consummated a settlement with his copartners, upon the basis of said erroneous estimates; that at the time of said transactions, by articles duly executed by his copartners, plaintiff was exclusively authorized and empowered to make any and all settlements and to give any and all acquittances for any moneys, claims or demands due or to become due upon the said work or contract therefor; and that plaintiff is interested in the copartnership to the extent of one quarter.

Plaintiff demanded judgment for a decree declaring that the pretended settlement made by his copartners and Payson, Canda & Co. be set aside as null and void; that all estimates made by the chief engineer of the railroad company of work under the subcontract to his firm be vacated and set aside; that an accounting be had of the work performed by his firm as subcontractors, and the value thereof; that plaintiff's firm recover of Payson, Canda & Co., and of the railroad company, any damages suffered by it in being compelled to employ unnecessary laborers, and from neglect and omission to make estimates, together with the amount due for work done by plaintiff's firm, deducting payments made on account before the pretended settlement; that if any of the defendant members of plaintiff's firm, Fleming, Kennedy & Co., shall be found to have released their individual claims by said pretended settlement, their remaining copartners recover such amount as shall remain due on account of said cause or causes of action; and that, if necessary to that end an accounting be had between the members of said firm; and for general relief.

The defendants upon whom service was had having answered, the case was sent to a referee to take evidence, and at a hearing at special term, upon the pleadings and proofs, an interlocutory decree was rendered, to the effect that the settlement between Payson, Canda & Co. and plaintiff's copartners was collusive and fraudulent; that an accounting be had to determine the actual amount of work done by

plaintiff's firm and the deficiency or difference between the same and the statement on which said settlement was made; that plaintiff is entitled to recover for such deficiency or such interest therein as may be determined on final hearing; with an order of reference to compute the actual amount of work performed by plaintiff's firm.

After the report of the second referee, a final decree was entered at special term, repeating the former finding that the settlement between Payson, Canda & Co. and plaintiff's copartners was fraudulent and collusive; and that plaintiff was entitled to recover from Payson, Canda & Co. on account of grading work done by plaintiff's firm, \$98,151.50, with interest and costs.

From this decree defendants appealed to the general term, which decided that plaintiff was entitled to recover only one fourth of the amount for which judgment in his favor had been entered, that being the extent of his individual interest as a member of his firm; and rendered judgment for him for \$23,803.38 and costs; and affirmed the judgment as thus modified and reduced.

From this judgment both the plaintiff and defendants appealed.

Mr. E. W. Paige, with **Mr. Henry Brodhead**, for plaintiff.

Messrs. William W. Niles and John Van Voorhis, for defendants.

Finch, J., delivered the opinion of the court:

There are, possibly, some facts in the mass of testimony taken in this case which admit of an inference that the settlement assailed was fraudulent and collusive as against the plaintiff. The proofs have not impressed us with the soundness of that conclusion; but the question is essentially one of fact; and, in the face of the finding of the referee and its approval by the general term, we can only reverse upon the ground that there was absolutely no evidence of fraud. We hesitate to do that, for the reason that certain incidents were proved which standing alone would tend to show collusion between all the other parties to injure and impair the rights of Sweet; and while they seem to us fairly explained, the adequacy of the explanation has not struck all minds alike.

But conceding the fraud, and waiving the difficulty that the false estimates, if they were such, originated in the act and influence of the railroad company, which has been dismissed from the case, it is quite clear that such fraud was against Sweet alone and furnishes a cause of action to him only and not to his firm. His four partners, who made the settlement with Payson, Canda & Co., had competent authority for that purpose, which bound the firm. The terms of their partnership agreement distributed among the partners, the work to be done, assigning to Sweet, who was an engineer, the duty of conducting the financial settlements, and to his associates the work of grading.

Such an agreement ought not to be construed as abrogating or dividing the general partnership authority and making one absolute dictator over four, as to the finances of the firm, unless such an intention is quite clearly and distinctly developed. The agreement strikes us as not so

intended. It did not forbid or prohibit the exercise of authority or the right to participate on either hand. In many firms the business is necessarily divided into departments which single partners specially control, but not to the absolute exclusion of the others or so as to abrogate utterly their partnership authority.

This agreement seems to us fairly of that character, and gave to Sweet a leadership or controlling influence in financial questions while he did his duty in exercising it, but did not strip his associates of their general partnership rights. But Sweet did not perform that duty. He went away to attend to other business of his own and left a letter directing Fleming to settle. He had no power to make such a substitution. When he surrendered his own control it went back to the firm and remained there, since he could not take up and abandon his duty at his pleasure.

The settlement made by the four partners, therefore, bound the firm. They lawfully represented it, and as to them there was neither fraud nor mistake. They allege neither, but deny both; and it follows that Payson, Canda & Co. were bound to pay the firm only the amount required by the settlement actually made.

Yet in spite of that it was possible for Sweet's partners and the other defendants to make, by collusion, a settlement—valid as between them but fraudulent as to him; and that is the fraud charged and the fraud proved, if there be any. Sweet may recover, not the debt due to the firm, for that is discharged, but damages for the fraud practiced upon him in the process. This is his individual right; and the resultant damages can only be measured by his individual loss, and that loss, if it exist at all, must necessarily be and can only be a diminution of his partnership share produced by a collusive waste of partnership assets.

But he has not proved any such loss. It cannot be known until a settlement of the partnership accounts what loss has resulted from the fraud. Payson, Canda & Co. are not bound to pay Sweet's firm or Sweet's partners anything. Primarily the action is by Sweet against his copartners, for a partnership settlement, in which he charges them with the willful and fraudulent waste of a valuable claim; and holds the debtors responsible also, by reason of their collusive participation. That is the sole theory upon which the action can be maintained.

To Sweet's partners and to his firm nothing is due from Payson, Canda & Co.; and they can be compelled to pay only what is needed to perfect Sweet's rights as disclosed by an honest settlement. He has a right, notwithstanding the settlement actually made, to be placed in the position he would have been in if the full debt had been honestly paid to his copartners, and he had received his aliquot share of the assets thus increased, after payment of the firm debts. When that is done he has obtained full justice and all to which he is entitled.

But as the case stands, his recovery may prove to be much too large or much too small. No final settlement of the firm accounts has been had and every effort to prove their exact condition was prevented by the rulings upon the trial. It may turn out that, even after charging the

four partners with the entire amount of the disputed asset, Sweet has already had his full share and is entitled only to judgment confirming him in its possession.

In that event Payson, Canda & Co. would have nothing to pay. If it should appear that the firm debts are all paid, or if not, that the four partners are so solvent and able to pay their proportions as to permit that subject to be disregarded, and that Sweet has already had, from the firm, property in excess of a sum equal to one quarter of the disputed claim, then the sole relief necessary to his protection is a judgment confirming him in the possession of what he has received. His partners claim that to be the truth; that he took in advance and over and above his share all that this asset would produce; and, having got it already, has no claim to be paid it a second time.

On the other hand, that claim of the four partners may prove to be untrue, and it may further appear that large debts are outstanding for which Sweet is liable and, at least, if his partners are insolvent and unable to pay and all the other firm property is exhausted, he may require from Payson, Canda & Co. a sum sufficient to restore the solvency of the firm and secure him his share of the surplus, even if it took much more than the sum he has already recovered.

In other words, whatever loss of Sweet on a final adjustment of the partnership accounts can be traced to the waste of the disputed asset by his partners, in collusion with Payson, Canda & Co., must be made good to Sweet out of it. But when that is done, full justice is rendered and he is entitled to no more. The arbitrary award of one quarter of the claim was therefore erroneous, since no sufficient facts are found to justify it.

There were cross appeals from the judgment of the general term. The plaintiff appealed from so much of it as reduced his original recovery; and the defendants, because it permitted a recovery at all. The conclusion we have reached determines both appeals.

The judgment should be reversed and a new trial granted; costs to abide event.

All concur, except **Miller, J.**, absent.

John HINCHLIFFE, *Respt.*,

v.

Margaret SHEA, *Appt.*

When a married woman joins with her husband in a mortgage of his land, the mortgage is defeated as to both by a sale of the husband's interest in the mortgaged premises on execution under a prior judgment, and her dower interest in the land cannot be subsequently foreclosed under such mortgage.

(Decided October 5, 1886.)

APPPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the King's Special Term in favor of plaintiff in an action to foreclose a mortgage as to a dower interest. *Reversed.*

Reported below, 34 Hun, 365.

Margaret Shea, the defendant, joined with her husband Martin Shea, in a mortgage of his

real estate given to secure a payment of his debt. Thereafter the interest of the husband was sold, under a judgment against him recovered prior to the mortgage; and the sheriff conveyed such interest to the purchaser at the sale, who in turn conveyed it to Margaret Shea in April, 1882, a few weeks after the death of her husband, Martin Shea.

Thereafter this action was brought by the owner of the mortgage, to foreclose it as to the dower of Margaret Shea; and judgment of foreclosure and sale of the dower interest was ordered. From this judgment defendant appealed to the general term, where it was affirmed, and she appealed to this court.

Messrs. F. T. Magill and William N. Dykman, for appellant:

A *feme covert* or a widow may release her claim of dower so as to bar her; but she can invest no other person with the right to maintain an action for it.

Jackson v. Vanderheyden, 17 Johns, 167.

The joining with the husband in his conveyance is but a release by the wife of a contingent future right, and operates but by way of estoppel.

Malloney v. Horan, 49 N. Y. 111.

A stranger to the title cannot claim the benefit of such estoppel.

1 Washb. Real Prop. p. 284; *Hawley v. Bradford*, 9 Paige, 200; *Green v. Putnam*, 1 Barb. 500.

A quitclaim or release by a married woman to a stranger to the title is ineffectual to divest her of an inchoate right of dower.

Merchants Bank v. Thomson, 55 N. Y. 7.

If a mortgage is paid and satisfied, the release of dower ceases to operate. To deny that a release of dower falls when the conveyance it is joined with ceases to operate is to affirm that a wife's conveyance of her inchoate dower can stand alone. The exact opposite has been decided.

Martin v. Smith, 46 N. Y. 571.

Messrs. Ruggles & Baldwin, for respondent:

By joining with her husband in the mortgage, Margaret Shea released and relinquished to the plaintiff, mortgagee, and his assignors, all her dower interest or future contingent right in the mortgaged property; and having outlived her husband, and the debt being unpaid and the mortgage being valid, the mortgagee is entitled to the judgment of foreclosure and sale here appealed from.

2 Scrib. Dow. chap. 12, § 49; *Hawley v. Bradford*, 9 Paige, 201; *Learned v. Cutler*, 18 Pick. 9; *Smith v. Handy*, 16 Ohio, 191.

Her dower interest is liable for her husband's debt, the same being secured by his and her mortgage.

Leavenworth v. Cooney, 48 Barb. 570.

The respondent, plaintiff, has the right, although the dower has not been formally admeasured, to have judgment of foreclosure and sale thereof.

Tompkins v. Fonda, 4 Paige, 448; *Payne v. Becker*, 87 N. Y. 153; *Pope v. Mead*, 99 N. Y. 201.

Andrews, J., delivered the opinion of the court:

The joinder by a married woman with her

husband, in a deed or mortgage of his lands, does not operate, as to her, by way of passing an estate; but inures simply as a release to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterwards claiming dower in the premises as against the grantee or mortgagee, so long as there remains a subsisting title or interest, created by his conveyance.

But it is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors or is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation and may, after the death of her husband, recover dower as though she had never joined in the conveyance. *Robinson v. Bates*, 3 Met. 40; *Malloney v. Horan*, 49 N. Y. 111; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Littlefield v. Crocker*, 30 Me. 193.

In short, the law regards the act of the wife in joining in the deed or mortgage, not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee of her husband, in and of the title or interest created by his conveyance. It follows, therefore, that her act in joining in the conveyance becomes a nullity whenever the title or interest to which the renunciation is incident is itself defeated. *Scrib. Dow. chap. 12, § 49.*

The wife's deed or mortgage of her husband's lands cannot stand independently of the deed of her husband, when not executed in aid thereof; nor can she by joining with her husband in a deed of lands to a stranger in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right. *Marvin v. Smith*, 46 N. Y. 571.

These principles are, we think, decisive of this case. The plaintiff's mortgagee has been defeated by the paramount title, derived under the execution sale. It was the husband's mortgage and not the mortgage of the wife, except for the limited and special purpose indicated. The lien of the mortgage, as a charge on the lands of the husband, has by the execution sale been subverted and destroyed. Nor can the security be converted into a mortgage of the widow's dower, now consummated by the death of her husband. This would be a perversion of its original purpose. Her act in signing the mortgage became a nullity on the extinguishment of the lien on the husband's lands.

If on the execution sale there had been a surplus applicable to the mortgage, it might very well be held that the widow could not be endowed therein, except after the mortgage had been satisfied. The surplus would represent in part the mortgaged premises. See *Elmen-dorf v. Lockwood*, 57 N. Y. 322.

We think the authorities require a reversal of the judgment.

Judgment reversed and complaint dismissed, with costs.

All concur except *Miller, J.*, absent.

N. Y.

John FISCHER, *Appt.*,

v.

George F. LANGBEIN *et al.*, *Respts.*

1. **Where a court is called upon to adjudicate upon doubtful questions of law, or to determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it (although afterwards vacated or set aside as erroneous) void, or subject the party procuring it to an action for damages.**
2. **Where, however, the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act; and if it nevertheless proceeds and entertains jurisdiction of the proceeding, all its acts are void and afford no justification to the parties instituting them, as against parties injuriously affected thereby.**
3. **If the parties procuring the commitment of another as for a contempt are not liable for damages for the original imprisonment, they are not responsible for the subsequent action of the sheriff or of the court in continuing it, although it is subsequently decided on appeal that the commitment was erroneous.**
4. **Where a commitment for contempt sets out the facts and proceedings in detail, and otherwise complies with the rule in respect to the contents of a commitment, it will not be held void because it omits to state that the disobedience referred to as a contempt had "defeated, impaired, impeded or prejudiced" some "right or remedy" of the party in the action who procured it. (Code Civ. Proc. § 14.)**

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the New York Circuit Court, dismissing the complaint in an action of false imprisonment. *Affirmed.*

Memorandum of decision below, 30 Hun, 882.

The facts are stated in the opinion of the general term as follows: "The appellant was a member of the *Kranken Unterstutzungs Verein Deutsche True und Einigkeit*, and commenced an action in the court of common pleas against the individual members of the association, to dissolve it, and applied for an injunction to restrain the disposition of its funds. Upon such application he was met by the affidavits of forty-two members of the society represented by the defendant, J. C. Julius Langbein, as attorney of record.

"The plaintiff, through his counsel, thereupon charged that these forty-two members who had made affidavits, being Germans and unacquainted with the English language, were mis-

led in signing and swearing to their affidavits containing averments prejudicial to his application; and it was agreed that the truth or falsity of his charge should determine whether he should or should not pay the referee's fees. If the forty-two members or a majority of them swore that they made the statement which appeared in the affidavit, the plaintiff was to pay the fees.

"An order of reference containing that provision in substance was thereupon entered by consent.

"The learned justice who made the order, in a subsequent proceeding said, in reference to it: 'Knowing the expense and vexation to parties, of references to determine disputed facts arising in the course of a motion, I endeavored to dissuade counsel from this course; but the course was taken, upon the strict agreement as to paying the expense which is embodied in the order of September 17, 1878, directing the reference.'

"The referee, after a bitter contest and it seems a protracted and tedious litigation, found in favor of the defendants. His fees were \$180. Due notice was given that his report was ready for delivery. The plaintiff, however, neglected to take it up; whereupon, upon application by the defendants' attorneys, an order was made requiring the plaintiff to pay to the referee his fees within three days, or show cause why he should not be committed and the injunction vacated and the motion for injunction and the appointment of a receiver denied, and his proceedings stayed until such fees were paid. The plaintiff was heard upon the return of the order to show cause, and the judge ordered that the commitment should issue, which was accordingly done on the 4th of December, 1878.

"On the 5th of December, 1878, the plaintiff obtained a writ of *habeas corpus*, which was returnable at a special term; and an order was made on the 7th of December, two days subsequently, dismissing it with costs and remanding the plaintiff. The opinion of the court was expressed upon the subject, and declared that the relator desired a reference for a particular purpose, and it was granted on his stipulating to pay the referee's fees in a certain contingency; that the event had occurred, and the court had directed the payment of the fees in accordance with the compact made; that he refused or declined to pay, and for this contempt was committed.

"And it was held that the power of the court to commit, under the circumstances, admitted of no doubt; that the expensive process was adopted as a favor to the relator, on his promise to pay; and he was bound to keep it.

"On the 27th of December, 1878, the plaintiff obtained another writ of *habeas corpus*, which was also dismissed and the plaintiff remanded to jail.

"It appears further, that in March, 1870, the general term of the court of common pleas reversed the order of commitment upon the ground that the right of the clerk of the defendants' attorneys, who made the demand for the payment of the referee's fees, to make such demand, was not exhibited. 'But' the court added, 'in view of the bad faith exhibited on his side, we shall not award costs to the plaintiff; and we make it part of the terms of re-

versal that the plaintiff shall stipulate not to bring any action on account of his imprisonment. This stipulation must be handed up with the proposed order of reversal.'

"The stipulation was not given, and the court affirmed the order. The plaintiff then appealed to the court of appeals, where the order was reversed. 81 N. Y. 235.

"Subsequently this action was brought against the defendants, as the attorneys and counsel for the defendants in the original suit, to recover damages for false imprisonment."

Messrs. Wehle & Jordan and Samuel Hand, for appellant:

The order of December 4, 1878, was void upon its face because it did not adjudicate the plaintiff guilty of any act which amounted to a contempt of court. The order recites that plaintiff was guilty of a contempt. It asserts this as a conclusion of law, but it does not adjudicate any fact which amounts to a contempt. Such adjudication must appear in the order, to render it valid.

Albany City Bank v. Schermerhorn, 9 Paige, 372; *People v. Rogers*, 2 Paige, 103; *People v. Nevins*, 1 Hill, 155, 168; *Green v. Elgie*, 5 Ad. & Ellis, N. S. 99; *S. C.* 48 Eng. C. L. 97; *Clark v. Bininger*, 75 N. Y. 845; *Fischer v. Raab*, 81 N. Y. 235; 2 R. S. 534, § 20; Code, § 2281; *Matter of Townshend*, 6 Thomp. & C. 227; *Matter of McFeele*, 2 Redf. 541.

The order amounted to a sentence, without a charge of and without evidence to show an offense; and without a conviction of an offense. Such an order could not protect the parties who procured it.

Comfort v. Fulton, 13 Abb. Pr. 276; *Curry v. Pringle*, 11 Johns. 444; *Vredenburg v. Hendricks*, 17 Barb. 179; *Lansing v. Case*, 4 N. Y. Legal Obs. 221; *Clarke v. May*, 2 Gray, 410; *Warner v. Perry*, 14 Hun, 337; *Rutherford v. Holmes*, 66 N. Y. 368; *Luhre v. Commo*, 13 Abb. N. C. 88; *People v. Board of Police*, 6 Abb. Pr. 162; *Wortman v. Wortman*, 17 Abb. Pr. 66; *Bullymore v. Cooper*, 46 N. Y. 236; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Patrick v. Solinger*, 9 Daly, 149; *Savacool v. Boughton*, 5 Wend. 172; *Davenport v. Doady*, 3 Abb. Pr. 409.

The plaintiff ought to pay the referee; but this is not the remedy to compel such payment.

Fischer v. Raab, *supra*; Code, Civ. Proc. § 2266 *et seq.*; *Bullymore v. Cooper*, 46 N. Y. 236.

The court being without jurisdiction, the proceedings are void; and the defendants, as the promoters of the imprisonment under the void process, are liable.

Elliott v. Peirce, 1 Pet. 340 (26 U. S. bk. 7, L. ed. 170); *Williamson v. Berry*, 8 How. 495 (49 U. S. bk. 12, L. ed. 1171); *Lessee of Hickey v. Stewart*, 3 How. 750 (43 U. S. bk. 11, L. ed. 814); *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Palmer v. Foley*, 71 N. Y. 109; *Müller v. Adams*, 52 N. Y. 409; *Day v. Bach*, 87 N. Y. 56.

The sheriff was protected by the process in his hands; but not so the attorney who issued it.

Deyo v. Van Valkenburgh, 5 Hill, 242.

The drawing of the commitment and the signing thereof were ministerial or, more properly, clerical acts of the attorney and the clerk of the court.

Code, § 2281.

A mistake in such acts does not fall within the province of judicial error; but the parties guilty of such a mistake must respond in damages.

MacDonell v. Buffum, 81 How. Pr. 154; *Houghton v. Searthout*, 1 Denio, 589; *Tompkins v. Sands*, 8 Wend. 462.

Upon the discovery of the mistake in the commitment, the defendants were bound to procure its correction.

Doyle v. Russell, 80 Barb. 300.

Messrs. George F. Langbein and J. C. Julius Langbein, respondents in person:

This court simply held the order and warrant of commitment to be an erroneous process, granted by the court below upon the facts presented to it; and not that it was irregular or void, or that the court below had not power to make it.

Fischer v. Raab, 81 N. Y. 235.

Jurisdiction may exist although the judgment be erroneous.

1 Pom. Eq. Jur. § 129, p. 111; *Hunt v. Hunt*, 72 N. Y. 217, 228, 230; *Staples v. Fairchild*, 3 N. Y. 41; *Porter v. Purdy*, 29 N. Y. 106; *Rodriguez v. East River Sav. Inst.* 63 N. Y. 460.

1. A void process is an entire nullity, the same as a piece of waste paper, or as if it had not been issued. It protects no one.

2. An irregular process is good until set aside. After it is set aside, it protects no one for acts done under it.

3. An erroneous process is good until set aside. After it is set aside, it is a protection for all acts done under it.

Wait, Fraud. Conv. §§ 420, 422, also §§ 423, 425, 443, 444 and notes and cases cited: *Groy v. Boules*, 13 Rep. 179; *Bradley v. Fisher*, 13 Wall. 351, 352 (80 U. S. bk. 20, L. ed. 651); *Tallman v. McCarthy*, 11 Wis. 420; *Ex parte Watkins*, 3 Pet. 202 (28 U. S. bk. 7, L. ed. 653); *Skinnion v. Kelley*, 18 N. Y. 355; *Miller v. Brinkerhoff*, 4 Denio, 118; *Van Alstyne v. Erving*, 11 N. Y. 331; *Miller v. Adams*, 52 N. Y. 415; *Simpson v. Hornbeck*, 3 Lans. 55; *Day v. Bach*, 87 N. Y. 61.

The question of the want of jurisdiction has been inquired into already and has been decided.

This court will not consider this appeal (from a judgment) as an appeal from the order and warrant of commitment over again.

Fischer v. Raab, 81 N. Y. 235; *Geib v. Topping*, 83 N. Y. 47; *Bradley v. Fisher*, 13 Wall. 351 (80 U. S. bk. 20, L. ed. 651); *Cooper v. Reynolds's Lessee*, 10 Wall. 308 (77 U. S. bk. 19, L. ed. 931).

Error of the court in adjudging a party entitled to process does not make the party liable for acts done under the erroneous process.

2 Add. Torts, 4th Eng. ed. notes, pp. 757, 781, 799, 810, 831; 2 Add. Torts, Wood's ed. pp. 39, 41, 83, 84, 144, 156; *Cohen v. Morgan*, 6 Dowl. & Ry. 9; *Carratt v. Morley*, 1 Ad. & Ellis, N. S. 18-28; *Cooper v. Harding*, 7 Ad. & Ellis, N. S. 928; *Blythe v. Tompkins*, 2 Abb. Pr. 472; *Williams v. Smith*, 14 C. B. N. S. 596; *S. C.* 106 Eng. C. L. 594; *Daniels v. Fielding*, 16 Mees. & Welsb. 200; *Smith v. Sydney*, L. R. 5 Q. B. 208; *Landt v. Hiltz*, 19 Barb. 283; *Chapman v. Dyett*, 11 Wend. 31; *Simpson v. Hornbeck*, 3 Lans. 58; *Cory v. Long*, 12 Abb.

Pr. N. S. 432; *Miller v. Adams*, 52 N. Y. 412; *Palmer v. Foley*, 71 N. Y. 109; *Day v. Bach*, 87 N. Y. 56; *Matter of Bradner*, 87 N. Y. 171; *Marks v. Townsend*, 97 N. Y. 590. See also Kaufman's Mackeldey, Civil Law, p. 163; 4 Abb. Dig. title, *Officers*, VIII. IX; *Waters v. Whittemore*, 22 Barb. 595.

In *Coster v. Wilson*, 3 Mees. & Welsb. 411, it was held that a warrant of commitment may be legal, although made intelligible only by reference to the order upon which it is granted.

Approved in *Green v. Elgie*, 5 Ad. & Ellis, N. S. 113.

Before an action can be brought upon the ground that the process was irregular, the party must apply to the court and have it set aside upon that ground.

Reynolds v. Corp., 3 Cal. 287; *Grinold v. Sedgwick*, 6 Cow. 462; *Mackay v. Blackett*, 9 Paige, 437; *Simpson v. Hornbeck*, 3 Lans. 55. See also *Steuben Co. Bank v. Alberger*, 78 N. Y. 252; *Ruppert v. Haug*, 87 N. Y. 143; *Day v. Bach*, 87 N. Y. 60.

No action will lie unless the complaint charges the attorney with acting maliciously, and this must be proven.

Anon. 1 Mod. 209; *Davies v. Jenkins*, 11 Mees. & Welsb. 745; *S. C.* 1 Dow. & Low. 321; *S. C.* 12 L. J. N. S. Exch. 886; *Carratt v. Morley*, 1 Ad. & Ellis, N. S. 18, 28; *Burnap v. Marsh*, 18 Ill. 535; *Lynch v. Commonwealth*, 16 Serg. & R. 368.

The complaint does not state why the order for commitment was set aside, whether for irregularity or for error. This was a fatal defect, and the complaint stated no cause of action.

Williams v. Smith, 14 Com. B. N. S. 596; *Prentice v. Harrison*, 4 Ad. & Ellis, N. S. 852; *S. C.* Dav. & Meriv. 50; *Smith v. Sydney*, L. R. 5 Q. B. 203.

Ruger, Ch. J., delivered the opinion of the court:

It cannot be disputed that an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed; and no preliminary proceeding is necessary to vacate or set it aside as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award (but which is irregular by reason of the nonperformance, by the party procuring it, of some preliminary requisite, or the existence of some fact not disclosed in his application therefor) must be regularly vacated or annulled by an order of the court before an action can be maintained for damages occasioned by its enforcement. *Day v. Bach*, 87 N. Y. 56.

In such cases the process is considered the act of the party and not that of the court; and he is therefore made liable for the consequences of his act.

Void process is such as the court has no power to award or has not acquired jurisdiction to issue, in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential.

Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case, by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein is valid and enforceable and affords protection to all persons acting under it, although it may be afterwards set aside or reversed as erroneous. *Simpson v. Hornbeck*, 3 Lans. 53.

Errors committed by a court, upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders or authorize a party to treat them as void; but can be taken advantage of only by appeal or motion in the original action. *Day v. Bach, supra*.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected, was void or even irregular, except for the alleged erroneous determination made by the special term, upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff; while upon appeal this court held otherwise.

All of the facts constituting the alleged contempt were undisputed and were presented to the special term for its consideration upon the hearing. After hearing the parties, it decided that a contempt had been committed, and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff had disobeyed an order of the court; and the only question presented for its consideration was whether such disobedience defeated, impaired, impeded or prejudiced a right or remedy of the defendants.

Upon the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded or prejudiced by the disobedience alleged; and the order adjudging the plaintiff guilty of a contempt was, for that reason, reversed as erroneous. *Fischer v. Raab*, 61 N. Y. 235.

A simple question of law was thus presented to the court, as to whether all the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question. The court concededly had jurisdiction of the parties and the subject matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a contempt. An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject matter of the application.

In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff and of the subject matter then pending did not give him judicial authority to adjudge her guilty of a contempt and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider of the question whether there had been a contempt committed by her. When facts

arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, although he may have held erroneously as matter of law." *Rutherford v. Holmes*, 66 N. Y. 370.

In the present case the court made an order upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine; and in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request and upon his stipulation to pay the fees in the event provided for. The order was therefore lawful and such as the court had a right to make, under the circumstances. The report of the referee being against the plaintiff he was required to pay the fees and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt.

The disobedience of its order by the plaintiff gave the court jurisdiction of the subject matter, and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question.

The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

In *Harman v. Brotherson*, 1 Den. 537, the defendant, a judicial officer, had awarded a *capias* upon affidavits which did not disclose such a cause of action as subjected the defendant to arrest therefor. He was, however, arrested and imprisoned, and in an action against the judge for false imprisonment it was held that he was exempted from liability by reason of the judicial character of his determination.

In *Landt v. Hiltz*, 19 Barb. 283, a county judge was prosecuted for false imprisonment for granting an order of arrest which was afterwards vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It was held, however, that the decision and the order protected the party applying for it, and the attorney and all persons acting in obedience to the order; that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question and to determine whether a case for an order was made out or not. * * * It presents, to say the least, a colorable case and that is enough to protect the officer who issued it."

It was further said "that the doctrine that the judicial officer is protected whenever he has jurisdiction and enough is shown to call upon him for a decision, even though he err grossly, and even intentionally, has long been firmly established. * * * Upon the same principles of public policy, parties who in good faith institute the proceedings, and act under and in accordance with judicial determination, should be protected from accountability as trespassers whenever the officer is entitled to protection."

This case is largely and approvingly quoted

from in *Marks v. Townsend*, 97 N. Y. 509.

In *Miller v. Adams*, 7 Lans. 138, affirmed in this court, 52 N. Y. 409, the defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings, in obedience to an order requiring him to do so. The affidavit upon which the attachment was issued was held upon appeal to be defective and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party procuring it; that the officer issuing the attachment had "jurisdiction of the matter and acted judicially in making the order; and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment."

It seems to us that the case of *Williams v. Smith*, 108 Eng. C. L. 596 [*S. C.* 14 C. B. N. S. 596], is indistinguishable in principle from this. As concisely stated by *Chief Justice Erle* it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very fact between the parties." The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was that he was guilty of a contempt. Upon appeal the Lord Justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings. It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it as well as the officers making it.

The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it (although afterwards vacated or set aside as erroneous) void, or subject the party procuring it to an action for damages thereby inflicted.

Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason upon evidence which might in its consideration affect different minds differently, a judicial question is presented which, however decided, does not render either party or the court making it liable for the consequences of its action.

It is further claimed that the defendants made themselves liable in this action by refusing to consent to the discharge of the plaintiff by the sheriff after he had complied, as it is alleged, with the terms of the commitment, and

for opposing before the special term motions made for his discharge.

These proceedings all took place before it was finally determined that the plaintiff was not guilty of a contempt in refusing to obey the order referred to and, so far as any thing appearing in this record shows, when the defendants naturally believed that the plaintiff was rightfully imprisoned thereunder. The motions were denied by the courts before whom they were made; and it must here be assumed that they were rightfully denied, for the reason that the plaintiff had not complied with the terms of the order entitling him to a discharge.

If the defendants were not liable for damages for the original imprisonment, it is quite certain that they were not responsible for the action of the sheriff or the court in continuing it. No obligation rested upon the defendants to consent to or procure the discharge of the plaintiff, as the right to such relief depended solely upon his compliance with the terms of the order committing him.

Some claim is made that the commitment was void for not containing the statement that the disobedience referred to as contempt had defeated, impaired, impeded or prejudiced some right or remedy of the defendants in the action. Not only the order and affidavit upon which it was founded, but the commitment itself stated in detail the proceedings which it was claimed the disobedience in question affected, and presented all of the facts upon which the judgment of the court in awarding the commitment was based, and fully complied with the requirements of the rule in respect to the contents of a commitment.

The judgment of the court below should be affirmed, with costs.

All concur.

William POST, *Appt.*,

v.

Charles KREISCHER *et al.*, *Repts.**

1. **Oysters planted in a defined bed, in tide waters of a bay or arm of the sea which is a common fishery, where there are no oysters growing spontaneously at the time, are the property of the person who plants them, and the taking of them by another is actionable trespass.**
2. **Under a grant from the commissioners of the land-office of the State, to the owner of the adjacent upland, of land under water in an arm of the sea which is a common fishery, not a natural oyster bed, and within the limits of the Port of New York within which the dumping of dredging material is prohibited except in the construction of piers, etc., reserving to the people of the State the right of entering upon and using the granted premises until appropriated by the grantee by the erection of a dock, etc., the grantee has no right to dump dredging material upon an oyster bed planted by another**

*See *Hess v. Muir* (Md.), 3 Cent. Rep. 891.

within said granted premises, **unless** that constitutes an actual appropriation **within** the provisions of the **grant**.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Richmond Circuit Court in favor of defendants in an action of trespass for destroying an oyster bed. *Reversed*.

Reported below, 32 Hun, 49.

Plaintiff planted a large quantity of oysters in a spot or bed between high and low and below low water mark, in Staten Island Sound, an arm of the sea, within the Port of New York, and together with his ancestors had been so planting oysters in the same bed for fifty years or more. The bed was properly staked and marked, and there was no natural growth of oysters there.

While plaintiff was in possession and had a large quantity of oysters planted in this bed, one Baltazer Kreischer, owning upland on the island adjacent to this bed, obtained a grant of the land under water in which this bed was situated, from the State of New York through the commissioners of the land-office.

In June, 1881, a few months after this grant was obtained, the defendants, the sons of the grantee, who were the owners of a terra cotta factory situated below the *locus in quo*, dredged the sound in front thereof and caused the dredging to be dumped upon the *locus in quo*, thereby destroying the oyster bed.

Defendants had actual and constructive notice of the oysters being planted in this bed and saw plaintiff's stakes; but neither they nor the grantee ever gave any notice to plaintiff or anyone else to remove said oysters, nor did they give notice to anyone that they were about to appropriate their grant. Plaintiff brought this action for the alleged trespass. At the trial the court directed the jury to find a verdict for defendants, and judgment was entered accordingly. On appeal by plaintiff to the general term this judgment was affirmed and plaintiff appealed to this court.

The terms of the grant to Kreischer, as far as they are material in this case, are stated in the opinion of the court.

Mr. Benjamin Patterson, for appellant: Oysters planted in a bed clearly marked out and defined in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the State where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously at the time, are the property of the person who plants them; and the taking of them by another person is a trespass for which an action lies.

McCarty v. Holman, 22 Hun, 55; *Loundes v. Dickerson*, 34 Barb. 589; *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592.

The Legislature recognizes the right of property in such oysters, and makes it a misdemeanor to take and carry them away.

Laws, 1866, chap. 753.

Such oysters being personal property, the State could not take them for public purposes without making compensation (Const. art. 1, § 6); and for private purposes not at all, be-
90

cause the right to appropriate property to private use has been deemed to be precluded by the provision authorizing it to be taken for public use only upon compensation.

Neucomb v. Smith, 1 Chand. (Wis.) 71.

And when taken for public purposes, the title of the owner is not divested until indemnity is afforded him.

Corbin v. Marsh, 2 Duvall, 193.

Where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.

2 Bl. Com. chap. 2, p. 126.

Plaintiff had a property in these oysters. He had them planted in the *locus in quo* lawfully and under the protection of the state laws. He was not a trespasser. No valid construction of the grant could make him such. And for the defendants to have destroyed his oysters as they did was actionable.

Lansing v. Smith, 4 Wend. 9; *Langdon v. Mayor*, 98 N. Y. 129; *Story v. N. Y. Elevated R. Co.* 90 N. Y. 157; *Matter of Jacobs*, 98 N. Y. 98; *Smith v. Rochester*, 92 N. Y. 463; *Dermott v. State*, 99 N. Y. 107.

There was no actual appropriation pursuant to the reservation of the grant.

The acts of the defendants, being *contra formam statuti* could not be construed an actual appropriation. No man can take advantage of his own wrong.

Hard v. Seeley, 47 Barb. 428; *Newton v. Porter*, 5 Lans. 416.

Defendants' act in dumping on the *locus in quo* as they did, was contrary to law, injurious to commerce, tending to fill in the channel of the sound and obstruct navigation; and he who commits a nuisance is liable to anyone specially damaged.

Lansing v. Smith, 4 Wend. 9; *Congreve v. Smith*, 18 N. Y. 82; *Dyggert v. Schenck*, 28 Wend. 446; *Creed v. Hartmann*, 29 N. Y. 591; *Clifford v. Dam*, 81 N. Y. 52; *McKeon v. See*, 51 N. Y. 306; *Adams v. Popham*, 76 N. Y. 413; 2 Story, Eq. Jur. §§ 925, 927.

The grant is to be strictly construed in favor of the people and against the grantee.

Lansing v. Smith, *Langdon v. Mayor* and *Dermott v. State*, *supra*.

Any act injurious to the public or the people or any of them, and not being for the benefit of commerce, is impliedly prohibited under the grant; the grant being one given for no consideration.

Langdon v. Mayor, 98 N. Y. 129.

While a sovereign power may convey its proprietary rights it cannot alienate its control over navigable waters without abdicating its sovereignty.

Martin v. Waddell's Lessee, 16 Pet. 367 (41 U. S. bk. 10, L. ed. 997).

The dumping by these defendants was not an actual appropriation, and the rights of fishing remained unimpaired, and the destruction of plaintiff's oysters gave an action against the defendants, either under the principle laid down in *Lansing v. Smith*, *supra*, and cases cited above, or that laid down in 6 Taunt. 44, or that in *McCarty v. Holman*, 22 Hun, 55.

Mr. David McClure, for respondents:

The State in its sovereign character owns the bed of navigable streams to high water mark; and the State may, as such proprietor of the

waters, grant them or any interest in them to an individual.

Lansing v. Smith, 8 Cow. 146; *S. C.* affd. 4 Wend. 9; *Gould v. Hudson River R. R. Co.* 6 N. Y. 522; *Furman v. Mayor*, 10 N. Y. 568; *People v. Tibbitts*, 19 N. Y. 527; *People v. Canal Appraisers*, 33 N. Y. 461; *Lowndes v. Dickerson*, 34 Barb. 592; *People v. Kelsey*, 14 Abb. Pr. 372.

The plaintiff had no rights in the land under water that were not subject to those of the grantee from the State, and liable to be extinguished by said grantee taking possession.

Gould v. Hudson River R. R. Co. 6 N. Y. 540; *Lansing v. Smith*, 4 Wend. 9; *McCarthy v. Holman*, 22 Hun. 54; *Trustees of Brookhaven v. Strong*, 60 N. Y. 67; *Tincum Fishing Co. v. Carter*, 61 Pa. 35; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101.

The plaintiff had notice of the application for the grant and had an opportunity to have its effect limited, or protect himself by removing his oysters.

1 R. S. p. 208, § 70.

The defendants, in dumping, acted as the agents of the grantee.

See *Lomer v. Meeker*, 25 N. Y. 362; *Elwood v. Western U. Tel. Co.* 45 N. Y. 553; *Koehler v. Adler*, 78 N. Y. 291.

Andrews, J., delivered the opinion of the court:

The authorities sustain the propositions asserted by the plaintiff that, by the common law, oysters planted in a bed clearly marked out and defined, in the tide waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the State where the bay or arm of the sea is situated, where there are no oysters growing spontaneously at the time, are the property of the person who plants them; and the taking of them by another person is a trespass for which an action lies. *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 589.

This planting of oysters in tide waters, and the right of property in the person planting them, is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the State, but as a legitimate exercise of the common right, not inconsistent with its reasonable enjoyment by others. Cases *supra*.

The right to plant oysters in the tide waters of bays and arms of the sea, upon the lands of the State adjacent to the County of Richmond, not being a natural oyster bed, is now recognized by the statute which prohibits any person from interfering with oysters so planted without the consent of the owner. Laws 1866, chap. 404; chap. 753.

The space on which the plaintiff's oysters were planted had been used as an oyster bed for more than fifty years; and there can be no doubt that, both by the common law and the statute, the plaintiff was in the lawful use of the oyster bed on April 28, 1881, when the commissioners of the land-office granted to Baltazar Kreischer, the owner of the adjacent upland, the land under water, embracing the oyster bed of the plaintiff.

The defendants justify their act in depositing the material dredged from other premises upon

the plaintiff's oyster bed, thereby covering and destroying the oysters thereon, under the grant to Baltazar Kreischer.

Unless the defendants are protected by this grant, there can be no doubt that their act in depositing this material in the waters of the bay was unlawful; and that upon familiar principles the plaintiff is entitled to recover damages for the special injury occasioned to him thereby.

Chapter 846 of the Laws of 1881 prohibits the depositing in the Port of New York of any dredging or other material within certain limits, which include the *locus in quo*, except in the erection or construction of any pier, etc., and the making, by filling in, of land authorized by the laws of this State.

It is not claimed that the defendants, in covering the plaintiff's oyster bed, were exercising any right other than that conferred by the grant to Baltazar Kreischer. That grant contains the following material exception: "Excepting and reserving to all and every the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated and applied to the purpose of commerce by erecting a dock or docks thereon, or for the beneficial enjoyment of the same by the adjacent owner."

It is clear from the words of the exception that the plaintiff's right to the continued use of the oyster bed, and his property in the oysters thereon, was not *eo instanti* terminated on the execution and delivery of the grant. It is unnecessary to inquire what the right of the plaintiff would have been, if the grant had been absolute and unqualified. It is sufficient for the present purpose to notice that it did not confer any right to interfere with the uses to which the land was then appropriated, or with the common rights of fishery and navigation, until the granted premises should be "actually appropriated and applied" by the grantee to the purposes mentioned in the grant.

It was claimed on the trial, in behalf of the defendants, that the filling in, in June, 1881, over the plaintiff's oyster bed, was with a view to the construction of a dock, for the beneficial enjoyment of the premises embraced in the grant; and was therefore a lawful act, constituting an actual appropriation of the premises, within the exception.

The plaintiff's counsel asked to have the question, whether under the evidence there had been an actual appropriation of the premises under the grant, submitted to the jury. The court refused the request, and thereupon directed a verdict for the defendants; to which the plaintiff's counsel excepted. We think the exception was well taken.

We do not intend to intimate any opinion as to what conclusion should have been reached by the jury, upon the question whether this deposit was made with a view to the improvement of the land embraced in the grant. It seems quite clear that the primary object of the dredging was to deepen the water in front of other premises occupied by the defendants.

One of the defendants testified that they deposited the material with a view to making a

dock on the premises embraced in the grant. It appears, however, that nothing was done in execution of this purpose, beyond depositing this loose material, which was left subject to the action of the winds and tides; and the purpose of building a dock, if originally entertained, was evidently abandoned. Under the circumstances, it was we think for the jury to say whether the depositing of the material from the dredging, over the plaintiff's oyster bed, was with a *bona fide* view to the improvement of the premises, or was done simply as a convenient way of getting rid of the material, and without any intention of making an actual appropriation of the premises within the grant.

The question whether the defendants, assuming that the material was deposited with a view to the improvement of the granted premises, were chargeable with notice of the existence of the oyster bed and were bound, before covering it, to notify the plaintiff and give him an opportunity to remove the oysters, is not presented by any exception and need not be considered.

But for the error upon the point suggested, the judgment should be reversed and a new trial granted.

All concur, except **Miller, J.**, absent.

Edwin W. HALL, *Appt.*,

v.

WHITEHALL WATER POWER CO.,
Limited, *Resp't.*

Land, conveyed by a deed from one who had acquired the same under foreclosure, was described therein as bounded on one side by a certain creek; the bank of the stream along the deeded premises was high and precipitous; the water rights in the stream had for a long time been used by the owners of a mill property on the stream just below the deeded property, and no attempt to use the water power had ever been made by the occupants of the deeded property, until a short time before the execution of the deed, when it became available to them through the destruction of the mill dam below.

Held,
(a) That, in view of the location and physical condition of the deeded property, title was acquired only to a strip of land along the stream, with no rights in the lands under water, or in the water power.

(b) That the owners of the mill property below should not be restrained from rebuilding their dam.

(Decided October 5, 1886.)

APPPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Washington Special Term dismissing the complaint in an action seeking to restrain defendant from setting back water on land of the plaintiff, by means of a dam, with damages for the injury already inflicted thereby. *Affirmed.*

Memorandum of decision below, 84 Hun, 630
For the purposes of the trial, the following facts were admitted:

First. On the 7th of December, 1852, and for several years prior thereto, John H. Boyd, late of Whitehall, had been the owner of the mill lot, so-called, in the Village of Whitehall, containing about twenty-five acres, embracing all the falls of Wood Creek, described as lying easterly of the lands and waters formerly of Ebenezer Proudfit; subject, however, to certain mortgages held by John Williams, a former owner of the premises, the lien of which mortgage dated back to March, 1822.

It is not admitted that Ebenezer Proudfit was ever the owner of any of these lands.

There was excepted from the lien of said mortgages a portion of said premises, which are particularly described in a deed thereof from Andrew Anderson to William Wait, dated September 30, 1847.

The defendant has acquired all the title and rights conveyed by said deed and is now the owner thereof.

At the date above mentioned a dam extended across said creek, near the foot of the falls, which set back the water and destroyed the natural fall thereof along the bank, above said dam and throughout the length of a portion of said premises known as the Phoenix barn lot or lot No. 22, now occupied by plaintiff and others.

This dam, and the water power therefrom after said date, was being used by said Wait and the owners and occupants of the adjoining mill sites until the year 1864, when said mills were destroyed by fire and said dam was carried away by high water in the following year.

On the 14th of October, 1863, said John H. Boyd executed and delivered to one Ami D. Gibbs a warranty deed of said Phoenix barn lot. This lot had been used for the purposes of a barn for several years prior to 1863. It was used for a barn by Gibbs until 1863, when Robert Irwin leased the same of said Gibbs and erected a mill on a portion thereof, and placed therein a steam engine and boiler and operated the same by steam power for three or four years and until 1875, at which date Baldwin & Perry and also J. D. Hancock each occupied a portion of said lot under a contract or lease with said Irwin.

Between October, 1841, and January, 1865, said John H. Boyd conveyed to divers persons parcels of said mill lot.

In November, 1870, an action was commenced to foreclose the mortgages covering said mill lot, except said factory lot.

The action was brought by Fanny Williams, the owner of the mortgages, against said Ami D. Gibbs, Robert Irwin and Benjamin F. Lacca, who then were the only occupants of said Phoenix barn lot and who were made parties defendant, together with divers other persons, occupants of some portion of said mill lot.

Said Gibbs, Irwin and Lacca, appeared in said action. In 1876 a decree of foreclosure and sale was rendered in said action, which determined that the sum of \$14,775.50 was justly due and owing to the plaintiff, upon the bond and mortgage described in the complaint therein; and that the whole of said mill lot, except

said factory lot, was liable for the payment of the same; that said mill lot should be sold at public auction by a referee to be appointed by the court, for the purpose of paying said sum so due to the plaintiff, besides the cost and the disbursements of the action, in the following order, to wit:

First. To sell all of said premises which had not been alienated since the lien of said mortgage debt attached thereto.

Second. To sell the alienated portions in the inverse order of alienation, or so much thereof as should be necessary to satisfy the mortgage debt and the costs and disbursements of the action.

Said decree further provided that if upon the sale of that portion of the premises known as the Phoenix barn lot, the same were not sold to Robert Irwin or his assigns, said Irwin or his assigns should or might remove all buildings, machinery and fixtures placed by either of them on said premises, he or they leaving them in as good condition as they were on the 29th of April, 1872. Said decree also provided that any of the parties to said action might become purchasers at the sale thereof. The sale under said decree took place August 31, 1876.

Upon the evening preceding the sale it was agreed between the plaintiff's attorney and the attorneys for several of the owners and occupants of portions of the mill lot, including said Gibbs and said Irwin and Lacca, that the referee should sell all the water rights and privileges of Wood Creek, with the unalienated portions of said lot; the same embracing the mill sites below said dam.

Said attorneys had no other power or authority to make such agreement than that conferred by their retainers as attorneys in the action.

There were present on the sale on August 31, 1876, in person, Ami F. Gibbs, Robert Irwin and Benjamin F. Lacca, with their attorneys, and James D. Hancock.

The referee first offered for sale lot A, upon a map of said premises there present. The description of the lot was read and reference made to the map before offering the same for sale. According to the description and the map, lot A embraced three parcels, the third parcel embracing all the water and lands under the water of Wood Creek and Lake Champlain, bounded north and south by the north and south bounds of said mill lot, west by the lands and water formerly of Ebenezer Proudfit, and easterly by the high water mark of Wood Creek and Lake Champlain.

Lot A, as thus offered for sale, was struck down to the plaintiff in the foreclosure suit, Fanny H. Williams, for \$3,750, she being the highest bidder therefor, and no objection was raised by anyone present at the sale.

After selling lot A the referee offered several other lots for sale and had realized \$9,500 when the Phoenix barn lot was offered.

Reference was made to the map before offering it for sale, and it was described as bounded south by James Greenough's lot, west by Wood Creek, north by the axe-helve-shop lot, east by Williams Street, the lot being 185 feet on William Street and about 80 feet wide from William Street to Wood Creek. It was struck down for \$2,126, to James D. Hancock, who signed a

memorandum annexed to the terms and the order of sale.

The lot was subsequently divided into three parcels and three separate deeds executed by the referee thereof, 55 feet being conveyed to Hancock, 40 feet to Baldwin & Perry, and 90 feet to Robert Irwin and Joseph Wilson.

The referee made a report of sale which was filed November 24, 1876, and which was duly confirmed, with the consent of all the attorneys mentioned.

Prior to said sale James D. Hancock had constructed a dam across said creek opposite that portion of lot 22, conveyed to Baldwin & Perry; and had placed a water wheel next to the westerly bank of the stream, and transferred power by rope therefrom to said premises; and the same was being used in running and operating machinery by Hancock, Baldwin & Perry, and Irwin & Wilson, at the date of said sale. This wheel was so placed and used, after having obtained the permission of Adin Thayer, one of the canal commissioners of the State of New York having charge of canals; the westerly bank of the stream being the easterly bank of the Champlain Canal at this point.

On the 30th day of September, 1881, said Hancock conveyed the portion of the lot occupied by him to the plaintiff, Edwin W. Hall, who used and operated said water wheel in connection with said dam in the operation of said mill and machinery, until the commencement of this action and until the same was interfered with by defendant's dam.

The defendant, as a corporation of the State of New York duly organized for the purpose of purchasing and improving the water power of Wood Creek, prior to this action commenced to erect a dam on the falls of said creek below the plaintiff's dam, and since this action in November, 1882, completed the said dam and thereby set back the water and interfered with the running of plaintiff's wheel; and since then has prevented him from running and operating said mill altogether.

At the foreclosure sale, before mentioned, Hancock also purchased a lot north of said lot 22, and adjoining the same, bounded on the west by Wood Creek at high water mark.

At this point and along lot 22, the easterly bank of the stream consists of a natural wall of stone extending upwards from 12 to 15 feet above high water mark. The bulkhead of defendant's dam abuts against the easterly bank of the stream at a point opposite plaintiff's lot, last mentioned, which is bounded west by Wood Creek at high water mark.

Mr. Esak Cowen, for appellant:

An easement over mortgaged premises may be cut off by making the owners parties to the foreclosure.

Packer v. Rochester & S. R. R. Co. 17 N. Y. 292, 297.

So far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and the mortgagee and those who have acquired rights under them, subsequent to the mortgage. The mortgagee has no right to make one a party defendant who claims adversely to the title of the mortgagor and prior to the mortgage.

Eagle P. Ins. Co. v. Lent, 6 Paige, 687, approved in *Corning v. Smith*, 6 N. Y. 84.

A purchaser on a foreclosure obtains the title which the mortgagor had before he gave the mortgage.

Packer v. Rochester & S. R. R. Co. 17 N. Y. 287; *Smith v. Gardner*, 42 Barb. 366; *Butler v. Viele*, 44 Barb. 166.

The position of the defendant is that of assignee of the mortgage. As such it can only hold the title which the mortgage gave to Williams, prior to foreclosure; and that cannot include an easement which was not in existence at the date of the mortgage.

Watson v. Spence, 20 Wend. 260; *Strong v. Dollner*, 2 Sandf. 444.

Angell, in his work on Water Courses (§ 449) says: "We have seen that an action on the case may be maintained, for the diversion of a water course or for making back water, even although no actual damage is thereby occasioned, upon the ground of the injury done to the right of the riparian proprietors affected, and the acquisition of an adverse right, by an uninterrupted enjoyment for twenty years. On the same ground a bill in equity may be maintained for an injunction."

See also *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Knapp v. Douglas Aze Co.* 13 Allen, 1; *Corning v. Troy Iron & Nail Factory*, 29 Barb. 311; *S. C.* 34 Barb. 492; *S. C.* 40 N. Y. 191.

Mr. Richard L. Hand, for respondent:

Caveat emptor applies with especial force to judicial sales.

Riggs v. Pursell, 66 N. Y. 193; *Olute v. Emmerich*, 99 N. Y. 342. See *Neal v. Gillaspay*, 26 Am. Rep. 38, note by editor.

This action is itself an affirmation of the sale, and plaintiff is bound by the terms and order thereof.

Story v. Hamilton, 86 N. Y. 428.

If the plaintiff or his grantor had any grounds of complaint, the remedy could only be sought in the foreclosure suit.

Jones, Mort. § 1668; *Van Vleck v. Clark*, 38 Barb. 316; *McCotter v. Jay*, 30 N. Y. 80; *Smith v. Am. Life Ins. & Trust Co.* Clarke, Ch. 307; *Bennett v. Bagley*, 22 Hun, 408. See *Leavitt v. Palmer*, 3 N. Y. 19, 38.

The attorneys had authority to modify the order of sale.

Newberry v. Lee, 3 Hill, 523; *Corning v. Southland*, 3 Hill, 552; *Gorham v. Gale*, 7 Cow. 739.

The true construction of the plaintiff's deed, as matter of law, limits him to high water mark, and does not convey any portion of the bed of the stream or water power.

Higinbotham v. Stoddard, 72 N. Y. 94.

For this reason the judgment is right and should be affirmed.

Marvin v. Universal L. Ins. Co. 85 N. Y. 278; *Gillespie v. Torrance*, 4 Bosw. 36; *S. C.* affd. 25 N. Y. 306.

As owner of the factory lot the defendant has title, from both mortgagor and mortgagee, to the water course included therein, with right to maintain the flow of water as it was maintained for forty-five years and more, prior to 1865.

Huntington v. Asher, 96 N. Y. 604; *Adams v. Conover*, 87 N. Y. 422; *Simmons v. Cloonan*, 81 N. Y. 557. See *Langdon v. Mayor*, 93 N. Y. 129, 148, 152; *Scriven v. Smith*, 100 N. Y. 471, 481; *S. C.* 1 Cent. Rep. 763.

The rule is the same, whether the water course is natural or artificial.

Lapman v. Milks, 21 N. Y. 505.

Nor is it affected by the omission to use it.

Townsend v. McDonald, 12 N. Y. 381.

Nothing contained in the deeds of the factory lot restricts or limits this title or right, so far as the claims of the plaintiff are concerned. Strictly, there is an attempt to reserve the water in the flume to a certain extent. But this is void on its face, as there is no property in running water.

2 Bl. Com. 18; *Race v. Ward*, 4 Ell. & Bl. 702.

It does not in law amount to an exception, reservation, covenant or condition. But if it were either, it cannot operate in favor of the plaintiff.

Craig v. Wells, 11 N. Y. 315; *Bridger v. Pierson*, 45 N. Y. 601; *Hill v. Priestly*, 52 N. Y. 635; *Nicoll v. N. Y. & E. R. Co.* 12 N. Y. 121; *Fonda v. Sage*, 46 Barb. 109; *Eysaman v. Eysaman*, 24 Hun, 430. See *Groat v. Moak*, 26 Hun, 380; *S. C.* affd. 94 N. Y. 115.

Even if it could be construed as giving a measure of quantity.

Comstock v. Johnson, 46 N. Y. 620; *Merrill v. Calkins*, 74 N. Y. 1; 1 N. Y. 96; 3 N. Y. 253; *Wakely v. Davidson*, 26 N. Y. 387.

The barn lot was subject to the easement, and a servient estate.

Burr v. Mills, 21 Wend. 290; *Pyer v. Carter*, 1 Hurl. & Norm. 916; *Potter v. Iselin*, 31 Hun, 134; *Parsons v. Johnson*, 68 N. Y. 62, 66; *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 81.

The deed to Gibbs, executed in 1863, conveyed nothing and was void. Catherine J. Boyd was not a party to it or affected by it.

§ Washb. Real Prop. 231, 232; *Agricultural Bank v. Rice*, 4 How. 225 (45 U. S. bk. 11, L. ed. 949); *Catlin v. Ware*, 9 Mass. 218.

The factory lot and these appurtenant rights were held by paramount title and could not be affected by the foreclosure, even if there had been any pretense of doing so.

Emigrant Ind. Sav. Bank v. Goldman, 75 N. Y. 127, and cases there cited; *Rathbone v. Honeoy*, 58 N. Y. 463; *Merchants Bank v. Thomson*, 55 N. Y. 7.

The plaintiff has no standing in a court of equity; he has no valuable interest to protect on any theory of the case, but is a mere trespasser.

Newton v. Russell, 87 N. Y. 527.

Equity would not interfere to protect his use of this dam and wheel, therefore, even if there were any water power appurtenant to his land.

Troy & Boston R. R. Co. v. Boston, etc. R. Co. 86 N. Y. 107, 123; *Trustees Columbia College v. Thacher*, 87 N. Y. 311; *Crooke v. Flatbush Water Works Co.* 27 Hun, 72; *Quackenbush v. Van Riper*, 2 Green Ch. 350; *S. C.* 29 Am. Dec. 716; *Clinton v. Myers*, 46 N. Y. 511, 521.

Rapallo, J., delivered the opinion of the court:

We are of opinion that the plaintiff's grantor, Hancock, took title under his deed, only to the strip of upland, 30 feet wide, lying between William Street and Wood Creek; and that he acquired no rights in the land under the waters of the creek or in the water power. This we think is the true construction of the deed from

the referee in the foreclosure suit, to Hancock, in view of the situation of the property and of the circumstances existing at the time of the conveyance and prior thereto.

The description in the deed from the referee is similar to that contained in the deed of the Phoenix barn lot, dated in 1868, from John H. Boyd and wife to Gibbs, under whose lessee (Irwin) Hancock afterwards held the premises in dispute until the sale under the foreclosure.

The Phoenix barn lot consisted of a strip of land on the easterly side of Wood Creek, lying between William Street and the bank of the creek, which was precipitous, being a natural wall of stone, the top of which was from 12 to 15 feet above the surface of Wood Creek when the water was high. This strip of land, called the barn lot, was about 185 feet long and 30 feet wide from William Street to the edge of the bank. It had for many years prior to 1863 been used for a barn site, and was so used for several years thereafter.

No attempt appears to have been ever made by any occupant of the barn lot prior to 1875, to make any use of Wood Creek, for power or otherwise. The water power of the creek had been used for a great number of years, by a factory and grist mill north of and adjoining the barn lot at or near the mouth of the creek. These establishments were supplied by means of a dam built across the creek at the north end of the barn lot, which dam had stood from 1818 to 1829 and from 1841 until 1864, when it was carried away.

While the dam stood, it set back the water opposite the barn lot so as to deprive it of any fall, and thus, as well as by the natural conformation of the land, the barn lot was entirely separated from the creek and was in fact enjoyed and treated as a separate property. In 1868, and while the mill and factory were in operation, and the dam was standing, using all the water power of the stream opposite the barn lot, Boyd and his wife conveyed to Gibbs the lot known as the Phoenix barn lot, by the following description: "Bounded south by James Greenough's lot, west by Wood Creek, north by the axe-helve-shop lot and east by William Street; the lot hereby conveyed is about 185 feet on William Street and about 30 feet wide from Wood Creek to William Street."

Gibbs continued to use the lot exclusively for the purposes of a barn until 1868 when he leased the same to Irwin. Irwin subleased to Baldwin & Perry the southerly portion of the lot, and to James D. Hancock the northerly 55 feet thereof. The dam previously existing having been carried away in 1865, Hancock, in 1875, for the first time, undertook to use the water power opposite the portion of the lot occupied by him.

While Hancock was in occupation as lessee, the whole property known as the mill lot was sold under judgment of foreclosure of the Williams mortgage (which was a lien paramount to the title of Gibbs and his lessees); and at the foreclosure sale, which took place August 31, 1876, Hancock, the grantor of the plaintiff, became the purchaser of the lot in question; and it was conveyed to him by the referee, by deed dated September 5, 1876, wherein it was described as "bounded on the north by lot T, on the west by Wood Creek, on the south by a lot

marked 228, on the east by William Street; the lot hereby conveyed being 55 feet in length along William Street from and off the end of said barn lot, and about 30 feet in width from Wood Creek to William Street."

At the same sale (at which Hancock was present), and before he purchased the lot, other parts of the mortgaged premises, together with "all the waters and land under the water of Wood Creek," within the boundaries of the old mill lot, including the land under water and the waters in front of the barn lot, were sold by the referee to parties other than Hancock; but the referee in this action finds that Hancock, at the time of his purchase and of receiving his deed, did not know of this prior sale of the waters in question.

In view of the location and physical condition of the property, its history and the definite specification of the dimensions of the plot conveyed to Hancock, we think it quite clear that the intention was to convey only the strip of upland 30 feet wide lying between the edge of the creek bank and William Street; and that the description was not intended to include any part of the waters of Wood Creek, or any water rights therein. *Higinbotham v. Stoddard*, 72 N. Y. 94.

These water rights had for a great number of years been enjoyed and used by the owners of the mill property on the north, near the mouth of the creek; and it was not until 1875, just before the foreclosure of the mortgage, that any attempt had been made by the occupants of the barn lot to use the water power, which had become available for the time by reason of the destruction of the old dam, the rebuilding of which by the defendant is the matter complained of by the plaintiff in this action.

Without going into the questions as to the defendant's title, and without intending to intimate any doubt in respect to it, we think the judgment should be affirmed, with costs.

All concur, except Miller, J., absent.

Elizabeth R. COGSWELL, Appt.,

v.

NEW YORK, NEW HAVEN & HARTFORD R. R. CO., Resp't.

1. The statutory sanction which will justify an injury to private property must be express or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury.
2. If a railroad company has the right, under an Act of the Legislature, to acquire land by purchase (for the accommodation of its business), it must secure such a location as will enable it to conduct its operations without violating the just rights of others.
3. Assuming that the general power given by the Laws of 1848, chap. 148, § 6, to the New York & New Haven R. R. Co. to run its trains into New York City over the New York & Harlem Rail-

road includes, as incidental thereto, the power to purchase land for an engine house, it does not sanction the maintenance of a nuisance, injurious to private property, resulting from the building and use of an engine house.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Superior Court of New York City at General Term, affirming a judgment of the Court at Special Term, dismissing the complaint in an action to enjoin as a nuisance the use of an engine house and to recover damages resulting therefrom. *Reversed.*

The facts are stated in the opinion.

Reported below, 16 Jones & S. 31.

Mr. Lewis Johnston, for appellant:

Being a foreign corporation, defendant can only acquire and hold lands by comity. Even if the defendant could by comity lawfully purchase and take title to the land and erect thereon the engine house in question, as against the plaintiff, in so doing it acted beyond the scope of express legislative authority and subjected itself to liability (as in the case of a private citizen) to the plaintiff, for all damages resulting to her from its acts in using the same.

Purdy v. N. Y. & New Haven R. R. Co. 61 N. Y. 353; *Tracy v. Troy & Boston R. R. Co.* 88 N. Y. 433; *Cleveland & Pittsburg R. R. Co. v. Speer*, 56 Pa. 325.

The injury is sufficient if it produces that which is offensive to the senses, injurious to health, or that which renders the enjoyment of life in the use of the property uncomfortable.

Catlin v. Valentine, 9 Paige, Ch. 575; *Fish v. Dodge*, 4 Denio, 811; *Brady v. Weeks*, 3 Barb. 157; *Smith v. Cummings*, 2 Pars. (Pa.) 92; *Dennis v. Eckhardt*, 3 Grant, Cas. (Pa.) 390; *Wesson v. Washburn Iron Co.* 18 Allen, 95.

It has been held that maintaining chimneys of lower height than surrounding dwellings, necessarily causing smoke to enter windows, was sufficient ground on which to maintain an action.

Sampson v. Smith, 8 Simons, Ch. 272; *Whitney v. Bartholomew*, 21 Conn. 213; *Cartwright v. Gray*, 12 Grant, Ch. (U. C.) 399; *Tipping v. St. Helen's Smelting Co.* 4 Best & Sm. 608, affd. in 11 H. L. C. 642; *Prescott's Case*, 2 City Hall Rec. 161.

A legislative grant does not exempt corporations from liability for injury caused by noise in the erection of workshops near dwellings and places of business, disturbing the enjoyment thereof and injuring property by casting smoke, fumes, dust, etc., upon dwellings and grounds.

Wood, Nuis. § 762; Cooper v. North British R. Co. 35 Jurist, 295; *Commonwealth v. Kidder*, 107 Mass. 188.

Authorizing a corporation to do such acts upon its own land as shall destroy or seriously impair the enjoyment of the adjoining land of a citizen is a taking of the land of such citizen within the meaning of the Constitution; and although such authority be given for public purposes, if provision be not made for compensation to the party injured, the authority is void.

Pumpelly v. Green Bay & Miss. Canal Co. 13

Wall. 166 (80 U. S. bk. 20, L. ed. 557), cited and apprd. in 74 N. Y. 516.

Private convenience is no excuse for infringing upon the rights of another, under the plea of necessity.

Truman v. London, Brighton & South Coast R. Co. L. R. 25 Ch. Div. 423; *Cooley, Const. Lim.* (5th ed.) 671.

Messrs. H. H. Anderson and Wm. E. Barnett, for respondent:

The burden of proving neglect was upon plaintiff to show affirmatively, by a preponderance of proof, that a practicable change in the construction of the structures could be made so as to lessen the annoyances complained of.

Shearm. & Redf. Neg. § 12 and cases there cited; *Pierce, R. R.* 433, 437, and cases there cited.

The finding of the court on a question of fact should not be disturbed; nor will a reversal of such finding be sanctioned by the appellate court, if the evidence was of such a conflicting character that the court might have found either way.

1 Bliss, Code, 922, and cases there cited; *East River Nat. Bank v. Gore*, 57 N. Y. 597; *Fisk Pure. Co. v. Evans*, 37 N. Y. Super. Ct. 482.

The courts have held that, under the statutes of the State, railroad companies may properly acquire land for engine houses, shops for the repair of locomotives, fuel yards, turnouts and side tracks as necessary incidents to the operation of a railroad.

Matter of N. Y. Cent. etc. R. R. Co. 77 N. Y. 248, 263; *N. Y. & Harlem R. R. Co. v. Kip*, 46 N. Y. 547, 552, 553; *State v. Comrs. of Mansfield*, 23 N. J. L. 510; *Philadelphia W. & B. R. v. Williams*, 54 Pa. 103; *People v. Utica Ins. Co.* 15 Johns. 358, 380; *Pierce, R. R.* 149, 150, 484, and cases there cited.

The location of the buildings and structures of the company is within the reasonable discretion of its managers.

N. Y. & Harlem R. R. Co. v. Kip, 46 N. Y. 546.

Where the grantees of a franchise have not exceeded the power conferred upon them, and when they are not chargeable with want of due care, no claim can be maintained for any consequential damages resulting from their acts.

Sedg. Dam. 110-112; *Pierce, R. R.* 197, 431, and cases there cited; *Sixth Av. R. R. v. Gilbert El. R. R.* 48 Super. Ct. 315; *Kellinger v. Forty-Second, etc. St. R. Co.* 50 N. Y. 206, 211; *Plant v. Long Island R. R. Co.* 10 Barb. 26; *Boothby v. Androsscoggin & K. R. R. Co.* 51 Me. 318; *Richard's App.* 57 Pa. 105; *Washburn & Moen Mfg. Co. v. Worcester*, 116 Mass. 458; *Frankford & Bristol Turnpike Co. v. Philadelphia & T. R. R. Co.* 54 Pa. 845; *Brand v. Hammermith etc. R. Co.* L. R. 1 Q. B. 130; reversed in L. R. 2 Q. B. 233; *S. C. L. R. 4 Eng. & Irish App.* 171; *Mersey Dock v. Gibbs*, L. R. 1 Eng. & Irish App. 112; *Bordentown & South Amboy Turnpike Road v. Camden & Amboy R. R. & Trans. Co.* 2 Harr. (N. J.) 314; *Bellinger v. N. Y. Cent. R. R. Co.* 23 N. Y. 42.

Andrews, J., delivered the opinion of the court:

We are relieved, by the findings of the trial judge, from any question as to the sufficiency of the evidence to establish that the engine

house, as used by the defendant, constitutes under the general rule of law a private nuisance to the property of the plaintiff.

The compromise exacted by the necessities of the social state, and the fact that some inconvenience to others must of necessity often attend the ordinary use of property, without permitting which there could in many cases be no valuable use at all, have compelled the recognition in all systems of jurisprudence, of the principle that each member of society must submit to annoyances consequent upon the ordinary and common use of property, provided such use is reasonable both as respects the owner of the property and those immediately affected by the use, in view of time, place and other circumstances.

It is in many cases difficult to draw the line, and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy.

There is, however, upon the evidence and findings in this case, no room for doubt. The plaintiff, from 1870, has been the owner of a house on East Forty-Sixth Street in the City of New York, used as a private residence, of the value at that time of at least the sum of \$20,000.

In 1872, the defendant, the New York & New Haven Railroad Company, purchased a lot adjacent to the lot of the plaintiff, extending from Forty-Sixth to Forty-Seventh Streets, and bounded on the west by Fourth Avenue; and erected thereon an engine house and coal bins for the use of its road; and since the year 1872 has used the engine house for the reception, sheltering, storing, cleaning, oiling, dumping, repairing, and firing of its locomotives, and the coal bins for coaling the same.

The engine house was designed to accommodate eleven locomotives, and has eleven smoke stacks, extending above the roof to about the height of the third story windows of the plaintiff's house. The court found that the engine house and coal bins were so constructed and used by the defendant as necessarily to cause damage from the use thereof to the plaintiff's dwelling house, and that the coal bins were unprovided with sufficient covering to prevent the dust of the coal, from time to time stored therein and removed therefrom by defendant, from passing into and upon the plaintiff's land and dwelling house.

The court further found that there is now, and at all times since 1872 has been, emitted from the engine house and smoke stacks, and from the defendant's engines in the engine house, hurtful and offensive gases, smoke, soot, and cinders, and coal dust from the coal bins; and that the same pour down upon, and are borne by the winds into and upon, the plaintiff's dwelling house and premises, filling the house with smoke, soot and cinders, injuring the furniture and clothing therein, rendering the air offensive and unwholesome, and the house uncomfortable and unhealthy as a habitation, and greatly reducing the rental value of the premises.

The evidence fully justifies the findings of the court. It was shown that the house was rendered untenable, and could not be rented, although before the erection of the engine house, it had been rented for \$2,500, a year; that the plaintiff's son became ill in consequence of the un-

wholesome atmosphere, and that she was compelled to remove him from the house on that account, and that the value of the house had diminished one half, a depreciation caused in great part at least by the maintenance and use of the engine house.

In short the engine house, as used, practically deprived the plaintiff of the use of the house as a residence. The defendant did not physically eject her therefrom, but by filling it with smoke and dust, and by corrupting and tainting the atmosphere with offensive gases, made life therein uncomfortable and unsafe.

It is scarcely necessary to cite authorities to show that the engine house as used was, within every definition, a nuisance for which, as between individuals, an action would lie for damages, and for which a court of equity would afford a remedy by injunction. See *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cases, 642; *Fish v. Dodge*, 4 Denio, 811; *Campbell v. Seaman*, 63 N. Y. 568.

In *Radcliff's Exrs. v. Mayor*, 4 N. Y. 198, a case which is often cited to sustain the doctrine that consequential injuries to private property, from the prosecution of public improvements do not give a right of action, Bronson, *Ch. J.*, referring to the general rule that a man may do what he will with his own property, said: "He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property."

The correctness of the findings of fact, made by the court, is not questioned by the defendant. The court placed its judgment, denying relief, upon the ground that defendant was a railroad corporation, authorized by law to acquire real estate for an engine house; that an engine house, at the point where this engine house was erected, was necessary for the operation of its road; and that in the construction and use of the engine house and coal bins it had exercised all practicable care.

The findings of law from these premises were that "Whatever damage has resulted to the plaintiff or her property, by reason of defendants' use and occupation of its engine house and coal bins, is *damnum absque injuria*."

It is manifest that if this judgment can stand, a most serious injury is inflicted by the defendant upon the plaintiff, for which she has no redress. Her premises are subjected to a burden in the nature of a servitude in favor of the defendant, which seriously impairs the value and enjoyment of her property.

The principle upon which the court below proceeded was that what the Legislature has authorized the defendant to do can be neither a public nor private wrong; in other words the Legislature has authorized the maintenance of this nuisance by the defendant, and the plaintiff must bear the consequences. The court below, in denying any relief to the plaintiff, of course assumed that the legislative authority, and the act of the defendant thereunder, resulting in flooding the plaintiff's premises with soot, smoke and noxious gases, was not a taking of the plaintiff's property, within the Constitution.

We place our judgment in this case upon the ground that the Legislature has not authorized the wrong of which the plaintiff complains; and it is therefore unnecessary to determine

whether the Legislature could have authorized it consistently with the principles of the Constitution for the security of private rights without providing for compensation.

The legislative authority under which the defendant seeks to justify the maintenance of the nuisance in question is found in section 8, chap. 143 of the Laws of 1848, entitled "An Act to Amend an Act, entitled 'An Act Relating to the New York & Harlem Railroad Company,' passed May 7, 1840." That section authorizes the defendant, the New York, New Haven Railroad Company, to enter upon and run its cars by the power or force of steam, animals or any mechanical power, over the road of the New York & Harlem Railroad Company from the point of junction of the two roads in Westchester County, to and into the City of New York, "upon such terms and to such points as has been or may hereafter be agreed upon by and between said companies."

The defendant is a Connecticut corporation. Its road extends from New Haven in that State to a point on the Harlem Railroad in Westchester County in this State. It constructed the part of its road in this State from the state line to its junction with the Harlem Railroad at Williams' Bridge, under the authority of the Act of the Legislature, chap. 195 of the Laws of 1846.

When the Act of 1848 was passed, the two companies had entered into an agreement for the use by the defendant, for its cars, of the tracks of the Harlem Railroad from Williams' Bridge to the City of New York, in which among other things, the New York & Harlem Railroad Company agreed to furnish the defendant Corporation room for its engine house at Thirty-Third and Forty-Second Streets, not to exceed one half of the real estate of the former Company at that place, for which the defendant was to pay as provided in the agreement.

It is claimed that the Legislature has authorized the erection and use of the defendant's structure on Forty-Sixth Street. The only express authority conferred by the Legislature is found in the sixth section of the Act of 1848 above referred to. The authority conferred by that section, on the face of it, is simply an authority to the defendant to run its cars on the Harlem Railroad to the City of New York, upon such terms as may be agreed upon between the two companies. The most obvious purpose of this section was to confer corporate capacity upon the defendant to do that which, without legislative authority, it could not do, viz.: operate its road beyond the terminus fixed in the Act of 1846, from Williams' Bridge to the City of New York.

But even this authority was not absolute. It could be exercised only in case and upon the terms of an agreement between the two companies, for the use by the defendant of the tracks of the Harlem Railroad. Upon this slender authority is based the claim of the defendant that the Legislature has authorized the injury in question. The argument in brief is: the Legislature has authorized the defendant to run its trains into the City of New York, over the Harlem road; it cannot do this without an engine house conveniently located; the power to acquire lands for and to construct an engine house is therefore incidental to the

power expressly given; the Company has exercised due care in its location, construction and maintenance; the annoyances suffered by the plaintiff are a necessary consequence of its use, and therefore the principle applies "That an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."

We shall pass without examination the question whether the authority given to the defendant to purchase land for an engine house is implied in the power conferred in the sixth section of the Act of 1848, to enter into an agreement with the Harlem Railroad for the use of the tracks of that road and to run its cars thereon, to the City of New York.

For the purpose of this case we shall assume that the general power conferred included the latter power as incident. It is no doubt a settled principle of the law that many things may be done by the owner of land causing consequential damages to his neighbor, for which the law affords no remedy. The cases embraced within this rule are those either where what was done was in the lawful and reasonable use by an owner of land, of his own property, or where the damages suffered, although by possibility attributable to the wrongful act of another, were too remote therefrom to justify the court in treating the one as the sequence of the other.

The case before us belongs to neither of these categories. The defendant's engine house as maintained, was a palpable nuisance, causing special injury to the plaintiff, for which, by the general rule of the common law, she has a right of action. The defendant, however, does not rely for its justification upon the ordinary rule governing the rights of adjoining proprietors; but, as we have said, it rests upon the claim that the Legislature has authorized the acts of which the plaintiff complains, and has therefore made that lawful which otherwise might be unlawful, and has taken away any remedy which the plaintiff otherwise might have had.

It is undoubtedly true that there are cases in which the Legislature, in the public interest, may authorize and legalize the doing of acts resulting in consequential injury to private property, without providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity. Indeed, such is the transcendent power of Parliament that it is the settled doctrine of the English law that no court can treat that as a public or private wrong which Parliament has authorized; and consequently, as stated by Blackburn, J., in *Hammersmith, etc. R. Co. v. Brand*, L. R. 4 H. L. Cases (Eng. & I. App.), 171, "The person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation."

The legislative power in this country is subject to restrictions; but nevertheless private property is frequently subjected to injury from the execution of public powers conferred by statute, for which there is no redress. The case of consequential injuries resulting from street improvements authorized by the Legislature is a familiar example.

In *Radcliff's Exrs. v. Mayor*, *supra*, which is a

leading case, the Corporation of Brooklyn laid out, opened and graded a street, under an authority contained in the charter; and the court held that in the absence of negligence, the city was not liable for consequential damages suffered by the plaintiff from the sliding down of his land, caused by the cutting down of the street, and thereby removing the lateral support. The court in its opinion declared that it had never been considered that consequential damages to private property, resulting from the opening and improving streets or highways, or other work of a public nature, could be recovered.

The case has been frequently followed, and its authority completely established by repeated decisions in this State. It is an application of a principle well settled, that private interests must yield to the public welfare; but the case carries to the utmost limit the right of the Legislature, for public reasons, to interfere with private property to the injury of the owner, without making compensation.

The case of *Bellinger v. New York Cent. R. R. Co.* 23 N. Y. 42, is another case frequently cited to support the claim that a use of property authorized by the Legislature cannot, in the absence of negligence, constitute an actionable injury. It was an action brought for the flooding of the plaintiff's land on the Mohawk Flats, caused, as was charged, by the turning of the water of the West Canada Creek out of its natural course, by an embankment constructed for the use of the railroad, over the low lands west of the creek.

The Utica and Schenectady Railroad Company (to whose rights and obligations the defendant succeeded), was created a corporation by chapter 294 of the Laws of 1833, with power to construct a railroad between Schenectady and Utica "on the north side of the Mohawk River as far as the Village of Herkimer." The charter authorized the directors to locate the line where it would be most advantageous for the road, and file a certificate of location; and the charter declared that the line so located should be deemed the line upon which the road should be built. The company located its line on the creek at the point in question. It constructed a bridge across the creek, 500 feet long, and also left a water way eighty-two feet wide in the embankment, for the passage of water in time of flood. The freshet which flooded the plaintiff's land occurred at the time of breaking up of ice of the creek in the spring. It was shown that ice and water flowed and was forced upon the plaintiff's premises at the breaking up of the creek in 1799, and again in 1813, and on three occasions after the road was built, between 1835 and 1866. There was some evidence tending to show that the flooding in question was occasioned by the embankment, and the want of sufficient apertures for the passage of the water. The plaintiff recovered a verdict and the judgment was reversed by this court, upon the ground of the rejection of evidence offered by the defendant, bearing upon the point whether the embankment and bridge were carefully and skillfully constructed. It was claimed by the counsel for the plaintiff that this was an immaterial issue. The court in its opinion conceded that according to the general rule of law, if the structure

of the defendant caused the injury, it would be liable irrespective of negligence; but held that as the company was authorized by statute to construct its road across the creek at the point where it was located, it was liable only for such consequences as were attributable to a failure to exercise due care and skill in executing the statute authority.

The case of *Bellinger v. New York Cent. R. R. Co.* is perhaps the strongest case to be found in our reports of the application of the doctrine that a statutory authority justifies acts which otherwise would give a right of action. But it will be noticed that it was a case where the line of the road was fixed by the charter. It was necessary, in constructing the road on that line, to cross the creek on a bridge, and the low lands upon an embankment. The flooding of the plaintiff's premises was an unusual occurrence, and the evidence was very slight that it was caused by the structures of the defendant. It was under these circumstances that the court reached its conclusion that the damages suffered by the plaintiff were not recoverable in the absence of negligence on the part of the defendant, in the construction of the road.

But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury.

This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed; for it cannot be presumed, from a general grant of authority, that the Legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent. This construction of statutory powers applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification for acts to the detriment of private property.

In the case of *Gardner v. Newburgh*, 2 Johns. Ch. 162, the chancellor granted an injunction to prevent the Village of Newburgh from diverting the waters of a stream, under an Act of the Legislature which authorized in general terms the taking of water for the use of the village, and which provided for compensation to the owner of land on which the spring or source of supply was situated, but made no provision for compensation to the owner of land below, through which the stream passed.

When that case arose there was no provision in the Constitution of the State prohibiting the taking of private property for public use, without compensation. But the chancellor held that the making of compensation was an indispensable attendant of the exercise of the public right; and, what is more material to our present purpose, he declared that the Legislature could not have intended, by the general powers conferred, to violate or interfere with private rights.

The same principle is stated with unusual force of language by Chief Justice Marshall, in *United States v. Fisher*, 2 Cranch, 390 [6 U. S. bk. 2, L. ed. 314]. He says: "Where rights

are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

What may be a sufficient statutory sanction for acts which injuriously affect general public rights or individual property is illustrated by cases which hold that an authority to construct a railroad and use locomotives thereon, takes away any remedy by indictment or private action, for such consequences as necessarily result from the use of locomotives, such as noise, vibration, etc., although no compensation is provided. *Reg. v. Pease*, 4 Barn & Adol. 30; *Vaughan v. Tuff Vale R. Co.* 5 Hurl. & Nor. 679; *Hammer-Smith, etc. R. Co. v. Brand*, *supra*.

There are two recent English cases which apply with great distinctness the principle that a statutory sanction cannot be pleaded in justification of acts which, by the general rules of law, constitute a nuisance to private property, unless they are expressly authorized by the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred. These are the cases of *Hill v. Managers of the Metropolitan Asylum District*, L. R. 4 Q. B. Div. 438; *S. C.* on appeal, L. R. 6 App. Cas. 193, and *Truman v. London, Brighton, etc. R. Co.* L. R. 25 Ch. Div. 423.

The case of *Hill v. Managers, etc.*, was an action for damages, and for an injunction to restrain the use of a small-pox hospital, established by the defendants under the direction of the poor law board, under the authority of the Metropolitan Poor Act of 1857. The Act of Parliament authorized the erection of asylums for sick, infirm and insane paupers in the metropolitan asylum district in London, to be designated by the poor-law board; and authorized the purchase, leasing or filling up of buildings for that purpose; and the Act referred to small-pox patients as among the class of persons to be provided for. The managers, under the direction of the poor law board, erected a hospital for small-pox patients, near premises of the plaintiff. The jury found that the hospital was a nuisance occasioning damage to the plaintiff.

The court, on the hearing, granted an injunction; and the case was appealed to the House of Lords, where it received great consideration, and the judgment was affirmed. The defendants justified under the Act of Parliament. The judges pronouncing opinions conceded that according to the settled doctrine of English law, if Parliament had expressly authorized the construction of the hospital upon the very site where it was located, its use in the manner and for the purpose contemplated could not be restrained by injunction, except in so far as it was negligent, although such use should constitute a nuisance at common law, and no compensation would be due in respect of injury to private rights, unless provided for in the Act.

But it was held that the statutory sanction, sufficient to justify the creation of a nuisance, must be express; that the particular land or site for the hospital must have been defined in the Act; or, as held by one of the judges, it must

appear that the Act, while defining certain general limits, could not be complied with at all without creating a nuisance; and its performance was made imperative.

In the House of Lords opinions were pronounced by Lord Chancellor Selborne, Lord Blackburn and Lord Watson, all concurring in substantially the same view. Lord Watson said: "If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute: and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose." [L. R. 6 App. Cas. 213].

The case of *Truman v. London, Brighton, etc. R. Co.* was also an action for damages and for an injunction to restrain a nuisance created by the maintenance, by the defendant, of the cattle yards at its station at East Croydon. The defendant was authorized by its charter to purchase lands in such places as it should deem eligible for the purpose of providing station yards for and unloading cattle, etc. It purchased lands for that purpose adjoining East Croydon Station, but near the dwelling of the plaintiff. The court found that the company acted *bona fide* in selecting the site, and conducted the business with all practicable care; but also found that it created a nuisance to the plaintiff, and granted the injunction.

That case arose after the decision in *Hill v. Managers of the Metropolitan Asylum District*, and was decided upon the principles there laid down. It is manifest that these cases, if well decided, completely answer the defense in the present case. See also *Reg. v. Bradford Nor. Co.* 6 Best & Smith, 631; *Atty-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147; *Hooker v. New Haven & N. Co.* 14 Conn. 146; *S. C.* 15 Conn. 312.

The authority conferred upon the defendant by the sixth section of the Act of 1848, to run its trains over the Harlem Railroad, was not, however broadly construed, a legislative sanction to commit a nuisance upon private property. The authority expressly given was not absolute, but conditional upon obtaining the consent of the Harlem Railroad.

It could not be known by the Legislature that the building of an engine house would necessarily interfere with private rights. However necessary it may be for the defendant that its engine house should be located where it is, this constitutes no justification for the injury suffered by the plaintiff; nor is it any answer to the action that it exercises all practicable care in its management. It may have the right which it claims: to acquire land by purchase, for the accommodation of its business; but it must secure such a location as will enable it to

conduct its operations without violating the just rights of others.

Public policy indeed requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side; but in this case the facts leave no room for doubt that the plaintiff has suffered a substantial and unauthorized injury.

The case of *Baltimore & Polomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317 [Bk. 27, L. ed. 739], fully supports the conclusion we have reached in this case, and the able opinion of Mr. Justice Field in that case vindicates the right of private property to protection against substantial invasions under color of corporate franchises.

The judgment should be reversed, and a new trial ordered.

All concur.

David S. PAIGE, *Respt.*,

v.

Edmund WARING *et al.*, Exrs. of William E. Waring, Deceased, *Appts.*

In an action to recover a certain award to "unknown owners," for land taken for public purposes, paid to defendants' testator, plaintiff claimed to be entitled thereto by force of adverse possession under a written instrument. Held, under the circumstances of the case, that there having been some evidence that the land was "usually cultivated or improved" and "protected by a substantial inclosure," for more than twenty years preceding the date of the award, and the jury having found a verdict in favor of plaintiff, his claim to adverse possession was well founded.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the New York Circuit Court in favor of plaintiff in an action to recover certain awards made to "unknown owners." *Affirmed.*

Memorandum of decision below, 86 Hun, 643.

The facts are stated in the opinion.

Mr. H. H. Anderson, for appellants.

Mr. John E. Burrill, for respondent.

Earl, J., delivered the opinion of the court:

This case has been here once before (76 N. Y. 463), and the most important legal questions involved were then settled.

The action was brought to recover certain awards made to "unknown owners" for the taking of certain land in the City of New York, for the opening of Madison Avenue, which awards were paid by the city to defendants' testator upon his claim to be the owner of the land. Both parties claim the land taken, by title derived from Peter Poillon. His conveyance of the land in the chain of plaintiff's title was made June 21, 1827; and if that conveyance had been at one recorded, there is no dispute that plaintiff's title to the land and the awards would have been perfect. But the infirmity in his title arises from the fact that

that conveyance was not recorded until August 15, 1864.

Poillon's conveyance of the land in Waring's chain of title was dated January 29, 1861, and recorded the next day. So the defendants have the best record title; and if there were nothing more, their title to the money awarded for the land and paid to their testator would have been perfect.

There is no evidence that any of the persons under whom the defendants claim were ever in the possession of the land or ever exercised any acts of ownership over the same. But the plaintiff claims that his grantor was in the actual, open, notorious possession of the land by his tenant in January, 1861; and hence that within the rule laid down in *Brown v. Volkening*, 64 N. Y. 76, and other cases, there was constructive notice to Poillon's grantee, at that time, of the prior unrecorded deed and of the rights acquired thereunder. He also claims that for more than twenty years before the land was taken by the city and the awards made, he and those under whom he claims were in the actual possession of the land, claiming under the conveyance from Poillon; and hence that his title to the award was perfect on that account.

The persons who knew most about the facts relating to the possession were, at the trial of this action, dead; and hence the evidence as to such possession was not as certain and definite as could be desired. But it was submitted to the jury under instructions as to the law which we must, in the absence of the charge or any exceptions thereto, assume to have been proper and satisfactory; and their verdict in favor of the plaintiff must be regarded as conclusive, so far as there was any evidence upon which it could be based.

To make out the adverse possession in this case it was incumbent upon the plaintiff to prove that the land was "usually cultivated or improved," or that it was "protected by a substantial inclosure," 2 R. S. 294; Code, Proc. § 83; Code, Civ. Proc. § 370.

Here, without going particularly into the evidence, we are satisfied that there was some evidence from which the jury could find that both of the conditions mentioned were satisfied during a period of more than twenty years preceding the date of the awards; and that plaintiff's claim of adverse possession was therefore well founded.

Without, therefore, determining whether at the date of the second deed of Poillon, to wit: January 29, 1861, plaintiff's grantor was in the open, notorious and actual possession of the land, within the meaning of the case of *Brown v. Volkening*, and other cases cited, we are of opinion that for the reasons stated the judgment should be affirmed, with costs.

George N. MANCHESTER *et al.*, *Respts.*,

v.

Susan R. KENDALL *et al.*, Exrs. etc., *Appts.*

Mr. David Thurston, for appellants.

Mr. W. McDermott, for respondents.

Judgment affirmed, with costs. No opinion.

All concur except Miller, J., absent. (Oct. 5, 1886.)

Mortimer F. REYNOLDS, *Appt.*,

v.

DeWitt C. ELLIS, as Assignee, *et al.*, *Resp'ts.*

A clause in a lease, providing that lessor shall have a lien for rent upon all goods and other personal property of lessee, a retail dealer, which then are or may be thereafter put upon the leased premises, and providing that the lessor may, in case of default in payment of rent, take and sell such goods, etc., in the same manner as in the case of a chattel mortgage, and providing that the lessee may continue in possession of the goods and sell the same in the regular course of his business and buy other goods with the proceeds (although valid as between the parties) is fraudulent on its face as to bona fide creditors of the lessee, and cannot be enforced by the lessor as an equitable lien upon the goods, against the rights of an assignee of the lessee for the benefit of creditors, in possession of the goods.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Monroe Special Term dismissing the complaint in an action seeking to enforce a lien upon personal property. *Affirmed.*

Reported below, 34 Hun, 47.

Statement by **Danforth, J.:**

This is an equitable action brought by the appellant for the purpose of subjecting the proceeds of certain chattels theretofore sold by the defendant Ellis, as assignee, etc., to the payment of rent due and to become due from the defendant, H. F. Van Dake.

It appeared upon the trial that in March, 1879, the plaintiff, as lessor, and H. F. Van Dake, as lessee, executed a lease by which the former let and the latter agreed to take certain premises for a boot and shoe store for the term of five years from the first of April, 1879, at the rent of \$2,000 for the first year, and a greater sum thereafter, payable monthly in advance, with interest after three days from maturity; and in case of default in payment, or seizure of the goods and merchandise, or other personal property in or upon the premises, by virtue of any writ, judgment, execution, assignment, or otherwise, the whole amount of such rent and interest agreed to be paid should immediately become due and payable, and to that should be added any sums due for water rates or gas.

Then followed this clause: "And it is further agreed that the lessor shall have a lien as security for all the rent and interest, gas bills and water rates aforesaid; or for any damage to building due from lessee, upon all goods, wares, chattels, implements, fixtures, tools and all other personal property, which are or may be put on the demised premises, belonging to the lessee, or to anyone holding or claiming the demised premises, or any part thereof, under him as assignee, under tenant or otherwise;

and such lien may be enforced on the nonpayment of any of said rent, interest, water rent or gas bills, by the taking of such property and the sale thereof in the same manner as in case of a chattel mortgage on default thereof; such sale to be made upon six days' notice posted upon the demised premises, or served upon said lessee. Such lien, however, shall not be enforced against any property which, being a part of stock in trade, shall have been sold in the regular course of business."

It was found by the trial judge (eleventh finding) that at the time of the execution of this lease it was agreed between the parties thereto that the lessee "should remain in possession of the said mortgaged goods in said store, and that he might sell the goods covered by said mortgage, in said store, and use the proceeds in his business, buying other goods with the money as opportunity offered; and using the proceeds of the sales to meet his liabilities and in the prosecution of his business and in supporting his family and paying his hired help;" and also (twelfth finding) "That at the time said chattel mortgage lease was executed, the said Henry F. Van Dake was in possession of said store and all the goods therein, and thereafter continued in possession of said store and of the mortgaged goods, and continued to deal with the said mortgaged property, consisting chiefly of boots and shoes, in which he was a retail dealer, as he had been accustomed to do before the giving of the chattel mortgage lease, buying and selling boots and shoes as opportunity offered, and using the proceeds of his sales in the prosecution of his business and in the support of his family and in paying his hired help in all respects as if no mortgage were in existence; all of which was done with the knowledge and approval of the plaintiff; and that the plaintiff never had possession of any of the goods covered by said chattel mortgage lease."

This condition of affairs continued until the 5th of January, 1881, when H. F. Van Dake made a general assignment to DeWitt C. Ellis, of all his property including that upon the leased premises, for the benefit of his creditors, among whom as preferred creditor was the other defendant, Harriet S. Van Dake.

On the same day, and without notice, actual or constructive, of any claim on the part of the plaintiff Ellis, as assignee, took possession of the property, and soon thereafter sold and converted it into money, realizing over and above expenses about \$2,000.

Afterwards, but before the commencement of this action, the plaintiff demanded of the assignee, either payment of the rent accrued and due, "or delivery of the stock of goods, fixtures and other personal property in the store, to him as such lessee; claiming a right and lien under said lease prior and superior to that of said Ellis, under the assignment."

Mrs. Van Dake's debt accrued prior to the lease, and is greater than the proceeds of the assigned property. The plaintiff asked judgment that he be declared to have a prior lien upon the assigned property and its proceeds, and that he be paid therefrom \$1,833.33 rent actually due, and \$6,966.86 which became due by reason of default on the part of the lessee.

The trial court as conclusion of law found:

"First, that the said plaintiff had no lien on the goods in said store at the time the said assignment was made, as against the said assignee and the creditors of the defendant, Henry F. Van Dake.

Second, that the said chattel mortgage clause in said lease was absolutely void as against the assignee and creditors of the defendant, Henry F. Van Dake.

Third, that said chattel mortgage clause in said lease is fraudulent in law, as against the assignee and creditors of the said Henry F. Van Dake.

Fourth, that the complaint be dismissed with costs against the plaintiff."

The plaintiff excepted to these several conclusions of law; and after judgment appealed to the general term where it was affirmed.

Messrs. J. A. Stull and Benton & Dickinson, for appellant:

As between the plaintiff and Henry F. Van Dake, the lease was a valid instrument; and all its provisions, including the lien clause in question, were in force and binding upon Henry F. Van Dake as lessee, before and at the time he executed his general assignment, and ever since; and the lien clause attached to all property embraced within its terms which was upon the premises when the lease was executed, and on that which the lessee afterwards put thereon.

McCaffrey v. Woodin, 65 N. Y. 459; *Wiener v. Ocmupough*, 71 N. Y. 113; *Hale v. Omaha Nat. Bank*, 49 N. Y. 627.

The claim of Harriet S. Van Dake against her husband was never placed in judgment; and as a general creditor, merely, she could not attack the lease nor prevent its enforcement, either on the ground that it had not been filed in the proper clerk's office, or on the ground that it was fraudulently executed.

Hayman v. Jones, 7 Hun, 238; *Thompson v. Van Vechten*, 27 N. Y. 568; *Jones v. Graham*, 77 N. Y. 628; *Niagara Co. Nat. Bank v. Lord*, 33 Hun, 564; *Van Heusen v. Radcliff*, 17 N. Y. 584.

The assignee is a mere volunteer; he parted with nothing, and is not regarded as a *bona fide* purchaser.

Van Heusen v. Radcliff, 17 N. Y. 582, 584; *Re Collins*, 12 Nat. Bk. Reg. 879; *Stade v. Van Vechten*, 11 Paige, 21; *Burrill*, Assign. 4th ed. 589 and cases cited.

An assignee cannot defend successfully against a chattel mortgage, upon the ground that it has not been filed according to the statute.

Southard v. Benner, 72 N. Y. 424; *Niagara Co. Nat. Bank v. Lord*, *Van Heusen v. Radcliff*, and other cases cited above.

The lien clause in the lease did not constitute a chattel mortgage so as to subject the lease or the plaintiff's rights thereunder to the provisions of the several statutes regarding either the filing of chattel mortgages (Laws 1838, chap. 279, as amended by Laws 1879, chap. 418) or the fraudulent conveyances or transfers of personal property.

§ R. S. part 2, chap. 7, tit. 2, § 5, p. 2328 of 7th ed.

A chattel mortgage is a sale of goods and chattels upon conditions. Here were no words of sale, transfer or assignment, and no title passed thereby.

N. Y.

McCaffrey v. Wooden, 62 Barb. 316.

In a chattel mortgage the legal title to the property mortgaged passes to the mortgagee; and that title becomes absolute on the failure of the condition.

Butler v. Miller, 1 N. Y. 496; *Stuart v. Taylor*, 7 How. Pr. 251; *Porter v. Parmly*, 43 How. Pr. 445; *S. C. 2 Jones & S. 398*; *Jones*, Chat. Mort. §§ 8, 9, 11; *Parshall v. Eggart*, 52 Barb. 367; *S. C. reversed in 54 N. Y. 18*; *McCaffrey v. Wooden*, 62 Barb. 316; *Brown v. Bement*, 8 Johns. 96; *Langdon v. Buel*, 9 Wend. 80; *Patchin v. Pierce*, 12 Wend. 61.

Words creating a lien merely do not constitute a mortgage, for no title passes to the creditor or grantee of the lien.

Sawyer v. Fisher, 32 Maine, 28; *Gushee v. Robinson*, 40 Maine, 412; *Shaw v. Wilshire*, 65 Maine, 485; *Metcalf v. Fodick*, 23 Ohio St. 114; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Dalton v. Laudahn*, 27 Mich. 529; *Jones*, Chat. Mort. § 11.

The general term was in error in holding that the plaintiff was not in as good condition to maintain this action as he would have been if his lease had been a chattel mortgage; and also that no actual lien existed against the property at the time it was taken in custody by the assignee; and that the equities of the creditors are just as great as those of the plaintiff; and that the court has no power to prefer one creditor over another.

1 Pom. Eq. Jur. §§ 165-167; pp. 145-148; 3 *Id.* chap. 7, § 1233, *et seq.*

As against this lease, the general assignment may be considered as made in fraud of the plaintiff's rights as lien holder, and wrongful, unless made subject thereto.

Hale v. Omaha Nat. Bank, 49 N. Y. 634.

Mr. John M. Davy, for respondents:

The fraudulent nature of the mortgage consisted in giving the mortgagor credit by allowing him to retain possession of the mortgaged goods, and to sell them, and to use the proceeds in his business and otherwise, thereby inducing parties to give him credit.

Potts v. Hart, 99 N. Y. 172; *Brckett v. Harvey*, 91 N. Y. 214; *Southard v. Benner*, 72 N. Y. 424; *Russell v. Winne*, 37 N. Y. 591.

The assignee in this case represents the whole body of creditors, and he had a right in their behalf to impeach the validity of the mortgage and show that it was fraudulent and void.

Southard v. Benner, 72 N. Y. 427; *Ball v. Slafter*, 26 Hun, 354; *S. C. 98 N. Y. 622*; *Hard v. Milligan*, 8 Abb. N. C. 59; *Southard v. Pinckney*, 5 Abb. N. C. 184.

No special form of words is necessary to constitute a mortgage.

The statement in the lease that the lessee "is to have a lien for the rent, and that on default he may take possession and sell in the same manner as in a case of a chattel mortgage, sufficiently discloses the intent of the parties when they executed the lease.

McCaffrey v. Woodin, 65 N. Y. 465.

At common law there could be no lien upon goods without possession.

3 Pars. Cont. p. 250; *Willard*, Eq. Jur. p. 123; *Black v. Bogert*, 65 N. Y. 601; *McFarland v. Wheeler*, 26 Wend. 467; *Grinnell v. Cook*, 8 Hill, 485; *Coryell v. Ferine*, 6 Robt. 40; *Walther v. Wetmore*, 1 E. D. S. 24.

Danforth, J., delivered the opinion of the court:

Upon this appeal the expectation of success seems to rest chiefly upon a supposed distinction between the clause in question and a chattel mortgage. It is upon the appellant's points styled a "lien clause;" and the contention is that as it does not purport to pass the title to the property, it cannot be said to be a mortgage or a conveyance intended to operate as a mortgage, within the provisions of law in regard to the filing of chattel mortgages (Laws 1833, chap. 279; Laws 1879, chap. 418), or those which relate to fraudulent conveyances or transfers of personal property. 2 R. S. tit. 2, pt. 2, chap. VII, p. 136, §5.

No question upon such supposed distinction appears to have been presented upon the trial, but on the contrary the complaint asks that payment "be made out of the mortgaged chattels;" "that the assignee be enjoined from disposing of said mortgaged chattels," and that "a receiver of said mortgaged chattels and the proceeds thereof be appointed."

So, while it is impossible to tell from the record how much of the complaint is admitted, or what is denied, it is apparent that such was the understanding of the defendants, for the instrument is repeatedly referred to as "a chattel mortgage lease," and the goods as "mortgaged goods," and want of filing of the instrument, and the agreement made at the time of its execution, that notwithstanding its provisions, the lessees might continue to deal with the property, in all respects "as if no mortgage was in existence," are set up as affirmative defenses.

In the same language the trial judge deals with the case in his findings, and there was no request for any different finding or interpretation. But I do not think it is material to inquire how the paper may be characterized. Its form was no doubt devised in order to give by contract, to the landlord of the demised premises, that priority for the collection of rent which once existed by statute but which the Legislature had at the time in question abolished (Laws 1846, chap. 274); thus leaving the landlord to take his place with other creditors, and a debt for rent to be enforced like other obligations.

What then is the effect of the contract as expressed by the clause lying at the bottom of this controversy? It cannot be doubted that it was, as between the lessor and lessee, good as a contract, not only as to property in existence and on the demised premises when the lease was executed, but as to that afterwards acquired and brought on to them.

A similar agreement was examined in *McCaffrey v. Woodin*, 65 N. Y. 459, and a taking by the lessor of property not in existence when the lease was made justified, upon the ground that in substance it had in equity all the characteristics of a mortgage, or of an equitable lien, which for the purposes of that case was said to be its equivalent. There the adverse party was the lessee.

That doctrine was applied in a similar action (*Wiener v. Ocumpough*, 71 N. Y. 118), against a person whose relation to the demised premises precluded him from acquiring any rights ad-

verse to those of the lessor, and who therefore was in no better position than the lessee.

Here the question is in equity, and is raised by the lessor against an assignee for the benefit of the creditors of the lessee. In the cases cited the lessor had obtained possession of the things in dispute, and the first decision turned upon the validity of the agreement as to nonexistent property; the other upon the priority of the plaintiff.

So in *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, there was an agreement for a future lien; and this was held to be sufficient against a defendant who made no title to the property as purchaser, creditor or otherwise, and had nothing but a naked possession tortiously acquired. In other words, the defendant showed no right to question the plaintiff's claim.

Here the assignment to the defendant is conceded to be valid, and it is found that under it he had taken possession of the property and actually sold it without notice of the plaintiff's claim, or the agreement upon which the claim was made; but notwithstanding all this, he has still the avails of the property in his hands; and if the appellant is right in his contention that the defendants' position is not better than that of the lessee, the plaintiff's lien will, upon general principals of equity, follow these proceeds.

We cannot agree, however, in that contention. The defendant represents creditors, and may treat as void all agreements made in fraud of their rights. Laws 1858, chap. 314.

He has greater power for this purpose than the creditor himself. The creditor can assert no right until by judgment and execution he has a lien, or a right to a lien, upon the specific property; but in favor of an assignee for his benefit, the Legislature has substituted a statutory right in place of these conditions. *Southard v. Benner*, 72 N. Y. 424.

The defendant availed himself of this right, and, upon the facts found by the trial judge, his action in so doing must be upheld. There was not only no delivery or change of possession of the things covered by the agreement, but it was understood between the parties that there should be neither. It was therefore void, both at common law (*Twyne's Case*, 3 Coke, 80) and by statute. 2 R. S. p. 136, §5.

It is true, as the appellant says, the clause is not in express terms characterized as a mortgage; nor are the words "sale," "transfer," or "assignment," to be found therein, but that does not matter. It takes effect as a mortgage; and the "lien as security" is given by agreement, or to take the exact words, "it is between the parties further agreed" to that effect. While its object may have been to give one creditor priority over another creditor, it also involves a secret trust in favor of the owner of the goods, and forms the very cover of fraud which the statute condemns by declaring that "Every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever," unaccompanied by delivery, "and followed by an actual and continued change of possession, shall be presumed to be fraudulent, as against the creditors of the vendor."

Nor is it of any consequence when the debt provided for by the assignment was created,

whether before or after the lease was executed. It is enough that the relation of debtor and creditor existed at some time while such goods and chattels remained in possession of the vendor or assignor. 2 R. S. 186, § 6.

It is inconsistent, not only with this statute but with the principles of equity, that such a lien should be successfully set up, to the exclusion of *bona fide* creditors, and we are referred to no case where it has been done. The equity of the defendant as a mere representative of creditors, is at least equal to that of the plaintiff, while the former has superadded to his equity the legal advantage of possession, and the statutory authority to treat as void a conveyance in fraud of the rights of creditors. In these respects his position is better than that of the lessee, and equal to that of a creditor with judgment and execution.

But the learned counsel for the appellant argues that there was no evidence to sustain the eleventh finding (*supra*), viz.: that showing a fraudulent arrangement at the time of the execution of the lease, and therefore that the provisions of the Act of 1858, as to the powers of assignees, are not brought into operation. Conceding it to be valid between the parties, as we have done, we think it fraudulent upon its face as to creditors, and therefore void as to the plaintiff, their assignee.

The lessee was a retail merchant. The lease in terms permits him to sell his stock in the regular course of business and relieves so much of it from the lien. He in fact carried on the business the same after the lease as before. The stock of goods fluctuated, and the plaintiff had notice that it would do so when he gave the lease; he also knew that the defendant was to and did continue the business in that way. There was no restraint upon him in regard to it, or the disposition of the money when the goods were sold. We think the finding was fully justified by *Edgell v. Hart*, 9 N. Y. 213, and *Gardner v. McEwen*, 19 N. Y. 123.

The argument for the appellant suggests no ground upon which a court of equity can interfere in his favor.

The judgment should therefore be affirmed.

All concur except *Miller, J.*, absent.

Board of COMMISSIONERS OF EXCISE OF the City of AUBURN, *Rept.*.

v.

Cary S. BURTIS *et al.*, *Appts.*

1. The amendment of 1879 to the charter of the City of Auburn (Laws 1879, chap. 53, title 7, §71), creating a board of charities and police, with the powers of overseers of the poor in towns, did not give such board the powers to sue for penalties for violations of the excise law; but such penalties are to be recovered in the name of the board of commissioners of excise, under the general provision of the Laws of 1878, chap. 109, that where there is no overseer of the poor, such penalties shall be sued for and recovered by and in the name of the board of commissioners of excise.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Cayuga Circuit in favor of plaintiff in an action to recover penalties for violations of the excise law. *Affirmed.*

Memorandum of decision below, 34 Hun, 624.

The question presented and the terms of the statutes construed are set forth in the opinion.

Messrs. John D. Teller and Nathaniel Moak, for appellants:

Whenever a power is given by statute, every thing necessary to make it effectual, or requisite to attain the end in view, is implied.

Stief v. Hart, 1 N. Y. 20; 1 Kent, Com. 5th ed. 464; *Foliam's Case*, Coke, part 5, fol. 115, p. 235; 1 *Ld. Raym.* 682.

Public officers necessarily possess a capacity to sue, commensurate with their public trusts and duties.

Overseers, Pittstown v. Overseers, Plattsburgh, 18 Johns. 407, 418; *Todd v. Birdsall*, 1 Cow. 260; *Supervisor v. Stimpson*, 4 Hill, 136; *Hathaway v. Town of Homer*, 5 Lans. 273; *Looney v. Hughes*, 26 N. Y. 514; *People v. Supervisors*, 82 N. Y. 477; *Victory v. Blood*, 25 Hun, 515.

That the board of charities and police is given enlarged powers does not affect the case; they are not inconsistent with the lesser powers of overseers which may be included in the greater.

Johnson v. Hud. Riv. R. R. Co. 49 N. Y. 460.

Where one statute is repealed and a more comprehensive one enacted relating to the same subject, in construing one, resort may be had to the other.

Commonwealth v. Bralley, 8 Gray, 457; *U. S. v. Freeman*, 3 How. 557 (44 U. S. bk. 11, L. ed. 724); *Hayes v. Hanson*, 12 N. H. 284.

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and statutes are to be expounded according to their meaning rather than according to the letter.

People v. N. Y. Cent. R. R. Co. 18 N. Y. 78; *Holmes v. Carley*, 31 N. Y. 289; *Chase v. N. Y. Cent. R. R. Co.* 26 N. Y. 523.

These officers have by the common law a capacity to sue, coextensive with their public trusts and duties. A statute is not to be construed as repealing the common law, unless the intent to alter it is clearly expressed.

Melody v. Reab, 4 Mass. 471; *Commonwealth v. Knapp*, 9 Pick. 496; *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231.

A construction which repeals a part of a statute and seriously mars the harmony of a system should be very clear, before it is adopted by the court.

Hayes v. Symonds, 9 Barb. 260; *Wallace v. Bassett*, 41 Barb. 92.

When a statute is made in addition to another on the same subject, without repealing it, the provisions of both statutes must be construed together.

Pearce v. Atwood, 13 Mass. 324; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *McCartee v. Orphan Asylum*, 9 Cow. 487-506.

The Constitution reserved to the electors the right to choose county and town officers, such

as existed at the time the Constitution took effect. While the Legislature may establish new civil divisions of the State for general purposes of government, the divisions recognized by the Constitution must not be abolished, nor their capacity impaired, to subserve the purposes and arrangements to which they are made instrumental by the Constitution.

People v. Draper, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *People v. McKinney*, 52 N. Y. 374; *People v. Crooks*, 53 N. Y. 648; *People v. Raymond*, 87 N. Y. 428.

A statute which transfers powers from an office existing at the time of the adoption of the Constitution to a new office not then created, there being no change of territorial authority, is unconstitutional.

Devoy v. Mayor, 36 N. Y. 449; *People v. Pinckney*, 32 N. Y. 382.

Mr. F. D. Wright, for respondent:

When the want of capacity to sue appears on the face of the complaint, the objection must be taken by demurrer.

Code Civ. Proc. § 488, §§ 3, 498.

When it does not appear on the face of the complaint, the objection must be taken by answer.

Code Civ. Proc. §§ 498, 499.

It must be strictly pleaded.

Wright v. Wright, 54 N. Y. 441.

The second clause of the motion for a nonsuit: that the plaintiff had not made out a cause of action, did not raise the question of the plaintiff's capacity to sue, because that defense had not been pleaded.

Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85; *Phoenix Bank v. Donnell*, 40 N. Y. 410; affg. 41 Barb. 571; *Bank of Louisville v. Edwards*, 11 How. Pr. 216; *Viburt v. Frost*, 3 Abb. Pr. 119; *Myers v. Machado*, 6 Abb. Pr. 198; *Hobart v. Frost*, 5 Duer, 673.

The facts proven did make out a cause of action, and subdivision 8 of section 488 of the Code of Procedure, relating to facts sufficient to constitute a cause of action, has no reference to the plaintiff's capacity to sue; and that question cannot arise under such objection.

Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85; *Phoenix Bank v. Donnell*, 40 N. Y. 410.

When Acts can be harmonized by a fair and liberal construction it must be done.

Sedg. Stat. Law, p. 98 note a; *Conner v. Southern Exp. Co.* 37 Ga. 397.

Ordinarily, express language is used when a repeal is intended, and a repeal by implication is not favored.

Sedg. Stat. Law, p. 98 note a.

The implication of repeal must be a necessary one.

Sedg. Const. of Stat. & Const. L. p. 98 note a; *Naylor v. Field*, 5 Dutch. 287.

If two statutes on the same subject can stand together without destroying the evident intent and meaning of the latter one, there will be no repeal.

Sedg. Stat. Law, p. 98 note a; *Roberts v. Fahs*, 36 Ill. 268.

A repeal by implication is not favored. On the contrary, courts are bound to uphold the prior law, if the two Acts may well stand together.

Sedg. p. 106; *Bowen v. Lease*, 5 Hill, 221.

Unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to uphold the prior law if the two can stand together.

Sedg. Stat. Law, p. 106; *Williams v. Potter*, 2 Barb. 316; *People v. Deming*, 13 How. Pr. 441.

To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old one that they cannot stand together or be consistent.

Potter, Dwar. Stat. 154 note 4.

Repeals by implication are never allowed but in cases where the inconsistency and repugnancy are plain and unwarrantable.

Wallace v. Bassett, 41 Barb. 92.

A subsequent Act which can be reconciled with a former Act should not be a repeal of it, although there be negative words.

Potter, Dwar. Stat. p. 157.

A construction which repeals another statute should be very clear, especially when the repeal is a part of a statute and seriously mars the harmony of a system.

Hayes v. Symonds, 9 Barb. 260.

In the case of *Cohoes v. Moran*, 25 How. Pr. 385, 387, the village charter prescribed a penalty for selling intoxicating liquors on the Sabbath. The court held that this was not repealed by the subsequent provisions as to the same offense in the excise law. The court says:

"The provision in question may well be upheld, as a valid police regulation sanctioned by the Legislature and applicable to that particular locality, without coming into collision with any of the provisions of the general law. Repeals by implication are not favored."

See also *Matter of the Evergreens*, 47 N. Y. 219, 220; *Matter of Comrs. of Central Park*, 50 N. Y. 498; *Van Denburg v. Greenbush*, 66 N. Y. 1-4; *McKenna v. Edmunstone*, 64 How. Pr. 461, 462.

A local statute providing a remedy in a particular class of cases arising in a particular locality is not repealed by a subsequent statute, general in its application, although the terms of the subsequent Act are broad enough to include the cases embraced in the special law, unless the intent to repeal is manifest.

Whipple v. Christian, 80 N. Y. 523-526; *Matter of Comrs. of Central Park*, 50 N. Y. 493; *McKenna v. Edmunstone*, 91 N. Y. 230-233.

Earl, J., delivered the opinion of the court:

This action was commenced to recover penalties for violations of the excise law in the City of Auburn, from the first day of June, 1890, to the first day of June, 1891. The plaintiff recovered, and the judgment having been affirmed at the general term the defendants appealed to this court.

The main question to be decided now is whether the action was properly commenced by the plaintiff or whether it should have been commenced by the board of charities and police of the City of Auburn; and the determination of the question involves the construction and consideration of various statutes.

From the incorporation of the City of Auburn in 1848, until 1879, there were overseers of the poor in that City, possessing the powers and duties of overseers of the poor of the several towns of this State. Laws 1848, chap. 106, § 8

of title 4, § 1 of title 9, §§ 1, 7 of title 11; Laws 1859, chap. 431, § 6 of title 5, § 1 of title 9; Laws 1869, chap. 273, §§ 5, 61, 203, 216.

By the Act, chapter 53 of the Laws of 1879, § 71, title 7, it was provided that "The commissioners of charities and police and the mayor *ex officio* shall constitute a board of charities and police of the City of Auburn of which the mayor shall be president."

Section 78 of the same Act reads as follows: "The said board shall possess the powers and execute the duties of overseers of the poor in towns, and may appoint a superintendent of charities and a clerk, when necessary, to aid in the discharge of their duties."

By chapter 628 of the Laws of 1857, § 22, the power to sue for violations of the excise law was given to the board of commissioners of excise of the different counties.

By chapter 820 of the Laws of 1873, § 1, section 22 was amended so as to read as follows: "The penalties imposed by this Act, except those provided for by sections 15 and 19, shall be sued for and recovered in a civil action in the manner provided by law for the recovery of penalties, by and in the name of the overseers of the poor of the town in which the alleged penalty was incurred; and the amount so recovered, when collected, together with all the costs of the proceedings for such recovery and collection, shall, within thirty days after such collection, be paid by the officer or party receiving the same to the county treasurer of the county, for the support of the poor of such county, except as is otherwise provided by law."

The same section was again amended by chapter 109 of the Laws of 1878, by providing that the penalties might be sued for and recovered in the name of the overseers of the poor of the town or city in which the alleged penalty is incurred, "except in such towns or cities as have no overseer of the poor; in which case said penalties shall be sued for and recovered by and in the name of the board of commissioners of excise of the town or city aforesaid, and paid over to the treasurer of the county, for the support of the poor of the town or city."

The claim of the defendants is that by the charter amendment of 1879 the board of charities and police for the City of Auburn was empowered to execute the duties of overseers of the poor; and that as it was among the duties of overseers of the poor to sue for penalties for violations of the excise law, that duty devolved upon that board.

The claim of the plaintiff is that when the office of overseer of the poor was abolished in the City of Auburn, and the board of charities and police was substituted in its place, there was, within the meaning of the Act of 1878, no overseer of the poor in the City; and hence, that it devolved upon the Board of Commissioners of Excise of the City to sue for these penalties; and we think the latter claim is supported by the best reasons.

After the enactment of chapter 109 of the Laws of 1878, it was the general system provided for the whole State that overseers of the poor, wherever they existed in the towns and cities of the State, should sue for and recover the penalties for violations of the excise law; but that where there were no overseers of the poor, such penalties should be sued for and re-

covered by and in the name of the commissioners of excise.

While such was the law and the system, the Act of 1879 was passed, and abolished the office of overseer of the poor in the City of Auburn, and thereafter there was no such office in that city; and the precise exigency existed which devolved upon the Commissioners of Excise the duty to sue for the penalties.

It cannot be supposed that when the Legislature devolved upon the new board created the duties of the office of overseer of the poor it meant to change the general system provided in the legislation of 1878, and to devolve upon the new board the duty to prosecute for violation of the excise law.

The two Acts of 1878 and 1879 must be construed together, and must be so construed that they can stand together; and upon such construction the latter Act must be so limited as not unnecessarily to interfere with the prior Act; and the duty which by the general law was imposed upon the Board of Commissioners of Excise cannot be held to be one of the duties devolved upon the new board created for the City.

It cannot be denied that much can be said and that much has been ably said in favor of the contention of the defendants upon the question in dispute; but the question is a technical one, having nothing whatever to do with the merits of the case; and we think the wiser and better rule is to hold that the general system provided by the Law of 1878 prevails everywhere in the State, where by its terms it is applicable, unless by some new enactment its provisions have been changed.

Other exceptions to which our attention was called upon the argument point out no error and require no special consideration.

The judgment should be affirmed.

All concur except **Miller, J.**, absent

Uriel DRIGGS, *Appl.*,
v.

John H. PHILLIPS *et al.*, *Respts.*

1. An **erroneous instruction** upon a material point, expressing the opinion of the court that the evidence did not warrant a certain conclusion, is **not cured**, in the absence of an explicit withdrawal, by a subsequent submission of the question to the jury.
2. The **plaintiff** in an action of **trespass** against public officers, for an act done in the performance of their official duty in **removing an obstruction from an alleged highway**, cannot recover if the act complained of was done upon **premises** which at any time had been set apart as a highway and by dedication had become such, **although** plaintiff had occupied a portion of it for **twenty years**.
3. Where the **owner of land took title subject to the easement of a highway**, no act of obstruction on his part can **deprive** the public **officials** of their **jurisdiction**; and no acquiescence on their part, in any act of his, can deprive

the public of the right to use the whole highway, or lessen their duty to remove obstructions.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term, in the Fifth Department, affirming a judgment of the Erie Circuit Court in favor of defendants, in an action for trespass on lands. *Affirmed.*

The facts are stated in the opinion.

Mr. E. B. Vedder, for appellant:

As to such acts as those of plaintiff after the flood, in using the land for lumber, timber, storage purposes, etc., letting the creek end of it to raftsmen, who used it as his tenants, and himself driving down piles for a foundation for another building, when accompanied with claim of title, see

68 N. Y. 465; 54 N. Y. 631.

The several sections of the Code in respect to adverse possession are but re-enactments of the Revised Statutes; and the enactments of the Revised Statutes were simply the putting into that form of the doctrines which had been established by the decisions of the courts as far back as those decisions go.

See Code Civ. Proc. § 869, with 2 R. S. 2d ed. p. 222, § 9; § 870, with 2 R. S. 2d ed. p. 222, § 10; § 372, with 2 R. S. 2d ed. p. 223, § 12; and see Reviser's notes to above sections of R. S. in 3 R. S. 2d ed. pp. 669, etc.

If a man takes possession with claim of title, his possession is in law continuous, notwithstanding an occasional vacancy or break in actual occupancy, if there has not been a voluntary abandonment of the premises as derelict, without the *animus revertendi*, and no other hostile possession has come in before he resumes actual occupancy; and even if a hostile possession does come in during such vacancy or break in occupation, he may overcome it upon proof of his prior possession alone, without proving title, unless such hostile possession defeats him by showing itself founded on title.

Smith v. Lorillard, 10 Johns. 338; *Jackson v. Denn*, 5 Cow. 200; *McLaren v. Morphy*, 19 U. C. Q. B. 609; *Whitney v. Wright*, 15 Wend. 171, 177, 178; *Clute v. Voris*, 31 Barb. 511; *Dana v. Valentine*, 5 Met. 8, 13, 14; *Webb v. Richardson*, 42 Vt. 465, 478, 474; *Thompson v. Kauffelt*, 1 Cent. Rep. 198.

The statute makes substantial inclosure possession.

See Code Civ. Proc. §§ 370, 372; Prior Code, §§ 88, 85.

We claim that highways and streets are themselves inclosures; that the line between a highway or street and the private land which is bounded by it is in effect a line of inclosure. In this case plaintiff's premises were bounded on the north by Tonawanda Creek. That was an inclosure.

Jackson v. Halstead, 5 Cow. 216, 220; *Becker v. Van Valkenburgh*, 29 Barb. 319.

Messrs. Greene, McMillan & Gluck, for respondents:

The submission of the case to the jury was proper.

Justice v. Lang, 52 N. Y. 323; *Ernst v. Hudson R. R. Co.* 24 How. Pr. 97; *Dunn v. People*, 29 N. Y. 528.

Especially is this true when the question of title to property is in controversy.

Farnham v. Hotchkiss, 2 Keyes, 9-11.

Any obstruction to the highway is a nuisance.

Harlow v. Humiston, 6 Cow. 189; *Lansing v. Smith*, 8 Cow. 146; *Dyger v. Schenck*, 23 Wend. 446; 14 N. Y. 506; 1 Duer, 451; *Peckham v. Henderson*, 27 Barb. 207.

The commissioners had an undoubted right to ascertain the boundaries of the road, and the summary right to remove the building when ascertained to be in the road.

Talmage v. Hunting, 29 N. Y. 447; *McFadden v. Kingsbury*, 11 Wend. 667; *Anderson v. Van Tassel*, 53 N. Y. 631; *Cook v. Harris*, 61 N. Y. 448.

Danforth, J., delivered the opinion of the court:

The action was brought to recover damages for an alleged trespass by the defendants, upon land of which the plaintiff claimed possession and ownership.

At the trial it appeared that the premises were part of a large tract of land which in 1827 was granted by the State to Burrows, Williams and others who in 1828 made a partition of the same, and described the various parcels as bounded in part by certain streets and highways, and among others "by the highway formed by the continuation of the military road," referring also to a map of the Village of Tonawanda, made by Colton Fletcher in 1825; and one of the covenants into which the parties to the partition entered was that all the streets named in the deeds as bounding any part of the premises, "shall be continued as public streets according to the plan of them in the before mentioned map."

The plaintiff and one Mansfield bought of Williams a portion of this land, and in 1829 or 1830 took from him a contract, which was not produced; but the plaintiff testified that Mansfield subsequently quitclaimed to him the same premises, and his deed shows a grant of lots 1 and 6 in block 4 of the Village of Tonawanda, as described in a map made by Colton Fletcher and filed in Erie County. He also testified that the building, for tearing down which the action was brought, stood on the corner of Main and North Canal Streets in the central part of the Village of Tonawanda; that the lot he claimed was lot 1, and that Main Street was formerly known as the Military Road.

One of the defendants was the supervisor of the Town of Tonawanda; the others were its highway commissioners. At the time of the alleged trespass they were lawfully engaged in constructing a bridge over the creek at the point where Main Street intersected it. Upon that street its approaches were to be constructed. In carrying out a necessary retaining wall, they came to an old foundation wall. It was in no way occupied, and so far as appeared no person was in possession. They deemed it within the lines of the street and so adopted it, making it fit for their purpose; they set coping stones which brought it to the surface of the street. The plan required an iron railing. Its completion was delayed a few days and in the meantime, without the defendants' knowledge, the plaintiff proceeded to erect a small frame

building, placing one corner of its frame upon the coping.

Before the house was finished, the defendants returned to put the railing upon the coping and, to do so, necessarily pushed away the plaintiff's structure. This was the trespass complained of; and the main question litigated was whether the building was within the lines of lot 1, or whether it projected into the street upon which it was conceded lot 1 abutted.

At the close of the case the plaintiff asked the trial judge to hold as matter of law that no defense had been made out; and the only question for the jury was as to damages. The court declined to do so, saying: "The question of the location of this line (of lot 1) is for the jury to determine."

Upon the evidence this was clearly so; nor is any point made upon this appeal to support the exception taken by the plaintiff to that ruling. The court, reviewing the whole evidence, charged the jury that if the plaintiff, in the erection of his building, kept within the lines of his lot, he was entitled to recover; otherwise, not. This was the simple and real issue in the case; it was fully tried and fairly submitted to the jury in a manner (and in various forms) so satisfactory that no exception was taken.

But another question was presented to the trial judge; and an exception to his ruling is now relied upon. The highway was not shown by any record; but, as we have seen, the plaintiff took his lot under a description bounding it upon the street; its existence was assumed by him throughout the trial and in his request for instructions to be given to the jury: "that the highway was limited to what the evidence showed had been actually used as such;" "Also, that the evidence failed to show that the building was an obstruction to the street, or a nuisance; that if it did stand within the bounds of a street or highway, no right has been shown in defendants to remove it." By the court: "I hold the other way, and have so charged." To this no exception was taken.

He also asked the court to charge that "The proof does not show any power in defendants over the street in question; that defendants had no power, as incidental to building the bridge, to remove plaintiff's building as obstructing the street or the approach to the bridge." The court declined, and plaintiff excepted.

Other requests followed, containing a similar implication. Upon the same assumption, he asked the court in substance to charge "that if the jury find that plaintiff had continuous possession of the land occupied by the removed building for twenty years under claim of title, the land belonged to him and he was entitled to recover;" and the court replied: "That would be so; but the evidence does not show any such title, unless there was a continuous possession for twenty years." Plaintiff excepted to that qualification.

To the same effect the court in commenting upon such a claim had already charged the jury, saying: "The evidence, however, does not show that continuity of possession which would constitute what the law terms 'an adverse holding,' so as to ripen into a title." To this the plaintiff excepted, and the trial judge then said:

"I submit the case substantially upon the

propositions suggested. If you are satisfied that this wall of the bridge was placed upon what was actually a portion of this highway, then the plaintiff is not entitled to recover, without showing an uninterrupted possession for twenty years; while on the other hand, if it was placed on the plaintiff's land, and his building did not extend over and beyond to the east of his land, so as to render this act necessary, then the plaintiff is entitled to recover. It all depends upon where the actual location of this line was, unless there has been a continuous possession of twenty years; and whether he went over it or whether he kept within it. If he went over it, he had no right to complain; if he kept within it, then he had a right to indemnity."

The propositions referred to are the propositions of the plaintiff, presented by the requests already made, and the charge left the jury to determine the question as to adverse and uninterrupted possession. It was the last utterance of the court, and was no doubt intended as a withdrawal of the positive opinion, before expressed upon it. No request was made for a specific modification of the charge already given, and the general term has regarded the final charge as an answer to the exception to the refusal of the court before made, to leave the matter of adverse possession to the jury.

We are unable to agree in this view of the case. If the instruction first given was erroneous and upon a material point it cannot be said the jury were not influenced by it. It expressed a very strong opinion, more than once repeated, upon a matter finally left to the determination of the jury; and, in the absence of an explicit withdrawal by the court, fairly permits the inference that it affected the verdict. The jury having heard from the judge that the evidence did not show that continuity of possession which would constitute what the law terms "an adverse holding," so as to ripen into a title, could hardly be expected to come to a different conclusion upon the same evidence, but might readily concur in that reached by the judge, so long at least as it was permitted to remain a part of the instructions by which they were to be guided.

The remark of the judge was more than a comment upon evidence, which he might make according to his discretion; it was a decision that there was no evidence to support the plaintiff's contention. If that was error, it was not cured by subsequently leaving the question to the jury, as one which they also might determine. *Veider v. Fellows*, 20 N. Y. 126; *Chapman v. Erie R. Co.* 55 N. Y. 579; *Allis v. Leonard*, 58 N. Y. 288.

We are of opinion, however, that the instruction asked for was irrelevant to any question actually before the court. The issue was not between individuals nor in relation to private property. It concerned the public and its rights in the highway. The defendants at the time in question were town officers, engaged in the performance of official duty; and if the acts complained of were performed upon premises which at any time, no matter how long before, had been set apart as a highway, and by dedication had become such, the plaintiff could not recover, although he had occupied a particular portion of it from time to

time, or even for a continuous period of time extending to twenty years. *Mills v. Hall*, 9 Wend. 315; *Kellogg v. Thompson*, 66 N. Y. 88.

There was no nonuser of the highways; and his occupation was a mere obstruction and nuisance for which no lapse of time would enable him to prescribe. Once established, a highway does not cease to be such until it has been discontinued by the proper authorities. Of that in question it was conceded that no record could be found; but the claim rested upon the dedication by the owner of the land and acceptance by the public through user.

Upon this point the learned trial court, after calling attention to the facts and circumstances relating to it, said: "For the purpose of maintaining a highway of this description, it is not necessary that the ground should be constantly or continually used, but that it should be used for the general purposes and convenience of the public, as a portion of a public thoroughfare or highway;" and the verdict of the jury under other instructions, to which I before adverted, shows that this was done over that portion of the land now claimed by the plaintiff, and which contained the *locus in quo*.

No exception was taken to this proposition, and it must be considered settled that that line of the highway included the wall in dispute. The jurisdiction of the defendants, in the performance of their duty, extended over the whole width of the highway as established, and each part of it. The plaintiff took his title subject to the easement; and no act of obstruction on his part could deprive them of their jurisdiction. *Bridges v. Wyckoff*, 67 N. Y. 180.

No acquiescence on their part, in any act of the plaintiff, could deprive the public of the right to use the whole highway, or in any degree lessen the duty of the defendants to remove obstructions, when that removal was necessary. *Cook v. Harris*, 61 N. Y. 448.

In any view of the case, the plaintiff had upon the trial every opportunity which the law affords, to assert his title, and we think no error was committed by the learned trial judge, to his prejudice.

The judgment appealed from should therefore be affirmed.

All concur.

110

Helena FLINT *et al.*, Exrs. etc., *Repts.*,
v.

William B. BACON *et al.*, Trustees, etc.
Appts.

Mr. Flamen B. Candler, for appellants.
Mr. Hamilton Wallis, for respondents.

Judgment affirmed, with costs. No opinion.
All concur except *Miller, J.*, absent. (Oct. 5, 1886.)

PEOPLE, *ex rel.* John J. CLARK *et al.*,
Repts.,
v.

Matthew P. BREEN, *Appt.*

Mr. R. S. Newcombe, for appellant.

Mr. Jas. C. De La Mare, for respondents.
Judgment affirmed, with costs. No opinion.
All concur except *Miller, J.*, and *Finch, J.*, absent. (Oct. 5, 1886.)

Daniel B. HALSTEAD, *Recept.*,
v.

Charles P. DODGE *et al.*, *Appts*

Messrs. Wm. D. Peck and John E. Ward,
for appellants.

Mr. James B. Dill, for respondent.
Judgment affirmed, with costs. No opinion.
All concur except *Miller, J.*, absent. (Oct. 5, 1886.)

Nelson J. BOTSFORD, *Recept.*,
v.

Charles P. DODGE *et al.*, *Appts.*

Messrs. William D. Peck and John E. Ward, for appellants.

Mr. James B. Dill, for respondent.
Judgment affirmed, with costs. No opinion.
All concur except *Miller, J.*, absent. (Oct. 5, 1886.)

NEW JERSEY.
COURT OF CHANCERY.

FAY'S ADMINISTRATORS

v.

FAY.

1. The use of words (here, "patent roofing") merely designating the kind of business one is engaged in, can not be protected as a trade-mark.
2. To recover for the "good will" of a business transmitted from one person to another it must appear affirmatively that there was a "good will" connected with the business, of some value in itself. Proof merely that the business is profitable is not enough.
3. Administrators cannot maintain a bill to have their coadministrator account for the "good will" of their intestate's business continued by their coadministrator with their consent, all the administrators being equally in the wrong for not turning such good will into cash as an asset of the estate.
4. Payment for the "good will" of a business must be claimed at the time of the transfer of the business.

(Filed October 12, 1886.)

ON bill for relief. *Dismissal advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. J. J. Crandall, for complainants.

Mr. B. D. Shreve, for defendant.

Bird, V.C., filed the following conclusions:

This bill is filed by two of three administrators against the third, to compel him to account for the profits of business which they allege he carried on in continuation of the same as carried on by the intestate in his lifetime under a patent-right called "patent roofing." Briefly, the insistence is that the intestate, by means of his patent, carried on and established a profitable business under such patent and by the name of "patent roofing," which name, from long use, became a trade-mark of great value; and that the defendant having appropriated it to his own use, by advertising "patent roofing" and using bill heads with the same phrase on, became responsible to the complainants as administrators for the value of such business conducted under this so-called trade-mark, "patent roofing."

First, it is proved to a demonstration that the alleged patent was worthless, so that there does not seem to be the slightest foundation for a claim on that score.

Second, can a valuable right, such as the law protects, arise to any citizen under such circumstances? Was the phrase "patent roofing," adopted as a trade-mark? Did the intestate adopt that sign in order to distinguish his business from all his fellows in the market? Or did he use that phrase as expressive of his rights under the license issued by the government? I am constrained to believe the latter. I can pick up no bit of evidence that he intended to use

the phrase in the former sense and to protect it as a trade-mark. To my mind the testimony is most clear that the intestate used the phrase, "patent roofing," not so much for the purpose of carrying on business under that mark, but simply to designate to the world the kind of business he was engaged in. It seems to me that this was done in the same sense in which hundreds of other dealers make known the special branch of business they may be engaged in. Under this category come dealers in boots and shoes, in dry goods, in dry goods and groceries, and the like. It strikes me that if the bill in this case can be sustained, then every person beginning either of the above vocations in dangerous proximity to one already in the field could be proceeded against. The law does not foster and protect monopolies in trade on any such general principles.

Third; but it is said by the complainants that the intestate, in his lifetime and at the time of his death, enjoyed what is termed a "good will," in the legal sense and that it was transmitted to them as his representatives. That the good will contemplated in the law is transmitted thus, I have no doubt. It is a subject of barter as any other right or thing is. But the good will must be shown to have some value in that sense, as distinguished from other dealers. Nothing in this direction has been presented. It does not appear that there was anything so special about the business or the mode of conducting it or the place as to give it peculiar prominence and profit in the estimation of business men or to secure to the owner advantages above all others which the law ought to protect him in. It seems to me that it would be quite dangerous for the courts to hold that every man who has a vocation has a good will in connection therewith which the law sustains; hence, I conclude that before the courts can aid in such cases it must appear affirmatively that there is a good will of some value, independent of every other consideration. The complainants urge that they have shown that this business was profitable to the intestate in his lifetime; but this is so far successfully assailed as to render their position too uncertain to found a decree upon. But they say the same business was continued by them for several months after the death of the intestate, at a profit of \$100 per month; and this they press as the true standard of value. Everyone will see that the greatest injustice might be committed by basing a decree upon the many contingencies arising or intervening in every such case; for example, the condition of the market, the activity of business generally, the skill or industry of the managers and the like.

Fourth, if the complainants' showing be sound, then, instead of charging their coadministrator with the estimated value of the good will, I would charge them with great neglect of duty in not selling such good will, as was most plainly their duty in the very beginning, rather than carry on a venture at the risk of loss. With this neglect upon them, they are before the court without any claims upon its favor, unless;

Fifth, it is because their coadministrator is the defendant, and the person charged. Considering that when the court finds both parties in the wrong it leaves them there and will aid

neither, the fact that the coadministrator now has the trade and is carrying on the business will not justify them in filing their bill. All three are alike accountable to the estate. All were alike bound to turn this good will into cash and available asset if anyone could be bound to pay cash for it.

Sixth, I cannot conclude that the defendant is liable under the circumstances, if I am in error in all of the foregoing conclusions. The complainants and defendant, as administrators, carried on the business of selling patent roofing for the estate, at the same place where the intestate had, from the month of May until October, when all parties interested agreed to sell all the office furniture and the machine, which it is claimed was patented, to the defendant for \$50, and to rent the establishment to him for \$10 per month.

If there existed any such thing as good will, it passed by fair implication, to the defendant. If it did not pass it still subsists or exists, and they have the right of power and it is their duty to sell it for the benefit of the estate. They had no right to make the sale of the office furniture to the defendant and allow him to proceed, under their own eyes, with the business until it has become of some value, and now to come to this court and ask for him to account. If they intended to make this claim, they should have done so at once, not allowing him to proceed as if by plain right.

I will advise that the bill be dismissed, with costs.

KAEUBLE

v.

GOEBBEL *et al.*

In a suit to foreclose a mortgage, payment after bill filed is properly set up by answer, and not by cross bill.

(Filed October 14, 1886.)

BILL to foreclose. On motion to strike out parts of answer. *Granted in part.*

The mortgage in suit was made by defendant Goebbel. Proceedings to foreclose were commenced by the mortgagee, Kaelble, some time since. He took a decree and was proceeding to sell when a third party, M., purchased the mortgage, with the proceedings thereon, and they were assigned. A rule was subsequently taken on Goebbel to show cause why Kaelble should not proceed to sell under his decree. Goebbel then answered, alleging payment to Kaelble (by means of the money furnished by M., the assignee of the mortgage, who is now taking steps to proceed) and questioning the right of M. to be placed in the shoes of Kaelble, and alleging that M. had agreed to withhold for five years, on payment of interest.

To this answer exceptions were taken.

Mr. Stephany, for the motion.

Mr. Abbott, *contra*.

Bird, V. C., filed the following conclusions:

The first and third objections are aimed at the formal beginning and ending of the answer. Such beginning and ending are in violation of the rule of court, and consequently the motion to strike out must prevail.

The second objection is to that part of the answer which sets up a payment of all the principal, interest and costs to the complainant's counsel, since the commencement of the suit. The argument is that such fact can only be set up by cross bill. No authority has been shown me sustaining this objection. Nor does a careful research bring to light any principle which would justify a cross bill in such case.

A cross bill is filed when the defendant seeks affirmative relief; but when he simply defends, he proceeds by answer only. No fact can be more appropriately used by way of defense than payment. Indeed, I cannot imagine any other possible method of presenting the question than by answer, even though as in this case the payment is not made until after bill filed.

The second objection is not well taken. Prevailing on the other two, the complainant is entitled to costs.

HUNT

c.

VAN DERVEER *et al.*

Next of kin, although not interested in the real estate in question, are proper parties defendant to a creditors' bill seeking to charge a claim against an intestate decedent's estate upon lands formerly owned by decedent and alleged to have been fraudulently conveyed by him in his lifetime; the decedent having, at his death, left only personal property, and such personalty being alleged to be insufficient to settle the estate.

(Filed October 14, 1886.)

CREDITORS' BILL. On demurrer. *Over ruled.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. John Schomp, for the demurrer.

Mr. H. F. Galpin, *contra*.

Bird, V. C., filed the following conclusions:

The bill shows that the complainant had a just claim against Mary V. now deceased, in her lifetime, and that after the creation of such obligation she conveyed all her lands to her daughter Julia V.; that since then Mary V. died, without a will, that no administration has been had upon her personal estate, that no administrator has been appointed; and that said Mary V. did not leave goods and chattels or other personal estate enough, so far as the complainant can discover, to defray the expenses of settling her estate.

The bill alleges that Mary V. left four children her surviving, her only heirs at law. These are all made defendants. Nellie C., one of these children, files the demurrer to the bill and puts it on the ground that no decree is asked against her, nor can any decree be made against her under the bill as framed.

Although Nellie C. can have no interest in the lands which her mother conveyed, whether such conveyance be adjudged fraudulent or not, the same cannot be said with respect to

the personal estate. The title to that remained in Mary V. at the time of her death. In such personal estate Nellie C. is interested as one of the next of kin. It could not be taken away from her without bringing her into court; nor could the personal estate be ignored by the creditor who seeks to charge the lands in the hands of the alleged fraudulent grantee, since the personal estate is the primary fund out of which to discharge the debts of the decedent. And to save all room for controversy, Nellie C. is not only made a party, but she is called upon to make discovery of any estate which was of her mother. In this respect relief is sought at her hands; and in this respect the court may be called upon to make an order or decree against her.

But independent of this prayer for discovery, I cannot but think that the bill is good as to Nellie C., in that it discloses that she is one of the next of kin and therefore has an interest in the personal estate left by the deceased. This, I say, is enough to sustain the bill, even though there be no other charge nor any prayer against her on which to base a decree. Such charge shows that she has an interest; and the prayer against her for subpoena brings her into court and enables her to make defense, if she so desires, and to protect her interest.

I think the demurrer should be overruled, with costs.

OSBORNE

v.

MUNROE *et al.*

1. A guardian who changes a first mortgage belonging to his ward's estate, to a second mortgage on the same premises, although (by part payment of the first mortgage) the amount of indebtedness upon the premises may not be changed, is yet liable to his ward for the amount of the second mortgage; the mortgaged premises having, on foreclosure, brought only enough to cover the amount remaining due on the first mortgage.
2. It is no defense to a guardian, in accounting to his ward, that he invested part of the ward's estate in real estate at the request of the ward, but without the previous sanction of the court.

(Filed October 9, 1886.)

BILL to render a guardian and the sureties on his bond liable for a loss to the ward's estate, arising from a change of securities by the guardian. *Decree advised for relief asked.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. M. Rosenkrans and **Mr. J. Linn**, for complainant.

Mr. L. VanBlarcum and **Mr. F. J. Swazy**, for defendants.

Bird, V. C., filed the following conclusions:

I have given this case the fullest consideration, in the hope of being able to see my way clear to protect the defendants from the charges of the complainant and at the same

time to do complete justice to the complainant, who at the time of the transactions complained of was an infant and the ward of the defendant Munroe.

I say this because I believe that the defendant Munroe acted in good faith. But I must remember that unless the case be a clear one the infant, who was innocent, ought not to suffer loss, even though there may be some doubt as to the extent of that loss. As the case is considered, all will agree that the complainant has the very highest claims upon the regard and watchfulness of the court.

In 1868 Munroe and S., as guardians, under the directions of this court sold the lands of O. and L., infants, for \$5,496.15. They received in cash \$1,000.15, and bonds and mortgages for \$4,496. The mortgages were on the property conveyed. Of this amount \$1,832 was set apart and secured, that the interest might be paid to the widow during her life; the interest on the balance \$2,664 was to be paid to M. and S. And the whole \$2,664 was to be paid in equal portions to O. and L. as they arrived at age; and the \$1,832 was also to be paid to them on the death of the widow, if she survived their arriving at age; and if not, when they did arrive at age.

The interest was fully paid, and \$1,164 was paid on the principal in 1875, thus reducing the incumbrance from \$4,496 to \$3,332. This payment was made and indorsed on the bond and mortgage which secured the amount of the purchase money payable to O. and L. as they came of age, leaving due thereon \$1,500. S. one of the guardians having died, M., as surviving guardian, took a new mortgage of that date (1875) from the then owner of the premises for the \$1,832, and assigned the other mortgage to Cole for \$1,500. He thus voluntarily surrendered the first lien, and lost all control thereof, and made the other mortgage a second lien. The interest was paid on the Cole mortgage until 1877; and not being paid thereafter, it was foreclosed. The lands were sold for \$1,500. Thus the balance, \$1,832, due to M. as guardian is lost, unless M. is personally liable. The bill seeks to charge him with such liability. His bondsmen are brought in.

The answer avers good faith. M. swears that he acted not only in good faith but under the advice of counsel. The argument in behalf of M. is that although the money was well secured in 1868, yet long before it became due there was such depreciation in values that the security was doubtful; and that this was so notwithstanding the payment of \$1,164 in 1875. This being so, it is said that the sale and assignment to Cole, of the old mortgage for \$1,500, and securing to him a preference over the mortgage for \$1,832, by taking a new mortgage for that amount, did not alter or affect the rights of M. as guardian, or of his wards, since he had the same security that he held before; that is, altering the securities did not increase or diminish the value of the land.

This perhaps is the turning point in the case. Were not his rights or interests as guardian, affected and altered by this surrender and change of securities, notwithstanding the value of the land remained the same? It is true the same amount and no more remained as a lien upon the premises. But was it of no value to have

the control of the first mortgage? Do not all business men seek such control? Is it of no value to be able to say whether in such case there shall be a foreclosure or not, and a sale or not? Has not many a doubtful claim been satisfied in full by prudence and good management? Manifestly it is of great value to have control of the first mortgage.

But it is said the court must judge of these things by results; that in this case the premises were offered at public sale by the sheriff, and that every effort was made to secure the highest price and that they sold for only \$1,500, having sold nine years before for \$5,496. Yes, it is true that the course pursued produced such a result. But, accepting this method of reasoning, it will at once appear most unfortunate that we know not and cannot know what would have resulted had the guardian retained his securities and foreclosed (if that became necessary) on his own account, or had called upon this court, from whence he derived his authority, for instructions and aid in the matter.

When courts of equity are asked to accept results and to ratify them, it must appear very clearly that the result reached is the most favorable. If there exists a reasonable probability that a different course might have secured a more advantageous result, I cannot understand how a court of conscience can close its eyes to such fact, and relieve a trustee from liability and cast the loss on an innocent *cestui que trust*. It seems to me that the reasoning of defendant's counsel is fallacious; and to stand upon it would be an abuse of a very salutary rule.

But is there not a most reasonable probability, indeed, do not the facts show that very much more than \$1,500 might have been realized on this security had M. retained the original lien intact? Just group the principal facts and consider whether or not they do not so strike the understanding with unremitting force, turn them as one will.

The lands were sold for \$5,496; in cash \$1,000 had been paid; M. and S., two able, competent and interested men, under the obligations of an oath and in full view of their legal and moral obligations, accepted mortgages for the balance (\$4,496) on the land sold; the interest was paid until 1875, when \$1,164 more of the principal was paid, leaving only \$3,332 still due; it was only necessary to realize a trifle over \$38 per acre (there being 99.93 acres) to secure the balance due, for lands which they had sold for \$54 per acre; M. allowed this same tract to be sold for \$1,500; and at the time of that sale it is shown by the witnesses called by M. that it was worth from \$2,000 to \$2,500. Hence, that the result would have been different under a wise management by the guardian himself is placed beyond speculation. With such a showing can any court justify the guardian and say that his ward should bear the loss rather than he? I conclude not.

The charge is made in the bill that, in making this change of securities, the guardian acted in his own interest and not in that of the ward, which, it is claimed, is shown by the fact that he used the money received from Cole to answer his own personal ends. M. does not meet this charge in his answer; and in his evidence he supports the charge by saying that he thinks

he did not use it all. This fact tends very strongly to raise the belief that he was acting more in his own behalf than of his wards.

Again; the guardian makes an effort to excuse his conduct and fix the responsibility for the present situation, by showing that he made investments of money in a house and lot, at the request of his wards and their grandmother, that they might have a home together, at an expense of about \$1,500, which the infants promised to accept a deed for on arriving at age, but which they now refuse to do. Such transactions, however honest or well meant, are wholly unavailing. And this circumstance is only an additional proof of the great wisdom of the rule which seldom if ever tolerates any such dealings between guardian and ward, without the sanction of the court first being had.

I will advise a decree according to the prayer of the bill, with costs.

Caroline LOREE

v.

William J. LEWIS *et al.*

Where tenants in common join in a mortgage of the premises held in common to secure a debt incurred by one of them only, the interests of the others are bound thereby; and this effect of the instrument cannot be overcome by parol. The court can, however, order a sale of the interest of the debtor tenant in common first.

(Filed October 9, 1886.)

ON bill to foreclose a mortgage. Decree of sale advised.

The facts of the case and the questions raised are set forth in the conclusions of the Vice Chancellor.

Mr. W. W. Cutler, for complainant:

In construction of law the mortgagors were equally liable to pay this mortgage. The incumbrance rested equally on the property of each.

Lavaletta v. Thompson, 2 Beas. 276.

Loree had a right to rely upon the face of the mortgage and the record of the same, for his information as to the security he was about to take and for the amount of equity that said Lewis had in the same.

7 Johns. Ch. 16.

No secret trust and agreement, entered into or existing between the mortgagors, can affect the rights of the holder of the mortgage. An innocent purchaser is not liable to a latent equity of which he was ignorant.

Reilly v. Mayers, 1 Beas. 59.

A mortgagee is a purchaser of the mortgaged premises within the intent and meaning of the law.

Ledyard v. Butler, 9 Paige, 132.

Mr. James H. Neighbor, for defendants: This case is governed by *Danbury v. Robinson*, 1 McCarter, 219.

An assignee of bond and mortgage takes them subject to the equities existing between the original parties.

See Stewart's N. J. Digest, p. 776, § 230; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Garrick v. Sherman*, 2 Halst. Ch. 219; *Rose v. Kimball*, 16 N. J. Eq. 185.

Bird, V. C., filed the following conclusions:

The defendants to this bill to foreclose are a brother and two sisters, the owners in fee, as tenants in common, of the lands mortgaged. The brother borrowed of Mrs. W. \$1,600 and gave his bond; and he and his sisters gave the mortgage in suit on said lands, as further security. Mrs. W. assigned the bond and mortgage to the complainant, who is a daughter of L. the real debtor. One of the defendants, by her answer, insists that she had no interest in the said transaction, beyond securing the loan; and that this fact was well known and understood by the complainant when she accepted the assignment of the mortgage; and that this being so, the complainant cannot enforce the claim under the mortgage, against the interest of said answering defendant, in the land.

Supposing that the complainant knew all the facts; is there anything in the case to discharge her from her liability as surety? For I can see no other principle involved than that which arises between creditor and surety. The testimony satisfies me that the husband of complainant advanced and paid a full consideration for the mortgage, and caused it to be assigned to the complainant. But independently of the question of consideration, in my judgment, the defense entirely fails. The defendant voluntarily joined in the execution of the mortgage to secure the claim. There is no deception nor any pretense of it set up or shown. It is true, something is said in the answer, to the effect that the sister's interest was not, after all, to be bound. But she gave the mortgage and thereby bound her interest, and this cannot be overcome by parol. The title of Mrs. Wood was perfect; she could have enforced her claim against all the tenants in common. All these rights she could assign; and just as well or perfectly without consideration as by gift, or for their highest cash value. The defendant could no more question the rights of the donee, in such case, than she could those of the donor.

In my judgment, all that the court can do is to order the interest of William J. Lewis, the principal debtor, sold first; and in case that does not produce enough to satisfy the claim, that then the balance be sold. I believe there is no dispute as to the amount due.

The complainant is entitled to a decree accordingly, with costs.

Charity BURD

v.

George KEYSER *et al.*

The question being whether one who had received a promissory note, made by a principal debtor and sureties, on paying certain judgments against the principal debtor (to the rights under which as against land of the debtor he became subrogated) took such note as additional to the claims under said judgments, with the right of applying it on other claims held by him against

said debtor; or whether such note was merely collateral to the claims under said judgments; held, that the note was collateral only, and that, after the payee therein had been reimbursed for his payments on said judgments, he should be restrained from proceeding, under a judgment recovered by him on said note, against land of a surety thereon.

(Filed October 13, 1886.)

BILL for injunction to restrain proceedings under a judgment, and to cancel the same. *Decree advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Messrs. J. G. Shipman & Son, for complainant.

Mr. Henry S. Harris, for defendant Keyser:

Bird, V. C., filed the following conclusions:

In 1872, Henry E. B. was indebted to several. J. L. had claims against him for over \$3,000, which had been secured by bond and mortgage and perfected by final decree. A. W. C. had a judgment for over \$250. And Mrs. K. had a judgment for over \$200. Mr. Keyser, the defendant, insists that at that same time he held a claim of over \$1,700.

The land of said Henry E. B. was advertised for sale by virtue of the executions issued upon said decree and judgments, when he applied to G. K. the defendant, for help in the premises, which G. K. undertook to render. There was a meeting of G. K., Henry E. B., his brother Adam W. B., and John D. Snyder, since deceased. It is agreed that G. K. was not willing to aid Henry E. B. unless he could have collateral security for at least a portion of the amount which he should either pay or become liable for. The dispute is whether that collateral security was for so much in addition to all other security or whether it was collateral only to the claims of J. L., A. W. C. and Mrs. K. G. K. insists on the former, and the complainant on the latter.

The complainant insists that G. K. agreed to become responsible for the above named claims, providing Henry E. B. would give him collateral security for the costs and interest due on said decree up to April 1, 1872, and \$250 of the amount of the A. W. C. judgment, and \$200 of the amount due on the Mrs. K. judgment. The complainant says that this was the understanding of the parties interested.

These claims, *i. e.*, the interest to April 1, 1872, on said decree and both of said judgments, amounted to \$1,421.62. For this sum the said debtor Henry E. B., Adam W. B., and John D. Snyder gave their promissory note to G. K., and at the same time G. K. gave J. L. his note for the whole amount of principal, interest and costs due on said decree, and accepted an assignment of said decree from J. L.

In 1874 and before these claims were all paid by Henry E. B.; said G. K. recovered judgment on said note given by Henry E. B., Adam W. B., and John D. Snyder. After this judgment, the said John D. Snyder died. The said J. L. became his administrator. On application the

orphans' court made an order for him to sell lands for the payment of debts. All the lands of the decedent were advertised and sold. The complainant, on being assured by J. L. that she would buy a clear title, purchased. Others also purchased. G. K. neither presented any claim to J. L. as such administrator, nor did he in any way warn purchasers that he relied upon the said lands to satisfy his judgment. In 1878, J. L. as such administrator executed and delivered deeds to the purchasers for the lands sold and the purchasers took possession.

On the 29th of April, 1885, G. K. had realized from the lands so incumbered, of the principal debtor Henry E. B., sums equal to the whole amount of said judgment, less the sum of \$450. This sum J. L. tendered to G. K., with the impression that G. K. had no first claim for any larger sum against the estate of John D. Snyder or his lands. G. K. declined the tender and issued execution upon his judgment and advertised said lands, so conveyed to complainant and others, for sale. He claims the whole amount of said judgment. The complainant asks for an injunction to restrain G. K. from proceeding, and to compel him to cancel his judgment as to John D. Snyder's estate on payment of said \$450.

There is no doubt about the amount of cash G. K. has received. The question is whether it should be applied to this judgment or not, and the judgment ordered to be canceled upon the payment of the said \$450. G. K., as above stated, maintains that he has a right to apply these moneys to other claims which he holds against Henry E. B., as the note upon which he took judgment against Henry E. B., Adam W. B. and John D. Snyder was general and not confined to any certain claims.

Let us trace the main features of the case. The makers of said note, so far as appears (according to the weight of testimony), understood that the security was collateral to the lien already had by virtue of the decree and the two judgments. The decree and the judgments bound the lands of Henry E. B. In addition to this, Henry E. B. gave said note with sureties, for the interest and costs on the decree, and for the amount of the judgments as stated. All the money realized by said G. K. was out of these lands on which he had these liens by decree and judgments against Henry E. B. It nowhere appears that he ever appropriated any of said moneys to the satisfaction of his other claims against Henry E. B., which had he done, I think would not be equitable for him to do in such case. But he did take a large amount of other securities from Henry E. B. for the other claims he held against him, which he still holds, or at least on which he has not realized. In other words, he has never accounted for these securities, as other creditors have a right to insist that he shall. These undisputed facts, of themselves, strongly incline the mind to the complainant's view of the case.

And I think the defendant, G. K. fastens himself to this same view, in his explanation of what passed at the time the note was given. I give his own words when asked to tell about the taking of this note as collateral security: "Well, there was Mrs. Kinnon's judgment and Mr. Crevelings, and some \$900 of Mr. Lamerson, for interest and costs, and another account he

had against Mr. Burd; and I told them that if they gave me collateral security to the amount of them, their claims, then I would pay the whole debt, and I done so; not for the amount, but to the amount; that was the word."

This effort to shift responsibility is entirely unavailing. Considering the subject matter, I am unable to make any distinction, even in a technical sense, between the words "to" and "for." The interview was with reference to the liens of L., C. and Mrs. K. And beyond refutation, a certain amount of these, in dollars and cents was to be further secured. It seems to me quite idle to say that such security did not and could not apply to those claims but was only applicable to other claims of G. K., because he said at the negotiations "If they gave me collateral security to the amount," and not for the amount.

I will advise a decree according to the prayer of the bill, with costs.

SUPREME COURT.

STATE, John REYNOLDS *et al.*, *Prosecutors*,
v.

Mayor and Aldermen of the CITY OF
PATERSON.

Taxes assessed, under section 131 of the charter of Paterson, at a fixed rate per lineal foot of street frontage, based upon the estimated cost of sewers in the drainage district are invalid, because neither assessed according to the true value of the property, nor imposed within the limits of special benefits derived from the improvement.

(Decided October 6, 1886.)

ON certiorari. *Tax vacated nisi.*

Argued at June Term, 1886, before Dixon, J., by consent of parties.

Statement by Dixon, J.:

The writ in this case brings up for review certain taxes called sewer taxes, assessed upon the lands of the prosecutors, in the City of Paterson, in and for the year 1885.

These taxes were assessed under and in pursuance of and according to the 131st section of the present charter of said City, passed in 1871, as amended in 1874. Laws 1871, p. 860; Laws 1874, p. 467.

The 131st section of said charter reads as follows:

"That on or before the second Monday in June, in the year 1871, and annually thereafter, it shall be the duty of the board of estimates and assessments to estimate the average cost per lineal foot, of all sewers and drains constructed in the several drainage districts of said City, subsequently to the year 1868, and up to the time of making such annual estimate; and to transmit a certified statement of such estimate to the department of finance; and in making the annual enumerations, valuations and assessments for taxes in such year the commissioners of assessment and revision of taxes shall, in a separate column of their assessment books, assess upon each lot fronting on or ad-

joining a street through which a sewer or drain has been constructed up to that time, a sum per lineal foot of frontage, equal to $8\frac{1}{4}$ per centum of the average cost per lineal foot of all sewers and drains constructed subsequently to the year 1868 in the drainage district wherein such lot is situated, estimated as aforesaid."

Meers. Geo. S. Hilton and H. A. Williams, for prosecutors:

The general principle is well established that taxation, as far as practicable, must be equal and uniform, even where there is no express constitutional provision to that effect.

Cooley, Const. Lim. pp. 495, 501; *Dill Mun. Corp.* § 587; *State v. Readington*, 7 Vroom, 66, 70; *State v. Fuller*, 10 Vroom, 576, 578; 11 Vroom, 615.

This applies to assessments for local improvements as well as to any other species of taxation.

Cooley, Const. Lim. p. 499; *Williams*, Tax. p. 357.

Here there is a clear case of taking private property for public use without just compensation, and it is therefore in violation of the principles enunciated in the opinion of the court of errors and appeals in the *Agens Case*, 8 Vroom, 415.

See also *State v. Fuller*, 5 Vroom, 227, 578, 579.

The statute does not limit these taxes to the special benefits conferred on the property assessed by the improvements, on account of which they are assessed or required thereby to be assessed, in proportion to such benefits; and it is therefore unconstitutional.

State v. Newark, 8 Vroom, 415; *State v. Chamberlin*, 8 Vroom, 388; *State v. Fuller*, 5 Vroom, 227; 11 Vroom, 615; *Vreeland v. Jersey City*, 14 Vroom, 185; 688; *Culver v. Jersey City*, 16 Vroom, 256.

All taxes that are not assessed upon the property benefited to the extent only of and in proportion to such benefits, must be assessed upon the entire political district, which in this case is the City of Paterson and not upon merely a portion thereof, or certain specified or selected property therein. Cases cited above.

A law providing for separate and distinct taxing districts in a city cannot be sustained.

State v. Chamberlin, 8 Vroom, 388; *State v. Fuller*, 5 Vroom, 227; 11 Vroom, 615.

A law providing for a tax to be laid according to an arbitrary rule, fixed therein by the Legislature, which does not regard either the value of the property assessed or the principle of uniformity in taxation is unconstitutional.

Jersey City v. Vreeland, 14 Vroom, 688; *Culver v. Jersey City*, 16 Vroom, 256.

Mr. Francis Scott, for defendant.

Dixon, J., delivered the following opinion: These taxes cannot be sustained. As ordinary property taxes, they are in conflict with article IV, sec. VII, par. 12 of the State Constitution, inasmuch as they are not assessed according to the true value of the property. As improvement assessments, they are invalid because not imposed for and within the limits of special benefits derived from the improvement. *Jersey City v. Vreeland*, 14 Vroom, 688.

The case agreed upon does not show the existence of any facts which warrant the inference

that the property owners have entered into a contract with the City to pay the sums assessed in consideration of the use of the sewers, so as to bring the case within the decision in *Vreeland v. Jersey City*, 10 Stew. 574.

Hence the taxes must be adjudged illegal, and I think the prosecutors should be awarded their costs, since there was no other mode of redress for them than by these proceedings.

Whether the property in question has ever been assessed for these sewers, or whether there is any legislation justifying its taxation or assessment therefor is not made clear, so as to call for the exercise of the power of the court under the Act of March 23, 1881 (P. L. 1881, p. 194); but if the city authorities shall be advised that they are entitled to some redress by reason of that statute, application therefor may be made to the supreme court during its coming term.

In case no such application be made, a rule may be entered setting aside the taxes now under review, with costs.

Mark T. SHANNON

v.

George R. McMURTRIE *et al.*

*If, under an order for discovery in aid of execution, an examination of witnesses be held without personal notice to the defendant, the proceedings will be set aside as irregular.

(Decided September 9, 1886.)

CERTIORARI to review proceedings under an order for discovery in aid of execution. *Proceedings set aside.*

The facts are stated in the opinion.

Argued February Term, 1886, before Depue, Reed and Dixon, JJ.

Mr. Harris, for plaintiff in certiorari.

Mr. Shipman, for defendants in certiorari.

Dixon, J., delivered the opinion of the court: An order for discovery in aid of execution out of the Warren Common Pleas was made November 25, 1884. It directed the defendant to appear and make discovery on November 28, 1884, at 10 o'clock A. M. It was filed on the day of its allowance and on the following day a copy of it was delivered to the defendant's wife at his residence in Warren County. The defendant was not then at home, and did not return home until November 29, 1884, nor was he in any way apprised of the purport of the order before the time set therein for his appearance. At the time so specified, the plaintiffs in execution produced witnesses who were examined before the designated commissioner; and, upon the testimony thus taken without notice to the defendant, a receiver was appointed and proceedings against the defendant, for contempt, were instituted. The certiorari brings up the whole matter for review.

The defendant was entitled to notice of the examination of witnesses; and, no other mode of notifying him being provided by statute, personal notice was requisite. For want of this, the proceedings were irregular; *Seifert v. Edison*, 18 Vroom, 428 [S. C. 1 Cent. Rep. 464]; and must be set aside, with costs.

*Head note by *DIXON, J.*

Nathan BARNET

v.

Mayor and Aldermen of the CITY OF PAT-
ERSON.

1. It seems that the general principle, that where an officer is required by law to perform a duty involving the disbursement of money out of pocket he must be reimbursed, should be applied to the case of the mayor of a city seeking reimbursement from the city, for his expenditures in resisting successfully an application for a *mandamus* against him, made on behalf of the city to compel his official action in aid of an illegal corporate enterprise.
2. When neither the charter of a municipal corporation nor a general law of the State provides to the contrary, a majority of the board of aldermen of the corporation constitutes a quorum; and the vote of a majority of those present, there being a quorum, is all that is required for the adoption or passage of a motion or the doing of any other act the board has power to do.

(Decided Oct. 13, 1886.)

CASE certified from the Passaic Circuit Court.
Action to recover for moneys expended by plaintiff when Mayor of the City of Paterson in defense of a suit against him as such Mayor. Judgment for plaintiff advised.

The facts are stated in the opinion.

Argued before Beasley, Ch. J., and Magie and Knapp, JJ.

Mr. George S. Hilton, for plaintiff:

The Board of Aldermen could have caused this claim to be paid.

State v. Hammonon, 9 Vroom, 430.

A mayor, by virtue of the provisions of the charter, which make it the duty of the Mayor of this City to be vigilant and active in causing the laws of the State to be executed and enforced, etc., has the legal capacity to institute and maintain, even in his own name, as such mayor, suits to prohibit the passage or execution of ordinances or resolutions contrary to the charter, and to test their legality; also, to institute and maintain suits to prohibit or restrain the officers of the City from doing any acts contrary

NOTE.—As the exact question presented in this case is new, the following authorities are noted as bearing upon it, in addition to those cited in briefs of counsel and opinion of the court.

The expense of an act required to be done by the charter is chargeable to the municipal corporation. *Tucker v. Trustees of Rochester*, 7 Wend. 254.

A city is liable for expenses incurred by an officer by the employment of his own counsel to gain possession of corporate property.

Stillwell v. Mayor of N. Y., 9 Abb. Pr. 376.

It was held in *Carroll v. St. Louis*, 12 Mo. 444, that the mayor had no power under the city charter (St. Louis) to hire an attorney to attend to cases for the city.

A city is authorized to raise and appropriate money to reimburse its agents for expenses of their defense in investigation of their official conduct made by order of the city government by a committee of that body on charges proved to be groundless.

Lawrence v. McAlvin, 100 Mass. 311.

Expenditures of a postmaster in the recovery of property stolen from him without negligence on his part should be borne by the government.

Glenn's Case, 4 Ct. Cl. 501.

to the laws of the State and in violation of the charter.

Genois v. Lockett, 13 La. 545.

It is settled that when the law requires a public officer to perform a duty attended with labor, trouble or expense, for which no compensation for money expended is provided, he can recover such compensation for money expended in a suit for that purpose.

Kinnie v. Waverly, 42 Iowa, 487; *Bright v. Supervisors of Chenango Co.* 18 Johns. 242; *Hanness v. Smith*, 1 Zab. 495, 499; *Atty-Gen. v. Mayor of Norwich*, 2 Mylne & C. 406, 424.

Mr. Francis Scott, for defendants:

The general rule is that want of success in a suit on the part of the actor is not actionable.

Hall v. Leaming, 2 Vroom, 321. See also 17 Mass. 190; 4 Mass. 488.

"A civil action is only pursued at the peril of costs."

Ritz v. Meyer, 11 Vroom, 252, 254.

The *mandamus* case was a civil action.

Addison, Torts, § 1511; 16 Cent. L. J. p. 19.

It is in substance a civil remedy for the subject, although the name of the King be nominally used.

Dill. Mun. Corp. §§ 842, 825 (2), 885 (2); *State v. Jennings*, 5 Wis. 109; 10 Ark. 428; *Commonwealth of Ky. v. Dennison*, 24 How. 66, 97, 98 (65 U. S. bk. 16, L. ed. 717, 726); *U. S. v. Boutwell*, 17 Wall. 604 (84 U. S. bk. 21, L. ed. 721).

There was no contract between Barnet and the City; and he could have resigned. Even if there was a contract, he could have resigned.

Butcher v. Camden, 2 Stew. 478.

As Mayor he has an additional burden.

If there was no salary attached he would have to serve gratuitously.

1 Dill. p. 254, § 230; *Boyden v. Brookline*, 8 Vt. 284.

The mayor, *virtute officii*, cannot employ counsel to defend city, without permission.

15 Gray, 103.

"A mayor has no authority, unless expressly conferred by the city charter or ordinances, to employ counsel in behalf of the city."

Fletcher v. Lovell, 15 Gray, 108; 4 Wait, Act. & Def. 648; 7 Gray, 12; 15 Gray, 108.

The Board of Aldermen of our City only has the sole right to employ associate counsel.

Hozzey v. City, 11 Vroom, 186, 189.

A municipal corporation is not bound by contracts within the scope of its chartered powers, if made by officers or agents not thereunder duly authorized.

Boone v. Utica, 2 Bond, 104; *Hodges v. Buffalo*, 2 Denio, 110; *Smith v. Albany*, 61 N. Y. 444; 4 Wait, Act. & Def. 638.

The English Parliament, recognizing that officers were subject to be prosecuted by *mandamus* and that they would legally have to bear their own expense, passed the Statute, 1 Wm. IV. chap. 21, R. 4, which provides that "Such officers should in certain cases be protected against the payment of damages or costs;" and therefore it provides that the real parties in interest shall come in and defend and have the benefit of success, in costs, etc.

2 Add. Torts, p. 755, § 1512.

Public moneys cannot be appropriated to pay for defense of an officer, forced into a lawsuit, for doing his duty.

1 Dill. p. 174, § 147, notes, etc.

The case of *Bradley v. Hammon-ton*, 9 Vroom, 480, holds that the town has the power to pay an officer's disbursement if it so chooses; but does not decide that it must pay in any event.

In *State v. Freeholders of Hudson Co.* 8 Vroom, 254, it is held that the board could pay even more than they could be held for in an action at law.

The general doctrine as stated in other States is as follows, to wit: 4 Wait, Act. & Def. p. 407.

A municipal corporation may legally indemnify an officer, acting in good faith, for a loss incurred in the discharge of his official duty; but the duty must have been one authorized or imposed by law, and the matter one in which the corporation had an interest.

Gregory v. Bridgeport, 41 Conn. 76; *State, Bradley v. Hammon-ton*, 88 N. J. L. 420; *Sherman v. Carr*, 8 R. I. 431.

A municipal corporation has no right to assume the defense of an action to which it is a party; it has no interest in resisting.

Halestead v. Mayor of N. Y. 5 Barb. 218 (N. Y.) The charter, § 24, P. L. 1871, p. 817, says: "No additional allowance beyond the legal claims, which exist for any services on its account or in its employment, shall ever be passed by the Board of Aldermen except by a unanimous vote," etc.

Knapp, J., delivered the opinion of the court:

This case, upon an agreed state of facts, is certified to this court for its advisory opinion.

The plaintiff's claim is for money expended by him when Mayor of the City of Paterson, to defray his reasonable costs and expenses in defending himself as such mayor, in a proceeding taken by or in behalf of the City, to obtain mandatory process compelling the plaintiff, as such Mayor, to join in the execution of certain bonds which the City was about to issue.

The plaintiff here was successful in his defense to that proceeding. This court justified the refusal of the Mayor to act as therein required, upon the ground that such refusal properly resisted the consummation of a corporate enterprise, illegally begun by other constituted authorities. The first question here is whether necessary, reasonable expenditures in such a discharge of public, official duty laid the ground for legal claim against the City. The right of the corporation to indemnify an officer for losses and expenses incurred in the discharge of an official duty, in a matter in which the corporation is interested, is supported by repeated adjudications. *Lewis v. Freeholders of Hudson*, 8 Vroom, 254; *State v. Hammon-ton*, 9 Vroom, 384.

But such indemnity may be granted to one not possessed of a right at law to enforce his claim. It does not therefore suffice for this claim that the City might lawfully repay him. The plaintiff's claim cannot be rested solely upon the ground that he was successful in a suit in which he and the defendant were opposing litigants, for all his rights as such litigant against his opponent would be determined and adjusted in the resulting judgment. *Hall v. Leaming*, 2 Vroom, 321.

His costs of suit would be the measure of his redress. His claim, if recoverable at all, must be based on relations with the defendant other than those of an opposing litigant.

The expenditure which he seeks to be repaid must have been made under some authority lawfully conferred upon him by the City, or subsequently recognized, or in virtue of some provision of the character or general rule of law. The city authorities had not authorized the employment of counsel. No provision in the charter expressed power in the Mayor to employ counsel at the City's expense; and on this branch of the case appeal must be made to the general law.

The implied liability of corporations of this nature is generally restricted to cases where the City obtains money or property of others by mistake or without authority of law, and appropriates such money or property under such circumstances that the general law imposes the obligation to pay in order to do justice. For services rendered voluntarily or under an unauthorized contract, or for money voluntarily paid for its use, no liability arises; the law will not raise the volunteer to the position of a creditor.

But this case is peculiar and I think exceptional. The Mayor, as head officer of the City, occupied a position of public trust. It was his duty under the charter "to be vigilant and active in causing the ordinances of the City and the laws of the State to be executed and enforced; and, as far as possible, to promote efficient government in the City."

The proceeding taken in the name of the City against him, which gave rise to the expenditure sued for, was to compel him to a course of official action which he deemed violative of law and detrimental to the interests of the City. To make proper defense service of counsel was necessary. If he was right in his judgment, the City should have furnished him the aid of proper counsel. But the official law officer was in court against him, and the city authorities to whom, ordinarily, he should have applied, were the real actors in the proceeding against him. It would under these circumstances have been idle to make the application. Ordinarily his duty would have ended with an unsuccessful application to the official counsel; or, if the city counsel were not available, then by application to the appropriate authority to furnish other counsel; but he could not expect aid from either source in the existing situation. He was chargeable with the knowledge of his official duty and was called upon then to decide what was the course of action which that duty demanded of him. The risk of decision was upon him. If he erred in judgment as to his legal duty in resisting the proceeding he must, on demanding to be reimbursed his outlay, have stood as a mere volunteer and borne the direct consequences of defeat. The judgment of the court which the parties invoked vindicated his decision, and found him acting in obedience to the commands of the charter.

I do not think the Mayor's duty would have been discharged by silent submission to the action of the court, on the rule to show cause why the *mandamus* should not issue against him. But had he remained silent then, when the alternate writ came he would have been required to make return to it and the same services of counsel would have then been indispensable. The City is at no loss because he met the matter at the threshold.

The claim to be indemnified for his expenditures, the entire benefit of which the City received, seems to me to be eminently just, and presents a strong case for relief in some mode. I think in its behalf the general principle of law may be invoked: that where an officer is required by law to perform a duty involving the disbursement of money out of pocket he must be reimbursed. The proper and only fund out of which it may be done in the plaintiff's case is that of the City, in whose behalf as its officer and for whose benefit he acted.

The rules which circumscribe and limit the implied liability of municipal corporations are designed in the law as shields against the imposition of false claims, and to guard against extravagance in administration. It would be a strange perversion of their purpose to convert them into means to deter faithful public officers from honest effort to guard and protect public trusts confided to their care.

But if this ground of recovery be regarded as untenable or doubtful, I think the action of the city authorities has been such as to raise this into an express promise to pay, and that upon valuable consideration. The bill, on being presented to the Board of Aldermen, was by proper resolution referred to the committee on finance and by that board reported for payment. This department of finance is not a mere subdivision of the council but is a statutory organization, with independent powers conferred by the charter. Its power is to settle and adjust all claims in favor of or against the Corporation. *State v. Paterson*, 10 Vroom, 489, 494.

The charter provides that the comptroller shall, when so ordered by the Board of Aldermen, draw warrants on the city treasurer for the payment of claims. § 67 P. L. 1871, p. 836.

The claim having been settled and adjusted by the department of the city government authorized to perform that duty, the order of the Board of Aldermen upon the comptroller was the remaining requisite for the issuing of a warrant on the treasurer for payment. On the presentation of the report to the Board of Aldermen at a regular meeting, at which fifteen members were present, on a motion that the report be received and adopted and the comptroller draw his warrant on the treasurer for payment, eight of the members so present voted in the affirmative.

The whole membership of the Board consisted of sixteen. The charter provides that a majority of the whole number of members shall constitute a quorum for the transaction of business. § 22.

It is denied that this passed the order of payment, on the ground that the Board of Aldermen had adopted among its rules one which provides that no resolution, by-law or ordinance, shall be passed without a concurring vote of at least nine members; and if they involve the expenditure of money, they shall require the votes of two thirds of the whole members of the Board. There are various provisions in the charter declaring the number of votes required in specified cases; but there is no part of the charter which provides for the number requisite to order payment of a claim passed upon by the finance committee.

The true rule in such a case I think is correctly stated in the brief of the counsel of plaintiff.

When the charter of a municipal corporation or a general law of the State does not provide to the contrary, a majority of the board of aldermen constitutes a quorum; and the vote of a majority of those present, there being a quorum, is all that is required for the adoption or passage of a motion, or the doing of any other act the board has power to do. 1 Dill. Mun. Corp. §§ 278, 283; *Wells v. Rahway Rubber Co.* 4 C. E. Green, 404.

Under the twenty-third section of the charter the Board is given power to establish its own rules of procedure. But I do not think that under this power it was designed to confer upon the Board the adoption of a rule changing either the general law or any special provision in the charter. Power to make such rules and by-laws was inherent in the Corporation without this provision. Such by-laws must be in accordance with the charter or the general rules of law. The charter is silent and the general law requires a majority vote. *Taylor v. Griswold*, 2 Green, 228.

Official action which affects the rights of third persons or the public must be taken and manifested in the mode pointed out by law.

I think it of no moment that the Board of Aldermen determined under its rule that the resolution and order to pay failed in its passage. The court will look at what it did, and determine the legal result of its action.

The Circuit Court should be advised that the plaintiff is entitled to recover his claim.

STATE, Annie I. HASBROUCK, *Prosecutor*.

William WINKLER *et al.*

- *1. The Newark District Court has power to amend during trial, by changing the action from case to trespass and by adding a plaintiff.
2. A part owner of goods, in possession of them may recover all the damages resulting from a trespass upon the goods, committed by a stranger.
3. A promise held to be nudum pactum and therefore unenforceable in law.

(Decided October 18, 1886.)

ON certiorari to review a judgment of the Essex Common Pleas, affirming a judgment of the Newark District Court. *Affirmed.*

Argued before Depue, Reed and Dixon, JJ.

Mr. Wm. G. Cumming, for prosecutor.

Mr. Abner Kalisch, for defendants.

Counsel for the prosecutor bases his third reason for reversal (that the judge of the district court, after a motion of nonsuit, permitted an amendment by the addition of a coplaintiff) upon the theory that section 138 of the Practice Act is not applicable to the district court, and that said section was, by force of section 301 of the Practice Act only applicable to the court of common pleas in cases on appeal from justices "where the facts are again presented by testimony." An examination of sections 118 and 138 of the Justice Court Act,

*Head notes by Dixon, J.

Rev. 1876, pp. 559, 563, will show that he is mistaken.

Section 113 of the Justice Court Act reads: "The provisions of the 188th section of an Act entitled 'An Act to Regulate the Practice of the Courts of Law' are hereby extended to the courts constituted by this Act and to the courts of common pleas on an appeal taken thereto; *Provided*, That if any objections be made before the justice by either party in any cause, upon the return day or upon the trial or hearing of the same, to any process or pleading in respect to any matter which might be amended by the justice under the provisions of said section of said Act, and no such amendment shall be made before the conclusion of the trial or hearing, then it shall not be in the power of the court of common pleas, on the trial of the appeal, to amend or to order amended the said process or pleading in respect of any of the matters to which such objections shall relate or were made."

This section 113 is designated as section 105 of Nixon's Digest, 1868, title, *Justices' Courts*, and which received construction in *Craft v. Smith*, 6 Vroom, 305, 306.

Section 138 of the Justice Court Act (Rev. 1876, p. 563) reads: "The provisions of this Act shall apply to the District Courts of the City of Newark, except where the provisions hereof are inconsistent with the provisions of the Act constituting said courts and of the supplements thereto."

And section 5 of the Special District Court Act (Laws 1873, p. 246), after referring to various Acts conferring jurisdiction upon justices of the peace, reads: "And said Acts, and all other Acts which modify said Acts, shall apply to said courts, and regulate the practice and proceedings thereof, except where they conflict with the provisions of this Act."

Thus it is easily to be seen that by statutory enactments section 138 of the Practice Act applies with full force to the District Courts of the City of Newark.

A recent construction of section 138 of the Practice Act is to be found in *Farrier v. Schroeder*, 11 Vroom, 601, where it was held that the power to amend under section 138 of the Practice Act extends to the amending the record at the trial, and, after motion to nonsuit, by striking out the name of the plaintiff, wherever it occurs in the process and pleadings, and inserting the name of another person as plaintiff.

The addition therefore of a coplaintiff was no error.

Dixon, J., delivered the opinion of the court:

The first reason for reversal is that the action in the district court was in the form of trespass on the case when it should have been trespass. This objection was not presented below. Had it been, an amendment could have been made, under the authority of section 5 of the Newark District Courts Act (P. L. 1873, p. 245), section 2 of the supplement to the Small Cause Act, approved February 6, 1858 (P. L. 1858, p. 33) and section 46 of the Practice Act (Nix. Dig. p. 739). The proceedings may now be amended. *American Life Ins. Co. v. Day*, 10 Vroom, 89.

The next reason for reversal is that in the district court the judge ruled that the following

testimony would not warrant the jury in finding that a written lease was changed by a subsequent agreement of the parties, so as to make the monthly rent under the lease payable in advance. "After the lease was signed, the lessor said to the lessee: 'Mr. Winkler, I expect my rent on the first of the month;' the lessee said, 'very well.' Rent was paid on April 1, and May 2 (May 1 being Sunday)."

We think the ruling was correct, assuming that this testimony shows a promise by the lessee to pay the rent in advance; yet such promise appears to have been *nudum pactum*. The rights of the parties were already fixed by the written lease, and there was nothing, either of benefit to the promisor or of detriment to the promisee, beyond the mutual obligations established by the lease, to stand as consideration for the oral promise. Therefore it did not legally modify the contract previously made. *Nightingale ads. Meginnis*, 5 Vroom, 461; *Conover v. Stillwell*, 5 Vroom, 54.

The last reason to be noticed is that when, during the trial in the district court, it appeared that the original plaintiff's wife was a part owner of the goods, for the destruction of which the suit was brought, and it was moved to nonsuit the plaintiff because his wife did not join in the action, the court refused to nonsuit and permitted the wife to be joined as coplaintiff. We think the amendment was within the authority conferred by the statutes above mentioned. *Farrier v. Schroeder*, 11 Vroom, 601.

Besides, it did not in the least affect the merits of the suit. The husband, being in possession of the goods as an owner, at the time of the trespass by the defendant, a stranger to the title, had himself the right of recovering all the damages resulting from the injury done. *Luse v. Jones*, 10 Vroom, 707.

The judgment of the Common Pleas should be affirmed.

COURT OF CHANCERY.

Jacob SUTTON

v.

George GROLL.

*The owner of the fee in an alley way over which is a right of way may erect a building over said way, if in so doing he does not interfere with the right of way.

(Filed October 9, 1886.)

ON bill for injunction. Dismissal of bill advised.

The facts are stated in the opinion.

Mr. H. M. Snyder, for complainant.

Mr. T. B. Harned, for defendant.

Bird, V. C., delivered the following opinion:

The owner of a plot of ground laid it out in lots. The plot was bounded on two sides by open streets. On the rear of the lots fronting on C Street he opened an alley way leading to the other street, D. G. purchased both the lot on the corner, fronting on C Street extending

*Head notes by BIRD, V. C.

along D Street to the said alley, and also the lot on the other side of the said alley, on D Street; so that G. owned both sides of the alley.

By his title deeds, G. has the fee in the alley way. By virtue of his deed S. claims the unobstructed use of this alley way from D Street to reach the rear of his lot. And there is no dispute between the parties but that S. has by purchase all the rights which anyone claiming such easement under such a title is entitled to.

Groll has erected a building on both of his lots, the walls of which abut the sides or lines of this alleyway. These walls are carried up ten feet, and at that elevation Groll has commenced the work of joining the two buildings, thus of course preventing all use of the space occupied by the building. Sutton asks that Groll may be enjoined.

What, therefore, is included in the ordinary grant of a right of way, commonly called an alley way? The complainant relies on *Kana v. Bolton*, 9 Stew. 21.

So far as the right to an easement entered into the controversy in that case, it was not decided that building over or across it, six feet above the ground, was or was not an obstruction. Nor can I find any case which supports the claim of the complainant. But so far as the question has been considered by the courts, the cases are against the complainant. In Massachusetts the owner of an adjoining tenement, who had the fee in the soil over which was a way, built over the way at an elevation of eleven feet; the court held that it was lawful for him to do so. *Gerish v. Shattuck*, 182 Mass. 235. See also *Atkins v. Bordman*, 2 Met. 457.

In the case before me it appears that in describing the property the way is referred to, and that following the description are these words: "Together with the appurtenances, and also the free and joint use of said five feet three

and a half inch wide joint alley for ingress and egress forever." There is nothing to show any special use intended. Only the usual and ordinary rights conferred upon a grantee can be taken into an account in such case. What are those rights? Only the right of ingress and egress upon the surface of the soil; not beneath the surface, not above the surface, at such elevation as he may elect. He could not construct an underground way or a drain or other openings. He could not construct an elevated way in order to reach his lot or dwelling or any part thereof. His rights are confined to and upon the surface of the soil.

Not so limited are the rights of the owner of the fee. He has only conveyed the right to the use of the surface. All other rights of ownership, not inconsistent therewith, he retains and may exercise. If he does not interfere with the right of way, he may use the subsoil, or go beneath the surface for any purpose; and so, undoubtedly, he may appropriate the space above the surface. Below the surface he has imposed no barrier; and above, none except the right of way; and with this exception all other rights are as perfect as they can be.

Does the erection of a structure over said way, at an elevation of nine or ten feet, interfere with or obstruct the right of the complainant to ingress and egress? I think not. There is nothing in the case to show that when he purchased his lot he intended to engage in anything that would suffer by the proposed erection; nor that he has since undertaken anything which cannot so well be done; so that I can find nothing in the present situation nor in any of the attending circumstances at or since the grant which calls for the interference of this court.

I think the injunction should be denied and the bill should be dismissed, with costs.

NOTE.—This case is in harmony with the theory that the owner of land owns from the center of the earth upwards to the highest heavens. His grantee takes from him a title to be governed by the construction of the conveyance; if it be in fee, he takes the title of his grantor, but if the conveyance be simply that of a license, privilege or easement, the grantee would take only what would be reasonably implied in the grant.

Even the grant of an easement to the public, as a street or a highway (whether by dedication or deed) would not convey a fee in the soil but simply a right, the reasonable use of which would be protected by law, under police regulations alone, which make the wrongful obstruction of a public street a misdemeanor, punishable under the provisions of the criminal law.

So a structure which projects over a street of a city, as a cornice of a building, is a nuisance which the corporate authorities may abate; *Grove v. Fort Wayne*, 45 Ind. 429; as it is the duty of the authorities to keep the streets reasonably safe. *Higert v. Greencastle*, 48 Ind. 574.

In *Bybee v. State*, 94 Ind. 443, it is held that a

bridge across a street, for private use, is an indictable nuisance, although it is so high above the surface as not to impede the passage of ordinary vehicles.

It is only figuratively speaking that the rights of the public, in a public street or highway, extend beneath the surface to the center of the earth and above its surface to the highest heavens, so that no person may wrongfully obstruct such public rights; and whether or not the particular structure erected or maintained obstructs or may obstruct wrongfully the public street or highway, is a question of fact for the jury. *Bybee v. State*, 94 Ind. 443; *Grove v. Fort Wayne*, 45 Ind. 429; *S. C. 15 Am. Rep. 262*; *Centerville v. Woods*, 57 Ind. 192; *Logansport v. Dicks*, 70 Ind. 85; *S. C. 36 Am. Rep. 166*.

If such be the law in relation to grants of easements to the public, restricting the rights of the public to the actual use intended, and the protection of that right, there seems to be no reason why the grant of a private right or easement, even under the rule of liberal construction in favor of the grantee, should not be restricted to the very terms of the grant.—[R. D.]

MARYLAND.

COURT OF APPEALS.

BALTIMORE & OHIO R. R. CO., *Appt.*,

v.

Peter F. LEAPLEY and Grace B. Leapley,
His Wife.

1. The agents of a carrier of passengers must observe the utmost care, proportionate to the age and condition of the passenger. They will be held to be able to distinguish a woman in an advanced state of pregnancy, and to know what would be safe or unsafe for her to do.
2. The failure of a railroad company to put a passenger, a woman advanced in pregnancy, off at the usual platform, without good reason, is an act of negligence for which such passenger can recover, if injured by reason thereof without fault on her part.
3. Negligence can not be imputed to a passenger, although a woman advanced in pregnancy, in jumping from a car to the ground in obedience to an instruction from the conductor, the train having been stopped at a place other than the usual platform.

(Decided June 22, 1886.)

APPEAL by defendant from a judgment of the Washington County Circuit Court, in favor of plaintiffs in an action for damages for personal injuries to the wife caused by negligence of defendant Company. *Affirmed.*

The material errors alleged are the giving of plaintiff's second prayer for instructions and the refusal to give defendant's second, third and fourth prayers, which were as follows:

Plaintiff's second prayer—The plaintiff, by her counsel, prays the court to instruct the jury that if they believe from the evidence in the cause that the plaintiff, on the 16th day of February, 1884, purchased of the defendant's agent in Washington, D. C., a ticket which entitled her to be carried in one of the defendant's passenger cars on its railroad from Washington, D. C., to Tuscarora, a station on the Metropolitan Branch of said railroad in Frederick County, Maryland, and that the defendant had provided a platform at said station of Tuscarora for the safety of its passengers in alighting from its cars; that when the train upon which the said plaintiff was a passenger approached the said station of Tuscarora it slackened its speed and nearly stopped at said station, but that the said plaintiff was not allowed sufficient time and opportunity to get off said train on to said platform, and before giving the said plaintiff sufficient time to get off said train on to said platform, the said train moved on and went beyond said platform, and stopped at a point where the said defendant had provided no platform, or other means for the said plaintiff to safely alight from its said cars; and that the defendant's conductor or agent told the said plaintiff to get off said cars at said point, and at the same time defendant's said conductor or agent used harsh and profane language in the presence

and hearing of said plaintiff, and that the plaintiff was excited and alarmed by the use of said language, and upon being told by said conductor or agent to get off said train, the plaintiff asked him "how," and that the said conductor in answer thereto, replied "jump," and that laboring under said excitement and alarm, the plaintiff did then and there get off said train, and in so getting off was thereby injured in one of her limbs, that then the plaintiff is entitled to recover in this action; and in assessing the damages to be allowed the plaintiff, the jury are to consider the health and condition of the plaintiff before the injury complained of, as compared with her present health and condition in consequence of said injury, and whether said injury is in its nature permanent; and also the mental and physical suffering to which she was and is subjected by reason of said injury; and to allow such damages as in their opinion will be a fair and just compensation for the injury which the plaintiff has sustained.

Defendant's second prayer—The defendant prays the court to instruct the jury that if they find that the plaintiff Grace B. Leapley was a passenger with two children and five packages, on the train of the defendant from Washington to Tuscarora, on February 16, 1884, and that said train did not stop at Tuscarora, a regular station for said train, but did stop some distance from said station, and that she, (being a large woman, weighing 175 to 200 pounds, and in a state of pregnancy for the period of about five months) if the jury so find, did leap or jump from said train with a child two years old and two packages in her arms, a distance of about three feet, unaided by anyone, or without requesting anyone to aid her, and in consequence of said leap or jump was injured, then such act was negligence on her part, and she is not entitled to recover in this action, although the jury may find that she was told to jump by the conductor of said train.

Defendant's third prayer—The defendant prays the court to instruct the jury that if they find that the plaintiff, Grace B. Leapley, did, by her own negligence and want of care, contribute to the injury she received in getting off the train, and for which this suit is brought (if the jury find that she was injured in getting off), then she is not entitled to recover in this action, and their verdict must be for the defendant.

Defendant's fourth prayer—The defendant prays the court to instruct the jury that if they find from the evidence that the plaintiff Grace B. Leapley was a passenger on the train of the defendant, on the 16th day of February, 1884, from Washington City, to a station called Tuscarora, of which Eugene Hagan was the conductor; that when said train arrived at said station called Tuscarora, it stopped, but before the said plaintiff had sufficient time with her children and packages to get off the car in which she was riding, the said train started, and was again stopped about one hundred feet or thereabout from the platform at said station, when she appeared upon the platform of the car for the purpose of getting off the car then and there, and without being brought back to the platform of the station, if the jury so find, and that the said conductor and the brakeman of said train, at her instance, did assist her off the said car, and in doing so used

all proper care and diligence, then the plaintiffs are not entitled to recover, although they may find that she was injured in getting off.

Messrs. H. H. Keedy, John K. Cowen, and W. Irvine Cross, for appellant:

Plaintiff was under no obligation to act on the suggestion or direction of the conductor, nor was she justified in doing so, if it was clear that she thereby incurred great hazard.

Chicago, etc. R. R. Co. v. Sykes, (Ill.) 2. Am. & Eng. R. R. Cas. 254.

Taber v. Delaware, L. & W. R. R. Co. 71 N. Y. 492; *Robson v. North Eastern R. Co. L. R.* 10 Q. B. 271; *S. C.* 12 Moak, Eng. 302; *S. C.* affd. 19 Moak, Eng. R. 228; *Cockle v. London & S. Eastern R. Co. L. R.* 7 C. P. 321; *S. C.* 2 Moak, Eng. 648; *Rose v. North Eastern R. Co. L. R.* 2 Exch. Div. 248; *S. C.* 19 Moak, Eng. R. 539; *Bridges v. North London R. Co. L. R.* 7 H. L. 213; *S. C.* 9 Moak, Eng. p. 165; *Weller v. London, Brighton & S. C. R. Co. L. R.* 9 C. P. 126; *S. C.* 8 Moak, Eng. 441; *Cincinnati, etc. R. R. Co. v. Peters* (Ind.), 6 Am. & Eng. R. R. Cas. 126; *Curtwright v. Chicago & G. T. R. Co.* (Mich.) 16 Am. & Eng. R. R. Cas. 321.

Messrs. Fred J. Nelson and John C. Motter, for appellees:

In support of the plaintiffs' prayers counsel cite the following authorities:

Foy v. London, Brighton & S. C. R. Co. 18 C. B. N. S. 225; 11 Irish Com. L. N. S. 377; *Thompson v. Belfast, Holyrood, etc. R. Co.* 5 Irish Com. L. 517; *Delamaty v. Milr. & Prairie Du Chien R. R. Co.* 24 Wis. 584; 49 N. Y. 47; 66 N. C. 494; 45 Ga. 288; 59 N. Y. 851; 23 Pa. 526; 126 Mass. 506; 124 Mass. 573; 115 Mass. 190; *Chaplin v. Hawes*, 3 Carr. & P. 554.

The question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, should have been submitted to the jury.

Holmes' Case, 39 Md. 243; *Linnehan v. Sampson*, 126 Mass. 506.

The evidence does not conclusively show a want of due care and prudence on her part, and should, therefore, have been properly left to the jury.

Linnehan v. Sampson, 126 Mass. 512; *Lane v. Atlantic Works*, 107 Mass. 104.

What would be ordinary care in one case might be negligence in another, the relative degree of care, or want of it, depending upon the circumstances of each particular case.

McMahon v. Northern Cent. R. Co. 39 Md. 451.

The defendant's third prayer is a mere abstract and question of law; and as such was properly rejected.

Johns v. Marsh, 52 Md. 323.

Defendant's fourth prayer is based upon a hypothesis of which there is no evidence. The hypothesis of the prayer is that the conductor and the brakeman of said train, at her instance, did assist, etc.

Mayor of Balt. v. Trimble, 25 Md. 34.

The accident having happened, the presumption that the unusual mode substituted was a safe one is against the defendant; and the *onus* of proof is upon it. The prayer does not even submit to the jury the question of safety, *vel non*, of the mode selected.

Worthington's Case, 2 Md. 375; *Northern Cent. R. Co. v. Geis*, 31 Md. 357; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329.

If by this prayer it is sought to impute negligence to Mrs. Leapley in getting off the train, then all the circumstances surrounding her at the time should have been stated; such as her knowledge of the distance from the platform of the car to the ground; her pregnancy, rendering her liable to anxiety and nervousness, and her excitement and alarm caused by the language of defendant's agent.

Chaplin v. Hawes, 3 Carr. & P. 554; 126 Mass. 511.

Stone, J., delivered the opinion of the court:

Mrs. Leapley, the plaintiff, was a passenger on the road of the defendant from Washington City to a place in Frederick County called Tuscarora, in February, 1884. She was a large woman, weighing from 175 to 200 pounds, and in a state of pregnancy for about five months. She had with her two children, aged respectively two and five years, and several bundles. She had duly paid her fare to Tuscarora, which was a regular stopping place for the train of defendant, and where there was the ordinary platform for the entrance and exit of passengers on the defendant's road.

The plaintiff gave evidence tending to show that the train, on which she was a passenger, did not stop at the platform at Tuscarora but only slackened, and did stop about 300 feet from the platform; that the conductor used profane language but not to her, and got off the car and told the plaintiff in a rough manner to "get off;" and upon her asking him how, replied "jump;" and that thereupon she did jump with the youngest child in her arms; that the car step from which she jumped was about three feet from the top of the rail, and that the ground was fifteen inches below the rail; so that, according to her evidence, the distance she jumped was about four feet three inches. She also gave evidence tending to show the injuries she received from the jump.

The defendant gave evidence tending to show that the train did stop at Tuscarora, but not long enough for plaintiff to get off; but that the engineer, mistaking a salutation made by the conductor to a friend for a signal to start, started off before plaintiff could get off the train; that the train was stopped as soon as it could be, at the distance of about ninety feet from the platform; that Mrs. Leapley appeared upon the platform of the car with her children, and seemed very anxious to get off, and that she was assisted and lifted down with all possible care and gentleness, and that no profane language was used, or anything said to wrong her; that the distance from the lowest step of the car to the ground was not more than about two and one half feet, and that plaintiff made no objection to getting off where she did; this is the defendant's evidence.

That the carriers of passengers are required to observe the utmost care is a question now so well settled that it is not necessary to quote authorities. If the carrier is a corporation its agents are required to use the same care. They, the agents, are presumed and required to have the ordinary senses, especially in so responsible a position as the conductor of a railroad train.

They certainly are presumed and required to have the ordinary eyesight, so that they can distinguish between a man in the vigor of his life and a woman in a state of pregnancy and accompanied by young children. They are expected to have and must have, in order to discharge their duty properly, judgment enough to know that what would be safe for the one would not be safe for the other. Whether this care which the law requires was observed is the question in this case.

There is really no very important conflict of testimony. The woman bought a ticket from Washington to Tuscarora, a known station, with the ordinary platform for the passengers to get on and off the cars by. This ticket gave her the right to be put off on that platform; whether the cars slowed up but did not actually stop, or whether they did stop but not long enough for the plaintiff to get off, is immaterial; the result is precisely the same. By the act of the defendant, she could not get off at the place that her ticket contracted that she could get off. This failure of the Railroad Company to put the plaintiff off at the usual platform provided for that purpose, and when no good reason existed why it did not do so, we think was an act of negligence on the part of the Company; and if the plaintiff was injured thereby and without fault on her part, she is entitled to recover.

But, notwithstanding the improper conduct of the defendant, if the plaintiff, by her own negligence and want of care, contributed to the accident, she would not have been entitled to recover, and the defendant's third prayer should have been granted, had there been any evidence legally sufficient to support it; but we perceive none in the record. According to the defendant's evidence, the conductor took from her arms the young child, and the brakeman, a strong man, lifted the plaintiff down. There is certainly nothing in this defendant's proof showing the slightest want of care on the part of the plaintiff. If we take her evidence, we find that she was told by the conductor to "jump off," and that she did so. In so doing she was only obeying the explicit orders of the person in charge of the train, and to whom the safety of the passengers was committed. It would come with a very ill grace from the road to say to the passengers "You have been careless and negligent because you obeyed the order of my agent." Whether we take the evidence of plaintiff or defendant, we find no element of contributory negligence, and the third prayer was properly refused for that reason.

The defendant's second prayer is based upon the hypothesis that in obeying the order of the conductor she committed an act of negligence; and what we have already said disposes of that prayer.

The fourth prayer of defendant is based upon another erroneous hypothesis. That prayer asks the court to say substantially that although the defendant did wrong in not stopping at the platform, yet if the conductor and brakeman helped her down as carefully as they could, then she cannot recover, although she was injured in so getting down. In other words, that if after the defendant had been guilty of an inexcusable act of carelessness and negligence, it was guilty of no more negligence, then it should be excused. The statement of the proposition

carries its refutation with it. The plaintiff offered two prayers which were granted. The first prayer is a full and correct statement of the law of the case and was properly granted.

We have heretofore said that the defendant was guilty of negligence in carrying the plaintiff beyond the platform; still, if the plaintiff, by her own negligence in getting off, contributed to the injury, she could not recover. It was to meet that view of the case that the second prayer of plaintiffs was offered, and we think properly granted by the court. If, without any direction from the conductor, the plaintiff had jumped from the cars as detailed by her, it might well have been said that she had not used that due care which she was bound to use. But if she was excited and alarmed by the language used by the conductor, although it was not addressed to her, and in that condition she was told by the conductor to jump, and she did so, we have already said that such an act did not constitute contributory negligence; and it was, therefore, proper for the court so to instruct the jury.

Seeing no error in the ruling, the judgment must be affirmed.

Jacob LERIAN, *Appt.*,

v.

Charles ROHR.

1. A **discharge in insolvency**, granted by the same court in which an issue of *nul tiel record* is on trial, may be **proved by the docket entries** and original papers. The production of a formal record is not necessary.
2. It is **not essential** to the validity of a **discharge in insolvency** by the circuit court that a formal order should be **written out and signed** by the judge at the time the discharge is ordered.

(Decided October, 1886.)

A PPEAL by defendant from a judgment of the Circuit Court for Baltimore County, in favor of plaintiff in an action of assumpsit. *Reversed.*

Argued before Alvey, *Ch. J.*, and Miller, Irving and Bryan, *JJ.*

The questions presented for review are stated in the opinion.

Messrs. Richard Grason and William Grason, for appellant:

The circuit courts, sitting in insolvency, are courts of law, exercising as such a jurisdiction conferred by statute, and a verbal direction given to the clerk to grant a final discharge, and the entry so made by the clerk (who is the mere hand of the court, by which all judgments at law are entered upon its dockets) of "petitioner finally discharged" is as effective and binding as a written order signed by the judge.

Johns v. Fritchey, 39 Md. 258; *State v. Logan*, 33 Md. 1-9.

If the appellee should be right in his contention that there was irregularity in granting the discharge of the petitioner, that there should have been an order in writing, granting the discharge, the appellant submits that the evidence as offered was admissible; it was the record of a court of general jurisdiction; the docket entry of "Petitioner finally discharged" in legal con-

temptation, was made under the eye and with the sanction of the court, and should be considered and taken as a judicial act; and for that reason is no longer open to question or controversy in any collateral proceeding.

Tabler v. Castle, 22 Md. 94; *Clark v. Bryan*, 16 Md. 171; *Hunter v. Hatton*, 4 Gill, 115; *Davis v. Helbig*, 27 Md. 465; 2 Poe, Pl. & Pr. § 812; 18 Md. 438.

Mr. Wm. Pinkney Whyte, also for appellant:

The docket entries do not show whether the case was tried by a jury on the issue joined on the first and second pleas, or by the court without the aid of a jury; and if the latter was the case, the record should show that it was by consent, and it not so appearing, the judgment on its face is void.

Desche v. Gies, 56 Md. 185.

Messrs. John I. Yellott and D. G. McIntosh, for appellee:

The discharge of an insolvent is the act of the court, and not that of the clerk. The extent of the clerk's authority in insolvent proceedings is clearly defined by the Insolvent Law, and relates entirely to certain preliminary matters.

See Code of 1878, art. 67, §§ 4, 16.

The Act of 1880, chap. 172, rendered unnecessary the production of anything more than a certified copy of the discharge, to establish the plea of discharge in insolvency.

Miller, J., delivered the opinion of the court:

This action of assumpsit was brought by the appellee against the appellant on the 8th of July, 1884, in the Circuit Court for Baltimore County. The defendant pleaded that on the 21st of June, 1879, he was by the same court adjudged an insolvent debtor, and discharged as such from all debts and contracts made before the filing of his application. To this plea there was a replication of *nul tiel record*, and upon the trial of this issue before the court the defendant offered in evidence the docket entries in the matter of his application for the benefit of the insolvent laws, entered on the insolvent docket of the court, together with the original papers in the insolvent proceeding; but the court refused to receive them in evidence and gave judgment for the plaintiff on the issue thus joined. The defendant excepted to the ruling excluding these docket entries and original papers as evidencing the discharge; and this is the only matter presented for review by this appeal.

The application in insolvency having been made in the same court in which the issue of *nul tiel record* was on trial, it was not necessary to produce a formal record of the insolvent proceedings. All that it was incumbent upon the defendant to do was to have the docket entries and original papers laid before the court for its inspection; and if these showed his final discharge, his plea should have been sustained. The docket entry in this respect is as follows: "June 21, 1879, certif. pub. notice filed, same day petitioner finally discharged;" and on the original petition there is this indorsement, signed by the clerk: "Petitioner discharged June 21, 1879. By order of court."

The presumption from the docket entry itself is that the court, while in session, ordered

the discharge; and that the clerk made the entry thereof at the time in open court, in the presence and under the eye and direction of the judge, in the same manner as similar entries in other law cases are made. We understand that the learned judge of the court below made the ruling excepted to, upon the ground that there appeared to be no formal order of discharge written out and signed by the judge or judges sitting at the time the discharge was ordered. But this was by no means essential to its validity. The proceedings in insolvency are on the law side of the court, and there was no provision of the insolvent laws then in force requiring such formal orders to be signed by the judges. It is true a practice to that effect may have prevailed in some of the circuits, but it has not in others; and such a practice to have the force of law must have been at least universal and long continued.

But it is objected in argument that this docket entry does not show from what the court ordered the defendant to be discharged. But it is plain that it must be read in connection with the previous entries and all the original papers, and in view of their purpose and object as well as the provisions of the insolvent laws under which they were taken. So read the entry was short but appropriate, and expresses all that was necessary as the basis of a full record. It would have been the duty of the clerk, if he had been required to make out a formal record, to extend and amplify this entry to the effect that the court ordered the petitioner to be "fully and finally discharged from all debts and contracts made before the filing of the application aforesaid."

Again; it is further argued that the proof was properly rejected because the offer of the docket entries and original papers was coupled with an offer of a certificate of the clerk of the court, of the final discharge of the defendant; and it is said that this was never filed, was not produced as one of the original papers in the custody of the clerk, and was in fact an outside paper forming no part of the record. But conceding this to be the character of this paper, what harm was done to the appellee by simply laying such surplus matter before the court? Or what effect could it have had upon the judgment which the court was called upon to render on this issue? It was the plain duty of the court to inspect the docket entries and original papers and determine from them whether they contained a sufficient record of the defendant's discharge. If they showed a discharge he was entitled to the benefit of it, no matter what papers the clerk may have written outside of his duty and outside of those which constituted and formed part of the record.

In our judgment the docket entries and original papers in the insolvent case show a valid, final discharge of the defendant from the contract sued upon. The ruling complained of was therefore erroneous; and the judgment on the issue of *nul tiel record* should have been in favor of the defendant, and his plea of discharge sustained. The record shows that the plaintiff, in reply to the plea of discharge, also set up a new promise after the discharge; and in order that he may have the benefit of a trial of this issue the cause will be remanded.

Judgment reversed and new trial awarded.

PENNSYLVANIA.

SUPREME COURT.

W. K. BECK, *Plff. in Err.*,

v.

Mary A. CHURCH, Admr.

No execution can be issued on a judgment, transferred from one county to another after the lien of the original judgment had expired, under the Act of April 16, 1840, without revival.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, dismissing a rule to set aside an *alias* *fi. fa.* *Reversed.*

Reported below, in 1 Pa. C. C. R. 56.

The facts are stated in the following opinion of the court below, by ARCHBOLD, J.:

"Judgment was originally entered against the defendant in Luzerne County, July 31, 1875, and transferred to this county December, 18, 1884. There had been no revival in the old county, and without any revival here execution was forthwith issued. This rule was thereupon taken, on the ground that no execution could issue until a *scire facias* had gone out and judgment been obtained thereon.

"This exact point was ruled by Judge Hand in the case of *Crago v. Dartie*, No. 89, April Term, 1888, in this court, where he held that a judgment, transferred under the Act of 1840, acquires such a status as a judgment in the county to which it is transferred, that execution may issue thereon, without a preceding *scire facias*, even though the judgment in the original county be over five years old at the time of the transfer.

"I cannot agree with this interpretation of the law. But as it would work intolerable confusion to have the judges of this court ruling differently on a question of practice regulating the conduct of the prothonotary's office, I consider it my duty to be governed in the determination of this case by what has been decided in the case of *Crago v. Dartie*, simply expressing my dissent therefrom and the reasons for it.

"The Act of 1840 is to be construed in harmony with the Act of June 16, 1836, regulating executions, where it is provided that no execution shall be issued upon any judgment after the expiration of the period fixed (originally a year and a day, but subsequently enlarged to five years), unless the party defendant shall be first warned by *scire facias*, etc. By the Act of April 16, 1840, a judgment transferred to another county is to have the same force and effect, and no other, as if originally entered in the court to which it is thus transferred. The statute does not give full status to such judgment obtained by transfer.

"As said by Judge Gibson, in *Brandt's App.* 16 Pa. 346: 'It is not, then, a very judgment, but a *quasi* judgment; and that, too, only for limited purposes.' It is affected with all the weakness of the original, and must stand or fall with it. Nor can such judgment by transfer be itself transferred to another county; *Melton v. Guthrie*, 51 Pa. 116; and it is transferred

in its character as a judgment, and not as a lien. Thus, until the recent Act of Assembly, an award of arbitrators could not be transferred until the judgment had become absolute by failure to appeal. *Hallman's Appeal*, 18 Pa. 810.

"Nor could a verdict docketed as a lien be transferred; *Bailey v. Eder*, 90 Pa. 446; nor a decree in equity for the payment of money. *Brooke v. Phillips*, 88 Pa. 188.

"Now, when a judgment has stood over five years, it will not support an execution until a *scire facias* has issued and been pressed to judgment. If, in such state, it is transferred to another county, it is to have the same force and effect, and no other, as if originally entered in such county. The condition in which it is, is continued in its transferred state; otherwise it would be given a new force and effect, and one which it did not before possess. In its unrevived condition it had in a certain sense ceased to bind the defendant's person. How could the mere transfer remove this condition, when by the very terms of the Act it is to have no other force and effect than if originally entered in the court to which it is transferred? Such transfer is said by *C. J. Lowrie*, in *King v. Nimick*, 84 Pa. 298, to have a strong analogy to a *testatum* execution. But it is clear that no *testatum* could run from an unrevived judgment into another county.

"This does not conflict with *Knauss' Appeal*, 49 Pa. 420. The question there was of lien merely, and not of execution. The judgment when transferred was in full life; and the court simply held that it acquired a lien by its transfer, distinct from and independent of the lien in the old country, so that the expiration there did not affect the judgment as transferred.

"But in that very case Judge Agnew says: 'The proceedings to enforce collection (of the transferred judgment) shall be according to the Act of 1836; and therefore if the debt is presumed to be paid so as to require a *scire facias*, it must be revived before proceeding to execution.'

"I should therefore hold, if the question were *de novo* in this court, that, while the Act of 1840 allows any judgment to be transferred to another county, it has no other force and effect than if originally entered in such county; and if, at the time of its transfer, it is over five years old, so that no execution could issue thereon, a *scire facias* must issue on the judgment so entered by transfer, and be proceeded in to judgment, before an execution can properly be taken thereon.

"But, for the reasons first given, I must discharge this rule."

The defendant took this writ, assigning for error the action of the court in discharging the rule, and in permitting execution of the judgment.

Messrs. Samuel W. Edgar and Lemuel Amerman, for plaintiff in error:

By the express terms of the Act, the transferred judgment is to have the same force and effect and no other of the original judgment, as to lien, revival, execution, etc.

Act of April 16, 1840.

The lapse of five years raises the presumption of payment of an unrevived judgment. The mere transfer to another county cannot remove that presumption.

The proper place to ask for relief is in the court whence the execution issues, as that is the source of the injustice.

The opinion of the court below is an unanswerable argument to sustain our position.

Mr. H. M. Hannah, for defendant in error:

The territorial extent of a judgment and the lien and the duration of the lien are fixed by statute. A necessary incident of a judgment is the right of execution. That the period of lien and right of execution are the same was a matter of accident, because the statute made them so.

Execution may exist without a lien, as in the case of after-acquired real estate. And a lien may exist in a county where no judgment exists at all, as in the case of a *test. fi. fa.* All this is accomplished by statute.

By the terms of the Act of 1840, the judgment entered on the transcript. "As to liens, revivals, executions, and so forth, it shall have the same force and effect, and no other, as if the judgment had been entered, or the transcript been originally filed in the same court to which it may be thus transferred."

The plaintiff in error asks that from the force and effect of such a judgment we deduct a certain incident which the judgment in Luzerne County had lost by lapse of time.

The new judgment does not derive its incidents from the old, unless imposed by statute. These incidents are not hereditary. The new judgment has lost nothing by lapse of time. No presumption of payment has arisen as to it. The only tenable theory in the plaintiff's case is that the old judgment in Luzerne County should have been revived before the removal. But this the statute does not require either by express condition or by implication.

The provision in the Act of 1840, that the proceedings to enforce collection shall be according to the Act of 1836, merely relates to the number and kind of executions which the plaintiff may have on his new judgment.

This provision was necessary to make it plain that the new judgment was intended to sustain an execution at all, and that it was not granted for the purpose of lien merely. By the Act of 1836, a *test. fi. fa.* was authorized in any county of the State. Unless expressly stated, it would have been a matter of grave doubt whether the Legislature intended by the Act of 1840 to authorize a second execution in the same county for the same debt.

The recital in the early part of the Act of 1840, specifying that the collection shall be "by execution, bill of discovery, or attachment, as prescribed," etc., clearly shows that the legislative mind was not then directed toward the part of the Act of 1836 relating to revivals of judgment before execution, but to the several forms of execution provided by that Act.

The question is fully discussed and decided in *King v. Nimick*, 34 Pa. 298, and *Knauss' App.* 49 Pa. 420

Mr. Chief Justice Mercur delivered the opinion of the court:

The errors assigned arise from the refusal of the court to set aside an execution issued in the County of Lackawanna on a judgment transferred from the County of Luzerne. It was recovered there in July, 1875, and transferred in 180

December, 1884. As the judgment had not been revived in the county in which it was recovered, and under the statute no execution could issue on it there, did a transfer thereof to another county, nine years after its rendition, authorize an execution thereon to issue forthwith?

The construction of the Act of 1840, authorizing the transfer of judgments to another county, is not entirely free from difficulty. The tendency of the decisions has been to restrict the effect of the judgments thereby created. Hence it was held in *Brandt's App.* 16 Pa. 343, that the record transferred under the Act does not become a very judgment of the court of the county in which it is entered, but a quasi judgment, and that too only for limited purposes; that the regularity or merits of it cannot be reviewed elsewhere than in the county where it was recovered, further than to stay execution. If the original judgment be set aside, the judgment entered on the transcript falls with it. The latter is not an independent and self-sustaining judgment. Two independent judgments of the very same kind, each binding the person and each for the same thing, cannot be sustained. If it were otherwise, the payment of one would not be a satisfaction or discharge of the other.

Although the Act of March 29, 1859, declares that decrees in equity for the payment of the money shall be and constitute a lien on the real estate of the defendant named in the decree, for the like period and with the same force and effect as the lien of a judgment rendered by and in a common-law court of this Commonwealth and be entered in a like manner in the judgment or lien docket of the proper county; yet it was held in *Brooke v. Phillips*, 83 Pa. 183, that such a decree cannot be transferred to another county for the purpose of lien and execution, as in case of a judgment at law.

To hold that an execution may be issued by the court of the county in which the transcript of the record is filed, without a revival there, when none can be issued in the county where the parent judgment remains, would be to sanction a proceeding not within the meaning of the statute, but one in conflict with the spirit of the decisions giving construction thereto.

The learned judge was correct in the reasons which he gave in favor of setting aside the execution, but was wrong in adopting the conclusion of the president judge in another case.

Judgment reversed; and rule, to show cause why the alias fi. fa. should not be set aside, made absolute.

CANNONSBURGH IRON COMPANY,
Limited, *Plff. in Err.*,

v.
UNION NATIONAL BANK of Pittsburgh.

1. Where a **cashier's check** is given by a debtor to a creditor for a **pre-existing debt**, the **presumption** of law is that it was intended only as a **conditional payment**.
2. A **surrender**, by the creditor, of the

note of the debtor, upon receipt of the check, will not overcome this presumption.

3. Facts cannot be inferred in a case stated; and what is not stated must be presumed not to exist.

(Decided October 4, 1886.)

In error to Common Pleas No. 1, Allegheny County, to review a judgment for plaintiff. *Affirmed.*

Amicable action of trespass on the case, and case stated, in which the following facts were agreed upon:

On May 24, 1884, the defendant was indebted to the plaintiff in the sum of \$2,287.67, for which the plaintiff held the promissory note of the defendant, which that day matured and became payable. On the same day the defendant had on deposit to its credit, with the Penn Bank, a corporation carrying on the business of banking in the City of Pittsburgh, the sum of \$3,115.02, subject to check, no part of which has been paid defendant except as herein stated: the defendant drew its check on the Penn Bank aforesaid for \$2,287.67, and presented the same to the said Penn Bank, which received the same and charged the same to the defendant's account, and issued and delivered to the defendant an instrument in writing, in the form, words and figures following, to wit:

No. 24,438. Pittsburgh, May 24, 1884.

PENN BANK.

Pay to the order of R. S. Smith, Esq., Ca.

Twenty-two hundred thirty-seven " Dol-

lars. \$2,287.67 E. G. Normecutt,

Teller.

the said R. S. Smith being the cashier of the plaintiff Bank.

The defendant received the instrument last mentioned, and, on the same day, presented the same, without indorsement, to the plaintiff, which received the same and delivered to the defendant its promissory note aforesaid.

On May 26, 1884, the 25th being Sunday, the plaintiff caused the said instrument, issued as aforesaid by the said Penn Bank, to be duly presented, duly indorsed to the said Penn Bank, at its banking house, for payment thereof, and payment thereof to be there duly demanded of said Penn Bank, which was then and there refused by the said Penn Bank, which had suspended and has not since resumed payment of its obligations, being insolvent; whereupon the same instrument was the same day duly protested for nonpayment thereof, and the plaintiff the same day duly notified the defendant of said presentment, demand and refusal; demanded payment by the defendant of the said sum of \$2,287.67, and offered to return to the defendant, duly indorsed, but without recourse, the said instrument so protested as aforesaid; which the plaintiff is and has always been ready and willing to return to the defendant, duly indorsed, but without recourse, upon payment of the said

sum of \$2,287.67, with the interest thereon, or the return of the said promissory note, by the defendant to the plaintiff.

On May 28, 1884, the said Penn Bank assigned all its property to Henry Warner, Esq., in trust for its creditors; at which time, without charging against it the amount of the said instrument so protested as aforesaid, there was to its credit with the plaintiff the sum of \$965.85, being a balance of the proceeds of sundry notes, of which none were payable when the said assignment for creditors was made; and some are now, and others not yet payable, which were made for the accommodation of the said Penn Bank and indorsed by it, and were discounted for it by the plaintiff, on May 23, 1884, in reliance upon its solvency, although it was then insolvent, and are now held by the plaintiff; for the recovery of which sum of \$965.85 an action has been brought by the said Warner, assignee as aforesaid, against the plaintiff, in said court, and is yet pending.

If on the foregoing case the plaintiff is entitled to recover, the judgment to be for the plaintiff and against the defendant, for \$2,287.67, or for the same less \$965.85, as shall be adjudged right, with interest from May 24, 1884, \$1.50 costs of protest, and costs of suit; otherwise judgment to be for the defendant for its costs.

The court entered judgment, in the following opinion by Stowe, P. J.:

"I do not think, under the facts set out in the foregoing case stated, that the receipt of the cashier's check of the Penn Bank and the contemporaneous delivery to defendant (of the note in question) amounted to anything more than conditional payment. But as the plaintiff had some \$965.85 belonging to the Penn Bank in its possession and to its credit, upon its books as due it by plaintiff, and which it could *pro tanto* have set off the amount of this cashier's check against at the time of demand and refusal of payment; and as the assignee can stand in no better position than his assignor in this regard, I think equity would give defendant a right to require plaintiff to hold such sum for its use and benefit; and therefore to that extent I am of opinion defendant is entitled to a set-off against plaintiff's claim.

"Judgment is now directed to be entered, on the foregoing case stated, in favor of plaintiff and against defendant, for \$2,287.67, less \$965.85, the amount to the credit of the Penn Bank as above stated, viz.: \$1,271.82, with interest from May 24, 1884, and costs of suit."

The plaintiff and defendant both excepted. The plaintiff assigned for error the action of the court: 1, in not holding that the check was satisfaction and discharge of the note; 2, in not entering judgment for the defendant; and 3, in entering judgment for the plaintiff as above.

For decision on defendant's exception, see next case (*post*, 262).

Mr. George W. Guthrie, for plaintiff in error:

A debt may be satisfied and discharged either by novation or by accord and satisfaction. While neither of these constitutes a technical payment, either operates as fully to satisfy and discharge the debt as though it had been actually paid.

The general rule (that where a negotiable instrument, whether of the debtor himself or of

a third person, is received in consideration of a pre-existing indebtedness, the *prima facie* presumption is that it is received simply as conditional payment) is subject to at least one well established exception: in *Bayard v. Shunk*, 1 Watts & S. 92, this court held that the acceptance by the creditor from the debtor, of bank notes, would be presumed to be a discharge and satisfaction of the debt, even though the bank had failed at the time.

A cashier's check has all the characteristics of "currency," and resembles an ordinary bank note in every particular. It is issued by a regularly organized banking company; being commercial paper, it will pass from hand to hand, free from any equities affecting prior parties (*Penn Bank v. Frankish*, 91 Pa. 339); it does not bear interest, and therefore, like "cash," is only valuable as a medium of exchange; it is payable on demand, without grace; it circulates on the credit of the bank issuing it.

The instruments being alike in all their characteristics, the necessity for uniformity in commercial law requires that they should be given the same technical operation in all business transactions.

They were adopted, as bank notes were adopted, to facilitate business transactions. It would be utterly impossible to carry on financial and commercial operations in the large business centers without them; both because there is not sufficient actual cash with which to pay debts, and because if there were, the delay in counting such cash would render it impossible to get through the daily business.

The language of *Chief Justice* Gibson, in the case of *Bayard v. Shunk*, *supra*, applies to such instruments without the change of a word: "They are lent by the banks as cash; they are paid away as cash; and the language of *Lord Mansfield* in *Miller v. Rice*, 1 Burr. 452, was not too strong when he said: 'They are not goods, nor securities, nor documents for debts; but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash.' If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely."

Where the holder of a note surrenders it at maturity to the maker, and accepts from him the note of a third person, payable to his (the holder's) own order, the original note is satisfied and the maker's liability thereon is at an end. This rule is applied to instruments under seal.

Shen. Touch. p. 70; *Cross v. Powell*, 9 Cro. Eliz. 433; *Lacey v. Lacey*, 7 Pa. 251.

Certainly it should be applied to the case of the surrender at maturity of a negotiable instrument which passes from hand to hand by mere delivery.

A note for a less sum than the amount of the debt will discharge the debt.

Goddard v. O'Brien, L. R. 9 Q. B. Div. 87 and cases cited.

Where in a case stated the evidence of the facts is set forth rather than the facts themselves, the court will treat it as a demurrer to the evidence, and draw every inference which a jury might draw.

Anent v. Sarver, 2 Grant, Cas. 34; *Parker v. Urie*, 21 Pa. 305.

In 2 Am. Lead. Cas. 271, the rule is said to be that when the securities held by the creditor are surrendered at the time the new instrument is delivered and accepted, the inference will be strong, if not irresistible, that the debt is satisfied.

In *Estate of Davis v. Desruque*, 5 Whart. 538, it appeared that on the maturity of a joint obligation, one of the debtors gave to the creditor his own individual obligation for the amount, and the original joint obligation was delivered to him. In delivering the opinion of the court, *Rogers, J.*, says:

"Whether taking the separate note of one of the partners amounts to an extinguishment or satisfaction of a joint debt depends upon the intention of the parties; and in the absence of all proof of a special contract, the giving up or the retention of the original security will in general be a decisive circumstance; for it is difficult to account for the fact, except on the supposition that in the one case it was intended, in case of need, to enforce the joint liability; or, in the other, to depend altogether upon the responsibility of one of the joint debtors. Where a joint debtor insists that the separate note is substituted and is in satisfaction of a joint debt, the *onus* is thrown upon him; and to discharge himself from liability it will be necessary to show a special contract to that effect; or that, in addition to a separate note being taken for the amount of debt, the original bills were given up."

This language was cited and relied upon in *Morris v. Hurvey*, 75 Va. 732. See also *Arnold v. Camp*, 12 Johns. 409; *Dennis v. Williams*, 40 Ala. 638; *Harris v. Lindsay*, 4 Wash. C. C. 273.

Plaintiff accepted the cashier's check payable to its own order and, without requiring any guaranty, surrendered the note to the maker. The inference is irresistible that it accepted the new obligation in satisfaction and discharge of the old one.

In *Chitty on Contracts*, p. 826, the author says: "It was decided in *Eyles v. Ellis*, 4 Bing. 112, that an actual transfer of the amount of a debt in a banker's book from the account of the debtor to that of the creditor with the consent of both is equivalent to payment." See also 2 Pars. Cont. p. 137, where the same rule is laid down. This is exactly what was done in the present case.

Mr. John G. Bryant, for defendant in error:

A payment of a pre-existing debt by the check, draft or note of a third person is presumed in law to be conditional only, and to overcome the presumption an agreement must be shown.

McIntyre v. Kennedy, 29 Pa. 448; *League v. Waring*, 85 Pa. 244; *Waring v. Wunderlich*, 25 Pitts. Legal Jour. 73; *Miller v. Lutz*, 32 Pitts. Legal Jour. 139.

In the case of a payment by check, the presumption is even stronger than in the case of payment by note or bill.

Olcott v. Rathbone, 5 Wend. 490; *Heartt v. Rhodes*, 66 Ill. 351.

And in case of payment by check, an agreement that the payment should be unconditional cannot be presumed as matter of law or inferred as matter of fact, from the fact of the surrender of an old note or bill on receipt of the check.

Russell v. Hankey, 6 Term R. 12; *Ridley v. Blackett*, Peake, Add. Cas. 62; *Olcott v. Rathbone*, 5 Wend. 490; *Johnson v. Bank of North America*, 5 Robt. 554; *Smith v. Miller*, 6 Robt. 157; *Turner v. Bank of Fox Lake*, 3 Keyes, 425; *Burkhaller v. Second Nat. Bk. of Erie*, 42 N. Y. 538.

"The delivery or surrender to the maker of the old note, upon its being renewed, does not in itself raise a presumption of its extinguishment by the new; it being considered as a conditional surrender, and that its obligation is restored and revived if the new note be not duly paid."

2 Dan. Neg. Inst. § 1266 a. See also *Bank v. Good*, 21 W. Va. 455; *Heartt v. Rhodes*, 66 Ill. 351; *Hunter v. Moul*, 2 Out. 13.

Respecting the cases seeming to hold the contrary it may be observed: In the *Estate of Davis v. Desauque*, 5 Whart. 538, and *Harris v. Lindsay*, 4 Wash. C. C. Rep. 273, no notes had been given up, and the opinions were in that respect mere dicta; *Manuel v. Miss. R. R. Co.* 2 Pa. 198, was on a certificate of deposit taken up by the bank and paid in its bank bills, which were again deposited on receipt of a new certificate; and the court said: "The case does not resemble those that have been cited, where a note or security has been taken for a subsisting debt * * *." The true mode of viewing it * * * is that of an instrument of a special character, binding the bank to the payment of certain money, which money * * * has been paid him, and again deposited under a new engagement."

Macungie Bank v. Hottenstein, 89 Pa. 328, was a case of payment by an accommodation indorser, who received the old note, and thereby acquired the legal title thereto, and is not like the case of payment by the principal debtor by delivery of a new note. In *Morris v. Harcey*, 75 Va. 726, the note had been received expressly in "satisfaction of a judgment" on the notes given up. *Arnold v. Camp*, 12 Johns. 409, is now of no authority, in view of the later cases in the same State cited above, unless there be a distinction between the cases of payment by note and by check; and *Dennis v. Williams*, 40 Ala. 683, was ruled when the question of the presumption, where the old note was not given up, was still open in that State, and is therefore now of no authority.

In the case of *Eyles v. Ellis*, 4 Bing. 112, cited in the quotation under the fourth head of the argument for the plaintiff in error, the bank was the agent of the creditor for collection. The proposition there quoted, if correct, is not applicable to the present case, for in it there was no transfer of account, or consent thereto. But there is no difference between a transfer on a banker's book and a transfer on any other person's, for the relation of banker and customer is merely that of debtor and creditor.

Bank of Republic v. Millard, 10 Wall. 152 (77 U. S. bk. 19, L. ed. 897).

That the check in question was payable to the plaintiff below, or its cashier, makes no difference, as is shown by the cases of *League v. Waring*, *Waring v. Wunderlich*, and *Müller v. Lotz*, cited above.

The cases respecting payment by bank bills have no application to the present. A bank bill or note is one issued to pass current as money, for an indefinite period, in the daily transactions of the people, and must be negotiable by mere delivery.

Morse, Banks, etc. chap. VIII, pp. 458-9.

Cashier's checks are not intended to circulate as money for an indefinite period, or for any period; but are merely instruments for making payment in money. They do not purport to be obligations or promises of the bank to pay money, and they only bind it by way of estoppel.

If one go to his banker and draw on and present to him a check, at the same time directing the amount thereof to be paid to his creditor, and the creditor, on hearing an order by the banker's teller for payment accordingly, in expectation of such payment, surrender a note to his debtor, could it be pretended, the banker then refusing to pay, that the note had been paid? This is the present case.

Assuming that an inference of an agreement to accept in absolute payment might be drawn from the fact of the surrender of the note, it cannot be drawn by the court. A presumption of one fact from others is an inference of fact, and cannot be drawn by the court.

Diehl v. Ihrie, 3 Wharton, 143.

A case stated is like a special verdict, and subject to the same rules.

Diehl v. Ihrie, *supra*; *Philadelphia & R. R. Co. v. Waterman*, 54 Pa. 387; *Kinsley v. Coyle*, 58 Pa. 461.

The court is confined to the facts found by a special verdict, and cannot supply the want thereof by any argument or implication from what is expressly found.

Thayer v. Society of United Brethren, 20 Pa. 60; *Loew v. Stocker*, 61 Pa. 347.

In a case stated, whatever is not distinctly and expressly agreed upon and set forth as admitted must be taken not to exist.

Diehl v. Ihrie, *supra*; *Berks Co. v. Pile*, 18 Pa. 493; *Philadelphia & R. R. Co. v. Waterman*, *supra*.

And if, instead of finding facts, it finds the evidence from which they may be inferred, a venire will be awarded.

Kinsley v. Coyle, *supra*; *Holmes v. Wallace*, 46 Pa. 266.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

We concur in opinion with the learned judge, that the receipt by the defendant in error, of the cashier's check on the Penn Bank, and the contemporaneous delivery of the note to the maker thereof, was a conditional payment, only, of the note.

The check was taken for a pre-existing debt. The case stated does not aver any agreement that it was to be accepted as an absolute payment. The burden of proof was on the maker of the note to overthrow the presumption that the check was taken as a conditional payment. It was of no higher character than the note, and

it certainly was not money. *Brown v. Scott*, 51 Pa. 357; *League v. Waring*, 85 Pa. 244; *Miller v. Lotz*, 15 Pittsb. Legal Jour. 139.

A case stated is in the nature of a special verdict. Facts must be stated and not left to inference. What is not stated must be presumed not to exist. *Berka Co. v. Pile*, 18 Pa. 493.

Due diligence was used in presenting the check on the next business day after it was received, and payment thereof was demanded and refused. Thereupon, on the same day, the check was duly protested for nonpayment, and the plaintiff in error was duly notified of the presentment, demand and refusal. Payment of the note was demanded, accompanied with an offer on its payment, to return the check.

The check not having been taken as a payment, and nothing having been realized thereon, the plaintiff in error has no just cause to complain of this judgment.

Judgment affirmed.

UNION NATIONAL BANK of Pittsburgh,
Plff. in Err.,
v.

CANNONSBURGH IRON COMPANY,
Limited.

1. A **set-off**, to be allowed, **must be a debt due between the same parties** and in the same right, and complete when the action was instituted.
2. A bank received a **cashier's check** of another bank, as a **conditional payment** of the debt of a third party. The latter bank made an assignment in trust for creditors and the check was not paid on presentation. At the time of the assignment, there was, on the books of the first bank, a credit to the insolvent bank of the **proceeds of notes**, indorsed and **discounted** for the latter's **accommodation**. In an action by the first bank against the debtor, for the debt, **held**, that this deposit was **not a valid set-off** against the debt.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 1, of Allegheny County, to review a judgment for plaintiff. *Reversed.*

The facts appear by the preceding case. The assignments of error appear by the opinion of the court set forth in that case.

Mr. John G. Bryant, for plaintiff in error:

Set-off is inadmissible, unless it be between the same parties.

Carman v. Garrison, 18 Pa. 158; *Milliken v. Gardner*, 37 Pa. 450; *Scott v. Fritz*, 51 Pa. 418; 2 Smith, L. Cas. *320.

In case of the insolvency of the borrower before actual payment of the money by the lender, an equitable right, analogous to that of stoppage *in transitu*, may be exercised by the lender.

Dougherty v. Central Nat. Bank, 93 Pa. 227.

This doctrine is also recognized in *Kensington Nat. Bank v. Shoemaker*, 11 W. N. C. 215;

the set-off in that case being disallowed only because it did not appear that the proceeds of the notes entered into the balance.

The balance in question would not have been the subject of either action or set-off by the Penn Bank or its assignee, because the plaintiff had a right or equity, arising out of the same transaction, to retain it.

But even if there was no such equity, the plaintiff had a right to set off the notes against the balance of their proceeds, even as against the assignee of the Penn Bank, which was absolutely liable on them, as they were made for its accommodation. In a case of voluntary assignment the right of set off exists, though one of the debts was not payable when it was made.

Jordan v. Sharlock, 84 Pa. 366.

Assuming that the plaintiff had an equal right to set off the check against the balance in question, it is not bound to elect to do so; especially as the defendant has not shown any equity superior to that of the plaintiff and of the makers of the notes.

Mr. Geo. W. Guthrie, for defendant in error:

The mere statement of facts shows how essentially different this case is from the case of *Dougherty v. Central Nat. Bank*, 93 Pa. 227, cited by the plaintiff in error.

In that case the bank, learning of the failure of Dougherty Bros. & Co. the day after their note was discounted, immediately, and before any assignment had been made or any portion of the proceeds of the discount had been paid out, rescinded its action, charged back to Dougherty Bros. & Co.'s account their old note, in renewal of which the one discounted was given, and tendered to Dougherty Bros. & Co. the new note, together with the collaterals deposited with it, and the amount of discount paid in cash. Not one of these circumstances exists in this case.

In delivering the opinion of this court, in that case, Trunkay, J., says: "The party whose debt is not due has no equitable claim to have it set off against a debt of his own already due, in the hands of a party who is insolvent." P. 231.

And again: "A bank has no lien on money standing to the credit of one of its depositors, for the amount of the note of such depositor, discounted by the bank, but which has not matured." P. 232.

This is the general rule, and is fully sustained by the cases cited, and applies exactly to this case.

Jordan v. Sharlock, 84 Pa. 366, is not in conflict with it. The action in that case was by the voluntary assignee of the holder of the note; the set-off claimed was due and payable at the time of the assignment, and was of course allowed.

In the case of *Sitgreaves v. Bank*, 49 Pa. 364, a case of the same character, this court said: "To shut out his defense, and make him pay the debt again, with a chance to recover it in an action against his principal, also in turn to recover it from the creditor, would be a circuity that neither law nor common sense would tolerate."

In *Hutchinson v. Woodwell*, 15 Pittsb. Legal Jour. 235, *Mercur, C. J.*, in delivering the opinion of this court, said: "It is settled law, when

the creditor has the means of satisfaction, either actually or potentially in his hands, or within his control as security, and does not choose to retain it, but relinquishes it, the surety is discharged."

Reed v. Garber, 12 Serg. & R. 100; *Everly v. Rice*, 20 Pa. 297; *Boaschert v. Brown*, 2 Pa. 372.

The same rule was again enunciated and applied by this court in the case of the *Commercial Nat. Bank v. Henniger*, 41 Legal Int. 356, where all the cases are fully discussed and explained by Paxson, J., in delivering the opinion of the court.

Carman v. Garrison, 13 Pa. 158, was decided on entirely different facts; the maker of the note having placed it in the hands of a broker for sale, on being sued by the purchaser, attempted to set off an alleged indebtedness of the purchaser to the broker, arising out of transactions having no connection with the sale of the note, and it was held that the set-off could not be allowed.

The plaintiff in error was under the obligation to exercise for the benefit of the defendant in error the diligence which any ordinarily prudent man would use in his own behalf. If the plaintiff in error were the absolute holder of this check, or if the defendant in error were insolvent, no one can hesitate to say what the action of the plaintiff in error would be; it would instantly charge this check to the account of the Penn Bank, and it should be required to take the same action, even though it holds it simply as conditional payment or for collection.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

This judgment was entered on a case stated. In an opinion just filed on a writ of error taken by the defendant, we held it had no cause to complain of the judgment. The complaint now to be considered is whether the judgment was not entered in favor of the plaintiff, for a less sum than it is entitled to under the admitted facts.

Conceding that the check given to plaintiff in error, on the Penn Bank, did not operate as a payment of the note held by the plaintiff against the defendant, yet the latter contends that it is entitled to a set-off for the sum of \$965.85 which, on the 28th day of May, 1884, stood to the credit of the Penn Bank on the books of the plaintiff. It was a part of the proceeds of sundry notes discounted by the plaintiff on the 28d of May, for the accommodation of the Penn Bank. The latter bank in fact was then insolvent, but its insolvency was not then known to the plaintiff. On the 28th of May, the Penn Bank assigned all its property to Warner in trust for its creditors. The trustee has brought suit against the plaintiff to recover the \$965.85; and that suit is still pending.

The court below thought the plaintiff was bound to set off or apply this sum on the note it held against the defendant, and entered judgment for the residue of the note only. This is assigned for error.

It is difficult to see on what principle the application of this sum can thus be enforced. The general rule is that a set-off is not allowable unless the debts be due between the same parties and in the same right. *Potter v. Burd*, PA.

4 Watts, 15; *Milliken v. Gardner*, 37 Pa. 456; *Scott v. Fritz*, 51 Pa. 418.

The money on deposit with the plaintiff was not due to the defendant. A set-off is in substance a cross action; and a cross demand must be complete when the action was instituted. *Gunnis v. Cluff*, 111 Pa. 512 [S. C. 2 Cent. Rep. 356].

The defendant was in no condition to bring suit against the plaintiff for this money. It had no such right of action. It had no legal or equitable claim which it could thus enforce. That money was wholly *res inter alios acta*. The defendant was not a party to the transaction which produced the fund. It could not check it out. Prior to the assignment it had no right to be heard as to what disposition should be made of it. What right it has, if any, to share therein under the assignment is a question not now before us. Whether under the authority of *Dougherty v. Cent. Nat. Bank*, 93 Pa. 227, the plaintiff can show such equities as to retain the money on the notes it discounted for an insolvent may arise in the suit brought by the assignee.

Whatever the equities may be between the plaintiff and the Penn Bank, arising out of that transaction, it is clear the defendant cannot control the application of that fund. The plaintiff did not hold that money as security for the payment of a check drawn on another bank. When the check was dishonored he offered to return it to the defendant from whom he received it. We think the learned judge erred in holding that the defendant was entitled to set off the amount which stood in the Bank of the plaintiff to the credit of the Penn Bank.

Judgment reversed; and now, October 4, 1886, judgment in favor of the plaintiff, for \$2,237.67 with interest from May 24, 1884, and \$1.50 costs of protest, and costs of suit, according to agreement in case stated.

PITTSBURG JUNCTION R. R. Co's. Appeal.

1. The **lands** or right of way **occupied** by one **railroad** company for its corporate purposes **cannot be taken** as right of way **by another** railroad company, **except for mere crossings**; and then only for crossing purposes and not for exclusive occupancy.
2. **This includes the grounds occupied** by all the **appliances necessary** for the successful operation of the road, both in the present and in the future.
3. Where the **evidence is conflicting as to the necessity** of land for the uses of a railroad, the courts will make **allowance for the future needs** of the road.
4. While the **franchises** of a corporation are property and may be **taken under** the power of **eminent domain**, yet **property taken** by one corporation for a **public use can not be taken by another** corporation **without an express grant** or by necessary implication.
5. There can be **no implication**, unless it arises from an **absolute necessity**, such

that without it the grant itself would be defeated.

6. A railroad company will be restrained from locating its road across the premises of another railroad company, used as yards for repairing, storing and shifting cars, etc., and large enough for the future needs of the road; the proposed line causing inconvenience and alterations in these premises and there being another route by which the proposed line can be built, although at greater cost.
7. The Act of June 19, 1871, regulating the crossing of lines of railroad by other railroads, does not apply to the crossing of yard tracks and switches which are merely incident to the use of the main line.
8. In injunction proceedings to restrain one railroad from locating a designated branch line across the yards of another, the master suggested a decree designating another route across the same lands and that the injunction be dissolved. The court sustained exceptions to the master's report and perpetually enjoined the defendant from taking any of the lands of the plaintiff. Affirmed on appeal.

(Trunkley and Clark, JJ., dissenting.)

(Decided October 4, 1886.)

APPEAL from a decree of Common Pleas No. 1, of Allegheny County, in equity, sustaining exceptions to the report of a master and enjoining the defendant, the Pittsburg Junction Railroad Company, from taking the land of the plaintiff, the Allegheny Valley Railroad Company, for railroad purposes. *Affirmed.*

The Pittsburg Junction Railroad Company, the appellant, desiring to construct a branch road from its main line in the City of Pittsburg, along the Allegheny River, to connect with other railroads and to gain access to mills and furnaces on the river, surveyed and located a route through the property of the Allegheny Valley Railroad Company. This property was used as a freight yard and extended from Forty-Third Street to Forty-Seventh Street, and from an unopened street on the south, to low water line on the river front.

This yard contained an engine house of eighteen stalls, a machine shop, water tanks, coal chute, ice house, storeroom for engine stores, blacksmith shop and tool house and other buildings, and a number of tracks for the storage of cars and for making up trains; and also a repair yard, for the repair of cars, and a coach yard for the storage of passenger coaches when not in use.

The Pittsburg Junction Railroad Company not being able to agree with the other company, presented its bond to the court below. The Allegheny Valley Railroad Company filed exceptions. Pending these exceptions, the Pittsburg Junction Railroad Company, claiming that the ground over which its branch line was located, between Forty-Third and Forty-Fourth Streets, had been dedicated to public use by a former owner, commenced to lay its tracks there-

on, crossing a switch track belonging to the Allegheny Valley Railroad Company.

The latter company thereupon filed this bill in equity, praying for an injunction to restrain the former Company, from entering upon any of the property of the plaintiff, or interfering, etc.; and with a prayer for general relief. The court granted a preliminary injunction, restraining the defendant from entering upon or interfering with the property of the plaintiff between Forty-Third and Forty-Seventh Streets, and the street bounding the property on the south side; and any other property of plaintiff between Thirty-Ninth and Fortieth Streets and on the south side of low water mark of the Allegheny River.

The defendant, after answering the bill, prayed for a decree that it had authority to take the property for the construction of its highway.

Samuel C. Schoyer was appointed master and examiner to take testimony. The master found that the proposed line, as originally located, cuts through the coach yard, repair yard and about twenty-four feet of the coal chute.

During the progress of the hearing, the defendant proposed a new location, nearer the river, lessening the injury to the plaintiff. This was done, however, without any action on the part of the board of directors. The master held that this change of location could be made by the court under the Act of June 19, 1871, regulating the "crossing of lines of railroads by other railroads."

The evidence as to whether defendant's proposed line would seriously interfere with the use of plaintiff's yard at present or in the future was conflicting. It was conceded that either route would require a rearrangement of yards, tracks and buildings.

As to the practicability of another route not across plaintiff's property, a witness for plaintiff said defendant could continue its line by an elevated railroad from Thirty-Third Street to the river at Forty-Seventh Street, but at greater cost.

A witness for defendant testified that such a route was "unreasonably practicable," as the line would cost \$400,000 without right of way.

The master held that "The defendant Company, under the right of eminent domain, may legally take and appropriate said land of the plaintiff Company, not necessary for its franchises, or the operation of its road." Exception. Sustained. *Assignment of error.*

Also that "There is no other reasonably practicable route on the said line on which defendant Company's road could be built to the terminal point, Negley's Run." Exception. Sustained. *Assignment of error.*

Also "That the coal chute erected by the plaintiff, as finished in 1883, is greatly in excess of the present or any probable future necessity (of plaintiff), and might be reduced on the river front one third." Exception. Sustained. *Assignment of error.*

Also that "The defendant Company's line could be built on the proposed new location without any interference to the plaintiff in its franchises or in the practical working or operation of its railroad; and said location will require the removal of but nine feet of its coal chute and a slight change of the position of the

tracks of the plaintiff's coach and repair yards, by moving them closer to the engine house, which would not lessen their capacity." Exception. Sustained. *Assignment of error.*

Also that "The trackage and siding facilities of plaintiff Company, already constructed, are ample for their present business; and those proposed to be constructed would be ample for their necessity for years to come." Exception. Sustained. *Assignment of error.*

The master recommended a decree that the defendant had lawful right to take a right of way twenty-four feet in width, across the property of the plaintiff between Forty-Third and Forty-Seventh Streets, for its branch railroad; and that it should be located upon the changed route. He further recommended that, upon the defendant filing a bond, the preliminary injunction should be dissolved.

The plaintiff filed, *inter alia*, the exceptions above mentioned. The court sustained the exceptions and made the injunction perpetual. The defendant thereupon appealed, assigning for error, *inter alia*, the action of the court in making the injunction perpetual, in sustaining the exceptions, and in not confirming the master's report and entering a decree as therein recommended.

Messrs. John McCleave and Geo. Shiras, Jr., for appellant:

The right of eminent domain is given over all lands, with the exceptions expressed of burial grounds, etc. It includes lands already dedicated to public use, expressly naming roads, streets and alleys.

Act of February 19, 1849, §§ 10, 18; *Cleveland & Pittsburgh R. R. Co. v. Speer*, 56 Pa. 332.

This right will be restrained when it is sought to apply it to lands already devoted to public use, in such manner as utterly to destroy or in a great degree defeat the prior public use.

Boston Water Power Co. v. Boston & W. R. R. Co. 23 Pick. 360; *Springfield v. Connecticut River R. Co.* 4 Cush. 68; *Packer v. Sunbury & Erie R. R. Co.* 19 Pa. 211; *Pa. R. R. Co.'s. App.* 93 Pa. 150.

The extent of the interference with the prior use must be such an interference as will sequester or deprive the plaintiff company of the whole or some essential part of its franchises.

Boston Water Power Co. v. Boston & W. R. R. Co. supra; *Philadelphia, W. & B. R. R. Co. v. Phila.* 9 Phila. 563; *Plan of Kensington*, 2 Rawle, 445; *Baltimore & H. Turnpike v. Union R. Co.* 35 Md. 230; *Morris & E. R. R. Co. v. Central R. R. Co.* 2 Vroom, 205; *N. Y. etc. R. R. Co. v. Boston, etc. R. R. Co.* 36 Conn. 196; *Little Miami, etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Baltimore & O. R. R. Co. v. P. W. & K. R. R. Co.* 10 Am. & Eng. R. R. Cas. 444; *N. Y. Cent. & H. R. R. Co. v. Metropolitan Gas Light Co.* 63 N. Y. 834; *Matter of Rochester Water Comrs.* 66 N. Y. 418; *Matter of Buffalo*, 68 N. Y. 187; *East St. Louis Connecting R. R. Co. v. East St. Louis Union R. R. Co.* 17 Am. & Eng. R. R. Cas. 163; *S. C.* 108 Ill. 265; *Chicago & A. R. R. Co. v. Joliet, etc. R. Co.* 14 Am. & Eng. R. R. Cas. 62; *Peoria, etc. R. R. Co. v. Peoria & F. R. R. Co.* 10 Am. & Eng. R. R. Cas. 129; *S. C.* 105 Ill. 110; *Peoria, P. & J. R. R. Co. v. Peoria & S. R. R. Co.* 66 Ill. 174; *North Carolina & R. R. Co. v. Carolina Cent. R. R. Co.*

83 N. C. 495; *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.* 11 Leigh, 75.

This includes the means necessary for the exercise of the franchise, but it does not include land, without which the franchise can be exercised.

Morgan v. La. 93 U. S. 217 (Bk. 23, L. ed. 860); *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. 468.

Aside from the general power given by the Act of 1849, there is also express authority for the appropriation here attempted. The Constitution and Acts of Assembly confer power upon railroads to intersect, connect with or cross other railroads.

Act of April 4, 1868, § 10 (2 Purdon, 12, 13, pl. 10); Act of June 19, 1871, § 2 (1 Purdon, 357); art. XVII, § 1 of the Constitution of 1874.

The right to cross the track necessarily involves the right to cross all lands necessary for the approach to such track. No restriction of this right can be based upon the dimensions of the land of the old company, or upon the use to which the tracks to be crossed may chance to be devoted. The right to cross also necessarily involves, to some extent at least, the right of exclusive occupancy, as for the support of embankments, or abutments, etc. Such crossing necessarily involves an appropriation of the land, for the tracks must be laid upon the land.

There are decisions construing and giving effect to similar statutes conferring the power to cross.

Philadelphia, etc. R. R. Co. v. Phila. 9 Phila. 563; *P. & E. R. R. Co.'s. App.* 16 W. N. C. 165; *Delaware & H. Canal Co. v. Village of Whitehall*, 10 Am. & Eng. R. R. Cas. 227; *Lake Shore & M. S. R. R. Co. v. Chicago & W. I. R. R. Co.* 2 Am. & Eng. R. R. Cas. 440; *East St. Louis Connecting R. R. Co. v. East St. Louis Union R. R. Co. supra*; *Chicago & A. R. R. Co. v. Joliet, L. & A. R. R. Co. supra*.

Messrs. Hampton & Dalsell, for appellee:

The lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings; and then only for crossing purposes, and not for exclusive occupancy.

1 Rorer, R. R. p. 295, note; *Pa. R. R. Co.'s. App.* 93 Pa. 151; *Cake v. Phila. & E. R. R. Co.* 87 Pa. 311; *Housatonic R. R. Co. v. Lee & Hud. R. R. Co.* 118 Mass. 391; *Boston & Maine R. R. Co. v. Lowell, etc. R. R. Co.* 124 Mass. 368; *Dublin & Drogheda R. Co. v. Navan, etc. R. Co.* 5 Irish Rep. Eq. 393; *Lake Shore & M. S. R. R. Co. v. N. Y. C. & St. L. R. R. Co.* 8 Fed. Rep. 858; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Cent. City H. R. Co. v. Fort Clark H. R. Co.* 81 Ill. 523; *Alexandria & F. R. Co. v. Alexandria, etc. R. Co.* 10 Am. & Eng. R. R. Cas. 23; *Hickok v. Hine*, 23 Ohio St. 523; *Contra Costa R. Co. v. Moss*, 23 Cal. 324; *Re Cleveland & P. R. R. Co.* 2 Pittsb. 348; *Pierce, R. R. p. 156*; *Springfield v. Conn. R. R. R. Co.* 4 Cush. 63; *Commonwealth v. Coombs*, 2 Mass. 492; *West Boston Bridge v. County Comrs.* 10 Pick. 271; *Boston Water Power Co. v. Boston & W. R. R. Co.* 23 Pick. 397; *U. S. v. Chicago*, 7 How. 195 (48 U.

S. bk. 12, L. ed. 665); *West River Bridge v. Dir.*, 16 Vt. 446; 1 Gill & J. 108, 150; *Bridgeport v. N. Y. & N. H. R. R. Co.* 36 Conn. 255; *Albany North. R. R. Co. v. Broienell*, 24 N. Y. 345; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480.

This rule applies not only to the right of way of the company, but also to the ground occupied by all the appliances necessary for the successful operation of the road.

Philadelphia, etc. R. R. Co. v. Williams, 54 Pa. 107; *Dublin & Drogheda R. Co. v. Navan, etc. R. Co. supra*; *Prospect Park & Coney Island R. Co. v. Williamson, supra*; *St. Paul Union Depot v. St. Paul*, 30 Minn. 359; *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. 325; *Boston & Maine R. R. Co. v. Lowell & L. R. R. Co.* 124 Mass. 368.

It would make no difference that all the land was not occupied for railway purposes at the time. The company has a right to consider the needs of the future, and to construct its road and make its plans with reference to those future needs.

Lake Shore & M. S. R. Co. v. New York, C. & St. Louis R. Co. 8 Fed. Rep. 858; *Philadelphia W. & B. R. R. Co. v. Williams*, 54 Pa. 107; *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. 325; *Chicago, B. & Q. R. R. Co. v. Wilson*, 17 Ill. 123.

The general grant of power to take lands does not include the power to take a street.

Cake v. Philadelphia & Erie R. R. Co. 87 Pa. 811.

To imply the power by necessary implication the necessity, on the appellant's part, to invade the appellee's property for the purposes of its switch, must be: 1, so absolute that the appellant's grant of power must fail if the invasion be prevented; and 2, the necessity must arise, from the very nature of things, without being created by the appellant itself, for its own convenience or for the sake of economy.

Pa. R. R. Co's. App. 93 Pa. 151.

The fact that every mill, furnace and manufactory sought to be reached directly by appellant Company can be reached by a short haul over the appellee's tracks, right to which is secured by the Constitution, would seem to be a conclusive answer to this plea of necessity.

Art. XVII., § 1, Const. 1874.

It is useless to attempt to discriminate, in the application of the rule, between land and a franchise. In this case the land is of no use without the franchise, nor is the franchise of any use without the land. The use of the land and the land to be used together constitute the franchise.

Cleveland & P. R. R. Co. v. Speer, and *Pa. R. R. Co's App. supra*.

The appellant's claim of corporate rights and privileges is to be construed most strongly against it; and whatever does not appear to have been unequivocally granted to it must be taken to have been withheld.

"This rule is to be held in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind."

Packer v. Sunbury & E. R. R. Co. 19 Pa. 211; *P. R. R. Co's App. supra*.

The cases cited in the argument for the appellant will, upon examination, be found to be generally either contests as to the occupation of

streets, as to crossings, or as to the occupation of land held by corporations not railroads, but of a private character. No one of them is authority for the proposition that exclusive occupancy by one railroad company of another railroad company's property laterally will be permitted, when such occupancy takes land actually in use and needed by the latter company.

When the bond was given the appellant acquired a *prima facie* right to enter on the located line described in the bond, but nowhere else.

Upon the bond being given, in due course of law, the grasp of the owner upon his property is loosened and the easement acquired passes, and he can only obtain payment on the bond.

Fries v. Southern Pa. R. R. & M. Co. 85 Pa. 74; *Beal v. Pa. R. R. Co.* 86 Pa. 509; *Wadhams v. Larkavanna & B. R. R. Co.* 42 Pa. 310.

The issue made up was as to the appellant's right to construct a branch railroad through the appellant's property, upon a route adopted by its board of directors, marked on the ground and in law already appropriated, if capable of appropriation. To that point the evidence was bound to be confined.

2 Dan. Ch. Pr. 850, 1; Story, Eq. Pl. § 257 *et seq.*

As a defendant cannot pray anything in his answer except to be dismissed the court, if he has any relief to pray, or discovery to seek, he must do so by a bill of his own, which is called a cross bill.

2 Barb. Ch. Pr. 126 (480); 2 Dan. Ch. Pr. 1649, note 3, and 1650; Story, Eq. Pl. § 391 *et seq.*

In the making of the original location the appellant's power was exhausted. This is apparent from the authorities already cited as to the effect of the filing of the bond.

A paper location, even if approved by the board, would have been no location in law.

New Brighton & N. C. R. R. Co's App. 105 Pa. 13.

Even under a new location, the appellant could acquire no rights, without a previous attempt and failure to agree with the land owner, and the tender and filing of a bond.

The second location is not claimed to be available without an entire rearrangement of the appellee's yard. A court of equity has no power to construct for it a new yard. An attempt upon the part of a court to exercise such functions was condemned by this court in the most unqualified terms in the case of *New York & E. R. R. Co. v. Young*, 83 Pa. 182.

The cases which decide that the company's delegated discretion as to such matters is controlling and conclusive are too numerous for citation. They will be found collected in 1 Wood, Railway Law, 645.

Crossings authorized by law refer to cases where both parties remain in the occupancy and use of their respective lines of railroad. And this is true whether the authority is to be derived from the Act of 1868 "to cross the track or tracks of any other railroad;" or from the Constitution "to cross any other railroad;" or as defined in the Act of 1871 to cross "the lines of railroads."

The appellant's so-called crossing involves the absolute destruction of certain of appellee's tracks and the exclusive occupancy of the land

on which they are laid, for a distance of 1,000 feet parallel with the appellee's railroad.

In a crossing case there is no question of the right, only of the mode or manner of its exercise.

The pleadings in this case present no question of crossing. The question presented is one of the right to appropriate in the first instance, and to occupy exclusively thereafter.

Mr. Justice Paxson delivered the opinion of the court:

This case has drifted from its moorings. Originally it was a bill filed in the court below by the Allegheny Valley Railroad Company against the Pittsburgh Junction Railroad Company to prevent said Company from taking, under the right of eminent domain, a portion of the property of the former Company.

The plaintiff is a railroad corporation owning and operating a line of railroad extending from Pittsburgh to Oil City, and, by means of various connections, to Buffalo, in the State of New York; and has owned and operated the same line for upwards of thirty years. The defendant is a Railroad Corporation created and organized under the Act of April 4, 1868, and its supplements. The plaintiff acquired the property in dispute long before the organization of the latter Company, and uses it for the purposes of its yard. It is occupied with numerous tracks, coal trestles, ice house, round house and other buildings convenient and necessary for its business.

The defendant is about constructing a railroad from its main line at the foot of Thirty-Sixth Street, in the City of Pittsburgh, extending along the left bank of the Allegheny River to a point at or near the mouth of Negley's Run; and also a like branch along the left bank of the Allegheny River to a point at or near the foot of Eleventh Street in said city. In pursuance of this object it surveyed and located a route through the plaintiff's yard, cutting through the coach yard, repair yard, and about twenty-four feet of the coal chute. Not being able to agree with the plaintiff, the defendant filed its bond in the court below in accordance with the Act of Assembly. Whereupon, the plaintiff filed this bill to restrain defendant from further proceeding to lay its tracks upon the location in question. The court below granted a preliminary injunction and, upon final hearing, made the injunction perpetual.

Upon the hearing before the master, the defendant abandoned its first location, and, without any action on the part of its board of directors, proceeded to relocate its road through plaintiff's yard, with a view to obviate some of the objections of the plaintiff, and lessen the injury and inconvenience to the business of the latter. The master proceeded to relocate the road, in accordance with the plan submitted by the defendant. He held that such action was justified under the Act of June 19, 1871, which provides that "If in the judgment of such court, it is reasonably practicable to avoid a grade crossing they shall, by their process, prevent a crossing at grade."

Upon exceptions to the master's report the court below held that the Act of 1871 had no application, for the reason that it referred to railroad crossings alone, while this was not a

case of crossing at all, in the proper sense of the term. In this we think the learned judge was clearly right. The Act of 1871 relates to crossing of lines of railroad by other railroads. There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through the plaintiff's yard, and the crossing of some of its yard tracks and switches which were merely incident to the use of its main line.

As was well observed by the court below: "The attempt is not simply to cross the yard and tracks for a common use, but absolutely to take from plaintiff a portion of its yard, for the sole use of the defendant. The issue is not in what mode the defendant should cross plaintiff's property, but solely whether it can cross at all. The right of a railroad company to corporate rights being established or admitted, the right to cross, if necessary or convenient in reaching its terminus, is absolute; and the court can only ascertain the mode. But the court must inquire and ascertain whether unnecessary injury will be done by crossing in the manner proposed, and also whether a grade crossing can reasonably be avoided; and decree accordingly." *Pittsburg & C. R. R. Co. v. Southwest P. R. R. Co.* 77 Pa. 178. No such issue was made in this case, and nothing suggested in the decree recommended by the master determines these questions."

We might well stop here and affirm this decree. We are in no doubt, however, as to the main question. While the franchises of a corporation are property and may be taken under the power of eminent domain, yet, when property has been already taken for one public use, by a corporation, it cannot be taken by another corporation for another use, except by express grant or by necessary implication. The principle is well settled that "The lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings; and then only for crossing purposes and not for exclusive occupancy." *Pa. R. R. Co.'s App.* 93 Pa. 150; *Cake v. Philadelphia & E. R. R. Co.* 87 Pa. 307; *Houston & R. R. Co. v. Ill. & H. R. R. Co.* 118 Mass. 391; *Boston & Maine R. R. Co. v. Lowell & L. R. R. Co.* 124 Mass. 368; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552; *St. Paul Union Depot Co. v. St. Paul*, 90 Minn. 350; *Central City Horse R. Co. v. Fort C. R. Co.* 81 Ill. 528; *Hickok v. Hine*, 23 Ohio St. 528.

This rule is not confined to the track or right of way of the company, but also to the grounds occupied by all the appliances necessary for the successful operation of the road. *Phila. W. & B. R. R. Co. v. Williams*, 54 Pa. 108; *Dublin & Drogheda R. Co. v. Navan, etc. R. Co.* 5 Irish Rep. Eq. 393; *Prospect Park & Con. I. R. R. Co. v. Williamson and St. Paul Union Depot v. St. Paul*, *supra*.

In *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. 325, it was said by Justice Agnew: "A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains or of leaving the track for the shifting of cars, or of repairs at the shops and yards, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience and

ability, and would be vain and nugatory." See also *Boston & Maine R. R. Co. v. Lowell, etc. R. R. Co. supra*.

It was urged, however, on the part of the defendant, that the yard of the plaintiff is larger than is necessary for its present use; and that it could be so rearranged as to accommodate defendant's tracks and without serious detriment to the plaintiff, either in the present or the future. The evidence upon this point is conflicting and we will not discuss it. The plaintiff contends that the arrangements of its yards cannot be changed without inconvenience and loss in the handling of its business; and that its area is not greater than will be required in the near future.

We are of opinion that a railroad company has a right to consider the needs of the future, and to construct its road and make its plans with reference to those future needs. Upon this point the sayings of McKennan, J., in *Lake Shore & M. S. R. R. Co. v. N. Y. C. & St. Louis R. Co.* 8 Fed. Rep. 858, is sound and sensible: "Every reasonable intendment must be taken in favor of the primary rights of the complainant at the points of the alleged conflict. No actual encroachment upon these rights can be sanctioned or allowed; and, in measuring their extent, there must be a liberal consideration of the future as well as the present necessities of the complainant; touching the use of the existing tracks; the construction of additional ones; the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business."

We are not embarrassed with the question that would arise if the defendant Company could not build its road without laying its track through the plaintiff's yard. The location claimed for defendant is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true it would be expensive, but it is a mere question of money and engineering skill.

It is not entitled to run through the plaintiff's yard, and cripple its facilities for handling its business, merely to save money.

Upon this point the language of our brother Gordon in *Pa. R. R. Co.'s App. supra*, is so clear and forcible that I may well repeat it here:

"This plea of necessity is so frequently made to cover infractions of both public and private rights, that *prima facie* it is suspicious and must be clearly scrutinized, especially when it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptance, that all Acts of incorporation and Acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be taken in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind. *Packer v. Sunbury & E. R. R. Co.* 19 Pa. 211. It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain; but in favor of such right there can be no implication, unless it arises from a necessity so absolute that without it the grant itself would be defeated. It must also be a necessity that arises from the very nature

of things, over which the corporation has no control; it must not be a necessity created by the company itself, for its own convenience or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with or extinction of previously granted franchises would be to subject these important legislative grants to destruction on a mere pretense; in fact at the will of the holder of the latest franchise."

The decree is affirmed and the appeal dismissed, at the cost of the appellant.

Mr. Justice Trunkey dissenting:

I shall only indicate the ground of dissent.

This decree restrains the appellant from entering upon or in any wise interfering with the property of the appellee, situate between Forty-Third and Forty-Seventh Streets, and from entering upon, working upon or in anywise interfering with any property of the appellee between Thirty-Ninth and Fortieth Streets, and on the south side of low water mark. It absolutely restrains the appellant from entering upon any part of said land to locate its road. It denies the appellant's right, even upon payment of damages, or giving security therefor. The bill prayed for such decree. It denies the appellant's right to enter at all. The opinion of the court below shows that the decree was intended to deny the right. That decree is now affirmed, and it matters not whether the location of the route was shifted after the filing of the bill, for the entry anywhere is restrained.

In this case the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land, extending from low water mark on the river to the hillside by the appellant, the whole of which land is not necessary for the use of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered.

Mr. Justice Clark concurred in the dissent.

William L. MOSEBY, *Piff. in Err.*,

v.

BEDFORD COUNTY BANK.

1. The **absence of entry of discount of renewal notes**, upon the books of a bank, will **not defeat an action** by the bank upon these notes.
2. The **evidence** in this case held sufficient to warrant a jury in finding that the **notes were accepted in renewal of former ones**.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Fulton County, to review a judgment on a verdict for plaintiff in an action of assumpsit upon several promissory notes. *Affirmed.*

At the trial before McClean, P. J., the following facts appeared:

On August 11, 1884, Moseby sent by mail to the Bank two of the notes in suit, for renewal of two notes held by the Bank, the parties to the original notes and to the renewal notes being the same, and the amount aggregating the same.

On August 27, 1884, John Dubois, the cashier of the Bank, wrote to Moseby as follows:

"The board requires me to ask a part payment of notes coming due; and therefore I will hold yours for a few days as they are and let you pay some on them, and give other notes in place of the ones you have sent us."

On September 13, 1884, the Bank suspended.

The plaintiff offered the notes, and evidence as to waiver of protest, and rested.

The defendant offered, *inter alia*, the following:

Discount book of plaintiff from 1877 to suspension (note Aug. 9, 1884, notes Nos. 12 and 13). No entries.

Journal of plaintiff, 1883-84, August 5, 1884, from that on, no such note.

W. L. Moseby called by defendant:

The note for \$900 and \$125 were sent there to be discounted by the Bank; I never received anything for them.

John Dubois, cashier of the Bank, called by the plaintiff, in rebuttal.

Shown note No. 12 for \$125, dated August 9, 1884, and note No. 13 for \$900, dated same day.

Witness. These notes were given for two other notes as renewals. They were sent to the Bank. My impression is that I wrote Mr. M. requesting that the notes be reduced. He did not reduce them; I think these were notes of \$950, and one for \$75 merged in them.

Cross examined. They were not accepted at the time when first received. I cannot speak positively whether the other notes were canceled. The books passed into the hands of the receiver September 13, 1884. I did not discount these notes on which suit is brought.

After the testimony was closed the plaintiff produced notes for \$950 and \$75, and offered to surrender them to the defendant.

The defendant presented *inter alia* the following points:

The court is respectfully requested to charge the jury (as to note No. 12 in plaintiff's statement for \$125, and note No. 13 for \$900) that it was the duty of the plaintiff, being a Bank and these notes being presented there for discount, to act upon them in the usual way; to present them to the board of directors for discount or refusal, and that the Bank could hold no interest in or ownership of them if discount was refused; and hence, would have no right of action upon them in this suit.

That there is no evidence in this trial that such notes were discounted.

That the letter of the cashier to the defendant, dated August 27, 1884, with the testimony of J. Dubois, the cashier, on the stand, the testimony of W. L. Moseby, the defendant, and the discount book of the Bank, all show that they were not discounted.

Answer. I decline to affirm these points, but leave the facts for your ascertainment and determination from all the evidence in the cause.

P.A.

Verdict for plaintiff and judgment thereon. The defendant thereupon took this writ.

The assignments of error were, *inter alia*, the answer of the court to the above points.

Messrs. W. Scott Alexander and R. Bruce Petrikin, for plaintiff in error:

The court submitted a question of law to the jury, which was clearly error.

Richardson v. Stewart, 2 Serg. & R. 84; *Commonwealth v. Henderson*, 1 Pen. & W. 401; *Keating v. Orne*, 77 Pa. 89.

Defendant was entitled to a clear and distinct instruction, so that the jury would not be misled or uninformed on this plain question of law.

Slaymaker v. St. John, 5 Watts, 27; *Geiger v. Welsh*, 1 Rawle, 349; *Noble v. McClintock*, 6 Watts & S. 58.

The first point should have been affirmed. The Bank cannot recover on notes not discounted or negotiated.

Nat. Bank of the Republic v. Perry, 2 W. N. C. 484; *Parke v. Smith*, 4 Watts & S. 287; *Byles*, Bills, top 607, note 1; *Witt v. Snyder*, 17 Pa. 82; *Harding v. Mott*, 20 Pa. 472.

It is error to submit a question to the jury, when there is no fact for them to consider.

Whitehill v. Wilson, 3 Pen. & W. 405; *Cook v. Mackrell*, 70 Pa. 12; *Elkins v. McKean*, 79 Pa. 498.

A party, upon request made to the court, is entitled to a clear and distinct instruction on the rule of law applicable to his case; and it is error in the court either to omit to give it, or give it in so imperfect a manner that the jury may be misled or left uninformed of the law.

Slaymaker v. St. John, 5 Watts, 27; *Geiger v. Welsh*, 1 Rawle, 349; *Noble v. McClintock*, 6 Watts & S. 58.

It is error to blend questions of law and fact and submit the whole to the jury.

Potts v. Wright, 83 Pa. 498.

The defendant has a full and complete defense to the original notes.

Messrs. John Stewart and Russell & Longenecker, for defendant in error:

"The mere possession of a negotiable instrument produced in evidence by the indorsee imports, *prima facie*, that he acquired it *bona fide*, for full value, in the usual course of business, before maturity and without notice of any circumstances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument, and proof that it is genuine (when, indeed, such proof is necessary), *prima facie* establishes his case; and he may rest it there."

1 Dan. Neg. Inst. § 812.

"When disputed facts are assumed in a point propounded to the court, the refusal to charge as requested is not error."

Cullum v. Wagstaff, 43 Pa. 300; *Pa. R. R. Co. v. McTigh*, 46 Pa. 316; *Gratz v. Beates*, 45 Pa. 505.

"The same defense which the defendant might make to an action by an indorsee of the note given by him, and the same requirement of proof, may be made by him in an action on a renewal of a former note, both notes being regarded as given upon the same consideration."

1 Dan. Neg. Inst. §§ 177, 179, p. 181, ed. 1884.

"If the consideration of the original bill or

note be illegal, a renewal of it will be open to the same objection and defense. * * * When a dealer at a bank pays off a note by renewal the debt is the same; the debt remains unpaid; the credit is extended."

Id. § 205, p. 210.

As bearing out this proposition we also refer to *Williams v. Thomas*, 1 W. N. C. 150; *Shrewsberry Sav. Institution's App.* 94 Pa. 309; *Brown v. Scott*, 51 Pa. 357.

Per Curiam:

We see no error in the answers to the points submitted by the defendant below. There was evidence showing that the notes in contention were accepted as a renewal of the former notes. It was not essentially necessary for the books to show an entry of the discount of the later notes. The case was submitted to the jury under proper instructions.

Judgment affirmed.

CENTRAL BANK OF PITTSBURGH,

Plff. in Err.,

v.

C. R. EARLEY.

1. A reserved point of law must state the facts out of which it arises.
2. Where the jury renders a verdict for plaintiff, by direction of court, subject to a reserved point of law which does not state the facts, and no exceptions are taken to the findings of fact contained in the verdict of the jury, the entry of judgment for the plaintiff, by the court, on the reserved point, will be presumed right and will be affirmed.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Elk County to review a judgment for the plaintiff on a point reserved in an action of partition. *Affirmed.*

The case, as it was presented to the court by the record, is stated in the opinion.

Messrs. George A. Rathbun, A. M. Brown, Thomas C. Lasear, J. McF. Carpenter and Richard A. Kennedy, for plaintiff in error.

Messrs. Jno. G. Hall, Henry Souther, C. H. McCauley and Charles B. Earley, for defendant in error.

Mr. Justice Clark delivered the opinion of the court:

This action of partition was brought in the Common Pleas of Elk County, by C. R. Earley, against W. B. Brickell and P. Y. Hite, to recover in severalty one third of certain lands, situate in said county, the title to which at the institution of the suit was held by the parties in common. The Central Bank of Pittsburgh, having afterwards acquired an interest in the property by purchase, was admitted to defend and the plea of *non tenent inasmul* was entered.

The verdict of the jury was for the plaintiff, the meaning and effect of which is that the parties hold together and in common, as set forth in the declaration; and that the plaintiff is entitled accordingly. The verdict was taken,

however, "subject to the opinion of the court on the question of law reserved, whether the plaintiff is entitled to have the undivided one third part of the lands set apart to him in severalty, or one undivided ninth part only."

The facts out of which this question of law is supposed to arise are not stated, and the proper determination of it depends, we think, wholly upon the facts. The contention of the defendant in error is that the original purchase of these lands by Earley was as a trustee for Brickell, Hite, Baldwin and himself; that Baldwin's interest was subsequently purchased for the joint benefit of the others; that the unpaid purchase money, secured by the mortgage, was (as between themselves) in fact a joint indebtedness of the four purchasers and afterwards of the remaining three; and that the \$25,608.21 paid by Earley on July 20, 1874, was his own money. Upon this assumption of the facts, it is argued that Brickell, Hite and Earley were, *inter se*, primary debtors for their own third of the purchase money only, and sureties for the other two thirds respectively; that the payment made by Earley, of his own money, would in equity be applied to his own proper debt rather than to the debt for which he was held as surety; and, as the record of the release and of the proceedings under which the marshal's sale was effected gave full notice, the release would operate as a discharge of the undivided third interest in the land, which at the time he himself owned, even as against the purchaser at that sale.

On the other hand, it is contended by the plaintiff in error that Earley's original purchase was on his own account and in his own interest; that the mortgage was given for his indebtedness; that the conveyances to Brickell and Hite are absolute in form; contain no condition or provision imposing any share of this burden upon them; that the release in question was therefore just such a discharge as in the law Earley was bound to provide for the benefit of his grantees; and as there was no specific application of the money at the time to any particular third interest in the property, Earley has no equity which would now enable him to apply the money specifically in his own relief.

The only bill of exceptions in this case is to the ruling of the court on the reserved question; and that, it is plain, does not bring up the testimony taken at the trial. We cannot draw conclusions of fact from the evidence, for the reason that the evidence is not before us. Every reservation of a question must for this reason place distinctly upon the record, not only what the point is which is reserved but the state of facts out of which it arises; this is essentially necessary to enable the parties to except to it and to have it reviewed. *Ferguson v. Wright*, 61 Pa. 258.

Without this a judgment *non obstante verdicto* cannot be entered.

The facts must be admitted of record by the parties or found by the jury. *Clark v. Wilder*, 25 Pa. 314; *Ferguson v. Wright*, *supra*.

When they are stated by the court, as part of the record, and no exceptions taken, it will be presumed that the parties have so agreed, and that the statement is true. *Ins. Co. of Pa. v. Phoenix Ins. Co.* 71 Pa. 31.

The rule is well stated in *Miller v. Hershey*, 59 Pa. 64, as follows: "A question of law cannot arise in a judicial sense without facts. The facts out of which the question springs must be seen in the record proper, or in the superadded statute record furnished by a bill of exceptions."

This is quite as true in the case of reserved questions of law as in other cases, and has been stated in *Irwin v. Wickersham* and *Wilson v. The Tuscarora*, 25 Pa. 316, 317, and in *Winchester v. Bennett*, 54 Pa. 510.

There are but three modes in which facts arising upon the evidence can find their way into the record: by the finding of a jury, which is a special verdict; by the agreement of the parties, called a case stated; and by the certificate of the court, contained in a bill of exceptions. It is the last mode which is directed by the statute in the case of reserved points.

In the case at bar, the question as to the measure of the plaintiff's recovery is presented, as it were, upon the facts proved or upon the whole case; and this it has been repeatedly said is not 'good.' *Roberts v. Hopkins*, 11 Serg. & R. 202; *Clark v. Wilder*, *Irwin v. Wickersham* and *Wilson v. The Tuscarora*, *supra*.

The court gave the jury binding instructions to find for the plaintiff, which, as we have said, under the pleadings was equivalent to a finding that one third should be set apart to the plaintiff in severalty. To this there was no exception; and as there is nothing before us to show that the judgment rendered by the court on the point reserved was wrong, the presumption is that it was right. *Leach v. Ansbacher*, 28 Legal Int. 277; *Miller v. Hershey*, 59 Pa. 64.

The judgment is affirmed.

Andrew FRIEDEBORN, *Plff. in Err.*,

v.

COMMONWEALTH of Pennsylvania.

Under the Act of 1794, prohibiting the performance of "any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday," there can be only one penalty for violation of the Statute, on one day, whether the act or acts which constitute such employment are one or many. (*Crepps v. Durden*, 2 Cowp. 640, followed.)

(Decided October 4, 1886.)

ERROR to Common Pleas of Montgomery County, to review a judgment affirming the judgment of a justice of the peace, on *certiorari*, imposing six penalties for violation in one day, of the Sunday Act of April 22, 1794. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. Wright Apple and Irving P. Wanger, for plaintiff in error:

From the time of the passage of the Act of April 22, 1794, until a very recent date, it was assumed by the judges of all our courts, the editors of all our digests of the laws and the legal profession generally, that one penalty only could be incurred in one day for exercising a person's business on Sunday.

PA.

In *Commonwealth v. Jeandell*, 2 Grant, 506, *Justice Thompson* says: "It has been decided that one penalty covers the combined infraction of a whole day."

This conclusion was based upon the decision of *Chief Justice Mansfield* in the case of *Crepps v. Durden*, 2 Cowp. 640, interpreting the Statute of 29 Charles II, chap. 7.

The distinction attempted to be drawn by *Judge Pearson*, in *Duncan v. Commonwealth*, 2 Pearson, 213, does not exist, as will be found by a comparison of the statutes.

The intention of the Legislature was to designate the performance of worldly employment and not the separate acts committed in that performance as constituting one of the offenses. "If any person shall do or perform any worldly employment, etc., or shall use or practice any unlawful game," etc., etc., thus stating the performance of worldly labor as one of the offenses, the use of any game, etc., as another; hunting, as another and so on. Any other construction leads to an absurdity.

Mr. Isaac Chism, for defendant in error: The title of the Act is "For the Prevention of Vice." If but one penalty is imposed, the Act does not prevent; it licenses the violation of the Sabbath.

Penal statutes must not be construed so strictly as to defeat the obvious intention of the Legislature.

U. S. v. Wiltberger, 5 Wheat. 76 (18 U. S. bk. 5, L. ed. 37.)

In construing statutes, penal as well as others, an interpretation must never be adopted which will defeat the evident purpose of the law, if it will admit of any other reasonable construction.

The Emily and The Caroline, 9 Wheat. 381 (22 U. S. bk. 6, L. ed. 116).

Such construction ought to be given as will not suffer the statute to be eluded.

Moore v. Hussey, Hobart, 98; *People v. Utica Ins. Co.* 15 Johns. 357.

There can be no rule which requires courts so to understand a penal law as to involve an absurdity or to frustrate the evident design of the law giver.

American Fur Co. v. U. S. 2 Pet. 358 (27 U. S. bk. 7, L. ed. 450).

All statutes, whether remedial or penal, should be construed according to the apparent intention of the Legislature, to be gathered from the language used, connected with the subject of legislation, and so that the entire language shall have effect if it can without defeating the obvious design and purpose of the law. And in so doing the application of common sense to the language is not be excluded.

Opinion of the Judges, 22 Pick. 571; *Commonwealth v. Loring and Reed v. Davis*, 8 Pick. 370, 514; *U. S. v. Wiltberger*, *supra*; *Rawson v. State*, 19 Conn. 299.

Reiff v. Commonwealth, 42 Legal Int. 90, follows *Commonwealth v. Duncan*, 2 Pears. 213, and there are no cases in Pennsylvania in conflict with them.

Commonwealth v. Jeandell, 2 Grant, 506, was the faintest shadow of a *dictum*, not a decision upon a point.

The Act 29, Car. II, was passed in 1678. The first Pennsylvania Act was the Act of

1705. It is in phraseology as to the point in question almost a copy of 29 Car. II.

Crepps v. Durden was decided in King's Bench, Trinity Term, 17 Geo. III, that is to say, in the year 1777. The Pennsylvania Legislature nine years thereafter, in passing the Act of 1786, which is the same in phraseology as to the point in question as the Act of 1794, purposely changed the wording of the Act of 1705, in order that the decision in *Crepps v. Durden*, should not be applicable to our statute.

"The form which the Legislature uniformly adopts, when the intention is that for each and every violation of an Act of Parliament there shall be a distinct penalty, is to impose a penalty by express words for each and every offense."

Atty-Gen. v. McLean, 1 Hurl. & C. 750.

The following cases decided that where there were also several classes or descriptions of offenses mentioned in the Act, the words "for every such offense" and "each offense" meant every repetition of any one of the classes, and did not refer to a class as a whole:

Commonwealth v. Borden, 61 Pa. 277; *Commonwealth v. Cook*, 50 Pa. 207; *Reg. v. Scott*, 83 L. J. M. C. 15; *Re Hartley*, 31 L. J. M. C. 232; *Ex parte Beal*, L. R. 3 Q. B. 387; 1 Smith, L. Cas. part 2, p. 1079; *Suydam v. Smith*, 52 N. Y. 888, 889; *People v. N. Y. Cent. R. R. Co.* 18 N. Y. 79; *Johnson v. Barclay*, 1 Harr. (N. J.) 1; *Pittsburgh, etc. R. Co. v. Moore*, 33 Ohio St. 384; *S. C. 81 Am. Rep. 543*; *Johnson v. Hud. R. R. Co.* 2 Sweeney, (N. Y.) 310.

As to the importance of enforcing the laws for the observance of Sunday, see *Omit v. Commonwealth*, 21 Pa. 435; and *Commonwealth v. Wolf*, 8 Serg. & R. 50.

Mr. Justice Gordon delivered the opinion of the court:

There are but few of our statutes which in principle are of more importance than the Act of the 22d of April, 1794, commonly called the "Sunday Act," in that it recognizes the first day of the week as a Sabbath of rest for the well disposed and religious people of our Commonwealth; and we can entertain but little respect for those who wilfully and persistently violate its prescriptions. Against all such its penalty should be enforced until they are taught that a respect for its provisions may, at least, be profitable from a pecuniary point of view.

The fine imposed is but light; far too light, indeed, to prevent the violation of the statute by our great corporations and heavy capitalists who regard their own profit rather than the public welfare; but the correction of this defect in the law is not within our province; we can but interpret the Act as we find it.

In the case in hand it appears from the record before us that the plaintiff in error, Andrew Friedeborn, was, on the 7th of October, 1884, arrested and brought before John J. Derr, a justice of the peace for the County of Montgomery, and convicted of six several violations of the Sunday Law on one and the same day, so that the fines altogether amounted to \$24.

The charge was of selling to six different persons small quantities of cigars, tobacco, cider, spruce beer and candy; and in each case the fine of \$4 was imposed.

On *certiorari* to the common pleas these convictions were affirmed. In this we think there

was error. The Act of 1794 imposes but one penalty; a fine of \$4 for the violation of the Sabbath Day; and as in law, unless otherwise provided by the Legislature, there are no fractions of a day, it is clear that, by the same person, there can be but one such violation, and consequently but one fine.

Moreover, the offense consists in "performing any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday," so that there is no prescription of any one or more distinct act or acts, but of "any employment or business," whether the act or acts which constitute such employment are one or many.

Friedeborn's business was that of a vendor of tobacco, cigars, etc., and he was not less a vendor, although on Sunday the fifth of October, he sold but one cigar; nor would he have been more so had he on that day sold all the goods of which he was possessed. In either case he was engaged in his worldly employment, and that employment could not be changed or its character altered by the number of articles sold or the time required for its performance. Nor is the construction which we thus put upon our statute a new one, for we have a ruling on the British Statute, which, so far as the offense charged in the present case is concerned, is precisely similar to our own.

The case to which we refer is that of *Crepps v. Durden*, 2 Cowp. 640. The action was trespass brought against a justice of the peace for issuing four warrants for the collection of four several fines imposed on the plaintiff on conviction under the Statute of 29 Car. II, chap. 7, for selling small hot loaves of bread on the Lord's Day, commonly called Sunday. These four several acts of selling the loaves or rolls were done on the same Sunday, and it was contended that under the Act there could be but one conviction; in other words, that the four sales constituted but one offense, and so it was held in the King's Bench. Lord Mansfield delivering the opinion of the court, said: "The first question is whether any objection can be made to the legality of the convictions before they were quashed. In order to see whether it can we will state the objection; it is this: that here are three convictions of a baker for exercising his trade on one and the same day; he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the Act of Parliament the offense is, 'exercising his ordinary trade on the Lord's Day;' and without any fractions of a day, hours or minutes. It is but one entire offense whether longer or shorter in point of duration; so whether it consist of one or many particular acts. The penalty incurred by this offense is five shillings. There can be but one entire offense on one and the same day."

It will be seen that the case in hand and that cited are so nearly alike that were it a decision of this court it must be regarded as a final determination of the contention; as it is, we regard the reasoning as so conclusive that we do not hesitate to adopt it.

The learned judge of the court below seems to have fallen into the error found in the case

of *Duncan v. Commonwealth* (Com. Pleas of Dauphin County), 2 Pear. 213; that is to say, that the Act of 1794 and that of 29 Car. II. are in language essentially different. This is a mistake; at least so far as a case like that in hand is concerned, as will readily be discovered by a comparison of the two Acts.

The first reads: "No tradesman, artificer or any other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's Day;" the other: "If any person shall do or perform any worldly business whatsoever on the Lord's Day, commonly called Sunday."

Now, as the plaintiff in error was in fact convicted of exercising worldly business in his ordinary calling on the Lord's Day, it is clear that the offense would fall as well within the Act of 29 Car. II. as within that of 1794. It is true, the latter Act embraces much more than the former, for while the one prohibits only such work or labor as is done "in the work of their ordinary calling," the other includes "any worldly employment or business whatsoever;" and this is the material difference between the two statutes, if we except the prohibition of amusements and games. *Kepler v. Keefer*, 6 Watts, 231; *Johnson v. Commonwealth*, 22 Pa. 102.

The mistake made in the court below was in holding that the Act of 1794 made every act done in any worldly employment or business a distinct and separate offense; but it does nothing of the kind; for the offense, as we have shown and as is apparent from the face of the statute, consists in the exercise of an employment or business; and either may include one or one thousand separate acts. So, in the case cited (2 Pearson); it has of necessity to be admitted that a mechanic in his shop or a farmer on his farm may work all of a Sunday, and yet be guilty of but a single breach of the statute. The farmer may plough, reap or sow, the mechanic hammer, plane or saw, through the entire day, and he is guilty of but one infraction of the law; but the merchant, although like them engaged in a single trade or calling, may be guilty of several such infractions; not because he sells several things to one person but because he sells those several things to several persons. We cannot adopt an interpretation of this kind, not because the law, were it as stated, would not be just and wholesome, but because such an interpretation is not admissible as the law now stands.

The judgment of the court below is now reversed as to all the fines against the plaintiff in error, except the first single fine of \$4.

Alexander CROW, *Plff. in Err.*,

Wilson GREENE, *et al.*

A subscriber who has not paid his subscription to the stock of a proposed corporation, which has never been chartered, cannot maintain an action of assumpsit against the other subscribers on a contract made with him by all the subscribers, including himself, in the name of the proposed corporation, for the purchase of his land in

consideration of the stock subscribed for by him and an additional sum in cash.

(Decided 1886.)

ERROR to the Common Pleas of Fayette County, to review a judgment of compulsory nonsuit against the plaintiff in an action of assumpsit. *Affirmed.*

This was a suit by Alexander Crow against Wilson Greene and forty-one others, partners under the name and style of the Gallatin Furnace & Mining Company, to recover damages for breach of a contract to purchase real estate.

The defendants pleaded "no partnership" and "*non assumpsit*."

At the trial before Inghram, P. J., the following facts appeared from the evidence for the plaintiff:

In the year 1876 Judge Alexander Crow was the owner of 178 acres of land in Nicholson Township, Fayette County, Pennsylvania, which was partly underlaid with valuable coal veins and with iron ore. In August, 1876, the defendants, below and in error, associated themselves together for the purpose of buying the judge's farm and establishing a blast furnace on it. Their intention was to include Judge Crow in their association, buy his farm at a certain figure, procure a charter of incorporation, issue stock and perhaps bonds, and pay the judge for his farm, in part at least, with stock or bonds.

The plan was executed to the extent of making Judge Crow an associate with them, securing his subscription to \$5,000 of the stock, which it seems he never paid, and making, executing and delivering to him a written agreement to buy his farm for \$23,000. This article of agreement was not under seal. It was dated August 31, 1876. It was signed by Alexander Crow of the first part and A. W. Boyd, as President of the Gallatin Furnace & Mining Company, of the second part.

At the time of the execution of this article of agreement Judge Crow was largely in debt. Judgments to the amount of from \$15,000 to \$18,000 stood upon the dockets of Fayette County against him, and some of them were pressing him very hard. It was supposed by the parties to the article of agreement that Judge Crow's debts would not exceed but would certainly come considerably under \$18,000. It was therefore provided in the article that the parties of the second part should immediately proceed to pay and satisfy the liens against Judge Crow; that they would pay him the difference between the sum requisite to clear the dockets and \$18,000 in cash, and then deliver him \$5,000 in stock of the company. Judge Crow subscribed for an additional \$1,000 of stock, but it seems did not pay it. A considerable amount of the other subscriptions was collected from the other stockholders.

The dower of two widows was included in the liens contemplated by this article, and it was expressly provided that the parties purchasing the land were to assume and pay all interest upon all liens and charges upon it accruing after August 31, 1876, the date when it was executed. This interest so accruing after August 31, 1876, was not to be deducted from the \$23,000, but was to be provided for by the

purchasers as their own debt. If Judge Crow's record debts should turn out to be in excess of \$18,000, then the judge was to receive no cash from the defendants, but was to accept stock of the company at par for the difference between the amount required to pay his debts and \$23,000. The par value of each share of stock was \$100.

As soon as the article of agreement was signed, the parties thereto of the second part, who were the defendants, entered upon the judge's farm, in pursuance of their rights under the article; surveyed it, located their blast furnace, assumed control of the fall farming operations; and in short, carried into actual execution all the provisions of the article relating to their rights in the premises. This was all done under the eye and with the knowledge and consent of Judge Crow. Steps were taken also to procure letters patent, but the incorporation of the company was never completed.

Michael W. Franks, was the treasurer of this prospective corporation. He was one of the defendants, and in pursuance of his duties as one of the purchasers of the Crow farm, he repaired to Uniontown with money to carry out the requirements of the article concerning the judge's debts.

These transactions, in execution of the article of agreement with the plaintiff, were all authorized and carried out by the defendants, after consultation and consideration among themselves, most of which deliberations are shown by regular minutes of meetings, kept at the time, and produced in evidence at the trial.

The parties of the second part decided to avail themselves of the clause in the article contemplating the postponement by them of the payment of the record liens, upon their immediate assumption as their own proper debt of all interest demandable after August 31, 1876. Franks therefore had instructions to pay interest on the judgments. He consulted a lawyer who advised him not to pay it. He did not pay anything on the judgments or liens, nor did any of the defendants ever do so.

Judge Crow's creditors had understood during the latter part of the summer of 1876 that he was perfecting arrangements to pay his debts; and they relaxed their compulsion upon him. As time passed, however, and nothing was done towards the liquidation of their claims, they renewed their process; and on the 5th of September, 1877, his farm of 178 acres, for which the defendants had agreed to pay him \$23,000, was sold under the sheriff's hammer for \$8,500. Whereupon, he brought this suit.

The plaintiff closed and the defendants, offering no evidence, moved for a compulsory nonsuit. This the court granted, saying: "In the case on trial it seems that the plaintiff as well as the defendants were partners in the same company; and it is very well settled that one partner cannot sue his copartner in an action of this kind; and we think the motion for a nonsuit ought to be sustained. We have therefore made an order directing judgment of nonsuit to be entered against the plaintiff, with leave to the plaintiff to move to take off such judgment at next term."

The plaintiff subsequently moved to take off the nonsuit; but the court overruled the motion. Thereupon, the plaintiff took this writ,

assigning as error the entry of the nonsuit and the refusal to take it off.

Messrs. R. P. Kennedy and Edward Campbell, for plaintiff in error :

Suppose the plaintiff to have been a partner with the defendants; it is submitted to this court, as it was maintained in the court below, that there is no rule of law and no reason preventing the recovery of plaintiff's entire claim.

Mr. Lindley, in his work on Partnership *p. 728, says : "Passing now to the subject of actions between persons who are partners in the full and proper sense of the word (this citation certainly concedes to the defendants as much as they can claim), it is proposed to inquire under what circumstances an action by one against the other will lie, and under what it will not. With reference to this inquiry it will be found useful to keep constantly in mind these questions, viz.: First, Is any matter of account involved in the dispute to which the action relates? Second, Will the damages sought to be obtained, belong, if obtained, to the firm? Third, Will such damages have to be paid out of a fund to which the plaintiff must himself contribute?"

"If these three questions can be answered in the negative, *i. e.*, if the action can be properly tried and decided wholly irrespectively of the state of the accounts between the parties, and if the damages sought will, when recovered, belong not to the firm (including the defendant to the action) but exclusively to the plaintiff, and if he will not have to contribute to his own payment, then an action will lie, notwithstanding the parties to it are partners, and the matter relates to some partnership transaction."

On page 730 Mr. Lindley explains: "Third, an action for damages for the breach of an express agreement, entered into by one partner with another, will lie if the damages when recovered will belong to the plaintiff alone."

On page 731 he says that "Generally an action may be brought for damages sustained by any breach of an express stipulation by one partner with his copartners, if it is so framed as to admit of an action by some or one only of the partners against the partner complained of; and the damages will, when recovered, not belong as much to himself as to the plaintiffs;" and gives instances of cases where such actions may be maintained by one partner against his copartners, as follows, viz.: 1. An action for not rendering accounts and dividing profits. 2. An action for a penalty stipulated to be paid in case of a breach of agreement. 3. An action for rent covenanted to be paid. 4. An action for not indemnifying the plaintiff against a debt. 5. An action for not putting the plaintiff in funds to enable him to defray expenses as agreed.

Mr. Lindley further says: "Fourth, if a person agrees to become a partner with others and to furnish a certain amount of capital, and he makes default, they can sue him at law for damages, although he as well as they was to have had an interest in what he undertook to furnish."

No other doctrine is maintained by any authority, and this clearly authorizes the plaintiff to demand his damages from the defendants; first, because they are for the breach of an

agreement made with him; second, because no matter of account is involved in the dispute to which the action relates; third, because the damages, if obtained, will not belong to the partnership, but to the plaintiff individually; and fourth, because the damages will not be payable out of any fund to which the plaintiff himself must contribute.

"As wrongs, unconnected with fraud, in the settlement of contracts or accounts are in their nature personal, partners will have the same remedies between themselves in respect to these matters as other persons have."

Coll. Partn. p. 346, § 392.

"Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either assumpsit or covenant, as the case may require, will ordinarily lie to recover damages for the breach thereof."

Story, Partn. p. 350, § 218.

No other doctrine is known to the law, and the following cases show its application:

Kilpatrick v. Penrose Ferry Bridge Co. 49 Pa. 118; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Scotts App.* 88 Pa. 178.

In the case of *Wicks v. Lippman*, in the Supreme Court of Nevada decided in October, 1878, 13 Nev. 499, *Mr. Chief Justice Hawley*, delivering the opinion of the court, says that an action at law can be maintained by one partner against another, to recover a balance due, whenever the adjustment of the matter in controversy does not involve the settlement of any partnership account:

Pars. Partn. 284; *Adams v. Funk*, 53 Ill. 219; *Russell v. Grimes*, 46 Mo. 411.

That the measure of damages is the price which the defendants agreed to pay for the land, the plaintiff in error considers settled by the decisions of this court.

In *Tripp v. Bishop*, 56 Pa. 424, 427, *Mr. Justice Strong* delivering the opinion of this court says: "If the contracting parties have done all that the statute requires (*i. e.*, to comply with the Statute of Frauds) there is no reason why a purchaser should not be held to pay what he promised; or, in other words, why the price he undertook to pay is not the measure of damages for this breach of his contract."

To the same effect are *Dentler v. Brown*, 11 Pa. 295; *Garrard v. Lantz*, 12 Pa. 186, 192, 198; *Addams v. Tutton*, 39 Pa. 447, and *Zimmerman v. Galbraith*, 82 Pittsb. Legal Jour. 446.

Messrs. Boyle & Mestrezal, for defendants in error:

Mr. Lindley says that an action between partners will lie if the damages when recovered will belong to the plaintiff alone, but will not lie if the damages have to be paid out of the fund to which the plaintiff must himself contribute. In the case at bar the plaintiff, being a partner, would be liable to contribute his share of any damages that were sustained by a breach of this contract; hence, under the authority cited, he cannot maintain this action.

It is well settled that one partner cannot sue his copartners in an action at law, except in account render, for or about a partnership adventure, unless they have settled their accounts and struck a balance, or the partnership was limited to a single transaction.

Mr. Smith, in his work on Mercantile Law, p. 70, states the principle and then gives the following reason: "The reason for which seems to be that a court of law could not in such cases do complete justice, since the forms of an action would not permit it to enter on such an investigation of the entire state of the partnership accounts as would be necessary in order to ascertain the fair and real claims of the contracting parties."

In this State this principle has been established and reiterated in all the cases.

Ozeas v. Johnson, 1 Binn. 191; *Andrews v. Allen*, 9 Serg. & R. 241; *McFadden v. Hunt*, 5 Watts & S. 463; *Hall v. Logan*, 63 Pa. 335; *Kyerr v. Hoffman*, 65 Pa. 126; *Leidy v. Messinger*, 71 Pa. 177; *Schnatterly v. Crow*, 2 Lan. Law R. 126.

Mr. Justice Green delivered the opinion of the court:

Conceding that although none of the defendants except Boyd signed the agreement in suit, they are nevertheless to be treated as partners because they were members of a proposed corporation which never organized; yet they were partners, if at all, jointly with the plaintiff. He was one of the largest subscribers to the stock of the company and represented a much larger proportion of the capital of the concern than many of the defendants.

The contract was for the purchase of property to be used for the purposes of the company or partnership. The business to be carried on upon the premises was a joint or partnership business. Upon the theory of a partnership, the plaintiff was certainly liable to contribute, in proportion to the extent of his interest, to whatever funds were required for the uses of the partnership. If the firm owed debts, we know of no reason why he should not ratably contribute to their liquidation. On the other hand, if they realized profits, it is equally certain he would be entitled to his proportionate share.

The theory upon which the action is based is that there was an actual partnership in legal effect, and without that theory of course there could be no recovery. But if there was a partnership, we find nothing in this record to show that the ordinary law of partnership is inapplicable to the relations of these parties to each other. The obligation to share losses as well as gains, to contribute jointly with the others to the funds requisite to meet the liabilities of the partnership, is one of the most important and fundamental duties of the relation. This being so we cannot understand why, if a recovery is had in this action, the plaintiff should not be required to contribute to the payment of the money recovered. We are not informed of any fact which relieves him of that duty. No authority has been cited to show that in such a case that duty does not arise. The decisions cited by the learned counsel for the plaintiff do not touch this question.

The citation from Lindley expressly excepts the case of a recovery of damages which must be paid out of a fund to which the plaintiff must contribute. It is entirely undisputed that there has never been any settlement of partnership accounts between the plaintiff and defendants. The latter, if liable at all, are only liable

because they are members of a partnership known as The Gallatin Furnace & Mining Company. It is that company only that is named in the contract upon which the suit is brought. None of the defendants are named in that contract and none of them signed it or purported to sign it.

But if the defendants are liable because they were subscribers to the stock of that company, the plaintiff is liable for the same reason. Suppose, then, a right of recovery be conceded in this case; for what amount shall the verdict be rendered? If for the whole amount of the contract price, most certainly the defendants could file a bill against the plaintiff, to compel him to contribute his proportion.

But why should these defendants, who are a part only of the members of the partnership, pay to the plaintiff, who is also a member, the whole of a debt for the payment of which he is jointly liable with them? Such a result would certainly be inequitable and contrary to every principle and precedent in the law of partnership. If, on the other hand, the verdict should be rendered only for such proportion of the whole amount of the purchase money as the defendants ought to pay, what is the amount of that proportion? That, of course, would depend upon the adjustment of partnership accounts. It is alleged that the plaintiff contributed nothing to the partnership. Mr. W. Franks testified: "The money had been collected of the stockholders. I don't know that Judge Crow ever paid any of his subscription. I don't think he ever paid the extra thousand. I would have known if he had. Judge was present at the meetings and was recognized as a stockholder."

It appeared from other testimony that a considerable amount of the subscriptions had been collected from the stockholders other than the plaintiff. How much, then, of the present liability should be paid by the defendants and how much by the plaintiff? Who can tell, or how can that matter be determined? Of course it can only be determined by a bill in equity, for the settlement of the partnership affairs and the adjustment of the accounts between the partners. But there is no pretense that anything of that kind has ever taken place between these parties. We find it impossible to conceive of any reason why that course should not be adopted in the present case.

There never was a contract by which these particular defendants agreed to pay to this particular plaintiff any sum of money whatever for any purpose. Their liability as individuals to make any such payment is a derivative liability, resulting from a joint relation with the plaintiff which imposes the same liability upon him. It is not necessary to enlarge upon this subject. The case comes within the perfectly familiar rule that one partner cannot sue another partner for a partnership transaction, except by bill in equity or action of account render. Some of the Pennsylvania authorities are the following: *Ozens v. Johnson*, 1 Binn. 191; *Hall v. Logan*, 34 Pa. 331; *McFadden v. Hunt*, 5 Watts & S. 468; *Leidy v. Messinger*, 71 Pa. 177; *Schnatterly v. Crow*, 2 Lan. Law R. 126.

Judgment affirmed.

PENNSYLVANIA R. R. CO., *Appl.*,
v.

George F. MISH *et al.*

1. A railroad company cannot appropriate and use a street or public highway for the laying of the tracks of its trunk line, switches, sidings or branches, unless the power is given expressly or by necessary implication.
2. A statute which authorized a railroad company to take lands for the construction of a railroad, with no other provision as to public highways except a requirement compelling it to make and keep in repair good and sufficient passages at the crossings of the highway, will not authorize the occupation of a public road longitudinally.
3. A statute conferring authority upon a railroad company to take lands, tenements or property necessary to straighten or improve the lines of railroads leased or owned, and the construction of the needful appurtenances thereto, does not extend the branching powers of the original road to its leased lines, or authorize the taking of a public street for tracks from the main lines to mills and factories.
4. A party who is specially injured is entitled to an injunction to restrain a nuisance, without proving the amount of damage.
5. One who has his dwelling fronting on a street unlawfully occupied by a railroad company, held, to be specially injured.
6. A wrong doer may not set off benefits to prevent the injured party obtaining relief.
7. Bill in equity to enjoin construction of railway track on highway, and for other relief, will support decree requiring removal of track laid after notice of the proceedings.

(Decided October 4, 1886.)

APPEAL by defendant, from a decree of the Court of Common Pleas of Dauphin County, in favor of complainants, property holders on a street, in a suit to restrain a Railroad Company from appropriating a public street for its tracks, and to compel it to take off tracks as laid. *Affirmed.*

The assignments of error specified by the appellant were in the action of the court:

1. In holding that plaintiffs had such standing as to entitle them to remedy by injunction, having neither alleged in their bill nor proved any special damage or irreparable injury.
2. In holding and decreeing that the defendant had not the power, under its charter and supplements, to appropriate the street as it did.
3. In decreeing the final injunction against the defendant.
4. In so shaping the decree as to require the defendant to take up the siding and tracks as laid, there being no prayer for such a decree in the plaintiffs' bill.

5. In stating that the complainants have sustained irreparable injury, there being no such allegation in the bill.

Messrs. Hall & Jordan, for appellant:

The remedy here sought is never granted, unless there was a clear right which was violated, resulting in irreparable injury; and where there is no adequate remedy at law.

Hagner v. Hayberger, 7 Watts & S. 104; approved in *Gray v. O. & Pa. R. R. Co.* 1 Grant, 412; *Richard's App.* 57 Pa. 105; *Hilliard, Inj.* 271; *Adams, Eq.* 495; *Fonb. Eq.* 51; 2 Story, *Eq.* § 925 *et seq.*

An injunction against such an erection will be refused, upon the principle that private advantage must yield to public benefit.

Daughtry v. Warren, 13 Rep. 667; *Wells v. Somerset & K. R. R. Co.* 47 Me. 345; *Harrison v. Brooks*, 20 Ga. 537; *Barnes v. Calhoun*, 2 Ired. Eq. 199.

That the complainants have no standing to sustain an injunction, see *Snyder v. Pa. R. R. Co.* 55 Pa. 340; *Duncan v. Pa. R. R. Co.* 94 Pa. 485.

They have sustained no such special damage as would enable them to maintain an injunction.

Heller v. Atchison, Topeka, etc. R. R. Co. 7 Am. & Eng. R. R. Cas. 636.

"The mere existence of a steam railroad, together with the passing of trains thereon, is not *per se* a nuisance."

Hentz v. Long I. R. R. Co. 13 Barb. 646.

"Nor is the tunneling in a street by a railroad company considered as a departure from the original public use, entitling the abutting property owners to damages."

Plant v. Long I. R. R. Co. 10 Barb. 26; *Adams v. Saratoga & W. R. R. Co.* 11 Barb. 414.

If the laying of a railroad track occasioned actual and substantial damage to property, which the law provides compensation for, a party would have a remedy at law. If no such damage was sustained, there is no remedy, either at law or equity.

That an injunction will not lie in such a case as this appears from *Getz's App.* 10 W. N. C. 453 and cases there cited.

The rule requiring complainants to show a special injury, peculiar to themselves and distinct from the general inconvenience experienced by the public, is inflexible.

Corning v. Louverre, 6 Johns. Ch. 439; *Morris & E. R. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Times Publishing Co. v. Ladomus*, 3 W. N. C. 557.

Annoyances arising from the use of a railroad is not a nuisance *per se*. The fact of nuisance in such case must be determined by a jury.

Bell v. Ohio & Pa. R. R. 25 Pa. 161; 8 Dana, 269.

The construction of a railroad will not be enjoined at the suit of an adjacent lot owner, who simply owns up to the line of the street, and over whose land the road did not pass, where no special damage is alleged and shown to the complainant different from that to other property owners.

Osborne v. Brooklyn City R. R. Co. 5 Blatchf. 366.

Where the injury is doubtful, and the evidence conflicting, the relief will be withheld.

Ripon v. Hobart, 3 Mylne & K. 169; *Hamilton v. N. Y. & H. R. R. Co.* 9 Paige, 171.

PA.

In the absence of any allegation of irreparable injury, an injunction will not be granted against the construction of streets or roads, since, without such injury, no sufficient reason exists for seeking relief in an equitable, rather than a legal form.

Holmes v. Jersey, 1 Beas. 299.

When the injury complained of is only such as is incident to a lawful business, conducted in the ordinary way, equity will not interfere; thus an injunction will be refused against the injury and annoyance caused by the smoke from coal, etc.

High, Inj. 800.

The facts showing such irreparable injury must be stated in the bill and proved. Mere allegations will not suffice.

Amelung v. Seekamp, 9 Gill & J. 468.

One who does not own the fee of a public street over which a railroad is about to be built, but is only an abutting proprietor, must show a special damage to himself before he can invoke the aid of a court of equity.

Osborne v. Brooklyn City R. R. Co. 5 Blatchf. 366.

Whether the act complained of amounts to a public or private nuisance, the fact must be clearly proved by satisfactory evidence. If the evidence is conflicting, the injunction will not be granted.

Dumesnil v. Dupont, 18 B. Mon. 800; *Commonwealth v. Long*, 1 Pars. Eq. 148; *Silliman v. Hudson River Bridge Co.* 1 Black, 582 (66 U. S. bk. 17, L. ed. 81).

When equity intervenes to restrain acts prejudicial to the community, it must be by bill by the Attorney-General.

Sparhawk v. Passenger R. R. Co. 54 Pa. 401; *Pa. & O. C. Co. v. Graham*, 63 Pa. 290; *Cox's App.* 10 W. N. C. 552; 11 W. N. C. 571; *Del. & Md. R. R. Co. v. Stump*, 8 G. & J. 479; *Wilson v. Straubridge*, 4 W. N. C. 35; *Denehey v. Harrisburg*, 2 Pears. 381; *Reimen's App.* 39 Legal Int. 468; *Clarke v. Bridge Co.* 41 Pa. 161; *Pa. R. R. Co's App.* 93 Pa. 150.

The owner of a lot abutting on a street cannot claim damages for the use of the street for a railroad, if the street is used in a reasonable manner only.

Greene v. N. Y. Cent. R. R. Co. 12 Abb. N. C. 124.

A court of equity will not interfere to restrain a public nuisance at the instance of an individual, unless he is in imminent danger of suffering special injury for which the law does not, under the circumstances, afford him adequate relief. The proper remedy is by indictment or action at law for damages.

Mayor v. Alexandria Canal Co. 12 Pet. 91 (37 U. S. bk. 9, L. ed. 1012).

The defendant has the statutory right to locate and construct the siding.

Act April 10, 1867, P. L. 1867, p. 993.

The Act further authorizes the Company to enter upon and take any lands necessary for all said purposes. Land includes not only the face of the earth, but everything under or over it.

Brockett v. Ohio, etc. R. R. Co. 14 Pa. 241; *Philadelphia, W. & B. R. R. Co. v. Williams*, 54 Pa. 108.

The Acts of 1832, 1834 and 1869 plainly show a legislative intent to confer all necessary

powers claimed here, even more fully than the General Railroad Law of 1849.

It is incident to the grant of a railroad that it may lay down as many sidings as are necessary to accommodate its business.

2 Redf. R. R. 245; *Cleveland, etc. R. R. Co. v. Speer*, 56 Pa. 325; *Wells v. Somerset & K. R. R. Co.* 47 Maine, 345; *Pittsburg v. Pa. R. R. Co.* 48 Pa. 355; *Struthers v. R. R. Co.* 35 Legal Int. 815; *Phila. W. & B. R. R. Co. v. Williams*, 54 Pa. 103.

In *Cake v. Phila. & E. R. R. Co.* 87 Pa. 307, the court simply held that as to that corporation, and in view of the whole legislation as to it, the word "property" in the Act of July 22, 1864, did not include public highways. The corporation was expressly prohibited from obstructing public highways.

Sanford v. R. R. Co. 24 Pa. 378, has no application here, because there the bill was filed by a stockholder of the railroad company, who thereby had a status.

"Land" is comprehensive enough to authorize the appropriation of the street.

Cleveland & P. R. R. Co. v. Speer, 56 Pa. 325. The essential power of a corporation may be inferred as well as expressed.

Ridge Turnpike Co. v. Stoerer, 2 Watts & S. 548; *Clarke v. Birmingham & P. Bridge Co.* 41 Pa. 157; *Linton v. Sharpsburg Bridge Co.* 1 Grant, 414; *Phila., Germantown & Norristown R. R. Co. v. Pa. & Schuylkill Valley R. R. Co.* 40 Legal Int. 287.

In the construction of a statute granting privileges to individuals, where there is ambiguity or inconsistency in the language of the grant, if one construction bears against the public trade and convenience and another abridges the grant, that must be adopted which favors the public convenience and trade.

Stormfeltz v. Manor Turnpike Co. 18 Pa. 555.

An injunction ought not to be granted to restrain a trivial departure from the provisions of a statute, where it will cause a greater public injury than can, in any event, result from the acts sought to be enjoined.

Fitzpatrick v. Flagg, 5 Abb. Pr. 213; *Gray v. Ohio & Pa. R. R. Co.* 1 Grant, 412.

Among recent decisions on the question, we have the following: *Spencer v. Point Pleasant & Ohio R. R. R. Co.*; *Campbell v. Same*, and *Smith v. Same*, 20 Am. & Eng. R. R. Cas. 125, 157 and 160; and *Hale v. Same*, Id. 162, and notes; *Fifth Nat. Bank of N. Y. v. N. Y. Elevated R. Co.* 32 Alb. L. J. 313, and 24 Fed. Rep. 114.

Mr. H. M. Graydon, for appellees:

When public or private rights are invaded, and an injunction is asked for in order to protect them, no question of the amount of damage is raised, but simply one of the invasion of a right. And when railroad companies or individuals exceed their statutory powers in dealing with other people's property, this principle may be invoked to restrain their usurpation.

Commonwealth v. Pittsburg & C. R. R. Co. 24 Pa. 159; *Reimer's Appeal*, 100 Pa. 182; *Duncan v. Pa. R. R. Co.* 94 Pa. 435.

An owner of lots upon a street on which a railway is about to be constructed, which will cause special damage beyond what the company has acquired the right to do, under its charter, may maintain a suit to enjoin such construction.

2 Story, Eq. § 929, a; *Story v. N. Y. Elevated*

R. R. Co. 90 N. Y. 122; *Pierce v. Drew*, 136 Mass. 75.

A court of equity will not only interfere upon the information of the Attorney-General, but also upon the application of private parties directly affected by the nuisance.

2 Story, Eq. § 924.

If a party has suffered special damage, whether direct or consequential, from a public nuisance beyond that which affects the public, an action will lie against the author of the nuisance.

Pa. & Ohio Canal Co. v. Graham, 63 Pa. 290.

Even if the object of the owner of the property be not profit, but repose, seclusion, and a resting place for himself and family, a court of equity will protect him in such enjoyment.

Bonaparte v. Camden & A. R. R. Co. 1 Bald. 280.

Equity has jurisdiction to prevent an injury that renders a property unsuitable for the purpose to which it is applied, or which lessens considerably the enjoyment which the owner has of it.

Jackson v. Newcastle, 10 Jur. N. S. 689.

An injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. This is irreparable damage.

Commonwealth v. Pittsburg, etc. R. R. Co. 24 Pa. 159.

Sanford v. R. R. Co. 24 Pa. 378, establishes the principle that courts of equity in Pennsylvania have complete control of corporations chartered by the State and will interfere to restrain them, the moment they go beyond the power which the Legislature has given them; and in a mistaken exercise of those powers they will interfere with the property of individuals.

That the Legislature may authorize a railroad company to construct its road upon and along a public street is not questioned. But the power to do so must appear in express terms, or by clear and necessary implication. All powers not given in this direct and unmistakable manner are withheld.

Commonwealth v. Erie, etc. R. R. Co. 27 Pa. 389; *Pa. R. R. Co.'s App.* 93 Pa. 150.

In *Mayor, etc. of Pittsburgh v. Pa. R. R. Co.* 48 Pa. 355, it was held that the Pennsylvania Railroad Company, under its charter and supplements, could occupy streets along the route of the main line; but no Act of Assembly gives this power to its leased lines. The general language of the Act of 1867 certainly does not.

The word "property" does not embrace public streets and highways.

Cake v. Phila. & Erie R. R. Co. 87 Pa. 307.

In *Cleveland, etc. R. R. Co. v. Speer*, 56 Pa. 325, the charter authorized the company to continue its road up a certain valley to Pittsburg; and as the town mentioned extended clear across the valley, the road must necessarily pass through it. Hence, the strong implication that the company might use the street, and not from the employment of the term "land" in the charter.

Brocket v. Ohio & Pa. R. R. Co. 14 Pa. 241, interpreting the phrase "any land," simply decides that it embraces a dwelling house; and does not so much as hint that it would cover a public highway.

Courts of equity are expressly authorized to inquire, at the instance of private parties, whether corporations have the legal right to do the acts by which it is alleged complainants are injured, and to enjoin the corporation if it is exceeding its power.

Act of June 19, 1871, P. L. 1860; *Western Pa. R. R. Co.'s App.* 104 Pa. 899.

Mr. Justice Trunkley delivered the opinion of the court:

Section 77 of the Act of June 9, 1832, authorized the Portsmouth & Lancaster Railroad Company to locate and construct a railroad of one or more tracks from Portsmouth to a point west of the City of Lancaster, and connecting with the Pennsylvania Railroad, and to construct all the appendages necessary for the convenience of said company in the use of said railroad. And section 81 made it the "duty of said company to construct and keep in repair good and sufficient passages across the said railroad, where any public roads shall intersect and cross the same."

Section 78 authorized said company to enter upon any lands for the purpose of surveying and locating the route, and after determining the route to enter upon, take possession of and use the lands for the purpose of constructing said road. And sections 79 and 80 provided the mode of ascertaining the damages where the said company could not "agree with the owner or owners of such required land for the purchase thereof."

The supplemental Act of March 11, 1835, authorized said company to construct an extension of the railroad from Portsmouth to Harrisburg, and extended all such provisions of the Act of 1832 as were applicable, to the locating and maintaining of the construction of said extension of said railroad.

The Act of April 10, 1867, empowered the Pennsylvania Railroad Company, "from time to time, as they may deem necessary, to construct and use, along, adjoining or contiguous to, their lines of railroad, or the line of railroads now owned or leased or that may be hereafter owned or leased by them, additional tracks, sidings, depots, turnouts, water ways, workshops and other appurtenances requisite and needful for the prosecution of their business, and for the accommodation and transportation of the trade and traffic over and upon the said railroads; and they are hereby also authorized and empowered to straighten and improve the said lines of railroads and to construct the needful appurtenances thereto; and for all and any of such purposes, the company shall and may enter upon, acquire, take and appropriate such lands, tenements and property along, adjoining or contiguous to said railroads or elsewhere that they may deem necessary for the purpose of straightening or improving of the said railroads and constructing the needful appurtenances thereto."

The foregoing are statutory or charter provisions relating to the fundamental question in issue, namely: Has the appellant the right to occupy longitudinally a public road or street in a borough for the laying of its railway tracks? Reference was made to the Statute of March 17, 1869, to enable railroads, canal and slack-water navigation companies to straighten,

widen, deepen and otherwise improve their lines and works; but the statute confers no greater power on railroads than was conferred on the appellant by the Statute of April 10, 1867. In passing, it may be noted that the learned master referred to the provisions relative to the occupancy of streets, in the General Railroad Laws of 1849 and 1868, in terms which might be understood that those provisions are part of the charter of the appellant, or of its road held by lease; but at the argument no such position was taken. Indeed, the provision is alluded to in appellant's argument, but not as if to be read into its charter. A company organized under the general statute may locate its railroad on a street or alley, because that statute expressly confers the power.

That the Legislature may authorize a railroad company to lay its tracks on a public street has not been doubted since the decision in the *Phila. & Trenton R. R. Co.'s Case*, 6 Whart. 25.

It ought to be equally free of doubt that when not authorized by legislative grant a railroad company has no right to appropriate and use a street or public highway for the laying of the tracks of its trunk line, switches, sidings or branches. And the power must be given in plain words or by necessary implication. *Commonwealth v. Erie & N. E. R. R. Co.* 27 Pa. 339; *Pa. R. R. Co.'s App.* 93 Pa. 150.

The course of legislation in Pennsylvania, relative to railroads, shows continuous care to protect the public roads from the grasp of railroad companies, except upon terms that they render an equivalent to the public. A fair example is the legislation upon this point for the Pennsylvania Railroad Company. At first the Act of April 18, 1846, provided that when necessary to cross or intersect any established road or way, said Railroad Company should so construct its road as not to impede the passage or transportation of persons or property along said established road or way. This being the only provision in the Act of incorporation relative to public roads, in force thereof it would have been exceedingly difficult, in accord with the rules of interpretation, to construe the general terms authorizing the taking of land, to authorize the taking of an established road and laying the track thereon longitudinally. Therefore, supplemental Acts were passed providing that when said Company should find it necessary to change the site of any turnpike or public road or any street, lane or alley, in any town, borough or city, it should reconstruct the same forthwith, on the most favorable location, and in as perfect a manner as the original road.

In this connection it may be remarked that the charter authorized the making of such lateral railroads or branches, leading from the main line to such points in the counties through which the main line may pass as the president and directors may deem advantageous, subject to the provisions and conditions relative to the main line; and hence, when it was ruled in *Mayor, etc. of Pittsburgh v. Pa. R. R. Co.* 48 Pa. 855, that said Company, within the designated counties, had as large powers to make branches as it had to make the main line, and could construct a branch through the city of Pittsburgh, by a route best suited to promote the convenience of the inhabitants of

the city and the interest of the Company, the ruling accorded with the precise terms of the charter. That case is no precedent for enlarging corporate grants by construction.

It has been said with reference to charters of incorporation, that "whatever is doubtful is decisively certain against the corporation." There seems no occasion to apply that rule in this case. Nothing in the statute relating to the powers of the Harrisburg, Portsmouth, Mount Joy & Lancaster Railroad Company shows an intentment that the company should have a right to lay its tracks lengthwise on other public highways.

Of course, it would be necessary in the construction of the railroad, to intersect and cross other highways, and the charter compels the company to make and keep in repair good and sufficient passages at such crossings. This express provision left no room for doubt as to any kind of occupancy of public roads not mentioned. What is not plainly expressed or necessarily implied is not granted.

Nor is the meaning of the Act of April 10, 1867, doubtful. It contains no expression respecting public roads or streets. It does not extend the branching power of the Pennsylvania Railroad Company to the lines it holds by lease. In view of the previous legislation relative to these companies the words "lands, tenements and property" are not used in a new sense which includes established roads. By the letter of the statute, lands and property may be taken for work shops as well as railway tracks. This is reasonable when applied to private property; but if public roads and streets are included as property which may be taken for work shops, the Act is unique and a wild departure from the line of legislation relative to these railroad companies.

The appellant admits that when the bill was filed it was about "to construct a railway track or siding on and along the bed of said Brown Street from the point where said street touches the main line of said road, intersecting Union Street, and passing by and along the whole length of the properties on said Brown Street owned by your orators respectively."

The master finds that "The track or siding, which is a continuation of the siding that existed before, extends along Brown Street, a distance of 100 feet, from the railroad to Canal Street and to within 150 feet of the canal, where the street terminates;" and that a number of factories, mills and business houses are in the vicinity of the terminus at Canal Street. One of the witnesses called by the defendant testifies that he has urged this siding for years, because of the necessities for business; because it will benefit the town; that its continuation to his land would benefit the whole town; an extension of this track would open up business sites, and this is the first the Pennsylvania Railroad has done in that direction.

Whether this railway track be called a siding or some other name, it is easy to ascertain that it is laid on Brown Street, from the main line to a point in the vicinity of mills, factories and places of business. That it is a benefit to the business of that part of Middletown is undeniable. No doubt were it extended further, land in the southeast part of the town would be enhanced in value.

This inquiry is not respecting the main line which has been laid for many years, nor the laying of additional tracks alongside that line; nor the right of the appellant to construct sidings, turnouts, depots or work shops; nor the right of the appellant to construct a railroad from its main line to mills and places of business in the southeast part of the town; but it is whether it can lawfully take and occupy a street from the main line to mills and factories. As already seen, it cannot.

This case differs widely from *Gate's Appeal*, 10 W. N. C. 458. In that, it was denied that the railroad had the right to construct the siding at all. The plaintiff's chief complaint was the injury done by taking part of his lot, destroying his dwelling house and obstructing his way to the street; but it was not contended that if the charter gave the right to construct the siding it did not give the right to construct it on the street.

In *Cleveland & P. R. R. Co. v. Speer*, 56 Pa. 326, upon the grant in the charter, and the route authorized therein, it was said that the implication was irresistible that the company could use Preble Street for the tracks of its railroad. Stress was put on the fact that the railroad had been constructed for years before the beginning of the suit, and it was said:

"Whatever private remedies individuals might have had, to prevent the location there and to compel a change of site before consummation, it is now too late to treat the location as a mere nullity." And if the act of location was "voidable because other ground ought to have been taken, none but the Commonwealth can now call the company to account for it."

That suit was when a party had no remedy for injury to his property, if none was taken, by the laying of a railroad at grade on a street in front of his dwelling. And it was before the Act of June 19, 1871, which provides that in all proceedings, at law or in equity, in which it is alleged that the private rights of individuals are injured or invaded by any corporation claiming to have the right to do the act from which such injury results, it shall be the duty of the court to inquire and ascertain whether such corporation possesses the right to do the act; and if such right has not been conferred, if the suit be in equity, the court shall restrain such injurious acts by injunction; if at law, the party may recover damages for such injury. In that case the switches complained of were within the lines of Preble Street until they reached the land owned by the railroad company.

It is urged that the plaintiffs are not entitled to injunction because they have not suffered irreparable injury. This would be sound if the defendant had right to lay the track on the street. But having no such right the case is different. Where railroad companies or individuals exceed their statutory powers in dealing with other people's property, no question of damages is raised, when an injunction is applied for. *Commonwealth v. Pittsburgh, etc. R. R. Co.* 24 Pa. 159.

True, the Company has not taken the plaintiffs' property; and if the plaintiffs have not been specially injured, they are not entitled to injunction. But if the defendant, without authority from the State, creates a nuisance on the street, one who is specially injured is en-

titled to relief, without proving the amount of damage. In such case, the defendant is not in the position of a person who carries on a business lawful in itself, of which a neighbor complains. It is not on its own land. If not empowered to use the street, it has no more right to construct a railroad on it than any other person. A wrong doer may not set off benefits to prevent the injured party obtaining relief, a man is not to be driven from his home by offensive structures, or compelled to sell it even for more than its value, by one who is not invested with power to injure or take it for public purposes. As this case comes, it is wholly immaterial whether the railroad has increased the market value of the plaintiffs' dwellings. They are not claiming damages.

All persons who merely travel on Brown Street suffer the same kind of inconvenience or injury, although the suffering may differ in degree. But he who has his dwelling fronting on the street; who cannot turn his carriage between the front of his lot and the rails; who must drive around a block because he cannot turn in the street; whose business as a physician is interfered with, or who is subject to the smoke, noise and other incidents of railway trains passing near his door, suffers a special injury which differs in kind as well as degree from that done to the mere traveller.

Were the road lawfully constructed the only question would be whether the plaintiffs' lots were worth more or less by reason of the construction; and if so how much.

This bill was properly filed and the plaintiffs prayed that the "defendant, its servants, agents and workmen may be restrained by injunction from constructing said railway track, or maintaining the same upon said public highway." And they prayed other relief. If the defendant went on and laid the track after notice of this proceeding it has no reason to complain of a decree which puts the plaintiffs in the situation they were in when they asked preliminary injunction. No remedy is complete that does not require removal of the track laid since the defendant had notice of the action.

And now it is considered and decreed that the decree of the court below be and is affirmed; that the appeal be dismissed at costs of the appellant, and record remitted, that the decree be enforced.

Elizabeth A. BAY'S APPEAL.

1. In divorce proceedings when the evidence shows that the **greatly preponderating degree of blame and misbehavior was on the part of the wife**, even though the husband was **not entirely free from blame**, such fault does not constitute a legal bar to his obtaining a divorce; and if the wife's treatment is such as to render his condition intolerable and life burdensome, a **divorce** should be **granted**.
2. Where the testimony fully warranted the jury in finding as **facts** that the respondent had rendered the condition of the libelant intolerable and his life burdensome, and that she was possessed of no separate estate when the marriage

took place, and was then a widow well advanced toward middle life, and that she had agreed before marriage that her share in the libelant's estate, in case of his death, should be \$8,000, in lieu of dower, his estate being productive property amounting to \$100,000, **held**,

(a) That an **allowance** of \$800 per annum for **alimony** and \$500 for **costs and expenses** of respondent in conducting her **defense**, including counsel fees, was quite as liberal as she was entitled to receive.

(b) That it was **not error** in the court below to **refuse** to add to or to **increase the allowance after final decree**.

(Decided October 4, 1886.)

A PPEAL from a decree of the Common Pleas of Dauphin County, granting a divorce and giving alimony and allowance for costs, etc. *Affirmed.*

James G. M. Bay filed his libel in divorce against Elizabeth A. Bay, on the grounds of cruel and barbarous treatment rendering the condition of the libelant intolerable and life burdensome. An issue was directed and the case tried before Simonton, P. J.

After the appearance of the respondent on application of her counsel for allowance the court made the following order:

"Nov. 3, '84. It is ordered that the libelant, James G. M. Bay, pay to the respondent or her attorney, within ten days after notice of this order, \$100 for counsel and preparing her defense, with leave before trial to move for further allowance."

On the trial the libelant testified that for many weeks during the two years preceding the application for divorce the respondent failed to get him his meals; that she frequently used the most approbrious epithets towards him; that she repeatedly threw tumblers, cups and buckets of coal at him, and upon two occasions a kettle full of boiling water.

He also called a number of witnesses who corroborated him in many of the above statements. One witness testified that she saw the respondent run at him with a butcher knife. Another witness heard the respondent declare that she would "shoot him, by God."

The respondent, on the other hand, testified that the libelant had choked her; had crushed her hands over a pair of shears thereby maiming them for life; that he had often struck her on the head, and did not supply a sufficiency of food to enable her to prepare the meals. She also alleged that he undertook to smother her with escaping gas.

Several witnesses called by the respondent testified that they had seen some marks and bruises upon her neck.

The libelant, upon being recalled, declared that the respondent had knocked the gas jet off with a chair and had offered to run the shears through him, whereupon he took them away from her, using no more violence than was absolutely necessary.

The court charged the jury, *inter alia*, as follows:

We are further asked to charge by the respondent's counsel that "If a husband apply

ing for a divorce is guilty of the same things which he alleges against his wife, his prayer will not be granted. It is not sufficient that the plaintiff is less faulty than the defendant; he must come into court with clean hands and without fault." We decline so to instruct you.

[We say, further, if you believe from all the evidence that the husband was not wholly free from fault, but that his fault was comparatively light, and provoked by his wife, such fault would not be a bar to a verdict; and this we say to you in connection with the last point that was presented by the counsel for the respondent. The law is not as there claimed, that the husband must be entirely without fault. He may not have acted entirely as he ought to have done; but if his fault was comparatively light, and if the greatly preponderating degree of blame and misbehavior was on the part of the wife, even though he was not entirely free from blame, that would not be a legal bar to his obtaining a divorce.]

The jury found for the libellant.

During the trial of the cause, application was made for increase of allowance, but the matter did not come up for consideration until afterwards. On this hearing the respondent showed, by depositions taken for the purpose, that the libellant was the owner of productive property of the value of \$100,000.

The libellant on the other hand produced an antenuptial agreement which provided that "In the event of his death Mrs. E. A. Galbraith is to receive of his estate, real or personal, the sum of \$8,000 in lieu of her legal rights, as his widow, to all rights of dower or other rights accorded a widow."

The competency and relevancy of this paper were objected to by the respondent because it had been fraudulently obtained by the husband and because it only purported to regulate or affect matters in the event of the death of James G. M. Bay, which event had not occurred. The court, however, received the paper and ordered it to be filed.

On November 4, 1885, the court filed a decree, of which the following are the material portions:

"Considering that the wife is the respondent in this case, and that the testimony fully warranted the finding of the jury, that she had rendered the condition of the libellant intolerable and his life burdensome, and that she was possessed of no separate estate when the marriage took place; and that she was then a widow well advanced toward middle life; and that she agreed before marriage that her share of the libellant's estate, in case of his death, should be \$8,000, in lieu of dower; and understanding that, in a case such as this, the principal reason for the requirement of the statute (that the husband being the libellant, and making out his case, shall be decreed to pay alimony) is that the respondent may be maintained at his expense rather than be permitted to become a charge upon the public; and having respect to the circumstances of the libellant, we think that an allowance of \$800 per annum will be just and proper. * * * Libellant will also, in addition to the \$100 already decreed and paid, pay the further sum of \$400, to respondent or her attorneys, for costs and expenses in conducting her defense, and for counsel fees. * * *

On November 10, 1885, a decree of divorce from the bonds of matrimony was entered and on November 16, 1885, the respondent took this appeal and issued *certiorari*. Subsequently, on December 1, 1885, after bail had been entered, appeal taken and writ issued and served, the respondent's counsel moved the court to make a further order on plaintiff for maintenance of the defendant and also for cost of paper book and reasonable allowance for counsel to prepare and argue the case in the supreme court.

This order the court declined to make, "having already made a final order and decree in the case."

The assignments of error were: 1, the answer of the court to the above point and the portion of the charge inclosed in brackets; 2, the order of court on November 8, 1884, above quoted, fixing the allowance for counsel fees and preparing defense; 3, the admission and consideration of the antenuptial agreement; and 4, the refusal of the court, after final decree, to make an additional allowance.

Messrs. Hall & Jordan, for appellant:

This suit is for divorce by the husband against his wife for her alleged "cruel and barbarous treatment" to him, under the Act of May 8, 1854, which increases the causes of divorce and which provides as follows:

"Where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable or life burdensome; *Provided*; That in case of divorce under this Act if the application shall be made on the part of the husband, the court granting such divorce shall allow such support or alimony to the wife as her husband's circumstances will admit of and as the court may deem just and proper."

1 Purd. Dig. p. 613.

Cruel and barbarous treatment has been frequently defined by our courts, as "actual personal violence or the reasonable apprehension of it, or such a course of treatment as endangers life or health and renders cohabitation unsafe."

Butler v. Butler, 1 Pars. Eq. Cas. 329; *Gordon v. Gordon*, 48 Pa. 226, 238; *Hush. Mar. Women*, 199, 200; *Harris' App.* 2 W. N. C. 831.

In *Gordon v. Gordon*, *supra*, it is clearly intimated that this principle will be more strictly enforced against the husband than against the wife.

The evidence does not show that any actual injury or violence was ever inflicted upon him by her at any time.

"Mere want of sympathy, disagreeable manners, ebullitions of ill temper, habitual disregard of her feelings, refusal to protect her from the insults of others; all these, although nearly as brutal as blows, are not to be taken as just cause for separation."

Breinig v. Meitzler, 23 Pa. 156, 160.

"Recrimination is a counter charge, by the defendant, of a cause for divorce against the complainant. When each party has a cause for divorce, neither can obtain a divorce. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce."

Stew. Mar. & Div. § 318, and the host of authorities there cited.

"Divorce is a remedy provided for an innocent party * * * if both parties have a right to divorce neither has; and a guilty party cannot

claim relief; the parties being in *pari delicto* must be left to themselves."

Id. § 814; 2 Bish. Mar. & Div. §§ 76, 78, 93.

The statute under which this divorce is sought expressly declares that "The Court granting such divorce shall allow such support or alimony to the wife as her husband's circumstances will admit of;" and this is not a mere matter of discretion in the court below, but a matter of right and the subject of review.

"The order of alimony is part of the final decree; and when brought up by appeal is, with all the evidence, the subject of the jurisdiction of the supreme court."

McChurg's App. 66 Pa. 386; *Miles v. Miles*, 76 Pa. 357.

The amount or *quantum* of alimony is not fixed by the statute; but is the subject of sound legal discretion, under the well established legal principles relating thereto. And it is surprising with what uniformity these general principles prevail and are applied, both in England and in the several States.

Stew. Mar. & Div. § 358.

In the present English matrimonial court one third of the husband's income is taken as a sort of standard "matter of course proportion" to be allowed to the wife for permanent alimony.

2 Bish. Mar. & Div. §§ 463, 464, 513; Stewart, § 375.

"Where the wife brings no means to the marriage, and derives none by inheritance afterwards, and whatever there is was accumulated through the efforts of the husband, it is not proper, on granting the wife a divorce, to give her part of the husband's real estate in fee. The alimony in such case should not exceed one half the husband's income."

Wilson v. Wilson, 102 Ill. 297.

"The application (for alimony) was not usually made in the divorce libel, but in the shape of a separate petition, alleging the husband's faculties, filed * * * in the case of permanent alimony, usually after the court's decision as to the divorce, but before the judgment, though the application could also be made at any time afterwards."

Stew. Mar. & Div. § 362.

It (alimony) may also be granted, according to the different practice, by the lower court, or by the appellate court, pending the appeal. And counsel fees may be allowed, even after the determination of the suit.

Id. §§ 385, 391.

The principle here contended for by the appellant is sustained by *Wood v. Wood*, 7 Lans. 204, because here the application was formally made and insisted upon.

Messrs. J. C. McAlarney and A. J. Herr, for appellee:

The court properly qualified the fourth point of the respondent, by declaring that if the libellant's "conduct was comparatively light and provoked by the respondent, such faults would not be a bar to a verdict."

This court has already plainly indicated its views in cases almost identical with the one in hand, and we rely with confidence on *Jones v. Jones*, 66 Pa. 494, and *Richards v. Richards*, 1 Grant, 389.

In this State there is no rigid rule as to the amount of alimony. It will be fixed by the court, according to the circumstances of the

parties and the degree of blame to be attached to either and as the courts may deem just and proper.

The wealth of the husband can only be made the standard where his conduct calls for condemnation or when the wife's conduct is such as to commend her to the sympathy or conscience of the court.

Per Curiam:

The issue was submitted to the jury in a clear and correct charge. The evidence justifies the verdict. Under all the facts, the sum decreed as alimony, and for costs and expenses of the appellant in conducting her defense, including counsel fees, are quite as liberal as she is entitled to receive from the appellee. There is no error in refusing to add to or increase the sum, after final decree. The amount which the counsel of the appellant may justly demand of her is not now decided.

Decree affirmed and appeal dismissed, at the costs of the appellant.

George W. STRINE, Late Sheriff of Northumberland County, *Plff. in Err.*,

v.

William H. FOLTZ & BRO.

The Act of March 23, 1877, authorizing any of the prothonotaries and sheriffs of the several counties of the Commonwealth, within six years after the expiration of their official term of office, to sue anyone residing out of the county, before a justice of the peace, within the county, for fees for official services, before or after judgment; authorizing constables to appoint deputies (in the county where the defendant resides) to execute the writ; providing for execution in any county in the Commonwealth; and making a certificate of the prothonotary of the county where suit is brought prima facie evidence that such fees are lawfully due and correct, held, to be special legislation and unconstitutional under article III, § 7 of the Constitution.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Northumberland County, to review a judgment reversing a judgment of the Justice Court in favor of plaintiff in an action to recover certain fees as a sheriff. *Affirmed.*

The only question raised is as to the constitutionality of the Act of March 23, 1877 (P. L. 25), under which the action was brought which, with the facts of the case, is set out in the opinion.

Reported below, 1 Pa. C. C. R. 490*

*The opinion of the court below, by ROCKEFELLER, P. J., was as follows, after stating the facts: Doubtless the Act of Assembly in question was intended to remedy a seeming hardship. The officers named in it are frequently obliged to perform services before they have the right to demand their fees; and to oblige them, at great expense, to go to distant counties to bring suit against nonresidents

Messrs. C. M. Clement and J. Nevin Hill, for plaintiff in error:

The power of the Legislature extends throughout the State; and it has accordingly power to direct process to be served in any county of the State. The Act in question authorizes the service of a summons upon any person residing out of the county wherein the sheriff or prothonotary may reside. This is process; and when served as required by the Act, after notice, it brings the defendant within the jurisdiction of the court, gives him the right to appear and be heard, and the right of appeal and trial by jury; this, according to all the authorities, is due process of law.

Kennard v. La. 92 U. S. 480 (Bk. 23, L. ed. 478); *Pennoyer v. Neff*, 95 U. S. 714 (Bk. 24, L. ed. 565). See also *Davidson v. New Orleans*, 96 U. S. 97 (Bk. 24, L. ed. 616); *Ex parte Wall*, 107 U. S. 265 (Bk. 27, L. ed. 552).

The Constitution was framed by the people, through a special body selected for the purpose and not by the Legislature. It is not to be construed by the rules of the common law which dealt with an unwritten Constitution, but by such rules as will give it the precise weight and effect which was intended by the framers at the time.

Prigg v. Commonwealth, 16 Peters, 539 (41 U. S. bk. 10, L. ed. 1060).

From the debates in the Constitutional Convention we learn that the Convention understood, by the term "special law," a law which

would operate in certain localities, and not in the whole State, or a law which would affect certain individuals or corporations, and not the whole class to which they might belong. Class legislation is not referred to and not mentioned as an evil to be remedied.

2 Const. Debates, 590, 593, 604, 609, 622; 5 *Id.* 249.

A private law is one which relates to private matters which do not concern the public at large. The definition of a public law is a law which affects the public, either generally or in some classes.

Bouv. Law Dict. title, *Law*.

County officers are classified by the Constitution itself. Article XIV, § 1, designates the different classes of county officers, and provides that certain classes shall not be eligible to re-election. Section 4 provides which classes of county officers shall have their offices in their county towns. Section 5 provides that the compensation of county officers shall be regulated by law. Section 7 provides a peculiar mode for the election of certain classes of county officers.

It is impossible for the Legislature to pass laws for the enforcement of the provisions of the Constitution, relative to county officers or any other subject, without making them open to the charge of being in some sense class laws. The powers and duties of county officers as one class cannot be prescribed by a general law, for the reason that their duties are different and

is, in effect, to compel them to perform such services without compensation.

On the other hand, in a foot note in *Brightly's Purdon*, p. 385, it is said: "A summons issued by a justice of the peace is to be served, by the Act of 1810, at least four (should be five) days before the time of hearing. Is it possible that a citizen of Philadelphia may be required to attend before a magistrate in Erie County on four days' notice to answer a claim of \$5, or less? This would be a mockery of justice. It cannot be termed 'due process of law'."

If a citizen can be sued for a small sum at such a distance, no matter how good a defense he may have, he must pay the demand or make up his mind to spend perhaps five times the amount to attend the trial. With all this, however, we think the court has nothing to do. Whether the Act in question is a good law or a bad law is a question entirely for the Legislature. The only question before us is the constitutionality of the Act.

Article III, section 7, of the Constitution [of 1874] of Pennsylvania (Purdon, p. 29) declares, among other things, that "The General Assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals; or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate." "Regulating the fees or extending the powers and duties of aldermen, justices of the peace, magistrates or constables."

Since the adoption of the new Constitution several cases have been decided by the supreme court, in which it has been held that certain Acts of Assembly were in conflict with said article, being special legislation and therefore void. *Commonwealth v. Patton*, 88 Pa. 258; *Montgomery v. Commonwealth*, 91 Pa. 125; *Scowden's App.*, 96 Pa. 422.

No case, however, has been cited which decides the question in the present case and I have not been able to find, in any text book or American decision, authority precisely to the point. If the Act in question extended to all officers there would be no difficulty in determining that it is a general and not a special law. The real question in the case is whether the Act is a general or special law; and if it is a special law, is it that kind of a special law that the

Legislature is prohibited from enacting by the said section of said article of the Constitution?

The text books abound with definitions of general or public Acts and of special or private Acts. *Blackstone* says: "A general or public Act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*." "Special or private Acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." 1 Bl. 85.

Kent says: "The most comprehensive if not the most precise definition in the English books is that public Acts relate to the Kingdom at large; and private Acts concern the particular interest or benefit of certain individuals, or of particular classes of men. Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons." 1 Kent, 460.

Sedgwick says the best definition is that given by *Dwarris*: "That public Acts relate to the public at large, and private Acts concern the particular interest or benefit of certain individuals or of particular classes of men." *Dwarris*, Statutes, 464.

There are many cases in the books upon the distinction between public and private Acts. A note in 9 *Bacon's Abridgement*, p. 231, also found in 1 *Chitty's Blackstone*, p. *86, contains a note in the printed report from the committee for the promulgation of the statutes, in which it is said that "Acts are deemed to be public and general Acts, which the judges will take notice of without pleading, viz.: Acts concerning the King, the Queen, and the Prince; those concerning all prelates, nobles and great officers; those concerning the whole spirituality; and those which concern all officers in general, such as all sheriffs, etc. Acts concerning trade in general, or any specific trade; Acts concerning all persons generally, although it be a special or particular thing, such as a statute concerning the assizes, or woods in forests, chases, etc., etc. Private Acts are those which concern only a particular species, thing or person, of which the judges will not take notice without pleading them, viz.: Acts relating to the bishops only; Acts for toleration of dissenters; Acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to the colleges only in the universities."

There is no doubt that a statute that extends

they naturally and necessarily divide into the classes mentioned in the Constitution itself, and for the same reason their compensation must be fixed by separate or distinct enactment.

A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition. The necessity for classification is recognized in the Constitution itself. The true question is, not whether classification is authorized by the terms of the Constitution but whether it is expressly prohibited. In no part of that instrument can such prohibition be found. Classification does not depend upon numbers. The word is used, not to designate numbers but a rank or order of persons or things.

Wheeler v. Philadelphia, 77 Pa. 388; *Kilgore v. Magee*, 85 Pa. 401.

There can be no proper classification of cities or counties except by population. The moment we resort to geographical distinctions we enter the domain of special legislation, for the reason that such classification operates upon certain cities or counties to the perpetual exclusion of all others.

Commonwealth v. Patton, 88 Pa. 258; *Scowden's Appeal*, 96 Pa. 422; *Montgomery v. Commonwealth*, 91 Pa. 125; *Davis v. Clark*, 106 Pa. 377; *McCarthy v. Commonwealth*, 1 Cent. Rep. 111.

The Act is not special, because it applies alike to all sheriffs and prothonotaries in the State

and to all citizens of the State who may become sheriffs and prothonotaries; and anyone may aspire in this Commonwealth to be included in these classes. Nor is it special, as regards others to be affected thereby. It reaches to all who are or may become suitors in our courts.

Mr. Robert L. Cope, for defendants in error:

The Act regulates the practice before a justice of the peace; it changes the methods for the collection of debts, and the enforcing of judgments; it extends the powers and duties of justices of the peace and constables.

It gives an additional and extraordinary remedy to these officers which is not given to other creditors nor even to other county officers. It grants "powers and privileges," in these particular cases, where the courts have jurisdiction to "give the relief asked for," and therefore violates another clause of article III, § 7 of the Constitution.

If an Act is an exception to a general law in force, and limited in its operation to particular cases or for particular purposes, it is undoubtedly a special Act. For a special Act is also defined to be "an exception to a general rule."

The Act is designed only for particular persons, to wit: for sheriffs and prothonotaries whose official terms have expired.

The Act applies to only two of a class of a dozen or more county officers.

to all officers is a public statute; but the question to be determined in the present case is whether a statute that relates, not to all officers but to certain officers only, such as sheriffs and prothonotaries, is a public or private statute. In England it is clear that such a statute is regarded as special. It will afford anyone who has the time, and takes an interest, much pleasure and perhaps instruction, if he will carefully read the reported English cases on the question in hand. The Statute of Westminster which says that no sheriff or other minister of the King shall take any reward to do his office, but be satisfied with what he receives from the King, was held to be a public statute, because it extends to all officers. *Holland's Case*, 2 Coke, pt. 4, fol. 76, p. 470; 9 Bac. Abr. p. 23.

The Statute of 23 Henry VI, cap. 9, relating to bail in civil causes, is reported in Roberts' Digest, p. 82. This statute was enacted in 1444. Before this the sheriff was not obliged to bail one arrested on mesne process, unless he sued out a writ of mainprise, although he might have taken bail of his own accord. This arbitrary power, which sheriffs possessed, of bailing or refusing to bail produced great extortion and oppression. It took 344 years for the English courts to settle the question as to whether this is a public or private statute. In some of the cases it was held that it only relates to sheriffs and is therefore a private statute, while in others it was held that, although it relates to officers of a certain description, yet all the King's subjects are included in it, for it gives to all of them the right to give bail. The following are a few of the cases in which the statute was held to be private: *Benson v. Welby*, 2 Saund. 154; *Trin. 22, Car. II*; 1 Plow. 65; *Sid. 24, 439*.

The contrary was held in *Okry v. Sell*, 2 Lev. 103; *Pasch. 23 Car. II*; 1 Lev. 83; *Sid. 23*; *Samuel v. Evans*, 3 Term Rep. 569; *Lovell v. Plomer*, 15 East, 220; 2 Saund. 155, note.

All the cases are collected in Bacon's Abridgment. The last is the said case of *Samuel v. Evans*. That was a well considered case and all the authorities on both sides cited by counsel and the court. Ashurst, J., said: "If all the cases on this subject were on one side, however apparently contrary to reason they might be, the court would be bound by them; but if there be several cases, which are not reconcilable with reason on one side, and one sensible case to the contrary, we ought to decide according to the latter. Now there can be no doubt, on the reason of the thing, that the Statute of 23 Hen. VI is a general law; for although it is said to relate

to officers of a certain description, yet all the King's subjects are included in it, for it gives to all of them the liberty of being bailed.

Buller, J., in an opinion in the same case, said: "It is astonishing that a doubt could ever have arisen whether the Statute 23 Hen. VI, cap. 9, were a general law or not, for it alludes to all arrests; and every person who may be arrested is within the provisions of it."

In *Holland's Case*, 2 Coke, pt. 4, fol. 75, p. 470. It was held that "office was a general word or genus; sheriff is a special word or species; and sheriff of Norfolk is *individuum*;" and the Statute 23 Hen. VI, cap. 9, which extends only to sheriffs, is but a particular and special Act."

It will be observed that all the cases holding the Act to be public put it on the ground that all the King's subjects are included in it. It is therefore clear, I think, that at the common law an Act which relates only to a certain description of officers, such as sheriffs, prothonotaries, etc., is a special Act. That being so, the Act of Assembly in question in this case is clearly a special Act. Indeed, it only relates to certain persons or individuals after they have gone out of office; for it gives them the right to sue for fees "within six years after the expiration of their official terms." It is an Act relating to certain individuals, giving them privileges not given to all the citizens of the Commonwealth.

Then, if it is a special Act, is it such as is prohibited by the Constitution? The Legislature may pass special laws in all cases not mentioned in the article of the Constitution referred to. I am of opinion that it is an Act regulating, in some sense, the jurisdiction of justices of the peace. It extends their jurisdiction throughout the whole State. It changes the rules of evidence. It makes a certificate of a prothonotary, that any bill of fees appears by the record of his office to be correct, *prima facie* evidence that such fees are lawfully due and correct. It is an Act providing or changing, in one sense, the method for the collection of debts, or the enforcing of judgments. It enables the party to recover a judgment against either the plaintiff or defendant in a suit, after a judgment has already been recovered in the suit in the court of common pleas of the county in which the fees accrued. Two judgments for the same cause of action would be recovered. I have come to the conclusion that the Act conflicts with the Constitution and is therefore void. The judgment of the justice and all proceedings are reversed.

In *Montgomery v. Commonwealth*, 91 Pa. 125, the Act was declared to be a special Act; not because it applied only to a particular locality nor because it applied only to a particular individual or individuals, but because it was designed for a particular purpose; thus applying Webster's definition of a special Act, to wit: "An Act designed for a particular purpose."

"A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special and comes within the constitutional prohibition."

Wheeler v. Philadelphia, 77 Pa. 338.

Here the class is county officers; the sheriff and prothonotary are particular persons of this class. They do not of themselves constitute a class either separately or jointly.

To sustain this Act on the ground of classification the class designated as county officers, by the Constitution, must be subdivided into a class of sheriffs and a class of prothonotaries; then these sub-classes must be again subdivided into a class of ex-sheriffs and a class of ex-prothonotaries; then again into further classes of ex-sheriffs and ex-prothonotaries who have been out of office not more than six years. Then you have the classes to which the Act relates. "This," in the language of *Justice Paxson*, in *Commonwealth v. Patton*, 88 Pa. 258, "is classification run mad."

Mr. Justice Sterrett delivered the opinion of the court:

In February, 1881, suit was commenced by the plaintiff, then late sheriff of Northumberland County, before a justice of the peace in that county, under the provisions of the Act of March 23, 1877 (P. L. 25), to recover from defendants, residents of Northampton County, certain fees earned by him as sheriff in a case in which they were plaintiffs. The summons, directed to a constable of Northumberland, was served in Northampton County by a deputy residing there; but defendants did not appear.

Judgment having been rendered in favor of plaintiff, the record of the justice was removed by *certiorari* into the court of common pleas, and exceptions were filed thereto as follows:

1. That the Act of Assembly, under which the suit was brought, is unconstitutional and void.

2. That the justice had no jurisdiction of the defendants, the summons not having been served within his jurisdiction.

Both exceptions having been sustained by the court, the judgment of the justice and all proceedings before him were reversed and set aside. The record was then brought here for review. The vital question here, as there, is whether the Act under which the suit was brought is constitutional.

The first section declares: "It shall be lawful for any prothonotary or prothonotaries," sheriff or sheriffs of the several counties of this Commonwealth, within six years after the expiration of their official terms, to sue any person or persons residing out of the county wherein such prothonotary or sheriff shall reside, for the recovery of any fee or fees in an action of debt or assumpsit for official service performed or hereafter to be performed for such person or persons during such official

term, before any justice of the peace within the county wherein such officer shall reside; that the writ of summons, in any such case, shall be directed to a constable in the county wherein the suit is instituted, which said constable is hereby authorized, by writing indorsed on such writ of summons, to depute any other constable in any other county in the State of Pennsylvania, in which the defendant or defendants shall reside, to execute said writ."

The second section declares that such service of the writ shall have the same force and effect as if served by a constable of the county wherein such action is commenced; and upon return of service the justice shall proceed to trial and judgment, upon which there shall be no stay of execution, as if such writ had been duly served in the same county.

The third section authorizes the officers named to sue for and recover fees from the plaintiff, before judgment; and from either plaintiff or defendant after judgment, in any suit in which such fees shall have been earned.

The fourth section provides for execution in any county of the Commonwealth.

The fifth section declares: "In all suits hereafter to be brought in any county by such officer or officers for the recovery of fees, a certificate of the prothonotary of the county wherein such suit is instituted, under his hand and seal of office, that any bill of fees appears by the record of his office to be correct, shall be *prima facie* evidence that such fees are lawfully due and correct."

The sixth and last section requires at least ten days' notice to the party or attorney of record before bringing suit under the Act.

Prior to the adoption of our present Constitution, pernicious class legislation similar to that contained in the Act above summarized was of such frequent occurrence that to remedy the evil it was ordained in section 7, article 3 of the Constitution, among other things, that the "General Assembly shall not pass any local or special law * * * regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; regulating the fees or extending the powers and duties of aldermen, justices of the peace, magistrates or constables; * * * nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same or give the relief asked for."

The Act in question is so manifestly in conflict with both the letter and the spirit of these constitutional provisions that a discussion of the subject beyond what may be found in the opinion of the learned president of the common pleas is uncalled for. He has pointed out very clearly wherein the Act is manifestly unconstitutional.

It is a special Act, in that it is designed for a particular purpose and is applicable only to particular persons and to them only for a lim-

ited period. In the special and restricted range of its operation it undertakes, among other things, to regulate the practice before justices of the peace; it changes the method of collecting certain specified debts due and owing to particular persons during a certain period only; it extends the powers and duties of justices of the peace and constables; it changes the rules of evidence in the particular cases to which alone it applies. In these and other particulars it is clearly in conflict with the constitutional provisions above quoted.

Without further comment, we are fully satisfied with the conclusion reached by the court below.

The judgment of the Court of Common Pleas, reversing the judgment of the Justice and all proceedings thereunder, is affirmed.

Watkin JAMES, *Plff. in Err.*,
v.

John CROWNOVER.

An instrument in the form of a **promissory note** with the addition of the words: "and waiving the benefit of all laws exempting property from levy and sale by execution, and **confessing judgment** for the said amount" is sufficient, when filed with the proper averment of non-payment and an express confession signed by an attorney, to authorize the **entry of judgment by the prothonotary**; and a judgment so entered should **not be stricken off** by the court.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Juniata County to review a judgment discharging a rule to show cause why a judgment entered upon a note signed by the plaintiff in error should not be stricken off. *Affirmed.*

On January 7, 1886, the defendant in error, plaintiff below, filed of record the following instrument in writing:

"Mifflintown, Pa., Oct. 1, 1885.

On January 1, 1886, after date, I promise to pay to the order of John Crownover, at the banking house of Parker & Co., five hundred and forty-five dollars, without defalcation, value recd., and waiving the benefit of all laws exempting property from levy and sale by execution, and confess judgment for the said amount of five hundred and forty-five dollars.

Watkin James."

With this was filed an averment that the whole sum of \$545, with interest from January 1, 1886, was due, and an express confession of judgment signed by the attorneys for the plaintiff as attorneys for the defendant, in the following words:

"By virtue of above general confession of judgment and warrant thereto, we hereby appear for Watkin James, to the above stated suit, and confess judgment against him and in favor of the above plaintiff for the sum of five hundred and forty-five dollars, with costs, release of errors, etc., waiving the benefit of all laws exempting property from levy and sale by execution, with interest from January 1, 1886.

D. D. Stone and J. A. McKee,
Attorneys for defendant."

Filed January 7, 1886.

PA.

Thereupon the prothonotary entered judgment. The court subsequently discharged a rule taken by James, to show cause why the judgment should not be stricken off, and this was assigned as error.

Messrs. Alfred Ashton and Alfred J. Patterson, for plaintiff in error:

The words used in the note gave no power to anyone except the prothonotary to appear for plaintiff in error.

A warrant to confess judgment contains not only a grant of the authority, expressed clearly and intelligibly, but a designation by name or description of the person who is to execute it.

Rabe v. Heslip, 4 Pa. 189; Act, Feb. 24, 1806, 1 Bright. Purd. p. 825; *Person v. Weston*, 1 Kulp, 337.

The warrant to confess must be express.

Rabe v. Heslip, *supra*; *Lytle v. Colts*, 27 Pa. 193.

A warrant of attorney is an instrument in writing or a demand to one or more attorneys therein named, authorizing them, generally, to appear in any court or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt.

2 Bouv. Law. Dic. 650.

The judgment is irregular because no warrant of attorney was filed when judgment was entered.

Judgment cannot be entered on warrant of attorney, before the warrant is actually filed in the prothonotary's office.

Chambers v. Denie, 2 Pa. 421; *Banning v. Taylor*, 24 Pa. 289.

On diminution of record suggested, the court will issue a *certiorari* to bring up the warrant.

Cro. Jac. 277; 3 Bac. Abr. 345, title, *Error*; 1 Com. Dig. 752, title, *Attorney*, B. 8.

Where no bond can be produced, or where no warrant of attorney exists, or none authorizing such judgment, the court cannot amend; and a judgment entered without authority ought to be stricken off.

Adams v. Bush, 5 Watts, 291.

Such a judgment should be stricken from the record at once, without regard to the question of indebtedness.

1 Troubat & H. 4th ed. (1867) p. 399; *Banning v. Taylor*, 24 Pa. 289.

The courts have authority to vacate or modify judgments entered by warrant of attorney, either for cause appearing on the record or for such as may be established by depositions.

Hutchinson v. Ledlie, 36 Pa. 112; *Cochran v. Eldridge*, 49 Pa. 365.

When there is no suit brought, and the plaintiff himself employs an attorney to appear for the defendant, under a warrant which is in the plaintiff's possession, in such a case, although the appearance is in form an appearance by the defendant, it is in fact an appearance procured by the plaintiff himself for his own advantage.

In a case of that kind, if the plaintiff causes a judgment to be entered against the defendant without a warrant to authorize it, the judgment should be stricken off.

Banning v. Taylor, 24 Pa. 289; *Campbell v. Kent*, 3 Pen. & W. 75.

The warrant of attorney must be filed without *oyer* demanded.

Banning v. Taylor, 24 Pa. 289.

Messrs. D. D. Stone and John A. McKee, for defendant in error:

Setting aside a judgment is a matter of sound discretion on the facts, and the refusal is not the subject of writ of error.

Sweeney v. Kitchen, 80 Pa. 160.

The prothonotary had the right to enter judgment on this note under section 28 of the Act of February 24, 1806.

Helcete v. Rapp, 7 Serg. & R. 306; *Ely v. Karmany*, 23 Pa. 314.

Per Curiam:

There was no error in the refusal of the court to strike this judgment from the record. The note upon which it was entered contains an express confession of judgment. Not only did attorneys for the maker of the note appear and confess judgment against him, but the prothonotary also entered judgment on the note against him.

The record showed no such defect or error as to require the court to strike off the judgment. *Judgment affirmed.*

James V. FENN *et ux.*, *Plffs. in Err.*,
v.

Amos EARLY *et al.*

1. To authorize judgment for want of an affidavit of defense against a married woman for work or labor done or money expended in relation to her real estate, the copy of book entries filed must contain or be accompanied by an averment that the debt was contracted for an act done that was necessary for the use, enjoyment or preservation of the wife's property.
2. Items of cash paid for the repair, or commissions charged for the sale of real estate, are not proper subjects of book account, and are not within the affidavit of defense law.
3. The statute limiting the time within which a writ of error may be sued out, does not apply to a married woman, plaintiff in error.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Cumberland County, to review a judgment for the plaintiffs for want of an affidavit of defense in an action of assumpsit. *Reversed.*

Motion to quash the writ of error. *Denied.*

This was a suit by Early & Kinzer, real estate agents, against James V. Fenn and Rebecca J. his wife. The summons was returnable May 7, 1883. The plaintiffs, on April 27, filed a statement in which they alleged their demand against the said defendants to be founded upon "a certain book account for work and labor done, services rendered and moneys paid, laid out and expended by said plaintiffs for the use of said defendant Rebecca J. Fenn, wife of said James V. Fenn, as per copy of said book account hereto attached, verified by the oath of said E. E. Kinzer, on behalf of said plaintiffs and made part hereof;" and upon "a claim

for work and labor done for and in relation to the sale of the real estate of said Rebecca J. Fenn, of which she was the owner at the time when said work and labor was done, as per said copy of book account, and at her instance and request."

The copy of the book account mentioned in the plaintiff's statement, and filed the same day, was as follows:

"Mrs. R. J. Fenn	
To Early & Kinzer, Dr.	
1877 Feb. 28, To numbering two houses on Vernon Street	40
Mar. 1, To advertising Vernon St. Houses 3 mos.	4 00
27, To cash paid for fixing locks,	25
31, To advertising Walnut St. House	15 00
1878 April 26, To advertising Third St. House in two papers	18 00
June 18, To commission on sale of Walnut St. House @ \$14,000 at 4 per cent.	560 00
1879 Jan. 28, To advertising Third St. House second time, two papers ..	18 00
	\$ 615 65
1879 Sept. 24, Cr. by note at Harrisburg National Bank at 60 days, drawn by Mrs. E. A. Gilchrist to our order for	\$180
Cr. by cash,	20
1880 Dec. 4, By cash per Rebecca J. Fenn,	100 \$300 00
	\$315 65

To this was attached the affidavit of one of the plaintiffs that the account was copied from their books of original entry.

On May 26, 1883, the plaintiffs took judgment for want of an affidavit of defense for the balance shown by the account, with interest.

At a later hour in the same day an affidavit of defense by the defendant James V. Fenn was filed, alleging in substance: that the said Rebecca J. Fenn was, at the time of making the alleged contracts and at the filing of the affidavit, a *feme covert*; and that the alleged services were not necessities nor for the improvement of her real estate; but that, on the contrary, the transaction was to her disadvantage and resulted in a loss of \$2,000 for which the plaintiffs were answerable.

Had an affidavit of defense been necessary, it should have been filed May 25.

On May 29, by petition setting forth their defense and that the failure to file the affidavit in time was due to a mistake in dates, the defendants obtained a rule to show cause why the judgment should not be stricken off or opened. This rule was afterward discharged without notice to the defendants. Execution returnable in April, 1884, called their attention to the fact, and they thereupon obtained a similar rule.

On January 5, 1886, the court below, Bar-

nett, P. J specially presiding, discharged the second rule; and on April 1, 1886, the defendants took this writ and assigned as error *inter alia* the action of the court below in holding the copy filed sufficient to sustain a judgment for want of an affidavit of defense; in entering judgment; in not striking off the judgment; and in discharging the defendant's rules.

Messrs. S. Hepburn, Jr., E. W. Biddle and Fleming & McCarrell, for plaintiffs in error:

Not an item in the copy filed is a proper subject for book entry, or susceptible of proof by books of original entry. All, except the charge for commission, are cash payments; and that cash payments cannot be proved by books of original entry is too well settled to admit of discussion.

The only other item in this account is the 4 per cent commission, on the sale of the Walnut Street house. The amount of these commissions depended upon the contract between the parties, and could not be proven by entries which one party chose to make in their books. There is no allegation or affidavit in the statement of claim filed, that the defendants or either of them ever agreed to pay these commissions.

An item of commission for collecting a sum of money is not a proper subject for a book charge.

Hale's Errs. v. Ard's Errs. 48 Pa. 22.

Commissions of a broker for sale of real estate, are not proper subjects of a book charge.

Great v. Noll, 1 W. N. C. 26; **McStay v. Dugan**, 2 W. N. C. 226; **Sylvester v. Thompson**, 11 W. N. C. 203.

A stock broker's books, charging commissions, etc., are not books of original entry within the meaning of the affidavit of defense law; and the objection thereto is not waived by filing an affidavit of defense.

Hudley v. Miller, 12 W. N. C. 461.

Had this case been on trial these books could not have been received in evidence to prove the plaintiff's claim. They would have been compelled to offer other evidence or suffer a compulsory nonsuit.

The declaration does not allege that plaintiff's claim is for necessities furnished the wife and contracted for by her. Neither does it allege that the claim against her is for the necessary improvement of her real estate. The sale of her real estate at her instance and request is not averred to have been for her advantage; while the affidavit of defense distinctly alleges that the sale was disadvantageous and resulted in serious loss to the wife.

The eighth section of the Act of April 11, 1848 (Purd. 1151), contains this important proviso, viz.: "*Provided*: That judgment shall not be rendered against the wife in such joint action, unless it shall have been proved that the debt sued for in such action was conducted by the wife and incurred for articles necessary for the support of the family of the said husband and wife."

The book of original entries was not proof of the plaintiff's claim; and the only affidavit filed was to the effect that the account was a correct copy of the books of original entry. Surely this was not the proof required by the statute to sustain a judgment against a married woman.

No definition of family necessities can be

given, but must be left to the jury in each case as it arises.

Parke v. Kleber, 25 Pa. 251.

Judgment cannot be taken against a married woman for want of an affidavit of defense.

Scott v. Wilmer, 1 W. N. C. 41; **Eisenbery v. Negus**, 2 W. N. C. 445; **Cooper v. Wallace**, 7 W. N. C. 468.

In **Debraham v. Walker**, 3 W. N. C. 26, which was an action of assumpsit against husband and wife on a book account against the wife, the court, in discharging the rule for judgment for want of a sufficient affidavit of defense, says: "Some further proof is necessary, besides the book of original entries."

In **Lippincott v. Hopkins**, 57 Pa. 328, Judge Brewster designates, *inter alia*, the cases under which a married woman is liable to suit upon her separate contract as follows: "Where the debt is contracted by the wife for the improvement of her separate estate, where the repair is necessary to preserve her property from dilapidation and to render it tenantable."

The liability depends upon the necessity of the thing contracted for by the wife to preserve or improve her separate estate. The necessity for this purpose is the essential fact, without which no liability attaches to the wife. The declaration in the present case does not aver dilapidation or any necessity for the sale of the wife's real estate, and is therefore incurably defective.

In the case of **Lippincott v. Leeds**, 77 Pa. 422, the declaration expressly averred that the material furnished for the repairing of the wife's property was necessary for the preservation and enjoyment of said houses.

The judgment must be stricken off because the declaration does not contain the necessary averments and proof to sustain it.

The learned judge erred in concluding that there was nothing in the merits of the case to urge the opening of this judgment.

Messrs. Francis Jordan and James M. Weakley, for defendants in error:

The defendants in error move to quash the writ in this case because not sued out within two years from the entry of the judgment, as required by the first section of Act of April 1, 1874, P. L. 1874, 50; *Purd.* p. 702, § 2.

There were intermediate proceedings, but they cannot legally affect this motion.

Application was made, May 29, 1883, by petition, to open the judgment; and a rule was granted as prayed. A full answer to the rule was filed, and the case in due course was put on the argument list. The affidavit of defense filed after the entry of judgment was of no legal consequence. Under the well known rules and practice in such cases the petition and affidavit to open had become *functus officio*, upon the granting of the rule; and being unsupported by any evidence the court could properly do nothing else than discharge when the matter came up for hearing. All things are presumed to be properly done in courts of justice; and even if the counsel of the defendant below was not present it could make no difference, nor could the other party be thereby prejudiced.

Association v. McBride, 4 W. N. C. 477; **Barter v. Szeley**, 10 W. N. C. 208.

The rule was discharged, August 22, 1883, and the plaintiffs in error had then, if never be-

fore, the right to their writ of error; and they had the two years fixed by statute in which to take it; yet it was not applied for or taken until April 1, 1886.

At the utmost, the application of the defendants below was an appeal to the equitable discretion of the court to open the judgment; and, as such, is not reviewable.

Riegel v. Wilson, 60 Pa. 388; *Wernet's App.* 91 Pa. 319; *Hill v. Irwin*, 82 Pa. 814; and *Commonwealth v. Howard*, 11 W. N. C. 81 and 82. And see also 17 W. N. C. 422; 100 Pa. 291; *Grim's App.* 105 Pa. 375-385.

Mr. Chief Justice **Mercur** delivered the opinion of the court:

Inasmuch as the plaintiff in error is a *feme covert*, the statute limiting the time within which a writ of error may be sued out does not apply to her. *The motion to quash the writ is therefore denied.*

The main contention is whether the statement filed is sufficient to support the judgment.

The claim is to recover a judgment *in personam* against the husband and wife for work and labor done and money expended, in relation to the sale of the real estate of the wife, at her instance and request.

The proviso to the Act of April 11, 1848, gives no express authority to a married woman to bind her separate estate by contract for the improvement or repair of her real estate. This power is only constructively within the Act. *Heugh v. Jones*, 32 Pa. 432; *Murray v. Keyes*, 35 Pa. 884; *Shannon v. Shultz*, 87 Pa. 481.

To sustain a common-law action against a husband and wife with a view of charging the separate estate of the wife, facts must be averred in the narr. and proved on the trial, sufficient to bring the case within the Act. It is not sufficient that a cause of action against the wife be proved, it must also be set forth in the declaration. *Murray v. Keyes*, *supra*; *Parks v. Kleeber*, 37 Pa. 251.

When the attempt is to charge the real estate of a married woman by a mechanics' lien the same rule applies. *Shannon v. Shultz*, *supra*; *Kuhns v. Turney*, 87 Pa. 497; *Loomis v. Fry*, 91 Pa. 896.

A judgment against a married woman which does not affirmatively show her liability on a contract within the statute is void; and a sheriff's sale of her property on execution issued thereon will confer no title to the purchaser. *Hecker v. Haak*, 88 Pa. 238; *Hugus v. Dithridge* *Glass Co.* 96 Pa. 160.

Applying these rules of law to the record in this case we find it clearly defective. It contains no averment that the debt was contracted for any act done, that was necessary for the use, enjoyment or preservation of her property, or that its condition or value was such as to make a sale thereof necessary, or even advisable for her advantage or profit. It is not sufficient to allege it was done for her use and at her instance and request. In some suitable language the necessity therefore must also be averred in the statement or narr. No such language is contained in this statement.

We also think the items contained in the copy of the alleged book account filed are not within the meaning of the rule requiring an affidavit of defense to be put in. The principal item is

for commission on sale of a house. This is not a proper subject of a book charge to be proved by the production of the book as one of original entry. *Hale's Exrs. v. Ard's Exrs.* 48 Pa. 22.

Other items are manifestly for money paid. The fact that the statement of the account is copied from books which the plaintiff below avers to be his books of original entries does not cure the defect. If the entries had no legal standing there to charge the defendant, a copy thereof cannot give to them additional force.

If they were not originally proper subjects of book account they have not become so since, and therefore are not within the rule requiring an affidavit of defense when a copy of the book entries is filed.

Judgment reversed and a procedendo awarded.

James DIEFENDERFER and Wife, In the Right of the Wife, *Plffs. in Err.*,

Jacob ESCHLEMAN.

1. **Dower**, at common law and under the Statutes of Pennsylvania, is an **estate** in the land, and **not a mere lien**.
2. The Act of March 29, 1832, charges the widow's dower on the land, in partition proceedings; and the **orphans' court cannot divest the dower**, by decree or otherwise, **unless the widow's consent is procured** in such manner as to pass her estate.
3. Her **consent will not be implied** from knowledge of the proceedings, and that the court had ordered a cash sale.
4. Such **knowledge will not operate as an estoppel**, and prevent her from recovering her dower, in an action of **assumpsit brought against an assignee of the land**.
5. **Evidence** that the administrator's deed omits reference to dower, or that the whole of the purchase money was paid to the administrator, or that the assignee of the land understood from his vendor or the scrivener that the land was clear from incumbrance, is **inadmissible**, where the widow is not a party to these transactions.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lehigh County, to review a judgment for the defendant in an action of assumpsit. *Reversed.*

This was an action of assumpsit by James Diefenderfer and his wife, to the use of the said wife, brought to recover arrears of interest due the plaintiff Sarah on her dower on the land of her late husband, Jacob J. Snyder, deceased.

At the trial before Meyers, P. J., specially presiding, the following facts appeared:

Jacob J. Snyder died on October 3, 1873, intestate, leaving to survive him his widow (now married to James Diefenderfer), and five minor children, and seised of two tracts of land situated in Lynn Township, Lehigh County, one containing about 76 acres, and the other about 8 acres.

On October 27, 1873, Henry J. Snyder, the guardian of three of these minor children, presented his petition in the orphans' court instituting proceedings in partition to divide this real estate.

The widow had notice of a rule to show cause why the land should not be sold.

An inquest was awarded which resulted in the sale of the real estate under these proceedings in partition, after refusal of all the heirs to accept. The order of sale was issued to Jacob Zimmerman, who had been appointed administrator of the estate.

The terms of the sale as fixed by the court were 10 per centum cash on the day of sale, one half of the purchase money on the first of April, 1874, and the balance thereof on the first Monday of October, 1874, with interest from the first of April, 1874.

Zimmerman made return to the court, that he sold tract No. 1, the seventy-six acres, to Daniel F. Snyder for \$2,750; and tract No. 2 to the same person for \$150, which sale was confirmed by the court on April 24, 1874.

Snyder, before receiving his deed from the administrator, entered into written articles of agreement with Jacob Eschleman, the defendant, dated March 22, 1875, for the sale of these two tracts of land. The consideration to be paid as stated in those articles of agreement, was as follows: "The sum of \$1,652 on the delivery of these presents, and the balance (less the dower which will remain on the said premises to the widow of J. J. Snyder, deceased, but the interest to said widow during her life), on the first of April next. Subject, also, to the dower of Jacob Snyder on said premises."

The defendant introduced under objection the following testimony of one Weiss in relation to this agreement:

Q. Did Eschleman and Snyder come to your office together at any time after the agreement was made?

A. When the deed was delivered.

Q. What was said about the dower?

Objected to as incompetent and irrelevant and a declaration between third parties; objection overruled and bill sealed for plaintiffs. *Assignment of error.*

A. The deed was made by some one from Zimmerman to Snyder; by whom I do not know; I wrote the deed from Snyder to Eschleman and I wrote it on the same form. I read the deed over to the parties as a matter of course. I was under the impression myself that Snyder got a free deed; so I had learned; and so he had to give a free deed, and so I wrote it.

Q. You inserted in the agreement that it was to be subject to a certain dower?

A. No, sir; I must acknowledge that it was put in at the instance of myself, because I was under the impression that the dower would remain. Afterwards I learned that the dower might be taken off.

Objected to as being in contradiction of a written paper and as a matter not transpiring in the presence of the plaintiffs, and also as incompetent and irrelevant. Objection overruled; and bill sealed for plaintiffs. *Assignment of error.*

Jacob Zimmerman, the administrator, conveyed these two tracts of land to Daniel F. Snyder by deed dated November 20, 1875; and Daniel

F. Snyder conveyed the same land, in pursuance of the agreement, to Jacob Eschleman by deed dated December 17, 1875. No mention of the widow's dower was made in either of those deeds.

Jacob Eschleman afterwards reconveyed to Daniel F. Snyder seven acres and twenty-six perches of this same land, and the balance he kept and held at the time this action was brought.

Jacob Zimmerman, the administrator, charged himself in his account with the proceeds of this real estate, and used some of it, in connection with the proceeds of the personal estate, for the payment of debts and expenses; so that the whole balance for distribution, as found by the auditor on the administrator's account, was \$1,169.87.

The widow never appeared before the auditor, and never released this dower or authorized anyone else to release it from the land. The administrator and Daniel F. Snyder, with their counsel, appeared before the auditor; and the auditor reported as a fact that "It was also agreed that the balance in hand, or assets arising from the sale of the real estate, is to be considered as real estate for the purposes of distribution, and that the widow is entitled to one third of the net balance, the interest whereof is to be paid to her during the period of her natural life annually; and that the said one third so distributed shall be invested on real estate security during said term." And he reported a distribution, *inter alia*, to "Sarah Ann Snyder (widow), \$389.79." His report was filed and confirmed by the court, December 28, 1875.

This money was never invested for the widow; and all she ever received on her interest was on December 8, 1876, in goods out of the administrator's store for \$33.78; and from his son in cash, in 1877, \$23.38.

The court charged, *inter alia*, as follows:

"Here are two innocent persons. The law says the court should have made a decree in a certain way; that this interest of the widow, constituting her dower, shall remain in the hands of the purchaser; but the court made a different order, and it may have made an order for reasons which we do not know. Zimmerman the administrator is dead and Snyder is dead, and they are not here to explain; and it is possible that it may have been understood between them that this dower was not to remain a charge on this land.

The deed which Snyder had from the administrator showed that it was a free deed and not subject to this dower. This lady also had constructive notice, and she made no objection. We would be glad if we could discover that she was the least culpable, so far as laches are concerned; but we cannot do so, as we understand the law. We think she is most to blame in this matter, as between the two innocent parties; and we therefore hold that the defendant in this suit is not liable, and direct that under the evidence you enter a verdict in favor of the defendant."

The jury found for the defendant in accordance with the direction of the court. Whereupon, the plaintiffs took this writ assigning as error the admission of the testimony of Weiss and the portions of the charge above quoted.

Mr. James S. Biery, for plaintiffs in error:

There was neither fraud, accident nor mis-

take alleged in the execution of the written agreement between Daniel F. Snyder and Jacob Eschleman, the defendant, for the sale of the land on which this dower remains.

Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement.

Martin v. Berens, 67 Pa. 403; *Thorne v. Wurfflein*, 100 Pa. 519.

Where there is no allegation that a limitation to an agreement was left out by fraud, accident or mistake, it cannot afterwards be interpolated by evidence on the trial of a case involving the agreement.

Heebner v. Worrall, 38 Pa. 373.

The real estate was sold under proceedings in partition; and our Act of March 29, 1832, *Purd. Dig.* §§ 41, 542, pl. 172, provides that in such case the widow "shall not be entitled to payment of the sum at which her purport or share of the estate shall be valued; but the same, together with interest thereof, shall be and remain charged upon the premises," etc.

Section 42 provides that where land is sold "under proceedings in partition, such real estate shall not be liable, in the hands of the purchaser, to the debts of the decedent," etc. And section 43 of the same Act directs, that "Where a decree for the sale of real estate shall be made by the orphans' court, in the event provided for in the preceding section, the court shall direct that the share of the widow, if there be one, of the purchase money, shall remain in the hands of the purchaser, during the natural life of the widow; and the interest thereof shall be annually and regularly paid to her by the purchaser, his heirs and assigns, holding the premises," etc.

What is the nature of a widow's statutory dower under our statutes? This court has said: "What her estate really is, is expressed in the Intestate Act of April 8, 1833, § 1. 'One third part of the real estate for the term of her life,' and the form in which the law assigns it leaves its character unchanged."

Schall's App. 40 Pa. 177.

Like dower at common law, it is a defined interest in her husband's lands, arising at his death, and is a freehold estate.

Bachman v. Chrisman, 23 Pa. 163.

It is an interest arising out of the land, in all respects of the nature of a rent charge, and subject to sale on execution.

Shaupe v. Shaupe, 12 Serg. & R. 12; *Thomas v. Simpson*, 8 Pa. 70.

It is an indefeasible charge for the widow and the heirs, and legal representatives after her death.

Vandever v. Baker, 13 Pa. 126; *Meizer v. Menor*, 8 Watts, 296.

That the widow's interest is real estate is well settled by repeated decisions. *Kurtz's App.* 26 Pa. 466.

That it is real estate is clear from considering that the Intestate Act gives her, where there are children, one third of her deceased husband's lands during her life.

Miller v. Leidig, 3 Watts & S. 458.

To call it a lien by way of expressing another additional security for the widow's rights is not to deny its true character as an estate.

Ziegler's App. 35 Pa. 189.

It is an estate that is given by the intestate laws; and the partition laws do not change it. But whatever difficulty there may be in defining the estate, there is no difficulty in understanding what it really and practically is. Where the widow's share is laid off by metes and bounds, she has a life estate in the portion assigned to her as land, which carries with it as a necessary incident the right to receive the rents and profits; but where the estate is accepted at the appraisement or sold, she has a life estate, not in any specific portion of the land, but in an equivalent share of the rents and profits of the whole estate, measured by the interest on her share of its value as ascertained by appraisement or sale. In whichever form, therefore, the assignment of her share is made, she has an estate in the land of which her husband died seised; and by force of statute it vests in her *eo instanti* the husband dies.

Gourley v. Kinky, 66 Pa. 274.

And this court has also said: "We have examined the old Acts of Assembly, April 19, 1794, § 22; April 7, 1807, § 6; and April 14, 1828, § 5, relative to the assignment of the widow's share in partition, and compared them with the Orphans' Court Act of March 29, 1832, §§ 41-43, and are satisfied that none of them change the character of her estate given by the Intestate Acts in lieu of dower, but only prescribe the form of assigning it."

Schall's App. 40 Pa. 177.

In addition, the Act of Assembly gives her the remedy of distress for the collection of her interest, which places her in the attitude of a landlord possessed of an estate. According to these authorities, the widow has not only a lien on the land but an interest or estate in the land.

The widow is not required, by our Acts of Assembly or by the decisions of the courts, to do anything in order to secure her statutory dower. The statute creates her estate and preserves it for her and the heirs until she dies, or until by some act of hers she relinquishes her rights.

In passing upon this very question, under the Act of April 19, 1794, this court has said: "It would not be in the power of the court to divest the lien of the widow and heirs in the teeth of an Act so express as the present; and it seems to me it is not using them fairly in supposing they had any such intention."

Medlar v. Aulenbach, 2 Pen. & W. 355.

In *Hise v. Geiger*, 7 Watts & S. 273, bonds and a mortgage were given by the purchaser to secure the interest of the widow and heirs, respectively, the principal of which was paid at the widow's death to the administrator, who entered satisfaction upon the mortgage and canceled the bonds. The court below held that this discharged the share of the widow and heirs and directed a verdict in favor of the defendant. This court reversed the court below and said, p. 275: "The lien remains, notwithstanding the recognition and mortgage executed by the purchaser, which, as is held in the case cited (2 Pen. & W. 355), are additional, collateral and cumulative remedies or securities for the debt." And the payment to the administrator was held not to affect the lien.

In *Fisher v. Kcan*, 1 Watts, 261, this court said: "The direction that it should be secured

by remaining a lien on the land amounted to nothing; the law had placed it there and made it a lien beyond the control of courts and juries until the widow died or released it."

The case at bar is very similar to that of *Kline v. Bowman*, 19 Pa. 25. In that case the court also failed to direct in the order of sale that the widow's share should remain in the land; but in the deed the conveyance was made subject to the widow's dower; while in the case at bar the dower was mentioned and reserved in the articles of agreement between Daniel F. Snyder and Jacob Eschleman, the defendant, and the conveyance was thereby agreed to be made subject to the dower.

Judge Lewis, in delivering the opinion, in *Kline v. Bowman*, said at page 33: "We are of opinion, for the reasons stated in the opinion of the court below, that the lien, by which the interest on one third of the purchase money was secured for the benefit of the widow for life, the principal to be paid to the heirs at her death, continued a charge upon the land, and was not divested by the sheriff's sale."

Clearly, then, the omission of the court to direct that the widow's share should remain a charge on the land, could not divest her of her statutory interest or estate in the land, which vested in her *eo instanti* her husband's decease.

An action of assumpsit may be maintained against a person taking land charged with the payment of money, as a means of enforcing payment out of the land. This arises out of privity of estate in the assignee, whose land is thus charged as a means of subjecting it to execution by a judgment *de terris*.

De Haven v. Bartholomew, 57 Pa. 126.

See also, *Hise v. Geiger*, 7 Watts & S. 275.

A widow has divers cumulative remedies for the collection of arrears due her on the valuation of her estate. The whole of the land is charged. Assumpsit or debt may be maintained by her, or after her death by the parties entitled to unpaid arrears and the principal against the alienee of the person who accepted the land, and the judgment will be entered *de terris*.

Alleman's App. 42 Legal Int. 70.

Mr. Evan Holben, for defendant in error:

The Act of April 8, 1833, does not provide how the money shall be secured. The plaintiff's interest is not an estate in the land, that cannot be divested by proceedings in partition. It is an annuity in the nature of a rent charge.

Power v. Power, 7 Watts, 212.

She cannot enjoy the land, except where her purport is laid off by metes and bounds under proceedings in partition.

The estate in the land may be divested in the manner prescribed in the Act; as, upon petition of the widow or one or more of the children.

Thomas v. Simpson, 8 Pa. 70.

By Act of March 29, 1832, it is provided, *inter alia*, that "The court may, on due proof of notice to all persons interested, make a decree authorizing and requiring the executor or administrator, as the case may be, to expose such real estate to public sale at such time and place, and on such terms as the court may decree."

Under this Act the court decreed that the terms should be cash. The authority of the PA.

court to do this cannot be controverted. These terms of sale ought to have been objected to by the widow if they were not satisfactory to her. If the decree was not strictly in accordance with the spirit of the Act, she ought not to have slept on her rights. A widow may waive her right to dower by her silence.

Where one of two parties who are equally innocent of actual fraud must lose, the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other.

Pa. R. R. Co's App. 86 Pa. 80.

Mr. Chief Justice Mercur delivered the opinion of the court:

A tenant in dower at common law has an estate and not a mere lien. *Zeigler's App.* 35 Pa. 178.

So under our intestate laws a widow's statutory dower is an interest in the land, not merely a lien.

Miller v. Leidig, 8 Watts & S. 458; *Backman v. Chrisman*, 23 Pa. 162; *Schall's App.* 40 Pa. 170; *Gourley v. Kinley*, 66 Pa. 270.

Section 41 of the Act of March 29, 1832, declares if the widow of the decedent be living at the time of the partition of his real estate, she shall not be entitled to payment of the sum at which her purport or share of the estate shall be valued; but the same, together with interest thereof, shall be and remain charged on the premises; and the legal interest thereof shall be annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs and assigns.

The remedies of the widow for the collection of her dower are cumulative. *Medlar v. Aulenbach*, 2 Pen. & W. 359.

She may collect by distraining or proceed on the recognizance, or other obligation given by the person to whom it was allotted, or bring assumpsit against his assignee. *Pidcock v. Bye*, 3 Rawle, 183; *DeHaven v. Bartholomew*, 57 Pa. 126.

Each of the several Acts of 1794, 1807, 1828 and 1832 relates to the assignment of the widow's share in partition. No one of them however changes the estate given to her by the intestate laws in lieu of dower, but only prescribes the form of assigning it. *Schall's App. supra*.

The legislative command, that the money for her share in the land shall remain charged thereon, withholds from the orphans' court in awarding partition all power to decree otherwise, unless her consent be procured in such manner as to pass her estate in the land. *Fisher v. Kean*, 1 Watts, 259.

No such consent was given in this case.

The assignee is in no better position than the original purchaser. The Act of 1832, cited, expressly extends the same liability to him. He was bound to take notice of the decree of partition which is in the line of his title. Here however the defendant had actual notice of the widow's estate in the land, and of her claim to the annual interest thereon.

Under proceedings in partition by the heirs of J. J. Snyder the intestate, the real estate was sold to one Daniel F. Snyder, and confirmed by the court. Before a deed therefor was delivered to him he entered into a written agreement under seal with the defendant for a sale

of the land to the latter in consideration of \$3,875, agreed to be paid therefor, to wit: \$1,652 on the delivery of "these presents" and the balance on the first day of April then next, "less the dower which will remain on the said premises, to the widow of J. J. Snyder deceased, but the interest to said widow during her life;" subject also to the dower of Jacob Snyder on said premises."

When Daniel afterwards executed a deed to the defendant, it does not appear that a reference was therein made to the dower of the plaintiff. Whether that may affect the vendor on the covenants in his deed is a question not now before us. Certain it is that that does not relieve the defendant from the express notice he had received of the estate and claim of the defendant.

We discover nothing in the evidence to estop the plaintiff from maintaining this action. The fact that she had notice of the rule to show cause why the property should not be sold works no estoppel against her. The result of that sale would determine the annual sum which she would be entitled to receive; but it could not affect the character of her estate nor deprive her of all appropriate remedies for the enforcement of her rights.

The omission in the deed, from the administrator to Daniel F. Snyder, to refer to the plaintiff's right of dower, and the fact that Daniel paid the whole purchase money to the administrator, and the additional one that when the defendant accepted the deed he understood, from his vendor or the scrivener who drew it, that the land was clear from incumbrance, are all irrelevant, and the evidence thereof was improperly admitted. The plaintiff was not a party to nor present at any of those transactions. The acts and declarations of other persons could not impair her estate in the land nor destroy her remedies for the collection of the sum given her by law.

The learned judge, therefore, erred in taking the case from the jury and in instructing them to find for the defendant.

Judgment reversed and a venire facias de novo awarded.

LANCASHIRE INSURANCE COMPANY,

Plff. in Err.,
v.

Thomas J. NILL and E. J. Nill, His Wife,
in Right of the Wife.

1. In an action of debt upon a policy of fire insurance, where the defendant filed a plea of non est factum, the plaintiff must offer evidence of the execution of the policy sued upon. Evidence that it was countersigned by parties representing themselves to be agents and in possession of the policy is not sufficient.
2. Where a party holds a policy of insurance in one company at the time of loss, no liability can attach against another company on a policy issued before the fire and retained by the agent until after the loss, to be substituted for the first policy, but of which the assured had

no knowledge, and this, although the assured accepted the substituted policy after the loss and gave up the other one for cancellation.

3. An attempt by the agent to shift the responsibility from the company upon which it had fallen to the other, which, at the time of the fire, had assumed no responsibility, is a fraud on the latter company.
4. The unearned premium of the canceled policy, not being returnable until after the loss, could not be applied to the other policy before the loss; and it was error to allow the jury to infer that it was.
5. Held, under the facts of this case, that the agent who issued this policy was not the agent of the assured.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Franklin County, to review a judgment on a verdict for plaintiff, in an action of debt on a policy of fire insurance. *Reversed.*

The facts were substantially these:

In 1881 and prior thereto, Mrs. Nill owned a life estate in a woolen mill, situated near Chambersburg, Pa. About May 1, 1881 she authorized her husband Thomas J. Nill to effect an insurance on this mill, to the amount of \$1,500, and he procured a policy for that amount, for one year, from the Hartford Fire Insurance Company, through Kauffman & Brown, its agents at Harrisburg. When this policy expired, May 1, 1882, she procured one for a like amount from the Imperial & Northern Insurance Company, from Kauffman & Brown, they being also that company's agents. About June 1, Mrs. Nill was advised by the company's agents that they were ordered to cancel the Imperial and Northern policy, and they sent her as a proposed substitute a policy in the Clinton Insurance Company of New York, for eleven months, the remainder of the year. After Mrs. Nill had talked the matter over fully with her husband, she accepted the Clinton policy, and returned that of the Imperial.

Thus matters remained, so far as all parties to this action knew, until August 9, 1882, when the mill was burned. Mr. Nill gave notice of the loss the same day by letter received on August 10, to the Clinton's agents, now Brown & Beggs, claiming under the Clinton policy, and on the latter date he received a telegram to come to Harrisburg the next day, and to bring with him the Clinton policy. On the 11th he went to Harrisburg with this policy and was told by Mr. Brown that about the first of August the Clinton Company had ordered its policy canceled and that he had issued one in the Lancashire (the defendant) in its stead, but neglected to send it to Mrs. Nill.

Mr. Nill hesitated about giving up the Clinton policy and accepting that of the Lancashire; but being assured by Brown that the Lancashire was a first class company, he surrendered the Clinton policy and took the Lancashire home with him. The Lancashire Company's general officers were ignorant of all these facts; but being advised by Brown & Beggs that they had

a loss on the mill in question, they sent a man to inquire into it; and upon learning the facts regarding the issuance of the policy, they refused to pay.

The plaintiff, accordingly, brought an action of debt on the Lancashire Company's policy of insurance to which the defendant pleaded payment *non est factum* and never indebted. Notice of special matter was also given to the effect that the defendant would show that the policy was not delivered nor the premium paid until after the fire.

Upon the trial of the cause, plaintiff's counsel offered to prove by Mr. Nill, among other things, that this property had been previously insured in the Clinton Insurance Company; that the witnesses, acting for the insured party, was notified by Mr. Brown that, the Clinton Insurance Company being unwilling to accept or continue the risk, he had placed the property in the defendant Company at the date which appears upon the policy in suit; that he (Brown) had issued this policy on the 28th of July, 1882, but that he had held it up by inadvertence; and immediately upon ascertaining the loss of the property, he had notified the witness to come to Harrisburg and bring with him his Clinton policy; that, pursuant to that notice, he went to Harrisburg on the 11th day of August, following the fire, and at the request of Brown, the agent, surrendered the Clinton policy and received the policy in suit from Brown's hands, Brown stating at the time that the policy had been regularly issued on the 28th of July, and that he had neglected to send it to the party insured.

Objected to, because there is no sufficient evidence of the agency of Brown, and a large portion of it is of a character that could not be testified to by the agent, being mere declarations of the agent himself outside of the line of his duty.

Objection overruled, the court holding that the agency of Brown & Beggs was made out *prima facie*, by the fact that they were in possession of policies of the Company under the seal of the Company. *Fourth assignment of error.*

Plaintiff's counsel offered the policy of the Lancashire Insurance Company in evidence.

Objected to, on the ground that there was no evidence to establish the policy as the act of the Lancashire Insurance Company.

Objection overruled. *Second assignment of error.*

The defendant presented, *inter alia*, the following points:

1. That it being admitted by T. J. Nill, agent of his wife, that he had issued to the wife a policy of insurance in the Clinton Fire Insurance Company of New York, in June, 1883, for eleven months, for which he paid \$37.50, and that the said policy was accepted by the wife and was in her possession at the date of the fire, the claim against said Clinton Company being a valid claim upon which the wife could have recovered the amount of said policy, she cannot recover against the defendant.

Ans. I do not affirm this point. If you find that Brown was the agent of Mrs. Nill for the purpose of accepting a policy of insurance from the Lancashire Company, according to my in-

structions already given; if he had implied authority from the course of their previous dealings to put Mrs. Nill into this company or that company at his option, and that thus he was her agent, for the purpose of selecting the company and for the purpose of accepting a policy in any one of these companies, then when he canceled the Clinton Company's policy, and did accept a policy in the Lancashire Company, that was an end of the Clinton Company's insurance, and it was no longer operative, and the Lancashire Company would be bound. *Sixth assignment of error.*

2. The Clinton Company, through its agents and managers, could not rescind or cancel the policy made to Mrs. Nill in June, 1883, without the consent of Mrs. Nill, or without reasonable notice to her of their purpose to rescind, and in this case no such notice was given.

Ans. The Clinton Company could not rescind its policy without the consent of Mrs. Nill, or, at least, without due notice to her; and no such notice was given. But if Mr. Brown was her agent, with implied authority, in the manner I have spoken of, to transfer her from one company to another and to receive a policy for her, then I say that the notice given to Brown by the Clinton Company, and his consent to the cancellation of the policy, was hers, and that this point raises no obstacle to her recovery. *Seventh assignment of error.*

4. That an agent of an insurance company has no authority to insure property already destroyed; and a policy written and intended as a substitute for a subsisting policy in another company but not delivered, and of which the assured had no knowledge until after the property is destroyed, is not a valid contract of insurance.

Ans. I affirm this point in its general terms, but not without qualification with reference to the circumstances of the case. An agent of an insurance company has no authority to insure property already destroyed. But Mrs. Nill, through her counsel, contends that this property was insured before it was destroyed, because this policy is dated the 28th of July; and she claims that it was delivered to her on the first of August (that is, delivered to Brown as her agent) and that that was a delivery before the property was destroyed. If you find that there was no delivery, under the instructions we have given you, until after the property was destroyed, then the plaintiff cannot recover, and the point is well taken. But if a policy is written and intended as a substitute for a subsisting policy in another company, and it is delivered before the fire occurs, then that the assured had no knowledge until after the property was destroyed does not affect it, if in point of fact the agent had the authority, express or implied, to change from one company to another, and was the agent of the insured for the purpose of accepting a policy. *Ninth assignment of error.*

5. T. J. Nill, the agent of his wife, having stated in his evidence that he held the Clinton policy at the time of the fire; that he gave notice under it to the company; that he paid his money on that policy and no other; that he knew nothing of the existence of the policy under which the plaintiff's claim until after the fire, that is to say, on the 11th of August, the fire having

occurred on the 9th of August; that he received the policy on said 11th of August; that he never knew of or authorized the substitution of the Lancashire for the Clinton, the said policy is not a valid contract upon which the plaintiff can recover in this case.

Ans. I cannot affirm this point. First of all, it assumes certain facts as existing which are not conceded and which you must ascertain for yourselves; as, for instance, it assumes that Mr. Nill's testimony was to the effect that he gave notice under the Clinton Company's policy to that company. But it is for you to say whether he did or not, under the instructions I have already given you. This point, therefore, I cannot affirm in the language in which it is stated; and I must submit the matter to you on the instructions I have already given you, without repeating them. If you once decide that this policy was duly issued by and was the deed of the Lancashire Company, that the preliminary conditions were fulfilled and that the premium was paid, then the question resolves itself very much into this: whether, under all the circumstances of the case, Mr. Brown was really the agent of Mrs. Nill as well as for the company; that is to say, whether he was her agent for the purpose of placing the insurance wherever he thought best and for her. If you be of that opinion, then the matter stated in this point would not prevent recovery by her. *Tenth assignment of error.*

The court charged the jury *inter alia* as follows:

When the Clinton Company's policy was canceled, the Clinton Company must refund a portion, namely: three quarters of the premium which its agent held in his hand for the whole year, from May 1, 1883. I suppose \$31.95 which we find in this policy would be the amount.

Then, if the Clinton Company would have to refund that sum, and he (Brown), being its agent and having its moneys in his hands, canceled the policy, it is contended, and it seems to me properly, that he would then have in his hands \$31.95 of Mrs. Nill's money to appropriate to some other insurance; and then he appropriated it to pay the premium for \$1,500 insurance for nine months, making the remainder of the year, in the Lancashire Company. And thus it would seem, if these be the facts of the case, that Mrs. Nill did pay the premium, \$31.95, in this way; Brown & Beggs acting as her agents in this business of transferring the policy from one company to the other, they being the agents for all these companies and acting for Mrs. Nill in making these transfers. It would seem, thus, that she did pay the premium for this insurance of nine months, supposing you to accept the evidence of Mr. Nill in regard to these transactions." *Fifth assignment of error.*

Verdict for plaintiff, in the sum of \$1,782.50, and judgment thereon.

The defendant took this writ, *assigning for error, inter alia*, the answer to the above points, the assignments above mentioned, the portion of the charge above quoted, and the action of the court in submitting the question to the jury whether the policy of the Clinton Insurance Company had not been canceled and the defendant's policy issued before the fire, there being no evidence thereof in submitting to the

jury the question whether Brown & Beggs had authority from Mrs. Nill to cancel the Clinton policy and accept the policy of defendant, there being no evidence of such agency; in admitting the policy in evidence; and in admitting Brown's declarations concerning the issuance of the policy, there being no legal evidence of the agency.

Messrs. F. M. Kimmell and Sharp & Alleman, for plaintiff in error:

Only one policy was intended to be in force at the time of the fire. Unless Brown & Beggs had authority from Mrs. Nill, not only to procure insurance for her but also to cancel her policies at pleasure, and without consulting either her or her immediate agent, only the Clinton policy attached at the time of the fire.

Stebbins v. Lancashire Ins. Co. 60 N. H. 65; *Massasoit Mills v. Western Ins. Co.* 125 Mass. 110.

Brown & Beggs never had such authority and the Lancashire policy, therefore, did not become a binding contract. Even if the agents, Kauffman & Brown, were the agents of Mrs. Nill to place the insurance originally, that did not constitute them or Brown & Beggs agents to receive notice from the Company of the cancellation of the Clinton policy. This has been flatly held in a case reversing the court below in *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278 (Bk. 27, L. ed. 932). It was not only necessary to the cancellation of the Clinton policy that the assured should be notified of the cancellation, but the unearned premium must have been returned.

May, Ins. ed. 1882, § 67.

The execution of the policy in suit was not proved.

There was proof only that the policy in suit, purporting to be that of the defendant, was in the possession of Brown & Beggs.

The seal of a private corporation does not prove itself.

Farmers & M. Turnpike Co. v. McCullough, 25 Pa. 303; *Angell & Ames, Corp.* § 226 and cases cited.

Mr. Jno. Stewart, for defendants in error:

The rule is well settled that where some evidence of agency has been given, it is competent to give in evidence the acts and declarations of the alleged agents respecting the subject matter of their authority.

Cent. Pa. Telephone & Supply Co. v. Thomson, 17 W. N. C. 331; *S. C.* 2 Cent. Rep. 544.

The fact that when the policy was in the hands of Brown & Beggs it was already executed by the chief officer of the Company would have been sufficient of itself to admit the acts and declarations of the alleged agents; for it is sufficient to establish agency in itself.

Lightbody v. North Am. Ins. Co. 23 Wend. 18.

On the plea of *non est factum*, wherever there is a spark of evidence of sealing and delivering, the court is bound to permit the instrument to be read; for it is not for it but the jury to judge of the fact.

Berks & Dauphin Turnpike Road v. Myers and Sigfried v. Loran, 6 Serg. & R. 15, 310; *Scott v. Gallagher*, 11 Serg. & R. 350; *Hamsher v. Kline*, 57 Pa. 402.

A general authority to represent the plaintiff in all matters relating to the particular insur-

ance would be sufficient warrant for Brown & Beggs to accept notice of cancellation for the insured.

Standard Oil Co. v. Triumph Ins. Co. 64 N. Y. 85; *Hermann v. Niagara Fire Ins. Co.* 1 Cent. Rep. 707.

Stebbins v. Lancashire Ins. Co. 60 N. H. 65 cited and relied upon by the defendant, is inapplicable, as it was not attempted in that case to show any implied or express authority in the broker, who placed the insurance, to do anything beyond.

Mr. Justice Gordon, delivered the opinion of the court:

This case is all wrong. In the very outstart under the defendant's plea of *non est factum*, it was the plaintiffs' business to prove the execution of the policy sued upon; but this was not done; nevertheless, the court, notwithstanding the defendant's objection, admitted it and sent it to the jury, with the instruction that they should treat it as the defendant's deed if they found that it was countersigned by Brown & Beggs, and if they were also satisfied that these persons were the company's agents.

In this there was double error, for neither was the execution of the policy proved, nor the agency of Brown & Beggs. "It purports," says the court, "to have been signed by Henry Robinson, the United States manager, and countersigned by Brown & Beggs at Harrisburg. Mr. Nill tells you that it was received by him from Mr. Brown, of the firm of Brown & Beggs, and that Brown & Beggs claimed to be the general agents of the Company at Harrisburg; he treated with them as such. Then you are told further that the adjuster, or one representing himself to be the adjuster of the Company, came here and saw Mr. Nill in reference to the fire."

All this, however, is assumption without evidence for its support. We have examined the testimony in vain, in order to discover such proof as would warrant the submission of such statements to the jury. There is nothing to show that either Henry Robinson or Brown & Beggs had any authority whatever to sign or countersign the defendant's policies. In this branch of the case, therefore, the plaintiff signally failed, and the court should so have instructed the jury. But admitting the execution of the policy and the agency of Brown & Beggs, and still the plaintiff was not entitled to the verdict.

The court directed the jury to determine whether Brown & Beggs were not acting as agents as well for the plaintiff as for the Lancashire Company. Of this, however, there was no evidence; the very contrary. Nill obtained the Clinton policy from these agents and paid them the premium through the medium of the postoffice, and never had a personal interview with either of them until the 11th of August following. Mrs. Nill had no agent but her husband nor was any other necessary.

She desired no change; the Clinton policy was perfectly good, and could not be canceled without notice to her; and neither she nor her husband knew of the action of Brown & Beggs until the date above mentioned, which was after the loss, when these men imposed alike on

Nill and the defendant by inducing him to surrender the Clinton policy and accept the one now in suit. A brief history of this transaction is found in his affidavit of the 17th of August, 1882, wherein Nill testifies:

"On Friday morning, the 11th instant, I took the 8:23 A. M. train at Greencastle for Harrisburg, arriving there about 11 A. M. I went from the depot to Brown & Beggs' office, where I was obliged to wait till after 12 M. before I saw said Mr. Brown. Mr. Brown came to the office. He had to tell me the Clinton Insurance Company had, about the first of August, 1882, canceled their policy on the said mill, and that he had put us in the Lancashire Fire Company; but he neglected to notify us of the change. I then asked him if it would make any difference in the exchange, or whether our rights would be affected or prejudiced by the exchange. He, the said Brown, then said it would not, as the company he had put it in was a first class company. I then gave him, the said Brown, the said Clinton policy, and he gave me the Lancashire policy. This was the first notice we had received of any change or any desire for a change."

From what is here said, and it accords strictly with his evidence given on the trial of the case, it is very clear that Brown's previous action was without warrant from the insured; and it will, we presume, hardly be pretended that had Nill, on the 11th of August, refused to surrender the Clinton policy, Brown's pretended cancellation of it would have released that company from its obligation to Mrs. Nill. But if the Clinton policy was still in force on the 11th of August, 1882, two days after the fire, the action of Brown & Beggs in the delivery of the Lancashire policy as a substitute for that of the Clinton Company was a mere attempt to shift the loss from the company upon whom it had fallen to the other, which at the time of the fire had assumed no responsibility.

It requires no argument to show that this could not be done and that the attempt to accomplish a design of this kind was a fraud on the defendant. Neither does it appear from the evidence that the defendant received a premium as a consideration for its policy. The court allowed the jury to infer that as Brown & Beggs were agents for both the Companies as well as for Mrs. Nill, and as, on the cancellation of the first policy, the unearned part of the premium must be refunded, therefore, these agents received this money thus due the plaintiff, and paid it on the Lancashire policy. This might have been so, but as there was no evidence of it, the court ought not to have devised and sent to the jury a theory that had no foundation in fact. Following the regular order of business, the return premium would not be payable to the insured until the policy had been surrendered, and, of course, until after that time there was nothing in the hands of Brown & Beggs belonging to the plaintiff which could be paid to the defendant.

Thus, however we view this case, we discover no foundation of fact upon which it can rest, or which could warrant a submission of it to the jury.

The judgment of the court below is reversed and a new venire awarded.

John FUNK'S ADMRS., *Piffs. in Err.*,

WAYNESBORO' SCHOOL DISTRICT.

1. **Proceedings**, instituted by a board of school directors, to assess damages for taking lands for school purposes, under the Act of April 9, 1867, may be discontinued at any time before final confirmation of the proceedings, or the taking of actual possession of the land.
2. **Staking off land** prior to a view for assessment of damages, is not such possession as to give title. (*Beale v. Pa. R. Co.* 86 Pa. 510, distinguished.)

(Decided October 4, 1886.)

CERTIORARI to the Common Pleas of Franklin County, to review the record of the court, vacating proceedings for the assessment of damages for lands taken for school purposes. *Affirmed.*

Reported below, 1 Pa. C. C. R. 422.

The facts are stated in the opinion.

The assignments of error were to the action of the court: 1, in allowing the withdrawal of the original petition and the subsequent proceedings in the case; and 2, in ordering the rule for a discontinuance to be made absolute and decreeing that all the proceedings be vacated.

Messrs. F. M. Kimmel and John Stewart, for plaintiffs in error:

Whenever the board of directors or controllers of any school district in this Commonwealth shall be unable to procure an eligible site for the erection of school houses therein, as they may deem expedient, by agreement with the owner or owners of the land, it shall and may be lawful for the board of directors, in behalf of the district, to enter upon and occupy sufficient ground for the purposes, which they shall designate and mark off, not exceeding in any case one acre; and to use and occupy the same for the purpose of erecting thereon a school house, with its necessary or convenient appurtenances; and for all damage done and suffered, or which shall accrue to the owner or owners of such land, by reason of the taking of the same for the purposes aforesaid, the funds of the district which may be raised by taxation, shall be pledged and deemed as security; and it shall and may be lawful for the court of common pleas of the proper county, on application thereto by petition, to appoint a jury of viewers who shall establish and determine the quantity and value of said land so taken, to be used for the purposes aforesaid, and who shall estimate and determine whether any, and if any what amount of, damages has been or may be sustained and to whom payable, and make report thereof to said court; and if damage be awarded and the report be confirmed by the said court, judgment shall be entered thereon.

Act of April 9, 1876, 1 *Purd. Dig.* p. 807, pl. 172.

No entry for experimental survey is required for the school board, nor does the Act contemplate any. It makes its selection of a site, determines upon the amount of land required, designates and marks it off, and then proceeds to enter and occupy. It is as absolutely the property of the school district, under the statute

ute, immediately upon its appropriation of it as it would have been had it paid a price agreed upon and taken a conveyance. Payment precedes the appropriation of the land only where the price has been agreed upon; where it cannot be agreed upon, the appropriation is made, leaving the price to be determined according to law. The extent or degree of appropriation is unimportant; it cannot affect the principle whether it be simply an entry and marking off, or actual subjection of the property to the proposed improvements.

Where a railroad has been located and the land has been taken and appropriated for the public use, the right of the land owner to sue for his damages is complete, and he may recover all which may be caused by the location and the subsequent construction.

Wadhams v. Lackawanna & Bloomsburg R. Co. 42 Pa. 810.

The question of damages depends on the taking, that is to say the appropriation of the property to railroad purposes.

Heise v. Pa. R. R. Co. 62 Pa. 72.

The appropriation of the land by a railroad company is completed upon the location of the road; and after the assessment of the damages, though the report has not been confirmed, the right of the land owner to the damages is vested, and cannot be divested by an abandonment of the original location.

Beale v. Pa. R. R. Co. 86 Pa. 510.

"There is nothing in the letter or spirit (of the Acts) which will permit the company to roam at pleasure over a person's land, changing the route as often as it is dissatisfied with the amount of damages assessed, thereby defeating the action of the court in a case pending. The recognition of such a power would be fraught with too great mischief to be sanctioned by any just rule in the administration of the law."

Beale v. Pennsylvania R. R. supra; Neal v. Pittsburgh & C. R. Co. 31 Pa. 20.

And of what consequence is it that the cases cited are the cases of private corporations? How do municipal corporations acquire any higher rights of eminent domain? Their rights are conferred alike by statute, and neither can acquire any right of eminent domain except for public purposes. It will not do to say that in the one case the right is conferred for purely public purposes, in distinction to the other, because it may result in private advantage. The law makes no distinction of this kind, and the right can be conferred only for public purposes.

The security being given in due course of law, the grasp of the owner upon his property is loosened by the Constitution itself; and consequently the easement acquired passes freed from his power to obtain payment otherwise than upon the bond, and the proceeding by assessment of damages given by the law.

Fries v. Southern Pennsylvania R. R. & M. Co. 85 Pa. 75.

Dillon's statement of the law amounts to nothing more than that, under the language by which the power to open streets is usually conferred, there may be an abandonment of the proceeding.

2 *Dill. Mun. Corp.* § 473, p. 572, ed. 1873.

In case of a site for a school house, the conditions precedent to the appointment of viewers are: 1. an entry and appropriation of the land;

and 2, a failure to agree with the owner as to the price. These must both be affirmed in the petition, and the viewers are appointed to determine the market value of the property taken, not with a view to enable the school board to decide whether the advantage from the proposed improvement will justify the expenditure, but solely to determine what the parties themselves could not decide, viz.: what is the fair and honest value of the property taken.

Messrs. O. C. Bowers and W. T. Omwake, for defendant in error:

If the right or title, such as the District takes, vests immediately upon the inception of the proceedings, and if the District be held to take the fee, then an abandonment of the proceedings (it might be argued) would leave the fee in the School District, and yet defeat the owner of the price.

The learned judge below seemed to regard this as a material question and, after a careful examination of it, arrived at the conclusion that the fee passes. In this we think he was in error.

"Where the purposes for which the land was taken is as well met by construing the authority to warrant the taking of an easement only, as of the fee, the grant, if doubtful, is to be construed most favorably for the citizen."

Dill. Mun. Corp. 3d ed. §§ 603, 604.

The words of the Act of April 9, 1867, are: "It shall be lawful for the board of directors, on behalf of the district, to enter upon and occupy sufficient ground for the purposes * * * and to use and occupy the same for the purpose of erecting thereon a school house," etc. If the Legislature intended the fee to pass it would not have stopped at granting the simple right of "use and occupancy;" and we submit that these words are not sufficient to confer the right to take the fee.

Again; the statute gives to the owner only damages, not the price and value of the land.

In *Long v. Fuller*, 68 Pa. 170, it was held by the court below that the school district takes only an easement under the Act of 1867. The judgment was affirmed by this court, but that question was not referred to in the opinion.

Municipal corporations may, at any time before taking possession of the property under completed proceedings or before the final confirmation, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached.

Dill. Mun. Corp. § 608 *et seq.* 3d ed.; *Re Anthony St.* 20 Wend. 618; *Martin v. Mayor*, 1 Hill, 545; *Re Dover St.* 18 Johns. 506; *Re Military Parade Ground*, 60 N. Y. 819; *Pumphrey v. Baltimore*, 47 Md. 145, and many other cases.

"Unless otherwise provided by statute, the proceedings may be discontinued by the municipality at any time before the title is acquired."

State v. Graves, 19 Md. 351.

"A long series of decisions in this State has established that in these street cases the corporation may be permitted to discontinue proceedings at any time before the report of commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for their compensation."

Re Washington Park, 56 N. Y. 144.

"When the power of eminent domain is conferred upon a merely public agent, and the compensation to be made is to be ascertained by another body, as commissioners or a jury, the agent has an election whether to pursue or abandon the condemnation, after the price is fixed, unless a contrary legislative intent is clearly indicated."

Mabon v. Halsted, 10 Vroom, 640.

A city may revoke ordinances establishing new streets before they are opened, if, in the exercise of its discretion it ascertains that the opening of them would be injurious to the public interest.

Municipality No. Three v. Levee Comrs. 7 La. Ann. 270. See, also, *Reg. v. Comrs. of Woods & Forests*, 15 Q. B. 761; *Jacob's Fisher's Dig.* 11170.

"The mere laying out streets, etc., for a city, under the Act of June 16, 1836, and its supplement, or under the general road law, is not of itself a taking of the property of individuals by the right of eminent domain, recognized in the Constitution; and it is only when they are actually opened and applied to public use that the owners are entitled to receive compensation."

Matter of Pittsburgh, 2 Watts & S. 820.

In *Yost's Report*, 17 Pa. 531, the difference between public and private corporations in matters of this kind is insisted upon, where it is said that private corporations exercise their privilege for their own advantage, the public advantage being only an incident.

The case of *Beale v. Pa. R. R. Co.* 86 Pa. 509, is not in point and does not rule the case at bar: 1. That was a case of a private corporation taking land for its own private benefit; whereas, this is a case of a public agent acting in behalf of and for the good of the public alone. 2. In that case there was no effort to discontinue or withdraw the proceedings, nor even to amend them, which this court intimated might properly have been done. The only question before the court there was the sufficiency of an exception to the report of viewers, filed on behalf of the railroad company.

This exception, it should be observed, was not taken to any act or omission or irregularity on the part of the viewers, but was based upon the act of the railroad company itself, viz.: an alleged change of route. This, we submit, was not the subject of exception on the company's part, and could only have been reached by a motion to amend the proceedings or to withdraw them, with a view to beginning *de novo*. The exception was declared insufficient; but the question at issue here did not and could not arise in that case.

Mr. Justice Gordon delivered the opinion of the court:

On the 27th of January, 1886, the School Board of Waynesboro filed in the court of common pleas a petition which, as it sets forth all the facts involved in the present controversy, we give *in extenso*.

"That on the 25th day of October, A. D. 1884, your petitioners presented their petition to the court, asking for the appointment of viewers to view and assess damages for taking by your petitioners of certain lands (of John Funk of H.) for school purposes, said lands be-

ing situated in the Town of Waynesboro, in said County of Franklin. That viewers were appointed in accordance with said petition who made report to the court on December 1, 1884, which report was ordered to be confirmed unless a review should be asked for on or before the first day of the next regular term. That before the first day of the regular term, to wit: on the third of December, 1884, a petition was filed by your petitioners, and reviewers appointed by the court, who made report to the court on the 23d day of February, 1885, only embracing however in their view and report a portion of the premises embraced in their first view. That said report was, on the 23d day of February, confirmed *nisi*, and on July 28, 1885, exceptions to said report were (on behalf of your petitioners) filed by leave of court. That neither of said reports was ever confirmed absolutely.

"Your petitioners further represent that they have never entered upon or occupied the said lands further than to stake off the same, prior to the first view; and that they desire to formally abandon said lands for school purposes, so that the same may remain to the said John Funk of H. for his own use, occupation and enjoyment, without hindrance or interference from your petitioners. Your petitioners, therefore, pray the court for leave to withdraw all their proceedings aforesaid by payment by them of all costs accrued thereon."

On this petition a rule was issued to the administrators of the estate of the said John Funk, deceased, commanding them to show cause why the prayer of the said school directors should not be granted; and on the 26th of March, 1886, after hearing the parties, the court made the rule absolute, and vacated the previous proceedings. The rectitude of this action is now called in question by the plaintiffs in error, and it is argued that the court acted *ultra vires*. We are, however, not convinced that there is any such error as requires our intervention to correct. The entry of the directors was not permanent; they had no actual possession of the land, hence, did not interfere with that of the owner.

The report of the viewers had not been confirmed, so that the matter was still within the jurisdiction and power of the court; and, under circumstances such as these, we cannot see why a discontinuance might not be allowed as at common law. It is certainly so in road cases; for, until the court of quarter sessions finally confirms the report of reviewers, the proceedings may be set aside or abandoned.

As was said by this court in the *Matter of Pittsburg*, 2 Watts & S. 320: the mere laying out or location of streets is not a dedication of the land upon which they are laid to the use of the public, but only an indication of what may thereafter be so dedicated; and until they are actually opened the land owner is entitled to no damages.

It would follow, of course, that if they were never opened, or if the locations were abandoned, there could be no damages, neither could the owner have any standing to assert what was but a possible claim. So, we have it from Dillon on Municipal Corporations, 8d ed. § 808, that where municipal corporations have the power to take private property for public use, they may, at any time before taking

possession thereof under completed proceedings or before final confirmation, recede from or discontinue the proceedings they have instituted. He adds: "Until assessment of damages has been made, the amount cannot be known; and it is reasonable that after having ascertained the expenses of the project the corporation should have a discretion to go on with it or not as it sees fit." For the doctrine here quoted he cites a multitude of authorities from the courts of our sister States.

Now it will be seen in the case in hand, that the school directors had no possession of the property in controversy, other than such as the public would have on the laying out of a road or street, so that the case cited is in point. Clearly, if the court of quarter sessions should, before the final confirmation of a road, discover that the expenses of its opening and maintenance were too much for the township to bear, it might for that reason alone refuse such confirmation; and it was quite as reasonable to allow a board of school directors the right to recede from its resolution to build a school house, as soon as it discovered that the price of the land which it proposed to improve was greater than the District could meet without oppression to its taxpayers.

But we are met with the case of *Beale v. Pa. R. Co.* 86 Pa. 509, in which we held that after a railroad company had made a location on the land of the appellant, and damages therefor had been assessed, it was too late to interpose an exception that it had subsequently adopted a new line on the same land.

But that case is not similar to the one now trying; that was a private, this a public corporation; the one had in view its own profit, and the other the public welfare; so that we might well allow a discretion to the latter that we would not to the former.

Besides this, no one would contend that the same rule would apply to a mere preliminary or trial survey as to a permanent location. Moreover, that the court might have taken this change of location into consideration on a motion to amend, and refer the matter back to the viewers, is admitted by the learned justice who delivered the opinion in that case. But if so, we cannot see why consideration might not also have been taken of the fact, had it been so, that the company had altogether withdrawn from the land. Whether, however, this be so or not, it is clear that the point now before us was not involved in that case; and it cannot, therefore, be used as authority to impeach the action of the court below.

The judgment is affirmed.

COUNTY OF ERIE, *Piff. in Err.*,
c.

COMMISSIONERS OF WATER WORKS
OF the City of ERIE.

1. The Act of May 14, 1874, entitled
"An Act to Exempt from Taxation Public property Used for Public Purposes,"

NOTE.—The question of the constitutionality of the Act of May 14, 1874, although not passed upon in this case, is an interesting and important one.

Judge Trunkay, when president judge of Venango County, used the following language:

which exempts certain property and contains a proviso that "All property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid and from which any income or revenue is derived, shall be subject to taxation; and nothing herein contained shall exempt the same," **imposes taxation upon public property used for public purposes, from which a revenue is derived.**

2. Property belonging to a municipality, owned and used by commissioners, appointed by law, in operating and carrying on water works to supply the public with water, and necessary for such purpose, **from which a revenue is derived, is taxable under the Act of May 14, 1874.**

(Decided October 4, 1886.)

ERROR to the Common Pleas of Erie County, to review a judgment in favor of defendants on a case stated. *Reversed.*

Reported below, 1 Pa. C. C. R. 547.

The following facts appear by the case stated:

The Commissioners of the Water Works in the City of Erie are a *quasi* corporation created by Act of April 4, 1867, P. L. 768, and Act of April 2, 1868, P. L. 610. The defendants are

the legal owners of five water lots in the City of Erie, and land adjoining the same, upon which is erected a stand pipe, engine house, pumping house, and machinery necessary for the pumping of and supplying water to the inhabitants of the City of Erie; and the defendants are also the legal owners of about seven and one half acres of land in the City of Erie, upon which a reservoir has been built, which contains, in part, the water supply of said city, and is in constant use in connection with the water works of said city.

The property is necessary in operating and carrying on said works, to supply the public with water. The defendants acquired title to said property in pursuance and by authority of the above mentioned Acts of Assembly, and erected the said water works, and have been and are now operating them in pursuance of the provisions of said Acts of Assembly. The money with which the original works were built was raised by the sale of bonds issued by the City of Erie to the amount of \$875,000, which bonds were delivered by the City of Erie to the Water Commissioners in compliance with the terms of section 5 of the Act of April 4, 1867.

No part of the principal of said bonds has been paid, and the interest thereon has always been and now is paid by the City of Erie. The revenue derived from said water works has been and is now received and expended by said

"The Act of May 14, 1874, exempts certain property from taxation and does nothing else. It was enacted in pursuance of section 1, article 9 of the Constitution. The proviso relates to property not in actual use and occupation for the purposes of exemption. It makes nothing liable to taxation which is not liable under some former Act, when not taken out by an exempting statute. This Act and proviso, as a whole, only exempts, as the title imports; therefore it is unnecessary to say that if any part authorized taxation, it would be a violation of section 3, article 3 of the Constitution."

Venango Co. v. Jamestown, etc. R. 11. Co. 2 Legal Ch. R. 325. See also, Luzerne Co. v. Lehigh Coal & Nav. Co. 8 Legal Gaz. 47; S. C. 5 Luz. Legal Reg. 5.

The provision of the Constitution of Pennsylvania, article III., § 3, is: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

In *Re Road in Phoenixville, 2 Chester Co. R. 433*, Judge Sterrett says: "The title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein." And again: "The intention [of the Constitution] was to require that the real purpose of the bill should not be disguised or covered by language calculated to mislead."

A statute entitled "An Act Relating to Boroughs in the County of Chester," which imposed the payment of damages upon the county, for the appropriation of lands for streets, was held unconstitutional because the title did not give notice to the county.

Re Road in Phoenixville, supra.

On the argument of the case, Judge Trunkay said: "The necessity for notice to the county exists, PA.

whether the liability is imposed by direct enactment or by the repeal of former legislation."

Chief Justice Mercur suggested that the title to that Act should probably have been "An Act Relating to Boroughs and Imposing Certain Liability on the County."

Montgomery County's Appeal, *post*, 303.

In construing a statute entitled "An Act Relating to Streets in the several Boroughs of Montgomery County," Judge Gordon, in delivering the opinion of the court, says that if the Act imposed upon the county the payment of damages it would be unconstitutional, since the title affords no notice that it embraces anything relative to the county; but holds that the provision as to assessment of damages does not include payment, and that the county is therefore not liable.

Judges Paxson and Green, in an opinion by Judge Paxson, dissented from this position, holding that the title affected the taxpayers of the county with notice of any legislation concerning those streets, whether it relates to the assessment of damages or otherwise, in this respect distinguishing the case from that of Road in Phoenixville, *supra*.

A comparison of the Acts shows that the title of the Chester County Act referred to boroughs, a division of the county, and therefore gave notice only to boroughs, while in the view taken by Judges Paxson and Green, the Montgomery County Act referred to streets in boroughs, and accordingly gave notice to the whole county.

Under the decision in Montgomery County's App. it seems that the Chester County Act would have been declared unconstitutional if the title had been "An Act Relating to Streets in the Boroughs of Chester County." Under this title, *quære*, whether Judges Paxson and Green would not, for the reasons given above, have held the Act constitutional.

Water Commissioners. No part of said revenue has ever been paid to the City of Erie; but the entire revenue, all of which is received from water rents, after payment of the actual operating expenses, repairs, and enlargement of works, has been used from year to year in extending the water supply to parts of the city not supplied. The surplus revenue for the year 1885, over and above running expenses, was about \$85,000, all of which was expended in enlarging the works and in making extensions as aforesaid.

The Commissioners have never paid any taxes to the Commonwealth upon said property in any form, nor do they now pay any such taxes; but the bonds issued by the city, as aforesaid, have been and are taxed for state purposes. For the year 1885 the assessors assessed the property above mentioned, belonging to the Water Commissioners aforesaid; and the county commissioners laid a tax thereon,

amounting in the aggregate to the sum of \$280.02, payment of which has been duly demanded and refused.

If, upon the facts stated, the court be of the opinion that said property is legally subject to taxation for county purposes, as aforesaid, then judgment to be entered in favor of the plaintiff, and against the defendants for \$280.02 and costs of suit; but if the court be of the opinion that said property is not taxable for the purposes aforesaid, then judgment to be entered in favor of the defendants for costs, either party to be entitled to a writ of error.

Judgment for defendants. The plaintiff then took this writ, assigning for error the action of the court in entering judgment for the defendants.

Mr. Frank Gunnison, for plaintiff in error, besides the argument stated in the preceding case, contended that *Chadwick v. Maginnes*, 94 Pa. 117, decided that public property used for

The Act of May 14, 1874, construed above, is entitled "An Act Exempting from Taxation Public Property Used for Public Purposes." The Act is held to impose a tax upon public property used for public purposes, from which a revenue is derived. And *Judge Green*, in his opinion, also holds that it imposes tax upon all other property not exempted therein, both *public and private*.

The converse of the above case was presented in the Act of June 30, 1885. The title was "A Further Supplement to an Act entitled 'An Act to Provide Revenue by Taxation.'" It was provided in section 20 that the taxes laid upon manufacturing corporations, under the revenue laws, should be abolished. *Schuyler, P. J.*, of the Common Pleas of Northampton County, suggested a doubt as to the constitutionality of the Act under article III, § 3 of the Constitution; but the supreme court declined to consider this question, as it was not necessary to the decision. *Paxson, J.*, delivering the opinion, said:

"Even if the section amounted to an unlawful exemption from taxation * * * the exemption would fall and leave the balance of the Act in full force. The Act is complete without this section."

An Act entitled "An Act Concerning Husband and Wife," which removed the disabilities of married women to make contracts was held to sufficiently express the subject in the title. *Barnett v. Harshbarger* (Ind.) 3 West. Rep. 570.

See also Board of Supervisors Seneca Co. v. Allen (N. Y.) 1 Cent. Rep. 71; *Fredericks v. Pa. Canal Co. (Pa.)* Id. 99; *Comrs. of Lancaster Co. v. Commonwealth (Pa.)* Id. 130; *Rogers v. Manufacturers Improvement Co. (Pa.)* Id. 144; *Water Comrs. of Clinton v. Dwight (N. Y.)* Id. 747; *State v. Govern (N. J.)* Id. 699; *Re Petition of Knaust (N. Y.)* 2 Cent. Rep. 97; *Tingue v. Port Chester (N. Y.)* Id. 163; *State v. Pugh (Ohio)* 1 West. Rep. 39; *Crawfordsville & S. Turnpike v. Fletcher (Ind.)* Id. 247; *Blumenthal v. Hueter (Ill.)* Id. 684; *People v. Hydraulic Co. (Ill.)* 3 West. Rep. 499; *Mix v. Illinois Cent. R. R. Co. (Ill.)* Id. 489; *People v. Haselwood (Ill.)* Id. 638.

See also *Petition of Mayor of N. Y. (N. Y.)* 1 Cent. Rep. 149, for note with collection of recent decisions on the subject.

A statute entitled "An Act in Relation to Streets in Union Township, Union County" was held unconstitutional in New Jersey, the court, *Beasley*, 224

C. J., saying: "It will, on a moment's thought, be perceived how general such an allusion to the legislative purpose is. It is true that it may be difficult to indicate, by a formula, how specialized the title of a statute must be; but is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can answer no useful end. It is not enough that it embraces the legislative purpose, it must express it; and where the language is too general it will accomplish the former, but not the latter. Thus, a law entitled 'An Act for a Certain Purpose' would embrace any subject but would express none; and consequently it would not stand the constitutional test. And so a law entitled 'An Act in Relation to Silk Goods' would not indicate, in the faintest outline, a purpose to incorporate a body for the manufacture of such fabrics. Such titles would be idle and inefficacious for every purpose." *Township of Union v. Rader*, 89 N. J. L. 509.

Mr. Buckalew in his work on the Constitution of Pennsylvania, p. 69, 1st ed. classifies titles to statutes, open to objection under article III, § 3, as follows:

"1, Those which are vague, uncertain, indeterminate in expression and meaning; 2, those which are too general, of too wide a sweep, not specific; 3, those which indicate only a part of the bill; 4, those which express or suggest a falsehood, or otherwise misled by the terms used; and 5, those which, for any other reason, do not fairly and fully express the subject matter of the bill." Referring to *Cooley*, Const. Lim. 141-150, 81-83.

The Constitutions of the following States contain provisions relating to unity of subject and that it shall be expressed in the title: Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Ohio, Oregon, South Carolina, Tennessee, Texas, Virginia, West Virginia.

In New York and Wisconsin the provision only applies to private or local bills.

A provision that if there are other subjects in the bill, not embraced in the title, the bill is nevertheless good as to the subject properly expressed, will be found in the Constitutions of California, Colorado, Illinois, Indiana, Iowa, Oregon, Texas and West Virginia.

[J. M.]

public purposes, from which a revenue is derived, is subject to taxation, and therefore ruled this case.

Mr. Theodore A. Lamb, for defendants in error:

A municipal corporation is merely an agency instituted by the Sovereign for the purpose of carrying out in detail the objects of government.

Philadelphia v. Fox, 64 Pa. 169.

The same power that created the agency can change it at will; and in directing that these Water Commissioners should be appointed to erect and carry on these works, at the expense of the city, the Sovereign was merely changing its agents in carrying out a public work.

Philadelphia v. Field, 58 Pa. 320, 329; *Perkins v. Slack*, 86 Pa. 270, 281.

Private property may be taken for the purpose of supplying the inhabitants with pure water. This is clearly a public use.

Dill. Mun. Corp. § 482.

The Commissioners were authorized to condemn any land necessary for the works, which condemnation could only have been authorized for a public use.

Cooley, Const. Lim. pp. 530, 531.

The Act does not say that all real and personal property held for public uses, except that named, shall be taxed; the language is: "Shall be subject to taxation." But such property is never taxable by implication.

Directors of Poor v. School Directors, 42 Pa. 25; *Louisville v. Commonwealth*, 1 Duvall, 295, 296.

The Act of 1874 is an exemption Act, pure and simple.

Coatesville Gas Co. v. Chester Co. 97 Pa. 476.

If it was intended to be anything more, it is unconstitutional.

Art. III, § 8, Const. of 1874.

It is entitled "An Act to Exempt from Taxation, etc." There is not a word in the title showing that the object of the bill was to subject anything to taxation; and yet it is urged that the proviso is a taxing law.

In the case of *Union Pass. R. Cos. App.*, 81* Pa. 91, *Judge Agnew* says: "When the title conveys the belief that one subject is the purpose of the bill, while another and different one is its real subject, it is evident that it tends to mislead by diverting the attention from the true object of the legislation. Confiding in the title as applicable to a purpose unobjectionable to the reader, he is led away from the examination of the body of the bill. In such a case the subject is not clearly expressed in the title. Indeed, it is not expressed at all."

See also *Dorsey's App.* 72 Pa. 192.

The title should not mislead or tend to avert inquiry into the contents of the Act.

Allegheny County Home's App. 77 Pa. 79.

In *Chadwick v. Maginnes*, 94 Pa. 117, it seems to have been conceded that the *quasi* corporation was a private one; and exemption was claimed only upon the ground that the public works of a private corporation are exempt from taxation, they being taxed in another form.

Mr. Justice Green delivered the opinion of the court:

The difference between this case and that of *Erie County v. City of Erie* [post, 305], is that

the Act of 1874 does contain a clause which directs that "All property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid and from which any income or revenue is derived, shall be subject to taxation." And it is the fact that the property in question here does yield a large revenue to the defendants.

It seems to us that the Legislature, possessing the power, as it does by section 1 of article 9, to provide for the levying and collecting of all taxes, has exercised its power and in such language as to embrace the property here in question. When it says "All property real or personal" which yields revenue shall be subject to taxation, we think the words used must be literally read. Water works are not essential to the administration of municipal government. They are incidental to it and possibly advantageous. If they are conducted without exacting revenue for the water furnished, they would not come within the language of the Act and would not be taxable; but as revenue is derived, the necessary meaning of the language employed embraces them. The fact of municipal ownership is the only matter that creates any doubt; but the provision is so broad and so peremptory that we think the liability to taxation was intended to be created without any regard to the public or private character of the ownership. It cannot be said that there was any want of consciousness of the fact, on the part of the Legislature, that it was dealing with public property; for that was one of the classes of property which it was exempting. Then, in contrast with this, it provides that all property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid and from which any income or revenue is derived, shall be subject to taxation.

The excepted property referred to includes certain kinds of public property but does not include the particular kind in question here; hence it is not embraced within the exception and is included in the general designation "all property." It would doubtless be entirely proper for the Legislature to exempt all public property, used for public purposes, from taxation without qualification; but as it has not done so, we have no discretion and must enforce the law as it is written.

The judgment is reversed and judgment is now entered on the case stated, for \$230.02 in favor of the plaintiff and against the defendants, with costs of suit.

MONTGOMERY COUNTY'S APPEAL.

RE Application to Lay out and Open AIRY STREET, in the Borough of Royersford.

1. A statute which is entitled "An Act Relating to Streets in Several Boroughs of Montgomery County," which provides that the damages for locating streets shall be assessed under the general road laws, does not impose the payment of the damages upon the county, under the general road laws, and the statute is, therefore, not unconstitutional under article XI, § 8 of the Constitution of 1838. (Article III, § 8 of the Constitution of 1874.)

2. **Paxson and Green, JJ., concurring on the ground that while the Act does impose the payment of damages upon the county, the title of the Act sufficiently gives notice to the taxpayers.** (Distinguishing *Road in Phoenixville*, 2 Ches. Co. R. 493.)

(Decided October 4, 1886.)

CERTIORARI to the Court of Quarter Sessions of Montgomery County, to review the proceedings dismissing exceptions to the report of viewers laying out a street in a borough and assessing damages. *Affirmed.*

Reported below, 1 Montg. Co. R. 185; *S. C.* 2 Ches. Co. R. 565.

The Borough of Royersford was incorporated under the general Borough Act of April 3, 1851. Certain citizens of the Borough, with the consent of the town council, petitioned the Court of Quarter Sessions of Montgomery County for the appointment of a jury to view and lay out a street and assess the damages. A jury was appointed upon said application, the street was laid out, and the damages were assessed. To this report exceptions were filed upon the ground that the damages should have been assessed against the Borough and that the Act of May 9, 1871 (P. L. 1871, p. 689), under which the proceedings were conducted, is unconstitutional.

The Act is entitled "An Act Relating to Streets in the Several Boroughs of Montgomery County," and provides, in section 1:

"That from and after the passage of this Act, the Court of Quarter Sessions of Montgomery County, by and with the consent of the town councils, shall have jurisdiction to inquire of, lay out, open, widen, vacate or change any public street, road or alley within the limits of any incorporated borough in said county, whether said streets and alleys have heretofore been laid out by commissioners appointed by Act of the Legislature or otherwise, in the same manner as is provided by law for the laying out, opening, widening, vacating or changing of other public roads within said county; and damages to the owners of land injured thereby shall be assessed as provided under the general road laws of this Commonwealth."

The Act further provides, in section 2, that the proceedings of the Court of Quarter Sessions of Montgomery County, vacating certain streets in the Borough of Norristown, should be ratified, confirmed and made valid; and that said streets be declared vacated.

The court, Boyer, *P. J.*, dismissed the exceptions and confirmed the report. The county commissioners appealed and assigned for error the action of the court in dismissing the exceptions.

Mr. Aaron S. Swartz, for appellant:

Under the general borough laws, the damages sustained by property owners in opening streets, were payable by the boroughs and the benefited properties. There was no liability upon the county to pay such damages.

Act of April 22, 1856, (P. L. § 25).

The sole object of section 1 of said Act of May 9, 1871, was to transfer the burden of paying damages from the borough to the taxpayers of the county.

The title to the Act gives no notice of such

proposed change in the assessment and payment of damages; and it also misleads, for it gives the reader the impression that it interests only residents and owners in boroughs.

Road in Phoenixville, 1 Legal Int. July 31, 1885, p. 813; more fully reported, 2 Ches. Co. R. 493; *Beckert v. Allegheny*, 85 Pa. 191; *Dorsey's App.* 72 Pa. 192; *Commonwealth v. Green*, 58 Pa. 226; *Union Pass. R. Co.'s App.* 81* Pa. 91.

There is no repealing clause in our Act, and we must so construe it as not to repeal the provisions of any other Act, if such construction be fair and reasonable.

Erie v. Bootz, 72 Pa. 196.

A statute will not be deemed repealed by implication, unless there be a clear and strong inconsistency between the two enactments.

Commonwealth v. Easton Bank, 10 Pa. 442; *Egypt Street*, 2 Grant, 455.

Mr. E. L. Hallman, for appellees:

The purpose of the Act was to render the payment of damages uniform, under the general Road Act of 1836, bringing all boroughs under this law.

All the presumptions are in favor of the constitutionality of the Act of Assembly. It is only in a clear case where the court is justified in declaring an Act to be unconstitutional.

Craig v. First Presby. Church, 88 Pa. 42.

An Act entitled "An Act to Open and Straighten Highland and Union Avenues and Thirtieth Street, in the Twenty-Second Ward, and Church and Adams Streets in the City of Philadelphia," which provided, in the body of the Act, for the assessment of damages was held constitutional.

Matter of Church Street, 54 Pa. 353.

It would not have thrown any more light on it if the Legislature had said: relative to the manner of assessing damages for laying out streets in the several boroughs of Montgomery County. Anyone seeing something relative to all the streets of all the boroughs of the county would certainly notice that a provision for so many highways was something to concern all inhabitants of the county.

If the provisions be upon the subject, or upon matters properly connected with it, the Act must be declared constitutional.

Clinton Township v. Draper, 14 Ind. 295; *Thomason v. State*, 15 Ind. 455; *Chiles v. Drake*, 2 Met. (Ky.) 150; *Commonwealth v. Green*, 58 Pa. 226; *Yeager v. Weaver*, 64 Pa. 425; *Cooley, Const. Lim.* 142.

The title need not be a complete index.

Yeager v. Weaver, supra.

There is no restriction in this title, tending to mislead; and mere generality in a title should not avoid a law.

Dorsey's App. 72 Pa. 195; *Commonwealth v. Green, supra.*

The legislation of the State should not be impaled upon sharp points of criticism which must often bring it to naught, but must receive such an interpretation that it may rather stand than fall.

Allegheny Co. Home's App. 77 Pa. 80; *Mauch Chunk v. McGee*, 81 Pa. 488; *Estling's App.* 89 Pa. 205.

All presumptions are in favor of the constitutionality of the law; and to prove it otherwise beyond doubt rests upon the plaintiff.

Speer v. School Directors, 50 Pa. 151; *Pa. R. R. Co. v. Riblet*, 66 Pa. 184. and all the former cases cited bear out this position.

The title of the Act embraces all the streets of all the boroughs in the county; this includes those mentioned in section 2.

Even if the second section were unconstitutional, this would not avoid the first section, which is the main purpose of the Act.

The main purpose of an Act of Assembly will not be avoided by the unconstitutionality of certain of its provisions which were called into life owing to their alternative contingent relations to the other provisions of the Act.

Lea v. Bumm, 3 W. N. C. 835.

Mr. Justice Gordon delivered the opinion of the court:

Did the Act of May 9, 1871, entitled "An Act Relating to Streets in the several Boroughs of Montgomery County," impose upon the county the damages assessed to the owners of property on the laying out, opening or widening of streets, roads or alleys in any of the said boroughs, we would agree with the counsel for the county that the Act was unconstitutional and void. In such case the title to the said Act would have to be regarded as wholly defective, since it affords no notice that it embraces anything relative to the county.

But as there is nothing apparent in the statute which at all affects the county or expresses an intention to make such damages payable out of its treasury we cannot for this reason, which has been urged by the counsel for the plaintiff in error, pronounce the Act unconstitutional. It will be observed that both the Borough Act of 1851 and the General Road Law not only provide for the assessment of damages upon the laying out of streets and roads, but also prescribe how they shall be paid; while the Act of 1871 only directs the method by which such damages shall be assessed and says nothing as to their payment.

They are to be assessed under the General Road Act; but as there is no direction for their payment the Borough Act remains in this particular unaltered, and to it we must resort in order to learn how those damages, when ascertained, are to be liquidated.

It is urged, indeed, on part of the defendant in error, that as the damages are to be assessed under the Act of 1836, they must be paid according to the directions of that Act. This might be so if the assessment necessarily involved payment by the county; but it does not, for the two things are essentially different.

There is no reason why the Legislature might not direct that on the taking of land by a railroad company in exercise of its right of eminent domain, the damages to the owner should be assessed under the provisions of the General Road Law; but in such case it would not follow that the county must pay those damages when assessed. It is clear, therefore, that unless the Act of 1871 imposes this burden upon the county it cannot be made to bear it.

This Act must be construed as supplemental to the charters of the several boroughs in the County of Montgomery, and when in them we find provision for the payment of damages, we certainly cannot assume that a supplement which involves only their mode of assessment,

is to be extended by implication so as to compel their payment out of the county rather than the borough treasury. It follows that as the court of quarter sessions neither has made nor can make any order affecting the County of Montgomery, it, the said County, has no standing to maintain the *certiorari* now before us.

The judgment of the court below is affirmed.

Mr. Justice Paxson delivered the following opinion:

I concur in this judgment, although not for the reasons given by my brother Gordon.

I am of opinion that the Act of May 9, 1871 (P. L. 639), is constitutional, although the effect of it be to put the damages upon the county. That it does put the damages upon the county was conceded by the court below and by the counsel on both sides. It was upon this ground alone that the constitutionality of the Act was assailed; the allegation being that the title of the Act did not give notice to the taxpayers of the county that the county and not the borough would be hereafter liable for the damages arising from the opening of streets in said borough.

The title of said Act refers to streets in the several boroughs of Montgomery County. I think this title affects the taxpayers of the county with notice of any legislation concerning those streets, whether it relates to the assessment of damages or otherwise. In this respect the case differs essentially from that of *Road in the Borough of Phoenixville*. Legal Int. of July 31, 1885, p. 313 [2 Ches. Co. Rep. 438].

The opinion of the court concedes the Act of May 9, 1871, to be unconstitutional, if it puts the damages on the county, but holds that such is not the effect of the Act. Said Act provides that "Damages to the owners of lands injured thereby shall be assessed as provided under the General Road Laws of the Commonwealth."

The General Road Law provides (Act of 1836) that the damages when assessed shall be paid by the county treasurer out of the county stock.

It will thus be seen that I have reached the same result as the majority of the court, but by a radically different route.

Justice Green concurs with me in this view.

COUNTY OF ERIE, *Plff. in Err.*, v.

CITY OF ERIE.

1. **Public property used for public purposes is not subject to taxation, and cannot be without express statute.**
2. **Article IX, § 1 of the Constitution, providing that all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and that public property used for public purposes may, by general laws, be exempt from taxation, does not render such public property taxable.**
3. **A house and lot and horses, owned by a city and used in operating the fire department of the city, are not liable to taxation.**

(Decided October 4, 1886.)

ERROR to Common Pleas of Erie County, to review a judgment in favor of defendant on a case stated. *Affirmed.*

Reported below in 1 Pa. C. C. R. 540.

The case stated showed the following facts: the City of Erie is a municipal corporation incorporated by Act of April 14, 1851, P. L. 631, and others amendatory thereof and supplementary thereto, and is located in the County of Erie. The City is the owner of a piece of land in said City, upon which is erected an engine house; the engine house is used exclusively for fire purposes, and is necessary therefor; the said land and building have been assessed for the year 1885 at the sum of \$9,140. The City is also the owner of six horses, which are used in operating the fire department of the City, and necessary therefor, which said horses have been assessed at the sum of \$600. The county commissioners of Erie County have levied a tax for the year 1885 of three mills upon each dollar of valuation of said real and personal property, amounting to \$29.22, payment of which said tax has been duly demanded.

The fire department of the City of Erie is maintained at the expense of the City, to prevent the destruction of property by fire; and no revenue whatever is derived therefrom. If upon the above facts the court should be of the opinion that said property was legally subject to taxation by the County of Erie, then judgment should be given for plaintiff and against the defendant, for \$29.22 with costs of suit; but if the court should be of the opinion that said property was not liable to taxation for county purposes, then judgment should be given for defendant for costs, either party to be entitled to a writ of error.

Judgment was entered for defendant. The plaintiff thereupon took this writ, assigning for error the action of the court in entering judgment for the defendant.

Mr. Frank Gunnison, for plaintiff in error:

The Constitution provides that all taxes shall be uniform upon the same class of subjects.

Art. IX, § 1.

This means a classification of subjects according to their nature, and not according to their ownership.

By the same section the Legislature is given power to exempt, not any particular kind of property, but property owned by the public and used for public purposes, etc.

It follows that it was the intention that no property of a class upon which a tax was levied, by virtue of any existing law, should escape taxation until the Legislature should exempt it, the power to exempt being limited to the property owned and used for the purposes specified in the section.

The only legislation since the adoption of the Constitution is the Act of May 14, 1874 (P. L. 158), and its supplement of June 4, 1879. This Act does not exempt this property, and it is therefore liable.

Chadwick v. Maginnes, 94 Pa. 117.

To make the meaning more clear, the Act of 1874, in the proviso, declares that all other property, except that enumerated in the Act, shall be subject to taxation.

The case of *Coatesville Gas Co. v. Chester Co.*

97 Pa. 476, decided nothing more than that article IX, §§ 1, 2, of the Constitution, did not execute themselves so as to repeal existing laws providing for the assessment and collection of taxes. Those provisions did, however, in express terms, repeal all laws exempting property from taxation.

Lehigh Iron Co. v. Lower Macungie, 81 Pa. 482; *Londonderry v. Berger*, 2 Pearson, 230; *Wagner Institute v. Philadelphia*, 48 Legal Int. 36; & C. 1, Pa. C. C. R. 256.

It makes no difference that the exemption in our case did not, before the new Constitution, depend upon any statute. The Act of 1874 exempted school houses, court houses and jails. They are public property used for public purposes. If they were not previously liable, why was it necessary to pass an Act to exempt them?

Mr. Theo. A. Lamb, for defendant in error:

"Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. A State may, if the Legislature sees fit, tax all property owned by its municipal divisions; but to do so would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself; and no one would be benefited but the officers employed. It is always to be assumed that the general language of statutes is made use of with reference to taxable subjects; and the property of municipalities is not in any proper sense taxable. It is therefore, by clear implication, excluded. It is not, like government agencies, excluded from the power of tax laws, but it is beyond the grasp of their intent."

Cooley, Tax. pp. 130, 131; *Directors of the Poor v. School Directors*, 42 Pa. 21, 25; *Louisville v. Commonwealth*, 1 Duvall, 295, 296; *People v. Solomon*, 51 Ill. 87; *State v. Gaffney*, 3 N. J. L. 133; *People v. Doe*, 36 Cal. 220, 222; *Dill. Mun. Corp.* § 614.

The public is never subject to tax laws and no portion of it can be, without express statute. No exemption law is needed for any public property held as such.

Directors of the Poor v. School Directors, 42 Pa. 25.

Counsel for the plaintiff concedes that prior to the adoption of the Constitution of 1874, such was the law. But he contends that sections 1 and 2 of article 9 of the Constitution of 1874 have changed this.

As to the first section, this court decided in the case of *Lehigh Iron Co. v. Lower Macungie Township*, 81 Pa. 482, that it was not immediately operative, but required legislation to carry it into effect.

Section 2 provides that "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Among the property above enumerated is public property used for public purposes; and therefore section 2 of this article did not avoid any law that exempted from taxation public property used for public purposes.

The Act of May 14, 1874 (P. L. 158), was intended to define what property shall be exempt from taxation and not to provide a method of taxation.

Coatesville Gas Co. v. Chester Co. 97 Pa. 476.

If that Act was intended to be anything more than an exemption Act, it would be unconstitutional, for article 3, section 3 of the Constitution of 1874, provides that "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.

The title to the Act in question does not contain the slightest reference to the bill being anything else than an exemption Act; and if it was intended to be a taxing Act, it is clearly unconstitutional because its title does not express the subject matter of the bill.

Union Pass. R. Co.'s App. 81* Pa. 91.

Mr. Justice Green delivered the opinion of the court:

The property concerning which the present question arises is public property, used for public purposes. It belongs to a municipality. Prior to the adoption of the Constitution of 1874 it undoubtedly was not subject to taxation. The reason for this rested in the character of its ownership rather than in the character of the property. It consists of a house and lot and some horses. Houses and lands and horses are taxable and have been so for a long time. But when these are held and used for the purpose of extinguishing fires and are owned by a city or borough, they become of a public character and they are used for public purposes.

In *Poor Directors v. School Directors*, 42 Pa. 21, we held that a county poor house is not taxable for school purposes and used the following language: "The public property is never subject to tax laws; and no portion of it can be, without express statute. No exemption law is needed for any public property held as such." To the same effect are *Dill. Mun. Corp.* 614; *People v. Doe*, 86 Cal 222; *People v. Solomon*, 51 Ill. 52; and *Worcester v. Worcester*, 116 Mass. 193.

In *Cooley on Taxation* 130, it is said: "It is always to be assumed that the general language of statutes is made up with reference to taxable subjects; and the property of municipalities is not in any proper sense taxable. It is therefore by clear implication excluded."

This being so the property in question was not taxable at the adoption of the Constitution of 1874. There is no legislation since that which makes it taxable. The Act of May 14, 1874 (P. L. 158), contains no provision subjecting such property to taxation. Unless, therefore, article 9, § 1 of the Constitution, changes the law and makes such property taxable it is not taxable at all, simply because there is no law making it so. The language of the section is as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

This section does not declare that all property whether public or private shall be subject to taxation; nor does it contain any equivalent provision. It does, however, direct that "All

taxes * * * shall be levied and collected under general laws." This certainly means that the legislative power of the Commonwealth shall provide the necessary legislation for levying and collecting all taxes.

In *Lehigh Iron Co. v. Lower Macungie Township*, 81 Pa. 482, and in *Coatesville Gas Co. v. Chester Co.* 97 Pa. 476, we held that these provisions of the Constitution do not execute themselves but were simply mandatory to the Legislature to enact laws to carry them into effect.

The provision of section 1, therefore, cannot operate to repeal any pre-existing law, exempting public property from taxation, because there was no such law. Such property was not taxable because there was no law which made it so. It was the absence, not the presence, of law which made it nontaxable. The new Constitution might have made it taxable but did not; and as the Legislature has failed to make it taxable, there is no law for its taxation and it is not taxable at all. It is true the Legislature of 1874 did exercise its power and exempt certain property which does not include this; but the fact still remains that it did not impose any taxation upon this and hence there is none.

Judgment affirmed.

Robert CORSON, Exr., Appt.,

v.

James GARNIER.

1. An **insurable interest** is not necessarily a definite pecuniary interest, such as is recognized and protected at law; it **may be contingent**, restricted as to time, or indeterminate in amount; **but it must be actual**, such as will reasonably justify a well grounded expectation of advantage, dependent upon the life of the insured, so that the **purpose** of the party effecting the insurance may be to **secure that advantage**, and not merely to put a **wager upon human life**.
2. A **nephew has not**, from mere relationship, an **insurable interest** in the life of his **aunt**.
3. If, at the time a policy of life insurance is issued, the insured is the debtor of the beneficiary and the policy is taken in good faith for the protection of the creditor, it is **not necessary to prove a continuance of the relation of debtor and creditor** until the maturity of the policy.
4. The **same rule applies** where the insurance company, admitting its liability, has paid the money into court, and the controversy is **between the beneficiary and the personal representatives of the insured**.
5. The **insurance of the life of a debtor for the sum of \$2,000 in favor of a creditor**, where the amount of **indebtedness** was uncertain when insurance was effected, but afterwards ascertained to be **between \$500 and \$750, held**, under the facts of the case to be **no evidence of bad faith**, or that the contract was a **wager**.

6. In the absence of evidence that a policy on the life of a debtor, in favor of a creditor, is held in trust for the debtor, the presumption is against such trust and that the rights of the parties appear upon the face of the policy.

(Decided October 4, 1886.)

A PPEAL from a decree of Common Pleas No. 4, of Philadelphia County, sustaining the appellee's exceptions to the master's report. *Affirmed.*

This was a bill in equity filed by Robert Corson, executor of Ellen McLean, deceased, against the Provident Savings Life Assurance Society of New York, and James Garnier, for the purpose of requiring Garnier to assign and surrender to Corson, as executor, a policy of insurance on the life of Ellen McLean, and compelling the Life Assurance Society to pay the amount of the policy, \$2,000 to Corson as executor.

The Life Assurance Society paid the money into court and Garnier filed an answer. The case was then referred to a master who found the following facts:

James Garnier, the defendant, was a nephew of Ellen McLean, who, prior to the spring of 1880, lived with her two minor children at Lawrence, Massachusetts, where she was employed in a mill. At the instance of Mr. Garnier she came to Philadelphia with her children, he having sent her money for that purpose. After her arrival in this city Mr. Garnier bought a grocery at Tenth and Manilla Streets, fitted it up and stocked it at his own expense, and placed Mrs. McLean in charge; he replenished the stock from time to time, and Mrs. McLean paid him as she got money from the receipts of the store.

This store Mr. Garnier sold at a good price, and Mrs. McLean received the price. Thereafter Mr. Garnier bought another store for her on Fitzwater Street, and fitted it up in the same way, and subsequently sold it for Mrs. McLean's benefit. And thereafter another store was bought by Mr. Garnier on Fifth Street below Christian, and fitted up for Mrs. McLean, and the stock replenished from time to time by him. This store was also sold at a good profit and Mrs. McLean received the price.

The relationship between Mrs. McLean and Mr. Garnier was most intimate. He was her friend and adviser and, in the language of one of the witnesses, was more like a son to her than a nephew. At the instance of Samuel, the son of Mrs. McLean, she had her life insured in the Provident Savings and Life Assurance Society of New York, in two policies, one of them in her own favor and the other in favor of her nephew James Garnier. The latter policy was for \$2,000, and neither it nor the application for it had any reference to any indebtedness from Mrs. McLean to Mr. Garnier, or that it was taken to secure any indebtedness.

In fact, the defendant Garnier in his answer (and his counsel on argument) disclaimed that it was taken out to secure an indebtedness, and avowed that there never had been a settlement between Mrs. McLean and Mr. Garnier

and, from the nature of their intimacy, could not be; and stated to the master that if his right to the proceeds of the policy was not otherwise absolute, he would not and did not claim it by reason of any indebtedness.

The master recommended a decree reimbursing the defendant Garnier for the cost of the policy and subsequent premiums paid by him, with interest, and the payment of the balance of the fund to the plaintiff with costs.

To this report the defendant, Garnier, excepted, substantially on the ground that the master erred in finding that there was neither relationship nor pecuniary interest sufficient to give Garnier an insurable interest in the life of Ellen McLean.

The court below sustained all the exceptions save one, and awarded the sum in court to Garnier; the costs since the fund was ordered to be paid into court to be paid by the plaintiff, and the costs prior to that time to be paid out of said fund.

From this decree the plaintiff appealed, and assigned as error, *inter alia*, the action of the court in sustaining the defendant Garnier's exceptions, and awarding the fund to him.

Measrs. John Sparhawk and N. Du Bois Miller, for appellant:

Where the insurable interest arises or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or for support; even though such legal claim does not exist, yet when (from the personal relations of the two and the kindness and good feeling displayed by the insured to the insurer) the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former, or to bear loss from his death, an insurable interest will be held to exist.

Rombach v. Piedmont etc. Ins. Co. 18 Ins. L. J. 268.

This is the reason recognized in this State for holding the insurance of a father's life by his son to be valid.

Reserve Mut. Ins. Co. v. Kane, 81 Pa. 154.

A man has no insurable interest in the life of his brother *per se*; *Lewis v. Phoenix Mut. Ins. Co.* 89 Conn. 100; or in the life of his son.

Halford v. Kymer, 10 Barn. & Cress. 724.

In *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, however, the very relationship now under consideration was held to show no insurable interest.

It has been held that a man has not an insurable interest in the life of his brother, merely as such, although it would be different if he were dependent upon him for support. The same is true of a nephew's interest in the life of an uncle; and the same has been said of a husband in his wife's life.

Bliss, Ins. p. 83.

If, however, the relation of debtor and creditor subsists, and the policy is affected with the privity of the debtor, and it is agreed or can be inferred that it is intended as a security, it will belong to the debtor after payment of the debt; *Crawley*, Life Ins. 87; *Lea v. Hinton*, 5 De G. M. & G. 823; *Morland v. Isaac*, 20 Beav. 399; although the creditor has paid over all the premiums.

Drysdale v. Piggott, 8 DeG. M. & G. 546;

Cammack v. Lewis, 15 Wall. 648 (82 U. S. bk. 21, L. ed. 244).

The learned court below denied our right as executor to recover the proceeds of the policy in suit from the defendant, because the contract of the insurance company was made with Garnier, who paid the premium; and, therefore, the legal representatives of the insured who simply joined in the application have no interest in or right to the fund, which arises by virtue of no contract with the decedent. But this is not the law of this State.

Gilbert v. Moore's Exrs. 13 W. N. C. 489.

Messrs. J. H. Anders and William F. Johnson, for appellee:

An examination of the authorities touching the question of assignments of life policies to secure indebtedness, and the proper distribution of the proceeds on the happening of the event insured against, shows that there is no inflexible rule of construction; and that in each particular case it is a question of fact, to be determined by the evidence.

Cunningham v. Smith's Admrs. 70 Pa. 458; *Bruce v. Garden and Knox v. Turner*, L. R. 5 Ch. App. 81 and 515; *Ashley v. Ashley*, 8 Sim. 149; *Freme v. Brade*, 2 De G. & J. 582; *Gottlieb v. Cranch*, 4 De G. M. & G. 440; *Drysdale v. Piggott and Lake v. Brutton*, 8 De G. M. & G. 546, 440; *Cammack v. Lewis*, 15 Wall. 648 (82 U. S. bk. 21, L. ed. 244).

Being a creditor at the time of the issuance of the policy, Garnier's right to the proceeds is incontestable.

Scott v. Dickson, 16 W. N. C. 181; *Ashley v. Ashley*, *supra*; *St. John v. Am. Mut. L. Ins. Co.* 13 N. Y. 31; *Clark v. Allen*, 17 Am. L. Reg. N. S. 83; *Dalby v. India & L. L. Assur. Co.* 15 C. B. 365.

In all the decisions declaring policies void on the ground of public policy as wagers between certain relatives there is a constant qualification.

In *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, it is declared "mere relation of uncle and nephew do not constitute an insurable interest."

In *Lewis v. Phoenix Mut. L. Ins. Co.* 39 Conn. 100, that a man has no insurable interest in his brother, *per se*, or as Bliss says, p. 33: merely as such.

The "mere," "*per se*," "merely as such," is constant.

Any interest added saves the policy.

Where the relationship between the parties is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from the imputation of a wager policy.

Atna Life Ins. Co. v. France, 94 U. S. 564 Bk. 24, L. ed. 289).

An insurable interest is such an interest arising from the ties of blood or marriage as will justify a reasonable expectation of advantage or benefit from the continuance of life.

Warnock v. Davis, 104 U. S. 779 (Bk. 26, L. ed. 926).

A man may effect an insurance on his own life for the benefit of a relative or friend.

Com. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 460 (Bk. 24, L. ed. 253).

PA.

Mr. Justice Clark delivered the opinion of the court:

Although a policy of life insurance is not like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death (*Scott v. Dickson*, 16 W. N. C. 181), yet the assured is not entitled to his action on the policy, unless he had, as the basis of his contract, an interest in the subject matter insured. This is a rule founded in public policy and is of general application. *Ruse v. Mut. Benefit L. Ins. Co.* 23 N. Y. 516.

If it were not so, the whole system of life insurance would become the mere cover for wicked speculation by wager in human life, and thus prove the occasion for the commission of the grossest crimes.

An insurable interest, however, is not necessarily a definite pecuniary interest, such as is recognized and protected at law; it may be contingent, restricted as to time, or indeterminate in amount; but it must be actual, such as will reasonably justify a well grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life.

Therefore a wife has an insurable interest in the life of her husband, or the husband in the life of his wife. *Baker v. Union Mut. Life Ins. Co.* 43 N. Y. 288.

And a single woman, under contract to marry, in the life of her intended husband. *Chisholm v. Nat. Capitol Life Co.* 52 Mo. 218.

A parent has in like manner an insurable interest in the life of a child, and a child in the life of a parent. *Loomis v. Eagle L. & H. Ins. Co.* 6 Gray, 396; *Mitchell v. Union Life Ins. Co.* 45 Me. 104; *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154.

In the case last cited this court says: "It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why, then, should he be not permitted to make a provision by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time."

In *Lord v. Dall*, 12 Mass. 115, a young unmarried female, without property, who for several years had been supported and educated at the expense of her brother, who stood to her *in loco parentis*, was held to have an insurable interest in his life.

So also, a creditor has an insurable interest in the life of his debtor. *American Life & H. Ins. Co. v. Robertshaw*, 26 Pa. 189; *Cunningham v. Smith's Exrs.* 70 Pa. 450.

In *Keystone Mut. Assn. v. Beaverson*, 16 W. N. C. 138, the assured, an unmarried lady, lived with her brother, who supported or maintained her in his family, under circumstances tending to constitute the relation of debtor and creditor

between them, and it was held that he had such an insurable interest in her life as would support a policy of insurance, taken out by him therein.

"This case" says the court, "was not submitted to the jury under a ruling that the mere fact of a person on whose life the policy was taken being a sister of the defendant in error, gave to the latter an insurable interest in her life, although reputable authorities have recognized such relationship to be sufficient. *Aetna Life Ins. Co. v. France*, 94 U. S. 562 [Bk. 24, L. ed 288]. In the present case evidence was given that he was supporting and maintaining her in his family under circumstances tending to constitute the relation of debtor and creditor. It was under all the facts of the case that the court held he had an insurable interest in the life of his sister. It is very clear that the insurance was obtained in good faith and not for the purpose of speculating upon the hazard of a life in which he had no interest. *Scott v. Dickson*, ante, p. 181. The policy in question shows the willingness of the company to take the risk on the ground of relationship alone."

The rule deducible from all the cases is thus stated in *Warnock v. Daria*, 104 U. S. 775 [Bk. 26, L. ed. 924], by *Mr. Justice Field*: "It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life.

"It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."

It cannot be pretended that Garnier had an insurable interest in the life of his aunt, by force of the mere relationship existing between them. No case has been brought to our notice which carries the rule to this extent. Between husband and wife, and parent and child, the relationship is so close and intimate and the mutual dependence and legal liability for support so manifest that nothing more is wanting to establish the insurable interest. Garnier, however, did not hold any such relation to Ellen McLean, either natural or assumed; he was simply her "friend and adviser." He was

doubtless a valuable friend; he had advanced money to bring her to Philadelphia; he fitted up, stocked, and from time to time replenished the store at Tenth and Manilla Streets; having disposed of this for her benefit, he purchased the establishment on Fitzwater Street, and selling this, he bought for her a third, on Fifth Street, below Christian. She repaid Garnier, however, for his outlays in her behalf, from time to time, from the ordinary receipts of the several stores and from the proceeds of the sales.

The only relation existing between James Garnier and Ellen McLean, which could give Garnier an insurable interest in her life was that of debtor and creditor, and upon this ground alone the case must be considered.

It is not denied that at the date of the policy Mrs. McLean was indebted to Garnier, for money advanced and expended in her behalf, in some amount between \$500 and \$750. It is said, however, that Garnier in his answer disclaims as a creditor; that he places his right to the proceeds of the policy on other grounds, and makes no claim whatever by reason of any indebtedness. We do not so understand either the answer or the evidence given by the defendant in the case. The bill charges, in the first paragraph, in substance, that the policy was taken out and applied as a collateral security to the debt which Mrs. McLean then owed Garnier, and in the subsequent paragraphs that the debt having been fully paid in the lifetime of the assured the proceeds of the policy should pass into her estate. This fact is specifically denied; the defendant in his answer says it is "not true that the policy of insurance, referred to in paragraph 1 of the complainant's bill, was applied for and issued upon the life of Ellen McLean, for any such reason or purpose as therein stated."

It is undisputed, however, that at the issuing of the policy the relation of debtor and creditor did exist, and to the extent stated; the defendant having denied that the policy was taken as collateral security for that debt, a question of fact is thus raised to be determined by the evidence. Upon examination of the proofs, we find no evidence from which the fact might be fairly inferred. The insurance was not effected at the instance of Mrs. McLean, but at the suggestion of her son Samuel McClatchy, in whose name a second policy in \$1,000 was at the same time issued; the premiums were paid and the policy maintained by Garnier; indeed there is not the slightest proof in support of the plaintiff's hypothesis that the policy was held in trust for the debtor; and in the absence of such proof, the presumption is that the rights of the parties appear upon the face of the policy. *Cunningham v. Smith*, 70 Pa. 450.

It has been said, however, on the authority of *Godsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid, the insurance is at an end; but it is now settled that this case is not the law; it was directly drawn in question and was expressly overruled in *Dalby v. India & L. L. Assurance Co.* decided in the Exchequer Chamber, 15 C. B. 865.

The law seems to be well settled that it is wholly unnecessary to prove an insurable inter-

est in the life of the assured, at the maturity of the policy, if it was valid at its inception; and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. American Mut. L. Ins. Co.* 37 N. Y. 282; *Murray v. Home Ins. Co.* 9 R. I. 348; *Hoyt v. N. Y. Life Ins. Co.* 3 Bosw. 440; *Phoenix Mut. Life Ins. Co. v. Bailey*, 13 Wall. 616 [80 U. S. bk. 20, L. ed. 501].

The doctrine of all the cases to which our attention has been called is that if the policy was originally valid, it does not cease to be so by cessation of interest in the subject of insurance, unless such be the necessary effect of the provisions of the instrument itself.

Therefore, where a husband insured his life for the benefit of his wife and was subsequently divorced, it was held that, notwithstanding the relation of husband and wife no longer existed, and her insurable interest had thus ceased, yet she could recover the full amount of the policy. *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457 [Bk. 24, L. ed. 251].

"Supposing a fair and proper insurable interest of whatever kind" says the court in the case last cited "to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms." To the same effect is *McKee v. Phoenix Ins. Co.* 28 Mo. 383.

All the cases to which we have referred, it is true, arose from suits brought upon the policies of insurance; but the same principles apply where the company, admitting its liability, has paid the money into court to abide the result, and the controversy is between the remaining parties.

In our own case of *Scott v. Dickson*, 16 W. N. C. 181, our brother Paxson, upon a review of the cases, concludes that where one has an insurable interest at the time an insurance is effected upon the life of another for his benefit, the fact that his interest ceases to exist, at or prior to the death of the insured, will not, as against the personal representatives of the insured, deprive him of the right to receive the insurance money; therefore it was held that a surety on an official bond has an insurable interest in the life of the obligor; and that his right to recover upon the policy was not affected by the fact that no breach of the condition of the bond had ever occurred.

But a merely colorable, temporary or disproportionate interest may present circumstances from which want of good faith, and an intent to evade the rule, may be inferred; therefore, although the relation of debtor and creditor may in general be said to establish an insurable interest, the amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 Moody & R. 481; *Miller v. Eagle Life & Health Ins. Co.* 2 E. D. Smith, 268.

The case of *Cammack v. Lewis*, 15 Wall. 643

[82 U. S. bk. 21, L. ed. 244], is exactly in point; the policy was taken out by Cammack, the creditor, upon the life of Lewis, his debtor, in the sum of \$3,000; \$2,000 for his own benefit and \$1,000 for the benefit of Lewis. Lewis, in fact only owed Cammack \$70, although he voluntarily and without consideration gave his obligation at the time for \$3,000.

"If the transaction," says *Mr. Justice Miller*, "as set up by Cammack be true, then so far as he was concerned it was a sheer wagering policy and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a *bona fide* effort to secure the debt; and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy which, if Cammack's account be true, was without consideration and could only have been intended for some purpose of deception, probably to impose on the insurance company." See also *Conn. Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498 [Bk. 27, L. ed. 800].

In the case at bar, the policy was \$2,000; the amount of the indebtedness was, at the time, undetermined and therefore uncertain. It has since been ascertained to have been between \$500 and \$750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith.

The essential thing is, as stated by the learned judge of the court below, that the policy should be obtained in good faith, and not for the purposes of speculation, upon the hazard of a life in which the insured has no interest.

The case is materially different from *Gilbert v. Moose's Admrs.* 13 W. N. C. 489. The principles involved in that case are not drawn in question here.

We find no error in the decree of the court below and it is therefore affirmed.

The decree is affirmed and the appeal dismissed, at the cost of the appellant.

CITY OF SCRANTON SCHOOL DISTRICT *et al.*, Appls.,
v.

LACKAWANNA IRON & COAL CO.

1. An Act of Assembly which applies to those only of a class who accept its pro-

NOTE.—Governor Pattison, in vetoing the Act construed in the above case, said:

"The prohibition of section 7, article III, of the Constitution, against the passage of local or special laws regulating the affairs of counties, cities, towns

visions, is not sustainable under the rule of classification, allowed by law, but is special legislation; and when the subject matter falls within the prohibition of the Constitution it is void.

2. The Act of March 18, 1875, regulating the assessment and collection of taxes in cities of the third class, which contains a proviso excluding from the operation of the Act all cities of the third class, etc.,

ships, wards, boroughs or school districts is absolute. The prohibition against local or special laws upon this subject includes the command that whenever laws relating thereto are passed, they shall be general in their application. Anything which defeats or limits their general application is obnoxious to the prohibition. If certain counties or cities cannot be specially legislated for by name, they cannot be thus legislated for by including them in an exception to a general law. The inhibition is against passing laws that will operate upon them alone, to the exclusion of others in the same general legal category.

Again, the fact whether a law is general or special is to be determined by the force of its operating words at the time of its passage, and cannot be made to depend upon the happening of any such contingency as the desire or action of the councils of a city or the act of a board of county commissioners. If the Legislature cannot give a particular county immunity from the operation of a general law, it cannot depute to the city or county the privilege of giving itself such immunity. The power denied to the superior body cannot be vested by it in the subordinate.

"Neither can the intentment of a broad constitutional provision be defeated by any mere juggle of words. If the law only recognizes cities of given classes, the Legislature cannot further divide those classes into those accepting and those not accepting legislation. Neither can such a division be set up as counties governed by special laws and those not governed by special laws. If this could be done, the whole purpose of the constitutional prohibition would be defeated. Some counties or cities in given classes would be governed by one law, and some by others. If the bills now objected to should be signed, the extent or generality of their application would be dependent entirely upon the willingness or unwillingness of certain counties or cities to be governed by them.

"Surely, this cannot be done and the purpose of the Constitution be defeated in such an indirect and specious manner. The tendency of this sort of legislation has become so great that I think it is time to assert rigidly the spirit and letter of the Constitution. It is true that many laws containing option clauses have been enacted in the past, and some may receive the sanction of the present Executive. The recurrence of this character of enactments, however, has become so frequent as to induce me to attempt to outroot the practice, if possible.

"In support of the line of argument I have adopted, I refer to the work of Mr. Buckalew on the Constitution, pp. 73, 74."

While class legislation is recognized and sustained in Pennsylvania, it is based upon the ground of necessity.

"Classification of cities, and laws confined thereto, are permissible only in matters relating to their municipal government, but the rights of persons and property must be secured by general laws, which must be uniform and in force everywhere throughout the State." Arnold, J., of Common Pleas No. 4 of Philadelphia County in *Phila. v. Pepper*, 2 Pa. C. C. R. 287.

The cases of *City of Scranton v. Silkman*, post 317; *Wilkesbarre v. Meyers*, post, 320; *Davis v. Clark*, 106 Pa. 394, and similar ones seem to be direct authority for this generalization.

Under the authority of *Scranton v. Silkman*, it may be a question if the provision to be found in many Acts of Assembly in Pennsylvania, saving special laws does not in like manner offend against the Constitution. Such is the view expressed by Governor Pattison, above. See also *Com. v. Scheckler*, 1 Pa. C. C. R. 505.

Some important Acts contain this provision, among others, the Act of May 23, 1881 (P. L. 45), providing for tax liens, etc.; the Act of June 29, 1881 (P. L. 128), to prevent fraud in primary elections; and the Act of June 25, 1885 (P. L. 187), regulating the collection of taxes in boroughs and townships.

The attempted classification, by option clause, condemned in the above case of *Scranton School District's Appeal*, is of frequent occurrence in the statute books of Pennsylvania. An extreme case

under this head is where an Act, general in its terms, is limited to those counties accepting it by ballot. Acts of June 23, 1885 (P. L. 142), relating to fences, and June 12, 1878 (P. L. 198), relating to taxation of dogs and protection of sheep.

Such legislation has been upheld in other States as general legislation. See cases cited below.

Prior to the constitutional prohibition against special legislation, it would probably have been upheld under *Locke's App.* 72 Pa. 481.

Another option clause, of frequent occurrence, is the acceptance of the new Constitution. See the illustration used below where corporations formed under general laws are likened to cities accepting legislation.

Among limitations somewhat similar to those in the case of *Strine v. Foltz*, ante, 285, may be mentioned that of the Act of April 28, 1883, authorizing voluntary tribunals to adjust disputes between employers and employees in iron, steel, glass, textile fabrics and coal trades; Acts applying to anthracite coal mines, bituminous coal mines, etc. See *Millet v. People of Illinois*, 5 West. Rep. (Ill.) 155.

The decisions of the different States are not in unison, upon the question of local or special legislation.

An Act regulating the holding of elections and declaring the result thereof, in cities, villages and incorporated towns in this State," with a provision for submitting the question of its adoption to the votes of the electors in any city, village or town, was held to be a general and not a local law, in *Illinois*, (*People v. Hoffman*, 3 West. Rep. 523 (Ill.)), the Chief Justice and an associate Justice dissenting to so much of the opinion as holds that this law is not local.) This illustration is used in the opinion of the court: "When 'An Act concerning corporations for pecuniary profit' first became a law, it had nothing whatever to operate upon. Its provisions were suspended until some corporation was formed to call them into action. When the first company was organized under it, it was in force as to that alone. Upon the formation of the second, it was only operative as to two companies and no more. It was none the less a general law because the objects upon which it took effect came into being at different times and not all at once."

The general principle is thus stated: "Laws are general when every person who is brought within the relations and circumstances provided for is affected by the law," citing *People v. Wright*, 70 Ill. 388; *People v. Cooper*, 83 Ill. 586.

"An Act to reorganize and consolidate cities of the first grade of the second class (Columbus), and to reduce the tax levy of said cities," was declared local legislation; not so much because the title contained the name of the City of Columbus, which was the only city of the first grade, second class, in the State, but because, by the terms of the Act, it could not in the future apply to any other city coming into that class, and because the legislative intent therefore was that the Act should apply to the City of Columbus alone. *State of Ohio v. Pugh*, 1 West. Rep. 36 (Ohio).

This case contains an elaborate discussion of class legislation, with a dissenting opinion.

See also the following cases on the general subject: *State of Ohio v. Hawkins* and *State of Ohio v. Hudson*, 3 West. Rep. 125, 159 (Ohio); *McCarthy v. Commonwealth*, 1 Cent. Rep. 111 (Pa.); *Morrison v. Bachert* (Pa.) 3 Cent. Rep. 117.

An Act creating the office of police judge in all cities of the second grade and third class, having at the last federal census a population of 16,512 and no more, is held to be special, designating one city, and not creating a class. *State of Ohio v. Anderson*, 3 West. Rep. 605 (Ohio).

An Act, which provides that "Justices of the peace in all cities in this State (Illinois) having a population of 100,000 or more shall have civil jurisdiction in all cases except landlord's summons cases, coextensive with the limits or boundary lines of such city, in the maximum amounts as now prescribed by the statute," held, not to be a special law. *Clarkson v. Guernsey Furniture Co.* 5 West. Rep. 89 (Mo.).

which do not accept, by ordinance, the provisions of the Act, **offends against article III, § 7 of the Constitution of 1874**, which prohibits the passage of any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts.

(Decided October 4, 1886.)

APPPEAL from a decree of the Common Pleas of Lackawanna County in favor of complainant, in a suit in equity to restrain the collection of taxes. *Reversed.*

The Lackawanna Iron & Coal Company was the owner of seventy-five acres of unimproved land in the City of Scranton, which was assessed as third class property for city purposes. The City of Scranton School District levied a tax of ten mills on the dollar for the year 1885, at a full rate, without regard to the classification; and a one half mill sinking fund tax at a full rate.

The Company, alleging that the levy should be a half rate, under the Act of March 18, 1875, applied for an injunction to restrain the School District and its treasurer, the defendants, from collecting the tax, at least as to one half thereof.

The Act of 1875 is entitled "A Supplement to an Act, Entitled 'An Act Dividing the Cities of this State into Three Classes, Regulating the Passage of Ordinances, Providing for Contracts for Supplies and Work for said Cities, Authorizing the Increase of Indebtedness and the Creation of a Sinking Fund to Redeem the Same, Defining and Punishing Certain Offenses in all of said Cities, and Providing for the Incorporation and Government of Cities of the Third Class,' approved May 23, 1874." It provides in section 1, that "In all cities of the third class, all real estate shall, for taxable purposes, be classified and arranged in three classes. * * * All taxes, whether for general or special purposes of such city * * * shall be assessed, levied and collected * * * upon property of the third class, a one half rate."

It is provided in section 5 that "No city of the third class, nor any city of less population than 10,000 inhabitants, heretofore incorporated, shall become subject to the foregoing provisions of this Act until the same are accepted by an ordinance, etc."

The City of Scranton was incorporated April 23, 1866; and on May 23, 1873, had a population of more than 10,000, and less than 100,000 inhabitants. On March 16, 1877, an ordinance was passed by councils and approved by the mayor, the title of which referred to the Act of May 23, 1874; but in section 1 it provided for the acceptance by the City of the Act of May 23, 1874, and the supplements thereto. Letters patent were duly issued by the Governor.

The court, McCollum, *P. J.*, specially presiding, granted a preliminary injunction, which on motion was continued. On appeal, the decree was reversed and the injunction dissolved, November 2, 1885, the supreme court saying, in a *per curiam* opinion: "We think the constitutionality of the Act of March 18, 1875, is too doubtful to permit this preliminary injunction to stand" [1 Cent. Rep. 627.]

The matter was then referred, on bill and answer, to Henry A. Knapp as master, and examined;

he reported the following conclusions of law:

1. The Act of Assembly of March 18, 1875 (P. L. 15), has no application to school taxes.

2. The first five sections of the Act of 1875 are in violation of article III, § 8 of the Constitution of Pennsylvania, which prohibits the General Assembly from passing any local or special laws regulating the affairs of counties, cities, townships, wards, boroughs or school districts.

3. The ordinance of the City of Scranton, approved March 16, 1877, and the certificate of the Governor issued in pursuance thereof, constituted a sufficient and lawful adoption of the Act of March 18, 1875, by the said City of Scranton.

4. Recommending that the bill should be dismissed.

The plaintiff filed exceptions to the first, second and fourth, and the defendants excepted to the third conclusion of the master. The court dismissed the defendants' exception, and sustained the exceptions of the plaintiff, and made the injunction permanent. The defendants then took this writ.

The assignments of error were to the action of the court in dismissing the defendants' exception, and in sustaining the plaintiff's exceptions, and in decreeing a permanent injunction.

Messrs. Fred. W. Gunster and Chas. H. Welles, for appellants:

The first five sections of the Act of March 18, 1875, are in violation of the constitutional restrictions as to special legislation.

Art. III, § 7, Const. 1874.

By the terms of the proviso contained in section 5, the Act is applicable to only a portion and not all of the cities of the third class. The proviso subdivides cities into those already incorporated and those which may be incorporated after its date; and if some of the cities accept the provisions of the Act there will be a further subdivision.

The Legislature having classified cities by the Act of 1874, cannot make subclasses by excepting a portion of any one class, by reference to the date of their incorporation, from the operation of a law passed for the class.

The proviso leaves it optional with each city whether or not it will become subject to the law. If such legislation be sustained, any city may get such particular laws as it wishes, without interfering with other cities, by simply tacking on a proviso like the one in question, and then passing the ordinance.

No classification of school districts has as yet been attempted; and until they are classified any Act affecting them must affect all or none.

Commonwealth v. Patton, 88 Pa. 258; *Scowden's App.* 96 Pa. 422; *Davis v. Clark*, 106 Pa. 877; *McCarthy v. Commonwealth*, 1 Cent. Rep. 111.

Nowhere in the title of the Act in question is there the remotest reference, express or implied, to schools, school districts or school taxes. Certainly no such ideas as these words suggest are clearly expressed in the title. The Act is, therefore, unconstitutional.

Art. III, § 8, Const. 1874.

The proviso is a virtual delegation of the legislative power, and therefore in violation of the

Constitution, vesting the legislative power in the Senate and House of Representatives.

Art. II, § 1, Const. 1874.

Until the ordinance is passed, the Act as a statute has no existence. It left the balls of legislation imperfect and unfinished, for it lacked the qualities of command and prohibition absolutely essential to every law.

Parker v. Commonwealth, 6 Pa. 507; *Locke's App.* 72 Pa. 491.

Again; the Act of 1874, relating to cities, is a general law. The tax provisions of the Acts of 1875 and 1874 cannot stand together; and whenever any city of the third class accepts the Act of 1875, so much of the Act of 1874 as conflicts therewith is repealed as to that city. By force of its own provisions the Act of 1875 (first five sections) becomes a partial repeal of the general law of 1874 and is local, applying only to the city which accepts it.

This is a violation of the provision of the Constitution, prohibiting the enactment of local laws by the partial repeal of general laws.

Art. III, § 7, Const. 1874.

Messrs. Willard & Warren, for appellee: In *Wheeler v. Philadelphia*, 77 Pa. 338, and *Kilgore v. Magee*, 85 Pa. 401, this court decided that the just classification provided for in the Act of May 23, 1874, offended against no provision of the Constitution.

The Act of 1874, so far as it relates to cities of the third class, § 57, contains a proviso similar to that of the Act of 1875. If this court holds that the Act of March 18, 1875, is unconstitutional, on account of the proviso, then all of the Act of 1874 relative to third class cities is, for the same reason, unconstitutional; and third class cities of the Commonwealth have been conducting their municipal affairs for ten years past without authority of law.

The object of the provisos in the Acts of 1874 and 1875, was to preserve to such cities of the third class as saw fit to retain their old charters such laws as experience had proved were adapted to their wants.

Commonwealth v. Halstead, 1 Pa. C. C. R.; S. C. 2 C. P. R. 247.

The Act in question, when it received the approval of the Governor of the Commonwealth, became a perfect law. It is not an invitation—it needs no ratification—it is not a delegation of legislative power, and lacks none of the qualities of command and prohibition essential to every law.

The Act of 1875 is a supplement to the Act of 1874; and the proviso therein was absolutely necessary in order to further the principle adopted in the fifty-seventh section of the Act of 1874. The purpose was to preserve the rights of cities not accepting, and the effect was to create uniformity of charters.

"The principle which allows a corporation, whose charter is in a sense a contract, to accept an Act of the Legislature, is very different from that which prohibits the people from voting a law into existence, when, under the fundamental law, they have delegated the law-making power to a body of representatives. It has been held in the latter case that such a law is unconstitutional, but we apprehend never in the former case."

Per Hand, P. J. in *Com. v. Halstead*, 2 C. P. R. 247; S. C. 1 Pa. C. C. R. 335.

"Nothing but a clear violation of the Constitution, a clear usurpation of the powers prohibited, will justify the courts in pronouncing an Act of the Legislature unconstitutional and void."

Speer v. School Directors, 50 Pa. 150; *Sharpless v. Mayor*, 21 Pa. 164; *Hilbish v. Catherman*, 64 Pa. 154; *Pa. R. R. Co. v. Riblet*, 66 Pa. 164; *Commonwealth v. Butler*, 11 W. N. C. 241.

All the presumptions are in favor of the constitutionality of an Act of Assembly.

Craig v. First Presbyterian Church, 88 Pa. 42.

Mr. Justice Green delivered the opinion of the court:

The plaintiff in this case claims the benefit of the provision of the first section of the Act of March 18, 1875 (P. L. 15), which directs that in cities of the third class, for purposes of taxation, all real estate and the improvements thereon shall be classified and arranged in three classes, upon which different rates of assessment shall be imposed. The rate claimed by the plaintiff is less than the full rate levied upon the adjusted valuation made for city purposes, upon which the defendant has caused the school tax to be assessed.

The proviso to the fifth section of the Act of March 18, 1875, excludes from the operation of the Act all cities of the third class, and all cities containing less than 10,000 population, previously incorporated, which do not accept, by an ordinance duly passed, the provisions of the Act.

According to this all cities that do accept will be subject to the methods of assessment and collection prescribed by the first five sections, and all that do not will not be so subject; and as to them, different methods will prevail. Whether the methods prescribed by the Act shall be the law will depend, not upon the terms of the legislation but upon the will of others who are not law makers at all; and what may be the law in one city of the third class may not be the law in another city of the same class. In other words, a majority of the members of the city councils of any one city of the third class may impose upon the inhabitants of that city a method of taxation which may not prevail in any other city of the Commonwealth.

A law which authorizes this to be done is, in our judgment, clearly obnoxious to the seventh section of the third article of the Constitution, which prohibits the General Assembly from passing any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts. The circumstance that the power to determine the question is delegated to another body does not at all affect the question. The practical result is the same; the Law of 1875 will be limited to the one or more cities that do accept, and that makes it local. All our recent decisions are to the effect that if local results either are or may be produced by a piece of legislation, it offends against this provision of the Constitution and is void. *Commonwealth v. Patton*, 88 Pa. 258; *Scowden's App.* 96 Pa. 422; *Davis v. Clark*, 15

W. N. C. 209; *McCarthy v. Commonwealth*, 16 W. N. C. 497; [S. C. 1 Cent. Rep. 111.]

In the first of these cases the method employed was to limit the application of an Act which ostensibly embraced "all counties," by a geographical description which confined it to one. In the next case the attempt was made to produce the same result by describing two concurrent populations of county and city, of such figures as to confine the operations of the Act practically to but one county, and it was condemned for the same reason. In the last two of the cases named, the objectionable limitation restrained the operation of the Act to counties of prescribed populations; and in both cases the legislation was condemned because it embraced less than the whole of the counties of the State.

In *Davis v. Clark*, the present Chief Justice said: "It was not then a general Act applicable to every part of the Commonwealth. It did apply to a great number of counties; but there is no dividing line between a local and a general statute. It must be either one or the other. If it apply to the whole State it is general. If to a part only, it is local. As a legal principle it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the Act makes it local."

'We see no difference in principle between the foregoing cases and the present. It is the duty of the courts to enforce the Constitution as they find it. Attempts in covert modes to defeat its plain provisions must be set aside, with the same certainty as when the methods are open. Even if the intention be innocent and yet the legislation comes within the constitutional prohibitions, it must not be tolerated. We are of opinion that the second conclusion of law found by the master should have been sustained and the bill dismissed. The other matters discussed do not require consideration.

Decree reversed and plaintiff's bill dismissed, at the cost of the appellee.

COMMONWEALTH, *ex rel.* John F. CONNOLLY, District Attorney, *Plff. in Err.*,

v.

Frank N. HALSTEAD.

The first five sections of the Act of March 18, 1875, are unconstitutional, under article III, § 3 of the Constitution. (*Scranton School District's Appeal*, ante, 811.)

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, to review a judgment for defendant in an action of *quo warranto*. *Reversed.*

Reported below in 1 Pa. C. C. R. 335.

The facts are stated in the opinion of the court below, as follows:

HAND, P. J.:

This is the case of a writ of *quo warranto* issued to test the title of Frank N. Halstead to the office of assessor of the sixteenth ward of the City of Scranton, a city of the third class. The informa-

tion alleges that since the second day of April, 1883, the defendant has intruded into the office of assessor of taxes of the sixteenth ward of Scranton, without having been legally elected and appointed thereto; that Nathaniel Halstead was duly elected and appointed to the said office on the 20th day of February, A. D. 1883.

The answer of the defendant alleges that he was duly and legally appointed assessor to assess property for city purposes only, under the statute in such cases made and provided, to wit: Act of March 18, 1875, P. L. 15, which said statute was duly accepted and adopted by the city councils of the City of Scranton, by an ordinance duly passed by a majority of the members elected to each branch thereof voting in favor of the same, and approved by the mayor upon the 16th day of March, 1877, being appointed assessor as aforesaid, by the judges of the court of common pleas of said county, on the 20th of March, A. D. 1884; which office he accepted and has exercised and continues to exercise.

To the plea and answer the plaintiff joins issue in the nature of a demurrer, admitting the facts and alleging that they are not sufficient in law, because the Act of Assembly of March 18, A. D. 1875, P. L. 15, is unconstitutional and in violation of the provisions of the Constitution of the Commonwealth of Pennsylvania.

The issue is joined on this sole question of the constitutionality of the Act of March 18, 1875, a supplement to the Act of 1874, dividing cities into three classes.

The clauses of the constitution which it is claimed are violated by the Act of 1875 are:

Article III, section 6, relating to amendments.

Article IX, section 1, relating to uniformity of taxation.

Article III, sections relating to local and special legislation, as specified under that article.

We can only briefly state our views in regard to the questions raised, and must base them rather upon general and recognized principles of constitutional law than upon the analogy of particular cases found among the decisions of our higher courts. While the demurrer places this issue upon the unconstitutionality of the whole Act of Assembly, it would be only necessary to inquire as to the validity of the appointment of assessors by the court, upon the application of the councils as provided for in the first section of the Act of 1875.

Under article XII, section 1, we have no doubt of the power of the Legislature to vest, in their wisdom, the appointing of the assessors of cities for taxation for city purposes in the judges of the courts of common pleas. We remark in this connection, to be further dwelt upon, that the Act of 1875 applies to all cities of the third class to the same extent that the Act of 1874 does, and specifically to all cities of the third class, subject only to their acceptance.

The objection which seeks to break down the whole of the Act of 1875 (that it violates section 6, article III of the Constitution, in that it is amendatory of the Act of 1874 and, therefore, improperly drawn, because the Act of 1874 is not re-enacted and published at length) is not well taken. Simply because a law, properly expressed by title as a supplement to an Act, the title of which is fully set forth, by construction is incidentally amendatory of the previous Act, or even necessarily so when germane to the whole subject-matter, is therefore within the provisions of the sixth section, article III, would be a construction which would create a greater evil than that section was sought to remedy. All supplements are more or less amendatory. It was never intended that because an Act had this character, it must necessarily include all verbiage of previous legislation within its language. The object of the section was to give a clear idea to legislators and citizens of what was intended as law; and to prevent the covering up of a design by reference to title only.

We come next to the question: Is the Act of 1875 prohibited special legislation?

It is argued that it is an attempt to subclassify cities so as to reach forbidden legislation by indirection. The allegation is that the proviso of the fifth section works this apprehended evil, in that it makes three classes of cities, viz.: those which adopt the Act, those which do not, and those which are chartered subsequently. It is erroneous to call it three classes; it is only two, those which are under the Act and those which are not. If this be an evil, it is one which can hardly be avoided by legislation or Constitution, except in a new territory, not blessed with years of civilization.

It is urged that because a city, by its constituted authorities, has the option to accept the amendment to its charter, the vice is allowed to come in. We apprehend, however, that this conclusion is neither logical, honorable to the present Constitution, nor wise, in view of the history which precedes this legislation. A few plain general statements will show this. The right of cities to their charters and their specific vested rights has always been held by laws and Constitutions to be sacred. Some of the severest struggles in history have been prolonged to secure this right. Our present Constitution in many ways recognizes this, even in the case of private corporations. A careful effort to avoid interference with acquired rights is apparent. When the Constitution of 1874 was adopted there was an effort, it is true, to create uniformity and generality of legislation, and to sweep away, so far as possible, the evils of special legislation. In so far as this was to affect the future of the cities not then in being, it was no doubt wise; it may be also wise that it should, as far as possible, tend to make uniform the charters then in existence; but that it was wise or intended to strip from the cities, without their consent, valued rights, or to impose upon them even benefits, which the Legislature deemed such, without their consent, is not to be considered.

The City of Scranton with others came into existence under a granted charter many years before the present Constitution and the legislation thereunder. Very wisely did the framers of the Act of 1874 provide for a preservation of all vested rights, with an invitation to come under the provisions of the Act of 1874, in the fifty-seventh section of that Act. P. L. 1874, p. 260.

This section, we apprehend, does more to create uniformity of charters, or fundamental law regulating cities, than any system of forced legislation imposed upon cities could have done. What was the problem presented to the Legislature in regard to uniformity of law relating to cities? We are speaking now of full corporations, granted charters and rights, not of mere municipal divisions of territory, as towns and counties. The problem was a class of cities already in existence, with varied charters, special legislation to the full extent, by some considered not an unmixed evil, by the cities themselves considered a legal and vested privilege.

Was it to be supposed that our people were so forgetful of rights secured by law that they would attempt to force the old cities of the Commonwealth to dress themselves up in the habiliments of the new era of things? We apprehend that the Act of 1874 shows a different view of their duty. They preserved all of the old to which it rightfully belonged, by a provision that "The acceptance shall not be construed to be a repeal or surrender of rights, powers, privileges and franchises heretofore by law conferred on such city, etc." This was a guaranty to all the old cities against vandalism and wanton disregard of privilege and right.

Then follows the Act of 1875, preserving the same jealous care of rights valued by long experience in self government, and providing for new privileges. Having adopted the principle in the Act of 1874, which we have found to be wise and necessary, the same option must be given in the Act of 1875, if beyond a peradventure vested chartered rights were not to be interfered with; hence, the condition that it must be accepted by the corporation. By this means it is plain that the tendency is increased toward uniformity of legislation.

The proviso in the Act of 1875, applying to cities before incorporated, was an absolute necessity in order to preserve franchises and to further the principle adopted in the Act of 1874.

It is to be remarked that the principle which allows a corporation, whose charter is in a sense a contract, to accept of an Act of the Legislature is very different from that which prohibits the people from voting a law into existence when, under the fundamental law, they have delegated the law-making power to a body of representatives. It has been held in the latter case that such a law is unconstitutional, but we apprehend never in the former case.

The only remaining question is that which relates to article IX, section 1, regarding uniformity of taxation. It is urged that the division of the rate upon the three classes of property into a full rate, a two-third rate and a half rate, conflicts with this section; also the division of property into the three classes does the same thing. After careful consideration we are unable to discover any wanton exercise of power by the Legislature in this behalf. The language of the Constitution is "uniform upon

the same class of subjects within the territorial limits of the authority levying the tax."

It will not be urged that the Legislature cannot fix the class of subjects. It must do this. The Constitution cannot do it. The Legislature has always done it. A reference to the tax laws shows this. Where is the prohibition that has taken this power from the sovereign power of the Commonwealth? If it can classify, then it may fix the rate, provided it makes it uniform upon the same class of subjects within the territorial limits of the authority levying the tax, to wit: within the county, the city, the borough, or the township.

But it may be urged that the Legislature cannot refine so much upon the classification as to destroy this provision of the fundamental law. This is true. It has been already held that the classification of cities is proper. The classification under the Act of 1875 is also proper. It is founded in experience, in natural necessity and in an equal distribution of burdens. We are dealing with incorporated cities, which require special provisions for health, police regulation, safety, and public convenience.

The great source of expense to a city is found in the first classification of real estate; the second source of expense in the second class; and the third source of expense in the third class. The classification is not refined, but natural, scientific, and we might almost say legal; for our courts, without legislation, have recognized the distinction between "rural" property in a city and improved property, where assessment by the front foot is attempted for local improvements. Whether, therefore, we look at it as a question of power or propriety, we reach the same conclusion. We are, therefore, of the opinion that the Act of 1875 is not unconstitutional but within the powers not taken from the Legislature.

We have said nothing thus far in regard to the merits of this legislation. If our views are correct, so far as uniformity of taxation is concerned, the Act of 1875 is in exact compliance with the letter of the Constitution. It fixes the classes of property and makes the tax uniform on these classes.

It would be useless to try to force city taxation down to the same uniformity as county and township taxation. It never will come to that, from the necessity of the case, the objects to be attained and the values being entirely different.

We look upon the legislation in the Acts of 1874 and 1875, relating to cities, as an honest and wise attempt to benefit cities, and to adopt principles in conformity to the Constitution which will actually, in experience, equalize the burdens of taxation. The Constitution, of itself, created two classes of cities, viz.: those existing with special privileges and those to come under the general laws for the first time in the history of the Commonwealth. There exist only these two classes now.

The Acts of 1874 and 1875 have been adopted by cities of the State. The City of Scranton in good faith adopted both at the same time, and for eight years taxes have been assessed under their provisions. They are proved to be beneficial. To declare the Act of 1875 now unconstitutional would work confusion, harm and only evil. It cannot be done without the clearest conflict with the letter of the Constitution. If it is in doubt it must stand. The classification is in the power of the Legislature; the rated tax is in accordance with the ability of the respective classes to pay, as well as in accordance with the burdens created by them.

If an instance was needed of the beneficial effects of the Acts of 1874 and 1875 in the small amount of corporate indebtedness, in the relatively low rate of taxation, and in the acquiescence of those who have the burdens of taxation, the City of Scranton presents that instance. The spirit of our present Constitution is to prevent the increase of both bonded indebtedness and the rate of taxation, and the Acts of 1874 and 1875 have tended to and produced this result. In fact the only cry which is heard is that the power does not exist to work out a contrary result, except by a vote of the people as now provided by law. The appointment of assessors has been made by this court on the nomination of councils from year to year, and the only object sought has been judicious officers, who would be capable, so far as possible, of making an equalized assessment. We discover no prohibition which avoids this legislative provision. It gives the people an opportunity to know who is to be appointed, with an opportunity to be heard.

Upon principles which we are constrained to recognize, we cannot set aside the expressed will of the Legislature as found in the Act of 1875. It has be-

come part of the system regulating cities of the third class, and is not clearly nor by strong implication offensive to the fundamental law.

It is therefore adjudged that the defendant have and retain his office as assessor, and judgment is entered in his favor, with costs.

Mr. Horatio N. Patrick, for plaintiff in error.

Messrs. I. H. Burns, Joseph O'Brien and Wendell MacLay, for defendant in error.

Mr. Justice Green delivered the opinion of the court:

The respondent in this case claims title to his office by virtue of an appointment as assessor of taxes in the sixteenth ward of the City of Scranton, made by the Court of Common Pleas of Lackawanna County. The appointment was made under the authority conferred by the first section of the Act of March 18, 1875, P. L. 15.

The question of the validity of the first five sections of that Act came before us in the case of *Appeal of Scranton School District* [ante, 811] at the present term. We there held, in an opinion just filed, that those sections of the Act were contrary to the provisions of article III, section 7 of the Constitution, and therefore void. It follows that the judgment of the court below must be reversed and judgment of ouster entered against the defendant, on the demurrer.

Judgment reversed and judgment of ouster entered against the defendant and that he pay all the costs of the proceeding.

CITY OF SCRANTON, *Plff. in Err.*,

v.

Catharine SILKMAN.

1. A statute is local legislation which applies to all the counties of the State except one, although that one is regulated by a local law on the same subject.
2. The Act of May 24, 1878, giving the right of appeal, from assessments for purposes of taxation, to owners of real estate in counties of less than 500,000 inhabitants, is unconstitutional under article VII, § 3 of the Constitution, prohibiting the passage of local or special laws regulating the affairs of counties, cities, townships, wards, boroughs or school districts. (*Davis v. Clark*, 106 Pa. 384, applied.)

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, to review a judgment for plaintiff. *Reversed.*

Reported below in 1 Pa. C. C. R. 329.

The facts are stated in the opinion of the court below, as follows:

HAND, P. J.—This is an appeal from the assessment of city taxes for the year 1883 and the decision of the board of appeal and revision. It is taken under the provisions of an Act of Assembly entitled "An Act Authorizing Appeals from Assessments in this Commonwealth to the Court of Common Pleas," approved April 20, 1876, P. L. 44, and the supplement thereto approved May 24, 1878, P. L. 132.

PA.

To this appeal the City of Scranton filed the plea that this court has no jurisdiction over the subject matter of this case because the Act of 1878, under which the appeal is taken, is unconstitutional and void, for the reason that it is special legislation prohibited by the Constitution.

The plaintiff joined issue upon the above plea. Upon this issue it was agreed in writing that if the court concluded to take jurisdiction of the case, the amount of reduction asked for and agreed to by defendant is \$1,004, being the amount separately assessed for coal on third class land, the surface of which was assessed separately against the plaintiff. It was further agreed, for the purpose of considering the constitutionality of the Act of May 24, 1878, that the Act of March 18, 1875, P. L. 15, was accepted by the City of Scranton and all other cities of the Commonwealth except Lancaster, Allegheny and Wilkesbarre, prior to 1878; and that the last named cities have not accepted the provisions of the Act of May 24, 1874, nor of March, 1875, relating to the classification of cities, etc.

The sole question for our consideration is the constitutionality of the Acts of 1878 and 1875. These Acts are attacked upon the ground of their being special legislation within the prohibition of article III, section 7, as being Acts "regulating the affairs of counties, cities, townships, wards, boroughs or school districts."

It is urged that this question is settled by the decision of *Davis v. Clark*, 106 Pa. 384, and by the decision of *Judge Galbraith*, in *Railway Company's Appeal* from decisions of Commissioners of Erie County, 16 Pitts. Legal J. 191.

The decision of the present question differs materially from that in *Davis v. Clark*, which involved an Act of Assembly directly in violation of the letter of the Constitution. That was a case relating to the creation of liens. It was the creation of a new lien and was, as the supreme court says, "special in its terms and local in its effect." It needed no construction to bring that Act of Assembly within the first clause of section 7, article III.

An examination of the Acts now under consideration will show their relations to the Constitution to be entirely different. The late day of argument of this case, and the short time allowed us in its decision, preclude as full an expression of our views as the importance of the question involves, and we desire. An early disposition of the question is sought because this is the triennial year of assessment. Our examination has led us to the following conclusions:

1. (a) The Act of 1878, in providing that it should apply to counties of less than 500,000 inhabitants, adopted a classification based upon population which has already been sustained by the supreme court as a proper classification on the part of the Legislature. (b) It is a classification not only proper, but one which the history of legislation for over a century rendered necessary in so far as it applies at present to but one city, and that Philadelphia. While it is based upon population, the necessities of the City of Philadelphia, as shown in the history of legislation, constitute a fact which justifies such a classification.

2. The Act of 1878, and its supplement, is not local nor special legislation within the meaning of the Constitution. Legislation may be denominated general in the sense of not being local nor special for various reasons. The clause against special legislation sought to remedy and prevent an evil. The Act of 1878 made that general law which before was special. A law may be judged as well by the results produced and the effect of the law, which means its aim, as by its language. The City of Philadelphia had its legislation allowing appeals to the common pleas long before the present Constitution. The Act of 1878 makes this valuable privilege coextensive with the State. In fact it gives the privilege to every "owner of real estate in this Commonwealth" on real estate in the counties outside of Philadelphia, and of course covers all owners residing in Philadelphia.

3. The Act of 1878 is not an Act regulating the affairs of counties. The matter of taxation, in all its branches, is pre-eminently a state affair. The power is a sovereign power. The subject matter of assessment, the levying and collecting of taxes, is wholly within the power of the State. It is the internal administration and management of counties, cities, townships, wards, boroughs or school districts that is aimed at in "the regulation of these affairs;" not the sovereign power and regulation of taxation with all its vital governmental concomitants.

4. The supplement of 1878 to the Act of 1876 is general, in that it applies to all the cities of the third class. It is possible a city may exist that cannot from some cause avail itself at present of its provisions. That does not, however, make a law special or local which in its terms is general.

The propositions above stated we believe are sustained by authority and a careful examination of the Acts in question.

The classification which separates, for the time being, the City of Philadelphia, is sustained by the case of *Wheeler v. Philadelphia*, 77 Pa. 350.

In that case the court says: "A statute which relates to persons or things as a class is a general law; while a statute which relates to particular persons or things of a class is special." A classification for the purposes of taxation is pre-eminently proper; and this may be made upon the basis of population, although it includes in one class the whole of the State, except one county, and puts that county in another class. Especially is this proper where that county embraces the largest city in the State, coextensive with the county, and differing in many respects from all the other cities and counties of the Commonwealth. To what extent this difference reaches may be discovered from the language of *Judge Paxson* on page 350 in the case cited.

In regard to the character of previous legislation relating to Philadelphia, we shall have something further to say. It is to be remarked that this is not a geographical classification in the Acts of 1876 and 1878; it is one based wholly on population. Undoubtedly a fact which moved the Legislature to adopt a maximum of population which excluded the rest of the State and included Philadelphia was the previous legislation on this same subject matter; but that is immaterial, provided she could keep her legislation general within her power of classification.

In Philadelphia it would appear that assessors are elected. *Purdon*, vol. 2, p. 1599, pl. 115.

In 1865 a board of revision was created with the right of appeal to the court of common pleas. *Purdon*, 1865, pl. 135.

By the Act of April 2, 1867, supplemental to Act of 1865 (*Purdon*, 1865, pl. 145-147) full provision is made for the assessment and collection of taxes for the City and County of Philadelphia. Is it possible that the Legislature may not, upon the subject of taxation, recognize this state of things in the largest county of the Commonwealth in providing for general legislation which covers the rest of the State? Must the Legislature and the rest of the State be handicapped by a technical construction of the Constitution which would create an evil worse than that sought to be remedied?

Again; we say the subject matter of this legislation is not the regulation of the affairs of counties. We are not disposed to place too technical a meaning upon the word "affairs." We are disposed to view the expression "regulating the affairs of counties, townships, etc." as that internal government of these subdivisions of the State which should be left to themselves and which consistent with the safety of the State at large may be so regulated by general laws without special interference. It is said by some writers that "affairs" relates to the business of the county. It is enough for the present comprehensive view that it should include all that may safely be given to the counties by general laws and not retained within the special control of the Legislature, the sovereign power, for the public good.

The power of taxation is a sovereign power. No limitation is placed by the Constitution on this power except that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority laying the tax; a limitation which may require in order that they may be levied and collected under general laws, more or less of special legislation. No express power is given by the Constitution to the Legislature, upon the subject of taxation; that power is sovereign. Every utterance is an emphatic expression of the most unlimited power in the Legislature to tax; it is restricted in its powers of exemption (III. 7, IX. 2) and it may not surrender this power (IX. 3).

The fact that taxation is necessarily associated with the affairs of the county, or is an affair indirectly in which the county is interested, cannot affect the principle involved. The Legislature must necessarily keep the power of taxation wholly within its own control.

Cooley, in his *Constitutional Limitations*, page 518, says: "Whether in any case a charter of incorpo-

ration could be held void, on the ground that it conferred unlimited power of taxation, is a question that could not well arise, as a charter is never granted which does not impose some restriction."

He also says: "It is as true of the political divisions of the State as it is of the State at large, that legislative authority must be shown for every levy of taxes. The power to levy taxes by these divisions comes from the State." See also *Burroughs on Taxation*, §§ 2, 4.

It has always been an underlying principle in Pennsylvania, not only that taxes can only be voted by the people's representatives, but that, so far as possible, the machinery of taxation should be carried on by the people themselves, either by an active participation in the assessment of the same or by a tacit acquiescence. The enforcement of these principles is under the supervision of the State.

We believe the two Acts of Assembly in question in this case are the only instances in which the Legislature has given to every owner of real estate in this Commonwealth the full power by appeal to actively or tacitly acquiesce in the assessment of his property. It has been a source of complaint that non-resident taxpayers have not had a full opportunity of appealing free from local prejudice. This Act now gives to them this right. To belittle this right by calling it an affair of the county when it is the sovereign Act of the Legislature on a subject wholly within its control, and which in its scope is far-reaching for public good and for the honor of the State at large, we think is too technical. With this power of appeal, the taxpayer either tacitly or actively acquiesces in the result of his assessment. The county is the mere instrument or channel through which the sovereignty of the State flows. It is seldom that the State exercises her power to assess taxes directly. It chooses to exercise it upon the county directly, but it is no less the power of the State and of the State alone, which is felt and exercised, even though it be to provide for local government by local taxation.

In the instances in which the court has held that this clause of the Constitution has been violated, we are confident it will be found that it was where the internal business of the county, properly within her own control, was interfered with. As an example we refer to *Montgomery v. Commonwealth*, 91 Pa. 125.

Again; in so far as the Act of 1878, comprehending in it the Act of 1876, relates to cities of the third class, we apprehend that upon the face of the Act it applies to all cities of the third class. If it does, it is general. Upon this point, as also upon the whole question involved in the Act of 1876, we cite *Cooley's Limitations*, * 129, note, foot 142, and cases there cited.

Because some cities have not accepted the Act of 1875 and have no board of appeal and revision cannot affect the generality of the Act in itself. A fact *in pais* outside of legislation may or may not be recognized by the Legislature.

Another principle is involved in this subject matter of general as opposed to special legislation, which we have referred to in the case decided by us at this time, involving the constitutionality of the Act of 1875 relating to cities. It is a question which affects or may affect all the old cities of the State, but especially the City of Philadelphia, because it is the oldest and largest.

It may be conceded that the charter of a municipal corporation is not a contract in the sense that the Legislature may not repeal it or any portion of it. But the question is whether, under the impulse and restraint that is upon the Legislature to provide general legislation, such general legislation, without any clear expressed intention to repeal any part of a city charter granted before the new Constitution, can be allowed to have that effect. May not the Legislature, in order to prevent a catastrophe, apprehended or real, exclude a city like Philadelphia from such legislation, which would be general without such exclusion? In the present case we have held that it may make that general which before was special, without repealing the special legislation. This involves to some degree the power of classification in order to exercise the power. The principles enunciated in *Dart v. Clark* do not militate against this view when the subject matter of the legislation is general.

From the foregoing considerations we have been compelled to differ with the learned Judge who decided the case in Erie County. We believe the legislation in question is not special or local, because it provides an appeal for "all owners of real estate in this Commonwealth;" because its subject matter,

taxation, is of necessity general; and because it in its effect provides a right of appeal to the common pleas over the whole Commonwealth, which before existed over only a part thereof.

We also remark that this legislation does not affect the "levying and collecting" of taxes; it only provides an appeal from the decision of Commissioners or Board of Revision and Appeal. We therefore entertain this appeal and, in accordance with the facts agreed upon, reduce the assessment \$1,004.

The defendant then took this writ.

The assignments of error were to the action of the court: 1, in taking jurisdiction and overruling defendant's plea; 2, in holding the Act of May 24, 1878, to be constitutional; and 3, in entering a decree in favor of plaintiff.

Messrs. I. H. Burns and A. C. Logan, for plaintiff in error:

The Act is clearly local because it does not apply to the whole State. Nor is it proper classification.

"Within reasonable limits and for some purposes, classification is allowable. It has been sustained on the basis of population of counties on the assumption that those having a small population may ultimately have one much larger. Here the larger are excluded. We cannot assume that their population will ever be reduced to less than the number named. They are, therefore, practically and permanently excluded by the intent and purpose of this Act, which is special in its terms and local in its effect."

Davis v. Clark, 106 Pa. 384.

"Classification which is grounded in no necessity, and has for its sole support an evasion of the Constitution, will not be encouraged."

Scowden's App. 96 Pa. 425.

"That is not classification which merely designates one county in the Commonwealth, and contains no provisions by which any other county may, by reason of its increase of populations in the future, come within the class."

Commonwealth v. Patton, 88 Pa. 260.

"But little ingenuity in the way of so-called classification would be necessary, in order to isolate every single county, borough, ward, township, and school district in the State, and provide for each its own local code."

McCarthy v. Commonwealth, 1 Cent. Rep. 111.

Local laws cannot be so spliced together as to cover the State, and make one general law.

The Act violates three constitutional provisions:

1. It regulates the affairs of counties and cities. 2. It regulates the practice and jurisdiction of courts. 3. It levies taxes under a local law.

Art. III, § 7 and art. IX, § 1, Const.

In *Montgomery v. Commonwealth*, 91 Pa. 183, this court defined "affair" to be "business; something to be transacted; matter; concern." Surely these terms are broad enough to cover the subject of this Act. Indeed, the principal business of a county is the levying and collecting of taxes.

The Act changes the jurisdiction of courts. It gives to courts of common pleas authority over subject matter which they did not have before, either by statute or common law.

It is levying a tax under a local law. Section 1 of article 9 provides that all taxes shall be levied and collected under general laws.

PA.

The word "levy" in this connection means the whole process, up to the time the tax is ripe for collection. It means the assessment and revision as well as the ordinance or resolution fixing the rate.

Messrs. Willard & Warren, for defendant in error:

Davis v. Clark, 106 Pa. 377, is clearly distinguishable. The Act of June 28, 1879, P. L. 182 (declared unconstitutional in that case), was an Act for the creation of liens in certain counties of the State, with a proviso absolutely excluding its operations in certain other counties. This was a local law, in plain violation of article 3, section 7 of the Constitution.

The reason for the decision in *Davis v. Clark*, was that "By the terms of the Act, the laborers in the two most populous counties of the State, although they perform the same kind of labor, are as effectually debarred from its operation as if those counties were designated by name, or were outside of the boundaries of the State." No such reason exists here.

The Act provides for appeals from the decision of county commissioners and boards of appeal and revision. There are no county commissioners charged with any matter of assessment or taxation in the County of Philadelphia; nor is there any board of appeal and revision of a third class city in that county. This fact was known to the Legislature when the Acts in question were passed. This court will take judicial notice of that fact.

There was and is now a board of revision in that county and city, charged with the entire matter of assessment and taxation. From the decisions of that board every taxpayer of Philadelphia has the right of appeal to the courts of common pleas of that county.

Applied to appeals from boards of appeal and revision of third class cities, the Act of 1878 is unquestionable. It is applicable to every third class city of the State.

The right of appeal to a citizen from an unequal and erroneous assessment, in order that the error may be corrected, is not the levying of a tax.

Mr. Justice Green delivered the opinion of the court:

The right of appeal, asserted by the defendant in error in this case, is given only to the owners of real estate in counties of less than 500,000 inhabitants. The Act of May 24, 1878, which gives this right, is therefore of limited application and comes within our ruling in the case of *Davis v. Clark*, 106 Pa. 384, in which we held that "The exclusion of a single county from the operation of the Act makes it local."

There is no doubt much force in the consideration that the only county which is now excluded has a system of appeal of its own; and the present law practically makes the right general which was before local. But the difficulty we experience is that we cannot consistently hold a principle of construction applicable in one case and not applicable in another where the same conditions exist. It is perhaps unfortunate that we are obliged to apply the doctrine of *Davis v. Clark* to the present case, because we thereby deprive a large class of citizens of a valuable privilege. But the remedy

is with the Legislature and not with us. It is far better that the law-making power should itself correct the mischief, by a new and proper enactment, than that the judicial department of the government should pursue a shifting, tortuous policy by executing a rule of construction in one case and refusing it in another when the circumstances of the two are the same.

We cannot doubt that the legislation we are considering comes within the prohibitions of the Constitution. The third section of the seventh article provides that "The General Assembly shall not pass any local or special law * * * regulating the affairs of counties, cities, townships, wards, boroughs or school districts."

The Act in question is one which regulates the assessment and collection of taxes in the several counties of the Commonwealth; and the receipt and disbursement of such moneys are certainly part of the affairs of the counties. The machinery, both for the assessment and collection of taxes for county purposes, is purely local; and the local courts are clothed with a special jurisdiction to determine controversies in relation thereto. The general subject has been so much discussed in our recent decisions that enlargement upon it is unnecessary.

Judgment reversed and appeal stricken off, at the cost of the defendant in error.

City of WILKESBARRE, Plff. in Err.,
v.

Frederick MEYERS.

1. While a **police officer** may come within the rule that a person holding a public office has a *prima facie* right to his salary, although physically disabled from performing his duties; but where a **municipal regulation** provided that an **officer, absent** from duty without leave, **should forfeit all pay** during his absence, except when sick and so certified by a physician, there can be **no recovery** during absence from sickness without the **certificate** of a physician. (*O'Leary v. New York*, 98 N. Y. 1, distinguished.)
2. A statute upon a given subject which applies to **all the counties** of the State except one where the **legislation is prohibited** by the Constitution, is not local but **general legislation**.
3. The **Act of July 7, 1879**, enlarging the jurisdiction of aldermen and justices of the peace, **intends to except only** the City of Philadelphia in its proviso that the Act shall not apply to magistrates in cities of the first class, **and is therefore not unconstitutional**, under article III, § 7, of the Constitution prohibiting special or local laws regulating the practice or jurisdiction or extending the powers and duties of aldermen or justices of the peace, the Constitution prohibiting the increase of the civil jurisdiction of magistrates in Philadelphia.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Luzerne County, to review a judgment for plaintiff in an action to recover compensation as a police officer during absence, through sickness. *Reversed.*

The facts are stated in the opinion of the court.

The court negatived the defendant's points, which were as follows:

1. Under all the evidence in the case, the plaintiff is not entitled to recover.
2. The verdict should be for the defendant.

Verdict for plaintiff and judgment thereon.

The assignments of error were the action of the court in negating the defendant's points. **Mr. William S. McLean**, for plaintiff in error:

Physical disability, rendering the servant unable to perform his part of the contract, will excuse the master from paying the stipulated wages while the disability lasts.

Hunter v. Waldron, 7 Ala. 753; *Dickey v. Linscott*, 20 Me. 458; *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; 2 Pars. Cont. p. 38.

There can be no recovery where no services have been performed in an office.

Butler v. Commonwealth, 10 How. 402 (51 U. S. bk. 13, L. ed. 472); *Connor v. Mayor*, 5 N. Y. 285; *Smith v. N. Y. City*, 37 N. Y. 518; *Dolan v. N. Y. City*, 68 N. Y. 282; *McVeany v. Mayor*, 80 N. Y. 190; *Hoboken v. Gear*, 3 Dutch. 265; *Evans v. Trenton*, 4 Zab. 764; *Wayne Co. Auditors v. Benoit*, 20 Mich. 176.

In *Hoboken v. Gear*, 3 Dutch. 265, the contention was between the City of Hoboken and one of its policemen; and the court says of the relation existing between them: "It is at most a contract that while the party continues to perform the duties of the office, he shall receive the compensation, which may, from time to time, be appointed by law."

The plaintiff is presumed to have knowledge, as matter of law, of the ordinance.

1 Dill. Mun. Corp. § 290.

It was his duty to obtain the certificate of a physician.

Hunt v. Otis Co. 4 Met. 464; *Noon v. Salisbury Mill*, 3 Allen, 840.

The Act of July 7, 1879, P. L. 194, under which this suit was brought, is a local or special law, because it does not apply to all the aldermen, magistrates and justices of the peace in the Commonwealth.

Art. III, § 7, Const.

Magistrates in Philadelphia are not affected by its provisions. They are "justices of the peace." They shall exercise the jurisdiction, civil and criminal, of aldermen.

Art. V, § 12, Const.

"Aldermen" and "justices of the peace" are synonymous terms in the new Constitution.

Art. V, § 2, Const.

They are "*ex officio* justices of the peace."

Act Feb. 5, 1875, § 12, P. L. 56.

Mr. John Lynch, for defendant in error:

Meyers was neither suspended nor discharged during the period of his illness. He therefore had title to the office and the salary attached thereto.

Philadelphia v. Given, 60 Pa. 136; *Commonwealth v. Bacon*, 6 Serg. & R. 322; *County of Luzerne v. Trimmer*, 95 Pa. 97.

The officer undertakes to perform the duties of the office, whatever they may be.

1 Dill. Mun. Corp. § 234.

A person holding a public office has a *prima facie* right to the salary thereof, although he be physically disabled from performing his duties. If there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal.

Sleigh v. U. S. 9 Ct. Cl. 869; 5 Wait, Act & Def. 20; *Philadelphia v. Rink*, 17 W. N. C. 136; *S. C. 2 Cent. Rep.* 289; 1 Dill. Mun. Corp. § 292; *Field v. Commonwealth*, 82 Pa. 478; *O'Leary v. N. Y. City*, 93 N. Y. 1.

"As to the stipulated allowance of an officer whether annual, *per diem*, or particular fees for particular services, depends on the will of the law makers; and this whether it be by the legislation of the State, or a municipal body empowered to make laws for the government of a corporation."

Commonwealth v. Bacon, 6 Serg. & R. 322; *Norristown v. Fitzpatrick*, 94 Pa. 121.

The Act of July 7, 1879, P. L. 194, is not prohibited by the Constitution. Article V, section 12, provides: "In Philadelphia there shall be established, for each 30,000 inhabitants, one court not of record, of police and civil causes, with jurisdiction not exceeding \$100; * * * and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia the office of alderman is abolished."

Wiesler v. Becker, 11 L. Bar, 187 [S. C. 2 Pa. C. C. R. 103; s. p. *Johnson v. Beacham*, 2 Pa. C. C. R. 108.]

Mr. Justice **Trunkay** delivered the opinion of the court:

The plaintiff was appointed a police officer in 1881, and removed in April, 1884. Because of sickness he quit duty before the end of October, 1883, and performed no service during the next five months. In April, 1884, he served one week and was then removed. This action is to recover compensation for the five months during which he rendered no service.

In the City of Wilkesbarre the compensation of policemen is fixed by resolution of council; and in 1883, was \$60 per month, payable monthly. An ordinance provides that "Any patrolman absent from duty without leave shall forfeit all pay for the time of such absence, and be fined, reprimanded or dismissed from the force, at the discretion of the council, except in cases of sickness when properly certified by a physician."

No physician certified that the plaintiff was sick. The members of the council knew it, but neither the council nor any committee gave him leave of absence, or in any way dispensed with the certificate.

It is contended by the plaintiff that his case is within the principle adopted in *O'Leary v. N. Y. City*, 93 N. Y. 1. But in that case the facts were different. There, the plaintiff was first excused, then given leave of absence for

an indefinite time, by the proper officer, and in September following the board removed him, the removal to take effect on the first of the preceding May. The court held that "The defendant, having excused the plaintiff for good and sufficient reasons from a temporary discharge of duty, and failing to take any action indicating an intention to relieve him from his office, must be regarded as assenting to his absence, and is estopped from insisting or claiming that the plaintiff was not in its employment."

It is well settled that a person holding a public office has a *prima facie* right to the salary thereof, although he be physically disabled from performing his duties. If there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal. It may be granted that police officers are not excepted out of this general rule.

But there was a regulation of the City, providing that the officer absent from duty without leave should forfeit all pay during the time of such absence, except when sick and so certified by a physician. The plaintiff forbore to procure and give the certificate; the council forbore to remove him. Had he brought himself within the exception, the council at once might have ended liability by his removal. Under the circumstances the council preferred not to act. There is no pretense that his sickness was of such nature as to prevent his procuring a certificate. The provision in the ordinance has like force as would a similar stipulation in a contract between employer and employee. That such contract binds the party was decided in *Noon v. Salisbury Mills*, 8 Allen, 840.

The defendant's points should have been affirmed.

The defendant further contends that the Act of July 7, 1879, P. L. 194, enlarging the jurisdiction of justices of the peace, is unconstitutional and, therefore, the justice had no jurisdiction. The Act contains a proviso that it shall not apply to magistrates in cities of the first class. If this proviso shall be taken according to the literal meaning of its words, the Act is void. However, is it not clear that the intention was only to except Philadelphia from the operation of the statute?

Cities containing a population of 300,000 or over shall constitute the first class. Act May 23, 1874.

Philadelphia is the only city of the first class in the Commonwealth. It is notorious that there has been much legislation specially for Philadelphia, although expressed to be for cities of the first class. That phrase is sometimes used instead of the name, Philadelphia.

The Constitution, art. V, § 12, provides that in Philadelphia, courts shall be held by magistrates with jurisdiction not exceeding \$100, in civil cases; and that their civil jurisdiction shall not be increased.

Section 2 of the same article provides that justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships; and the power of the Legislature to confer civil jurisdiction is unlimited. This section applies to all the State except Philadelphia.

Section 7, art. III, prohibits the passing of

any local or special law regulating the practice or jurisdiction of aldermen or justices of the peace, or extending their powers and duties.

At the argument it was contended that the Legislature could not enlarge the jurisdiction of aldermen and justices of the peace in all the State, except Philadelphia, because such an Act would be local. That would be true if the Constitution itself did not make the exception. In that city the office of alderman is abolished, certain courts created, and the power of the Legislature to change the civil jurisdiction of or confer political powers on said courts is prohibited. But that city is excepted, and the power of the Legislature to enlarge the civil jurisdiction of aldermen and justices of the peace in other parts of the State is unrestrained, save it shall not be done by a local or special law. It must be general for all the State, except as otherwise provided in the Constitution.

Were the word "Philadelphia" in place of the words "cities of the first class," there would be no difficulty; in that case there could be no doubt of the constitutionality of the Act. That the Legislature intended by the proviso, in pursuance of the Constitution, merely to except Philadelphia, cannot be doubted. Surely it did not intend that the Act should not apply to cities of the first class, should there be others besides Philadelphia sometime in the future. It intended to enact a law; not to do a vain thing. In the attempt to obey the Constitution and to except Philadelphia out of the statute it used a periphrasis instead of the proper name; and the phrase, "cities of the first class," may not always mean only Philadelphia. Having reference to the Constitution, and to prior statutes classifying cities, and to the fact that Philadelphia alone is in the first class, can the proviso be construed according to the obvious intent, to save the Act from being a nullity?

Among the rules for interpretation of statutes are the following:

The interpretation which renders a statute null and void cannot be admitted; it is an absurdity to suppose that after it is reduced to terms, it means nothing. It ought to be interpreted in such a manner that it may have effect and not to be found vain and illusive.

What tends to render an Act null and without effect, either in whole or in part, and consequently everything that introduces any change already agreed upon, is odious.

A thing within the intention is within the statute although not within the letter; and a thing within the letter is not within the statute, unless within the intention.

If such rules may be applied in the interpretation of a statute as respects its subject, with stronger reason should they apply to a clause respecting its territorial operation. Restricting the application of the proviso to the only city in the first class existing at the date of the Act, or now, and the Act is not a nullity. We are of opinion that the Act, so far as it relates to the jurisdiction of aldermen and justices of the peace, is constitutional.

This case will not often be a precedent to save statutes drawn in like manner. Were it not for the provision in the Constitution for magistrates in Philadelphia, it would be impos-

sible to hold that the phrase, "cities of the first class," means only Philadelphia.

Judgment reversed.

APPEAL of George M. FRANKLIN, *Admr.*

1. At common law, a husband and wife are jointly liable in an **action of damages for the torts of the wife**; but the death of the wife terminates the liability of the husband. If the husband dies she may be sued alone, as if she had been *feme sole* when the tort was committed.
2. A **married woman is personally liable for a tort** committed by her, **unless her husband was both personally present and directed the doing of it at the time.** If directed by him, he alone is liable.
3. While **his presence** furnishes evidence and raises the **presumption of his direction**, it may be **rebutted** by competent evidence; and in the absence of evidence that he was present there is no presumption.
4. The evidence in this case shows a **wrongful conversion of trust funds by a married woman**, for which her **estate is liable in damages**, although the **trust funds be not identified as a part of her estate.**
5. A written **acknowledgment** by her, in which her husband joins (that she has the proceeds) and a **promise to repay the trustee, will not relieve her estate from liability.**

(Decided October 4, 1886.)

A PPEAL from a decree of the Orphans' Court of Dauphin County. *Reversed.*

George M. Franklin, as administrator *d. b. n. c. t. a.* of Anne Franklin, deceased, took this appeal from a decree sustaining the exceptions filed to the report of Robert Snodgrass, auditor, distributing the balance in the hands of George Nauman, executor of the will of Anne E. Henderson, deceased, and ordering that the amount of \$3,000, awarded by the auditor to the appellant should be paid to Clara A. Franklin, residuary legatee, under the will of Anne E. Henderson.

The estate for distribution consisted chiefly of a mortgage of \$10,000, which was the result of an investment of the proceeds of a policy of life insurance held by the decedent on the life of her husband, who died in January, 1885. The decedent died in June, 1885. The further facts are stated in the opinion of the court.

Messrs. H. M. North, Wm. Aug. Atlee and W. M. Franklin, for appellant:

Femes covert and other persons who are *non sui juris* may become trustees.

Hill, Tr. *p. 49.

A trust already in existence and annexed to the present subject matter is created *de novo* as against a person who takes by a title derivative from the original trustee.

Coble v. Nonemaker, 78 Pa. 501; *Lewin, Trustees*, 205. Digitized by Google

If an estate be passed by trustees to a stranger by conveyance, then the grantee, if he be a volunteer, will be bound by the trust, whether he had notice of it or not; for although he had no actual notice of the equity, yet the court will presume it against him where he paid no consideration.

Mansell v. Mansell, 2 P. Wms. 678, 681.

It is well settled that if an estate in trust be conveyed to a volunteer, he will be bound by the trust, although he had no notice of it.

Sadler's App. 87 Pa. 154.

A volunteer taking with notice is in equity bound by the trust, to the same extent and in the same manner as the person from whom he purchased. And this will be the case equally, whether it be an express trust or a constructive one.

Hill, Trustees, *p. 164.

A married woman may be a trustee.

Hill, Trustees, *49.

In *Dundas v. Biddle*, 2 Pa. 160, this court held a married woman to be a trustee by descent of the legal estate upon her, to such an extent as to oblige her to acknowledge that she signed a deed voluntarily when she had refused so to do.

In *Still v. Ruby*, 35 Pa. 373, this court expressly decides that "Femes covert, like infants, lunatics and others *non sui juris*, may be trustees."

In *Adair v. Shaw*, 1 Sch. & Lef. 243, Lord Redesdale in a very careful opinion decides that married women may be trustees and that they are liable for waste committed on the trust fund during their coverture.

When these bonds were handed to the then two beneficiaries, on May 1, 1865, the trust had become a dry trust for their lives. The bequest to them was the annual interest and income of the fund for their lives and the life of the survivor; and that was a bequest of the fund itself for that term.

Clevenstine's App. 15 Pa. 495; *Parker's App.* 61 Pa. 478, 484, 485; *Rogers v. Rogers*, 7 Watts, 15.

This being so they were entitled to the custody of the fund. True, the executors might have demanded security under the Act of February 24, 1834, § 49, P. L. 81 (Purdon, 554, § 223).

This Act was the only one in force on May 1, 1865, and left it optional with the executors to demand security or not, before paying or delivering the property to the person entitled.

Mr. D. G. Eshleman, for appellee:

Mrs. Henderson was not a trustee. To call her a trustee is a misapplication of the term; a metaphor, as Lord Westbury called it in *Knox v. Gye*, L. R. 5 H. L. Eng. & Irish App. 676.

The executors were the trustees. She owed no duties "to preserve, to ear mark, to invest" this fund for the present *cestui que trust*. When the executors, for the purpose of saving themselves trouble, handed the trust funds to her and her sister, they became simply the agents of the trustees in regard to these funds.

The identity of the fund is now lost, and there cannot be any further pursuit.

Thompson's App. 22 Pa. 16; *Farmers & M. Nat. Bk. v. King*, 57 Pa. 202; *Peoples Bank's App.* 93 Pa. 107.

The right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject matter is turned into money, PA.

and mixed and confounded in a general mass of property of the same description.

Story, Eq. §§ 1257, 1258, 1259.

A married woman has no capacity to contract; *Glidden v. Strupler*, 52 Pa. 400; not even as to necessities, by a subsequent declaration.

Berger v. Clark, 79 Pa. 340.

The bequest was to the executors (who were to retain \$8,000,) in trust, that they pay the annual interest and income thereof to testatrix's two daughters. Therefore the daughters were not entitled to the custody of the fund.

In *Clevenstine's App.* 15 Pa. 495, *Parker's App.* 61 Pa. 478, 484, 485, and *Rogers v. Rogers*, 7 Watts, 15, the bequest was directly to the life tenant, without a trustee.

This case was not within the Act of February 24, 1834, § 49 (Purdon, 554, pl. 223), which provides: "Whenever personal property is bequeathed to any person for life," etc.

Nor is this case within the Act of April 11, 1856, § 4 (Purdon, 1155, pl. 96).

That Act authorized married women to execute refunding bonds, when they are entitled to a distributive share of an estate; but this was not a distributive share as provided for in the Act. There was no necessity for a refunding bond. The executors did an unlawful act and violated their trust in delivering the money or bonds to the life beneficiaries. They not only could not be compelled to deliver the funds, but they were forbidden to do so by the creation of a trust.

The paper is not a refunding bond. A refunding bond is a bond with "sufficient real or personal security to be approved of by the court, with condition that if any debt or demand shall be afterwards recovered against the estate of the decedent, they will respectively refund the ratable part of such demand."

Purdon, 536, pl. 195; 553, pl. 220.

Mrs. Henderson did not contract under the Act of April 11, 1856, § 4, and she could not contract in any other way.

Mr. Justice Trunkley delivered the opinion of the court:

The executors of the will of Anne Franklin, deceased, invested the trust money in United States treasury notes. These notes, on May 1, 1865, were delivered to Anne E. Henderson and Elizabeth R. Franklin, who were entitled to the interest and income, on the express terms that they should retain the interest and that the survivor should return the notes to the executors as directed by the said will. Soon after, Miss Franklin died, and the notes passed into the hands of Mrs. Henderson. On the 5th of August, 1881, Mrs. Henderson and her husband, reciting the prior receipt and that the investment had been changed, acknowledged that they held \$3,000, "the interest on which is to be retained by said Anne during her life, and the principal sum upon her decease is to be returned to the said executors, to be distributed according to the will of Anne Franklin, deceased."

That Anne E. Henderson knew that the notes were trust property under the said will is clear. It was her duty as survivor, to return them to the executors, or hold them so they could be returned after her decease. Her acknowledgment, with her husband, that she had changed

the investment and held the money to be returned to the executors, put no new face on the transaction. It left her just as she stood immediately after the conversion of the notes. She had no right whatever to appropriate the notes to her own use, or the money she received for them. Because of her coverture her contract to return the note was void, so was her promise to return the sum of \$8,000 which she received for the notes; but the executors gave her no authority to dispose of the notes or to use the proceeds. If she used the trust fund, or gave it away or destroyed it, her act was a wrongful conversion.

There is nothing in the case showing that she committed the tort by coercion of her husband. The presumption of coercion does not arise, unless it appear that he was present at the time of the offense committed. In the absence of evidence that he was present, there is no presumption.

Upon the facts found by the auditor, Anne E. Henderson (with full knowledge of the trust) received the trust fund and so disposed of it that it is impossible to trace it. The fund for distribution is affirmatively shown to have been derived from another source. If in her lifetime she was liable for damages for the conversion of the fund, her estate is liable. Her legatees may make the same defense which she could make, if living, and no other.

Except where otherwise provided by statute, the husband is liable for the torts of the wife, during coverture; if committed in his company and by his order, he alone is liable; if not, they are jointly liable, and the wife must be joined in the suit with her husband. And when the remedy for the tort is only damages by suit, the husband is liable with his wife. 2 Kent, Com. 149.

Husband and wife may be jointly guilty of

the tortious conversion of a chattel. At common law the wife is liable to an action for her torts; and, while living, her husband may be joined and will be liable with her for the damages recovered; but if she dies then his liability terminates, while if the husband dies she may be sued alone, the same as if she had been *feme sole* when the tort was committed. Cord, Mar. Women, §§ 1147-1149.

A declaration in trover against husband and wife, stating that the defendants converted the property to their own use, was held sufficient, the objection having been made after verdict. *Keyworth v. Hill*, 3 Barn. & Ald. 685.

Although the point decided in that case related only to the pleading, the declaration was held good upon the ground that the wife could be guilty of conversion by other means than the acquisition of property. It was not gained that she was liable and responsible in case she was guilty of the conversion.

When a tort is committed by the wife she is personally liable, unless her husband was both personally present and directed the doing of it at the time. His presence furnishes evidence and raises the presumption of his direction; but it is not conclusive, and the truth may be established by competent evidence. *Cassin v. Delaney*, 38 N. Y. 178.

We are of opinion that the facts reveal a wrongful conversion of the trust fund by Mrs. Henderson, and that she was liable therefor in damages. Therefore the appellant is entitled to recover.

Decree reversed; and it is now considered and decreed that the report of distribution made by the auditor be and is confirmed, and that the money be paid to the parties entitled, as shown by said report. Appellee, Clara A. Franklin, to pay costs of appeal. Record remitted for enforcement of this decree.

NOTE.—The husband and wife, by the civil law, are for most purposes treated as separate, distinct persons, entitled to sue and contract with each other; by the common law they are treated as one person, the husband being that person. *Mackinley v. McGregor*, 3 Whart. 363; S. C. 31 Am. Dec. 522.

The husband is liable for the torts of his wife, committed both before and after coverture. *Hubble v. Fogartie*, 3 Rich. Law, 413; S. C. 45 Am. Dec. 775.

A husband is liable for the torts of his wife; and an action may be maintained against him to recover goods of which she holds possession. *Mackinley v. McGregor*, *supra*.

In Vermont the husband alone is liable for the wrongful detention of property by his wife, which was delivered to her *in specie* in his presence with his approval, and detained for their use. *Doherty v. Madgett* (Vt.), 1 New Eng. Rep. 346; *Shaw v. Hallihan*, 46 Vt. 389; *Chit. Pl. 93*; 2 Wm. Saund. 471; *Nelthrop v. Anderson*, 1 Salk. 114; *Draper v. Fulkes*, Yelv. 166.

Coverture must be clearly proved to entitle the wife to the presumption that she committed crime under her husband's compulsion. *Davis v. State*, 15 Ohio, 72; S. C. 45 Am. Dec. 559.

The presumption that the wife acted under the coercion of her husband can be overturned. *Miller v. Swetzer*, 22 Mich. 391; *Cassin v. Delaney*, 38 N. Y. 178.

A wife cannot be held liable in trespass for an act committed in her husband's presence and in connection with him; he alone is liable. *McKeowen v. Johnson*, 1 McCord, 578; S. C. 10 Am. Dec. 606; *Hines v. Guile*, Yelv. 107; 2 Bacon, Abr. 503; 2 Lev. 63.

His presence furnishes evidence and affords a presumption of direction; but it is not conclusive. *Cassin v. Delaney*, *supra*.

To establish the fact of his presence it is not necessary to show that the act was done literally in his sight. *Commonwealth v. Burk*, 11 Gray, 437; *Commonwealth v. Welch*, 97 Mass. 593.

If the wife acts in the absence of her husband, there is no presumption that she acts under his coercion; but if the husband is near enough for the wife to act under his immediate influence and control, although not in the same room, he is not absent within the meaning of the law. *Commonwealth v. Flaherty*, 1 New Eng. Rep. 530; *Commonwealth v. Burk*, 11 Gray, 437; *Commonwealth v. Munsey*, 112 Mass. 287; *Commonwealth v. Pratt*, 126 Mass. 462. See *Commonwealth v. Patterson*, 138 Mass. 498; *Commonwealth v. Churchill*, 136 Mass. 148.

It may be rebutted by proof that the wife was the instigator, or that the husband was incapable of coercion. *Marshall v. Oakes*, 51 Maine, 306; *Wagner v. Bill*, 19 Barb. 321; *City Council v. Van Roven*, 2 McCord, 465; *Ferguson v. Brooks*, 67 Maine, 251.

The responsibility of the husband for torts committed by him, jointly with his wife, proceeds upon the ground of coercion. *Meegan v. Gunsollis*, 19 Mo. 417; *Dalley v. Houst*, 58 Mo. 361; *Sisco v. Cheney*, Wright (Ohio), 9; *Park v. Hopkins*, 2 Bailey, 411.

Trespass lies against husband and wife for a wrongful act committed by them jointly. *Cornwell v. Brookhart*, 4 B. Mon. 580; S. C. 41 Am. Dec. 244.

When she commits a tort by direction of her husband, she is jointly liable with him, but this relates to mere personal torts. *Mayhew v. Burns* (Ind.), 1 West. Rep. 577.

For all personal torts of the wife committed out of the husband's presence he must be made a co-defendant with her, as for slander or libel by wife. *McElfresh v. Kerkendall*, and *Luse v. Oaks*, 36 Iowa, 224, 562; *Sunman v. Brewin*, 52 Ind. 140; *Fowler v. Chilchester*, 28 Ohio St. 8; *Tait v. Culbertson*, 57 Barb. 9.

For her assault and battery. *Coolidge v. Parris*, 8 Ohio St. 595; *Anderson v. Hill*, 53 Barb. 238; *Commonwealth v. Neal*, 10 Mass. 152, 6 Am. Dec. 105; *Whitmore v. Delano*, 6 N. H. 542. [R. D.]

NEW JERSEY.
COURT OF CHANCERY.

George W. W. BALDWIN
v.
CITY OF ELIZABETH.

1. **Sales of land to the City of Elizabeth for nonpayment of taxes, for a term of 900 years, are unauthorized by law; and such sales and the certificates thereof convey no estate or interest in the property sold.**

2. **The right to maintain a suit, under the statute, to quiet title by removing the cloud caused by a sale for alleged illegal taxes, may be lost through laches in failing to question the validity of the tax by certiorari.**

3. **The constitutional amendment requiring that "property shall be assessed for taxes under general rules" does not affect the mere machinery for the collection of taxes; hence, it does not affect the time within which a sale for taxes should take place.**

4. **When a tax has been lawfully laid but the sale to enforce it is a nullity, the Act of 1881 (P. L. 1881, p. 194), providing that no tax, etc., shall be set aside for irregularity, if the person against whom it is assessed is liable to taxation, but that the court shall make a new assessment, has no applicability.**

5. **When a land owner seeks the aid of a court of equity to relieve him from a tax sale and the tax is lawful, the court should (on the principle that he who would have equity must do equity) require, as terms of setting aside the sale and certificate, that he pay the tax and interest thereon.**

6. **The "Act concerning past due assessments" (P. L. 1881, p. 38) affords a complete remedy to the owner of land assessed under unconstitutional laws for benefits for municipal improvements; and he therefore has no standing to seek relief in equity.**

(Decided October 21, 1886.)

BILL to quiet title. On final hearing on pleadings, proofs and stipulations of counsel. The questions raised are stated in the opinion.

Mr. William P. Wilson, for complainant: The evidence shows that the land in controversy was sold by the City of Elizabeth (for the taxes of the City of Elizabeth for the years 1872-1878) for the period of 900 years; and that the City of Elizabeth was the purchaser at said sales. Such sales have been declared by the courts of this State to be illegal and void.

Sciatt v. Grooch, 4 Stew. 199; *Calhoun v. Elizabeth and Ludington v. Elizabeth*, 7 Stew. 171; *Morgan v. Elizabeth*, 15 Vroom, 571. See also *Bogert v. Elizabeth*, 12 C. E. Green, 568; *Jersey City v. Lembeck*, 4 Stew. 255, 272; *Blackw. Tax Titles*, 496; *Jones v. Gibson*, 2 Taylor, N. J. 41, Battle's ed. 480.

J. J.

In 4 Cruise, Digest, title 32, chap. 18, § 2, citing Jenk. 205, it is held as follows: "There is a material difference in common-law powers, between a naked power or bare authority and a power coupled with an interest. In the case of a naked power if it is exceeded in the act done, it is entirely void."

"The power to sell lands for the nonpayment of a tax is a naked power."

Blackw. Tax Titles, 32, 441; *Woodbridge v. State*, 14 Vroom, 262.

The sales are void and the lien of the taxes has expired by limitation. Sections 115, 122, of the General Act respecting taxes (Rev. pp. 1163, 1165) provides that all taxes shall be a lien for two years.

Section 7, ¶ 12 of the amended Constitution provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

The amended Constitution went into force September 28, 1875, and its effect was immediately to repeal all special laws regarding taxation.

North Ward Bank v. Newark, 10 Vroom, 380.

The law under which taxes of 1879 were assessed has been declared to be unconstitutional.

Morgan v. Elizabeth, 15 Vroom, 571.

This tax of 1879 having been assessed under an unconstitutional law, the sale must be set aside and the tax must cease to be a lien and the lien cannot be revived.

See *Kirkpatrick v. New Brunswick*, 13 Stew. 52; *S. C. 3 Cent. Rep.* 82.

The fact that these sales were void leaves the taxes just as though no sale had been made.

Cassellbury v. Piscataway, 14 Vroom, 358.

The assessments in question, under the decisions of *Bogert v. Elizabeth*, 12 C. E. Green, 568 and *Jersey City v. Lembeck*, 4 Stew. 255, 272, are nullities.

In the case of *Schuh v. Newark*, 5 Stew. 466, which was a bill to quiet title and in which were set up exactly such assessments as are set up in this case, the court of chancery made a decree for the complainant. The case was taken to the court of errors and the decree below was affirmed and the doctrine laid down in the *Bogert Case* was reaffirmed.

As to the sales for the taxes of 1879. The charter of the City of Elizabeth has been declared by the supreme court to be unconstitutional.

Morgan v. Elizabeth, 15 Vroom, 571.

The sale must, therefore, be void and is a cloud on the title and should be removed.

In the case of *Woodbridge v. Allen*, 14 Vroom, 262, the court says: "The power to sell lands for taxes is a naked power; and the validity of the title derived from such a sale depends upon a strict compliance with the directions of the statute. * * * The *onus probandi* is upon the purchaser; and he must show affirmatively that everything has been done which the statute makes essential to the due execution of the power."

Mr. Frank Bergen, for defendant.

Runyon, Chancellor, delivered the following opinion:

The bill is filed under the Act "To compel the determination of claims to real estate in certain cases and to quiet the title to the same."

With this case several others, brought by other complainants against the same defendant for like relief and under a similar state of facts, were argued. The questions presented under all of them will, for convenience, be considered and disposed of in this opinion.

The City sold land of the complainant for nonpayment of taxes for years prior to 1879, for the term of nine hundred years, becoming itself the purchaser at the sale. It is insisted that such sales and the certificates made in pursuance thereof are nullities, because a sale of land to the City for unpaid taxes for a term exceeding fifty years is unauthorized by law.

The City sold land of the complainant for the unpaid taxes of 1879 and became itself the purchaser and such sale was for a term of fifty years, but the complainant insists that the sale was made after the expiration of the lien for taxes given by law, and it appears that those taxes were assessed under an unconstitutional law.

There are, upon the properties of the complainant, assessments for municipal improvements laid by the City under the city charter, which provided for laying such assessment by a rule which was in contravention of the constitutional rights of the land owners, and the assessments were so laid. It is insisted by the complainant that this court should declare that such assessments for that reason constitute no lien upon the lands. On the other hand, the City insists that this court ought not to declare the before mentioned tax sales and certificates null and void, except upon condition that the complainants, respectively, pay the taxes with interest thereon assessed against them respectively, for nonpayment whereof their lands were sold.

The sales of land to the City for a term of nine hundred years, for nonpayment of taxes, were unauthorized by law. *Schlatt v. Grosch*, 4 Stew. 199; *Morgan v. Elizabeth*, 15 Vroom, 571.

It should be decreed, but on terms as herein-after stated, that the sales and certificates thereof convey no estate or interest in the property. The sales of land for the taxes of 1879 were for a term of fifty years. The tax was, however, assessed under an unconstitutional law. *Morgan v. Elizabeth*, *supra*.

The complainant insists that on that ground the sales (and certificates) for that tax should be declared null and void and that it should be decreed that the tax is no lien or incumbrance upon the property. The complainant had a remedy at law by *certiorari*. Rev. p. 1045, § 16; *Morgan v. Elizabeth*, *supra*.

If he has lost it, it is by reason of his laches. This court has always been unwilling to interfere to restrain the collection of a tax which is illegal and void, merely because of its illegality; but requires that there be some special circumstances attending the injury threatened to bring the case within some recognized head of equity jurisdiction. *Dusenbury v. Newark*, *Bogert v. Elizabeth* and *Lewis v. Elizabeth*, 10 C. E. Green, 295, 426 and 298.

And in *Jersey City v. Lembeck*, 4 Stew. 255, it was expressly held that the Act to quiet titles does not apply to cases where a party in possession of land can throw the hostile claim into a court of law and thus get rid of the cloud

upon his title; or when, having had the power to do so, he has lost it by his inaction.

It is urged that the sales for the tax of 1879 were made after the expiration of the lien. The charter of the City provides that the tax shall be a lien for four years (the sale took place within that period); but the general law provides that the lien for unpaid taxes shall continue for two years. Both provisions were in force when the amendments to the Constitution were adopted; and it is argued that the provision of the Constitution as amended, that "Property shall be assessed for taxes under general rules, according to its true value," by its own force abrogated the provision of the charter and substituted for it that of the general law. It is enough to say upon this head that the constitutional provision does not affect the mere machinery for the assessment or collection of taxes. *Trustees, etc. v. Trenton*, 3 Stew. 667.

As to the sales for nine hundred years above mentioned: the Act entitled "A General Act Respecting Taxes, Assessments and Water Rates" (P. L. 1881, p. 194), provides that no tax, assessment or water rate shall be set aside or reversed for any irregularity or defect in form or illegality in assessing, laying or levying it or in the proceeding for collecting it, if the person against whom or the property upon which it is assessed or laid in fact is liable to taxation, assessment or imposition in respect of the purposes for which the tax, assessment or water rate is laid, assessed or imposed; but that the court shall make a new assessment, etc. It does not provide that no invalid or unlawful sale for a lawfully imposed tax, assessment or water rate shall be set aside. Nor does it provide that if the court shall set aside any such sale it shall direct a new one or shall set it aside only upon terms of payment. It deals only with the tax, assessment or rate. And when the tax, assessment or rate has been lawfully laid, assessed or imposed (but the sale for it is a nullity) the statute has no applicability.

To hold otherwise would in effect extend the lien given by law for such assessments indefinitely, and practically annul the limitation as to the term for which land may be sold for nonpayment thereof. Such was not the intention of the Legislature. But when, as in this case, the land owner seeks the aid of this court to relieve him from the tax sale, and the tax is lawful, it is but reasonable that the court should, on the principle that he who would have equity must do equity, require as terms of setting aside the sale and certificate that he pay the tax and interest thereon at the rate fixed from time to time since the tax was levied, by the general law of the State limiting the rate of interest upon contracts. *Gage v. Pumpelly*, 115 U. S. 454 [Bk. 29, L. ed. 449].

As to the assessments for municipal improvements: "the Act of 1881, entitled 'An Act Concerning Past Due Assessments in Certain Towns and Townships of this State' (P. L. 1881, p. 38), provides that the common council, board of township committee, or governing body of any town or township, may reduce assessments laid upon illegal and erroneous principles and without regard to the peculiar benefit derived by reason thereof, or may agree to arbitrate the assessments upon the applica-

tion of the owner or owners of the property; and that if the common council, board of township committee, or other governing body shall refuse to arbitrate, arbitrators may be appointed by a justice of the supreme court on like application.

This beneficial and remedial Act renders it unnecessary for the owner of land assessed under unconstitutional laws, for benefits for municipal improvements, to have recourse to equity for relief; and its provisions are so just and equitable that he should be required to obtain relief by application under it. See *Newark v. Schuh*, 7 Stew. 262.

The tax sales for nine hundred years and the certificates thereof will be set aside, upon terms that the complainants pay the tax and interest thereon as above adjudged. The relief prayed, as to the sales and the certificates thereof for the taxes of 1879 and as to the assessments for municipal improvements, will be denied.

No costs will be awarded to either side.

MAYOR and Aldermen OF JERSEY CITY,
v.
CENTRAL R. R. CO. OF NEW JERSEY.

- *1. A grant under which it is claimed that authority is given to destroy a public right should be strictly construed.
2. A railroad corporation having authority, when public necessity requires, to change the grade of the streets crossing its tracks, will not be permitted to exercise its power in that respect, except upon the same terms that the municipality within which the streets are located may exercise like power; that is, upon the payment of damages to those injured by the change.
3. The board of public works of Jersey City can exercise the power conferred upon it by the Legislature, only when regularly convened and acting as a body.
4. A municipality, having the control and supervision of the public highways within its territorial limits, may maintain a suit in equity to prevent any alteration of the streets or injury to them which will deprive the public of their use.

BILL for injunction. *Granted.*

On final hearing on bill and answer and proofs taken before a master.

The facts are stated in the opinion.

Messrs. William D. Edwards and John A. Blair, for complainants.

Mr. Benjamin Williamson, for defendant.

Van Fleet, V. C., delivered the following opinion:

The object of this suit is to procure a decree restraining the defendant from changing the grade of Communipaw Avenue at the point where the avenue crosses the railroad of the defendant. The avenue is one of the public

streets of Jersey City. It is of ancient origin, having been in existence long prior to the construction of the defendant's railroad, and is an important thoroughfare over which there is a large amount of travel daily.

The railroad of the defendant, at the point where it crosses the avenue, is built in a cut; and this condition of affairs made it the duty of the defendant, according to a provision of its charter; to construct and keep in repair a good and sufficient bridge over their railroad at the point where it crosses the avenue, so that public travel on the avenue should not be impeded. P. L. 1847, p. 183.

The defendant built a bridge at the point in question in the spring of 1864. The bridge thus became a part of the avenue. At that time the avenue was neither graded nor paved. In 1865 the grade of the avenue was established by the proper municipal authority. It was made to conform to the bridge the defendant had previously erected. Since then the avenue on both sides of the bridge has been graded, in conformity to the grade established in 1865, and paved with Belgian pavement; sidewalks laid, gutters made and curbstones set. The lands adjacent to the avenue, on both sides of the bridge, have also been graded, in conformity to the grade established in 1865, and improved by the erection of dwellings and other structures thereon.

In August, 1883, the defendant was warned by the street commissioner of Jersey City that its bridge was so badly out of repair as to render travel over it dangerous, and it was required to put it in a proper state of repair. It thereupon built a new bridge. The new structure is three feet higher at each end than the old. The reason assigned for this change in the elevation of the bridge is that it was necessary to increase the distance between the railroad and the bridge, to prevent injury to train hands who may be required, by the proper discharge of their duties, to be on the top of freight cars when passing under the bridge. Two lives have been lost, it is said, in consequence of the old bridge not being at a sufficient elevation.

It is obvious at a glance that the change the defendant proposes to make in the elevation of its bridge, if carried out, will, unless the grade of the street on either side of the bridge is also changed, render the avenue wholly useless as a public highway, and operate as a practical vacation of it. A rise of three feet, or even two, between the road bed of the avenue and the floor of the bridge will render the avenue impassable and utterly destroy it as a public highway. By force of the charter of Jersey City, after the grade of a street has once been established and the street graded in conformity thereto no change can be made in its grade, without the consent in writing of the owners of a majority of the property to be assessed therefor, and upon payment to the owners of property injured thereby of the damages they have sustained in consequence of such change. P. L. of 1871, p. 1122, § 58.

It is thus made apparent that if the defendant has power to make the change in the elevation of its bridge which it proposes, and if it exercises it in this instance, it must inevitably result in the imposition of serious burdens upon certain persons, which they ought not to be re-

*Head notes by VAN FLEET, V. C.

quired to bear; or, otherwise, in the complete destruction of an ancient and important public highway.

In view of the fact that a change in the grade cannot be made, except with the consent of those who will be injured by it, it may be taken, I think, as almost absolutely certain that no consent will be given, and that the other alternative (the destruction of a valuable public right) must ensue. A power which is so autocratic as to invest its grantee with authority, either to impose unjust burdens on the citizen or otherwise take away valuable public rights, should be construed with the utmost rigor, and should never be held to have been granted, except it is made perfectly clear that such a grant was within the scope of the grantor's power and that he intended to confer authority of that extraordinary nature.

Chief Justice Whelpley, in *Warren R. R. Co. ads. v. State*, 5 Dutch, 858, said: "Public highways ought not to be destroyed, even in part, under pretense of legislative authority, unless it be conferred either in express terms or by necessary implication. If the words are ambiguous, the construction ought to be in favor of the common right of highway, not against it."

Other eminent judges have expressed the same view. *Morris & Essex R. R. Co. v. Newark*, 2 Stock. 352; *Greenwich v. Easton & Amboy R. R. Co.* 9 C. E. Green, 217.

The only grant to which the defendant points, as the source of its power to raise the bridge above the grade of the street, is the ninth section of its charter; a reference to which has already been made for the purpose of showing that it imposed a duty on the defendant. This section declares that it shall be the duty of the defendant to construct and keep in repair good and sufficient bridges, or passages, over or under its railroad, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on the said road shall not be impeded thereby. P. L. of 1847, p. 133.

These words have received judicial construction. They have been construed to impose upon the defendant the duty to keep, at all times and under all circumstances, the public highways, at the points where they cross the railroad, in a condition fit for safe and convenient use. The duty is a continuing duty, which in its performance must be measured by circumstances. Thus, a bridge or passage way which at one time would be adequate to the public accommodation, might at a subsequent period, from increase of business or population, be totally inadequate; and consequently a provision which at one juncture would be a discharge of the duty would, at another, amount to its infraction. Suppose a public street in a town to have been originally laid out over the surface of the railroad track; and that, by reason of the growth of the business of the railroad at that locality, trains should pass in such quick succession as to render the street almost impassable, there can be no doubt that under such circumstances the railroad company could not discharge itself from the obligation which this section imposes, except by passing the street thus obstructed under its railroad, so as to restore it to public use.

Now, in such a condition of affairs, where a change of grade is absolutely indispensable to

the safe and convenient use of the street as a public highway, it was held that the defendant had power to alter the grade. *Central R. R. Co. of N. J. ads. State*, 8 Vroom, 220.

But of course, such power can only be exercised in conformity to law. In no event can it be exercised, except under the pressure of public emergency. It may be exercised to restore or save a public highway; but even then if damages must, by law, be paid to those injured by the alteration as a condition on which alone the alteration can be made, the defendant would be bound to comply with such condition before exercising the power. These considerations make it entirely clear that the defendant's act was wrongful. It was without the least justification in public necessity, and consequently without legal warrant.

But the defendant says that it raised the bridge with the consent of one or more of the members of the board of public works of Jersey City, which body alone has authority, by law, to make an alteration in the grade of the streets of Jersey City. If this fact were fully established, it would neither justify nor excuse the act of the defendant. The members of this board have no authority whatever as individuals. It is only when they are regularly convened and acting as a body that they can use the powers conferred upon them by the Legislature. Their individual action is without the slightest legal force. The proofs show, however, that there was no consent by even an individual member of the board. What occurred was this: at a meeting at the bridge in question, between the chief engineer of the defendant and one or more members of the board of public works, the chief engineer stated that the defendant wanted to raise the bridge, and that he would go on and raise it unless he was forbidden to do so. He was not forbidden, and therefore assumed that they consented. His assumption would not have been warranted, even if he made his declaration to the board when regularly convened for the transaction of business.

The complainants are the proper parties to apply for relief in such a case as this; and the injury which they seek to have redressed belongs to the class which this court may redress by injunction. It is settled that a municipality which has, by law, the control and supervision of the public highways within its territorial limits may maintain a suit in equity to prevent any alteration of them or injury to them which will deprive the public of their safe and convenient use. *Greenwich v. Easton & Amboy R. R. Co.* 9 C. E. Green, 217; *S. C. on appeal*, 10 C. E. Green, 565.

The complainants are entitled to an injunction requiring the defendant to reduce its bridge so as to conform to the grade of the avenue. The complainants are also entitled to costs.

MUTUAL LIFE INS. CO. of New York
v.

Joseph M. EVERETT.

A, the owner of certain real estate, executed a deed thereof to B, in trust to execute a conveyance of the premises to such person as C might appoint by

a writing under seal in her lifetime, or by will, and to permit C to occupy the same and receive the rents and profits thereof during her life. This deed was made upon a valuable consideration moving from C, the *cestui que trust*. A and B both died without C's having made any appointment under the trust deed, A leaving a will bequeathing all his estate to C. Thereafter C orally requested the principal heir at law of B to convey the premises to her, which was done by deed executed by the principal and certain other, but not all, the heirs at law of B.

Held, that the power given to B to convey to C's appointee was a power coupled with a trust; that C's appointment of herself was valid; that the fact that her request for a conveyance was oral, instead of in writing, was such a defect in the execution of the power as equity will correct; that the conveyance of the legal title to C by heirs at law of B was valid, and that a title to the premises acquired through C thereunder is good.

ON bill for relief. On final hearing on pleadings and proofs.

The facts are stated in the opinion.

Mr. F. G. Burnham, for complainant.

Mr. William Clark, for defendant.

Rayon, Chancellor, delivered the following opinion:

The bill is filed to restrain the defendant from prosecuting an action of ejectment to recover the possession of land in Middlesex County, to which he claims title under the provisions of a trust deed from Joseph McChesney to Doctor Charles G. McChesney, dated September 5, 1853; and if necessary to establish the title of the complainant under a conveyance of the property to Elizabeth M. Everett under that deed, the complainant's title being derived from her through foreclosure proceedings upon a mortgage given by her grantee.

The deed from Joseph McChesney to Doctor McChesney recited that Mrs. Everett, one of the children of the grantor, had paid and discharged out of her own funds sundry debts and claims against her father, and had laid out and expended from time to time large sums of money in and about his support and maintenance, and had also agreed to and with him to board, clothe and maintain him in a comfortable manner for and during the term of his natural life; and that it was the wish, purpose and intent of the grantor to settle and secure the real estate and premises described in the deed to and for her use and benefit as thereinafter set forth; and the deed thereupon witnessed that the grantor, in order to carry into effect such wish, purpose and intent, and in consideration of the premises and the natural love and affection which he had for his daughter Mrs. Everett, and also in consideration of \$1, granted, bargained, sold, aliened, released, conveyed and confirmed to Charles G. McChesney, his heirs and assigns, the property in question, a tract of forty-four acres, to the use of

the grantee, his heirs and assigns forever; but, nevertheless, upon the trust and to and for the several uses, intents and purposes thereafter expressed, limited and declared, and to no other use, purpose and intent whatever; that is to say, upon the trust that the grantee, his heirs and assigns, should and would grant, bargain, sell, assign, transfer and convey the premises, or any and every part and parcel thereof, unto such person or persons and to and for such uses, purposes, estates and interests, and in such parts, shares and portions, form and manner as Mrs. Everett might at any time during her natural life and, notwithstanding any coverture, by writing under her hand and seal, direct and appoint; and in trust that the grantee, his heirs and assigns, before and until such direction and appointment should be made, and for and at all times during the natural life of Mrs. Everett, should and would permit and suffer, authorize and empower her to use, possess, occupy and enjoy the premises and every part and parcel thereof; and the rents, issues and profits thereof to have, take and receive to and for her own sole and separate use and benefit, free from the debts, control or engagements of her then present or any future husband; and in trust, from and immediately after her decease, to grant, bargain, sell, release, convey, confirm and dispose of the premises and any and every part and parcel thereof, unto such person or persons and to and for such uses, purposes, estates and interests, and in such parts, shares and portions, form and manner as she at any time during her life, notwithstanding any coverture, should by her last will and testament in writing, duly executed according to law, or any writing purporting to be her last will and testament or in the nature thereof and executed as a will, direct, limit, give and appoint the same or any part thereof, and, in default of such direction, limitation and appointment, then in trust for her right heirs; provided always, nevertheless, that it should and might be lawful to and for the grantee, his heirs and assigns from time to time, in the first place, to deduct, retain and reimburse unto himself and themselves (out of the rents, issues and proceeds of the said premises) all such costs, charges and expenses as he or they or any of them should or might sustain, expend, pay or be put unto, in and about the performance of the trust thereby in them reposed, or in any manner concerning the same.

It may be stated that in 1857 the grantor died, leaving a will dated July 22, 1850, and a codicil thereto dated June 25, 1852, by which will and codicil he gave to Mrs. Everett all his estate, real and personal.

Doctor McChesney died in 1863, leaving no lineal descendants. His heir at the common law was Stephen F. McChesney, the oldest son of his deceased brother John. The premises had not, nor had any part thereof, been conveyed away when Doctor McChesney died.

After the death of Doctor McChesney, and on or about January 6, 1864, Mrs. Everett (she being then a widow), being desirous of acquiring the legal title to the property, under the advice and direction of her counsel requested the heirs at law of Doctor McChesney to convey the premises to her so that she might become seised of them by a good and perfect legal title

in fee simple absolute. In compliance with that request Stephen F. McChesney (the heir at common law) and others, heirs at law of Doctor McChesney, by deed dated January 6, 1864, and acknowledged January 6, 1865, conveyed the property to her in fee to her own use. The deed declared that the property was the same conveyed by Joseph McChesney to Doctor McChesney by the before mentioned deed, in trust for Mrs. Everett, as particularly set forth in the deed; and that, Doctor McChesney having died holding the title in trust under that deed, the grantors, his heirs, executed the conveyance to her for the purpose of vesting in her the legal title of the property.

The executrix of Jonathan E. McChesney, one of the brothers of Doctor McChesney, also made a conveyance to Mrs. Everett for the same purpose. The last mentioned conveyance was dated January 9, 1865, and was made under a power contained in the will of Jonathan E. McChesney to convey all the real estate of the testator.

It appears that certain of the heirs at law of Doctor McChesney did not join in the conveyance to Mrs. Everett. On January 28, 1865, Mrs. Everett conveyed the property to George Farr in fee for his own use, for the consideration of \$11,000, subject to certain mortgages; one for \$300 and another for \$600, given by Joseph McChesney in his lifetime, and the others given by Mrs. Everett, one for \$500 and the other for \$1,000. The principal of those mortgages, amounting in all to \$2,400, constituted a part of the consideration of the conveyance.

On February 10, 1871, Farr mortgaged the property to the complainant to secure the payment of \$20,000. Under foreclosure proceedings in this court upon that mortgage, it was decreed that a part of the property be sold to raise and pay to the complainant \$21,400, besides costs and interest. The part so ordered to be sold was purchased by the complainant for \$8,850, and was conveyed to it accordingly by the sheriff of Middlesex County, by deed dated September 28, 1873. Immediately afterwards the complainant entered into possession, and has held such possession ever since.

Mrs. Everett died February 28, 1883. In May, 1884, her son and only child, Joseph M. Everett, brought an action of ejectment in the supreme court against William D. Perrine, who then held the property so bought by the complainant, as tenant of the complainant, to recover possession of the premises; and this suit was brought to restrain him from prosecuting that action and to establish the complainant's title.

At the death of Doctor McChesney (who died intestate) the title to the property descended to Stephen F. McChesney, who was his heir at the common law, Stephen being the oldest son of Doctor McChesney's deceased oldest brother, John C. McChesney. At Mrs. Everett's request, Stephen, with other heirs at law of Doctor McChesney, conveyed the property to her, in order that she might have the legal title to her own use. This was an effectual transfer of the title to her in equity.

The execution of the power was defective in one and only in one respect, viz.: the form in which the request for a conveyance was made. The trust deed provided that the request should be in writing. It appears to have been oral

merely. Stephen testifies that he executed the deed to Mrs. Everett at her request. Equity will, in a proper case, aid the defective execution of a power by supporting, correcting and completing it. Here the conveyance to Farr was in consideration of \$20,000. Moreover, it appears clearly from the trust deed itself that the conveyance to Doctor McChesney was itself upon a valuable consideration moving from Mrs. Everett herself. It states that she had paid debts and claims against the grantor, out of her own funds, and had expended large sums of money in and about his support and maintenance, and also had agreed with him that she would clothe, board and maintain him for the rest of his life. The power given to Doctor McChesney was not a naked one; it was coupled with a trust; and his heir at law was bound to convey the property to her on her request. The trust was for her benefit, to enable her to dispose of the property at will. No trust was declared as to the purchase money of any sale to be made by her; but the trust was, that on request from her the trustee should grant, bargain, sell, assign, transfer and convey the property to such person or persons as she might designate; and to and for such uses, purposes, estates and interests, and in such parts, shares, portions, form and manner as she should direct and appoint. She might have directed a conveyance to another person to her own use and it would have been valid. She had the same power to direct, as she did, a conveyance to herself for her own use. It is quite clear that the object of the grantor in the trust deed was to give her full and absolute power over the property, and at the same time to protect her against any interference by her husband in the enjoyment or control of it or her dominion over it. The intention to execute the power is manifest, and it was the duty of the trustee to execute it. He was bound to convey on request. The fact that the request was not in writing obviously ought not to be allowed to defeat the conveyance. It is a mere formal defect.

The deed will be decreed to be a valid conveyance, and the injunction will be made perpetual. The complainant is entitled to costs.

JERSEY CITY GASLIGHT COMPANY

CONSUMERS GAS COMPANY OF JERSEY CITY.

- *1. **Public grants** are to be **strictly construed**, and whatever is not plainly granted must be understood to have been withheld.
2. **In construing a statute** a purpose to disregard sound public policy must not be attributed to the law-making power, except upon the most cogent evidence.
3. A complainant is not entitled to a **preliminary injunction** to protect a right which depends upon a **disputed question of law**.
4. The **charter** of a corporation will not be **declared to be forfeited, except in**

*Head notes by VAN FLEET, V. C.

a proceeding instituted directly for that purpose, by the government granting the charter.

5. In the absence of legislation conferring jurisdiction upon other tribunals, the common-law courts have exclusive jurisdiction of all questions relating to the forfeiture of franchises.

ON application for an injunction. *Denied.*

Heard on bill and affidavits on the part of the complainant, and affidavits on the part of the defendant.

The facts are stated in the opinion.

Messrs. Randal Morgan and Joseph B. Bedle, for complainant.

Messrs. Peter Bentley and James B. Vredenburg, for defendant.

Van Fleet, V. C., delivered the following opinion:

This is an application for an injunction. The litigants are corporations organized to manufacture and supply illuminating gas. Although other corporations than the Jersey City Gaslight Company and the Consumers Gas Company of Jersey City are parties to the suit, the questions in dispute will be considered as though the two corporations just named were the only litigants. This course will allow the only question now at issue between the parties to be presented in its simplest form, and save the necessity of adverting to facts quite immaterial to the present inquiry.

The complainant, the Jersey City Gaslight Company, was incorporated in 1849, by special charter. P. L. of 1849, p. 279.

It has power to manufacture and sell gas and to use the streets and public grounds of Jersey City to lay pipes to supply gas. The defendant, the Consumers Gas Company of Jersey City, is a corporation organized under the general law authorizing the formation of gaslight corporations. Rev. p. 460.

Its articles of association were filed December 1, 1883. It, too, has authority to use the streets and public grounds of Jersey City to lay pipes to supply gas, provided it first obtains the consent of the municipal authorities. The defendant has obtained such consent, and has laid its pipes, and is now supplying such of the citizens of Jersey City as choose to purchase their gas.

The complainant's charter does not prescribe the quality of the gas which it shall furnish, nor is any duty, in that regard, imposed upon it by any other statute. It is at liberty to furnish gas of any quality it pleases. The defendant, however, has not the same liberty. The statute under which it is organized prescribes the quality of the gas which it shall furnish, both in respect to its illuminating power and its purity; and declares that it shall be subject to a penalty of \$100 a day for each and every day that the gas supplied by it is not in accordance with the requirements of the statute. Rev. p. 462, § 18; Rev. p. 1841, § 1.

The complainant charges that the gas which the defendant is supplying does not come up to the standard prescribed by the statute; and it says, moreover, that the defendant has never made gas of the purity required by the statute. For present purposes this charge will be con-

sidered to be true. A cursory examination of the affidavits certainly leads to that result. This fact constitutes the whole of the equity on which the complainant's present application rests.

The argument by which the complainant attempts to vindicate its right to an injunction in this case is this: it says that the Legislature, in enacting the statute under which the defendant was organized, did not intend to authorize or permit corporations formed under that statute to compete with existing corporations, specially chartered, unless such new corporations furnished gas of the quality prescribed by the statute; and it therefore insists that the defendant, in furnishing gas of a quality below that which the statute requires, is carrying on an unlawful competition with it, and thus doing what amounts in its practical effect to an invasion of its franchise. Or, to state the complainant's contention in a more direct form, it says that in order to give full effect to the legislative purpose, the statute must be read as though that part of it which prescribes the quality of the gas to be furnished, contained words expressly declaring that no corporation organized under the statute shall have the right to supply gas to any locality where gas is already supplied by a corporation specially chartered, unless the gas which it supplies shall be of the quality prescribed by the statute.

The complainant claims a conditional monopoly. That is what its claim, plainly stated, amounts to. It says that unless the defendant furnishes gas of a specified quality it, alone, is to have the right to supply the citizens of Jersey City with gas. Whenever a suitor asserts a right of this nature as the foundation of his right to relief he must produce, in support of his claim, a plain grant, or fail. To doubt, in such a case, is to deny. It is a cardinal rule of construction that all public grants are to be strictly construed, and that whatever is not plainly granted shall be understood to be withheld. An attentive perusal of the statute under consideration fails to present to my mind the least evidence that the Legislature, in passing it, had any such purpose in view as that attributed to them by the complainant. A contrary purpose seems to be plainly manifest.

The twenty-second section (Rev. p. 463) expressly provides that whenever a corporation shall be organized under this statute, to supply gas to any city, town or village which is already supplied with gas, the new corporation shall, within certain periods fixed by the statute, extend its main pipes so as to supply all persons of that particular locality with gas. And the object of this provision is declared to be "that all may enjoy the benefits of competition."

The twenty-fifth section (Rev. p. 464) then declares:

"That no exclusive privilege heretofore granted in the charter of any company to construct and operate gas works shall hereafter continue to be or be construed to remain exclusive."

The object of these provisions cannot be misunderstood. They were designed to abrogate all exclusive or monopoly privileges, and to promote free competition in the supply of gas.

But if the statute did not contain these provisions, I still think the complainant's construction could not be adopted. Its construc-

tion ascribes to the Legislature a design to discriminate against the public, and in favor of a few persons of a particular class. The complainant is at liberty to furnish gas of any quality it sees fit; while the defendant, to escape daily penalties, must furnish it of a specified quality. There is no reciprocity of duty, in respect to the quality of the gas to be furnished, between the complainant and the defendant. The one is free and the other is bound. So that, to adopt the complainant's construction, we must say that the Legislature meant there should be no competition between existing corporations and corporations organized under this statute, except upon very unequal terms, with all the advantages in favor of existing corporations. Such a purpose is so manifestly opposed to sound public policy, so contrary to the spirit of our laws, and so clearly in conflict with popular judgment that it should not be attributed to the Legislature, except upon the most cogent evidence.

But suppose this view to be erroneous, and let it be conceded that there are expressions in the statute which support, to some extent, the complainant's construction, then its attitude before the court would be this: it would be asking the court to protect it by injunction, in the enjoyment of a right which as yet is unsettled and undetermined. Now, nothing is better settled, as a rule of equity procedure, than that a complainant is not entitled to a preliminary injunction to protect a right which depends upon a disputed question of law, and which question has never been adjudged in his favor by the courts of law of this State. *Citizens Coach Co. v. Camden Horse R. R. Co.* 2 Stew. 299.

But there is another objection to the complainant's application, quite as fatal as either of the other two. The defendant is a corporation *de jure*. It is not denied, by anything which is entitled to be regarded as proof, that it is a legal corporate entity. As a corporation *de jure*, with its powers in full vigor, it has a lawful right to manufacture and sell gas, and to use the streets and public grounds of Jersey City to transmit gas to its customers. If it furnishes gas of a quality inferior to that which the statute makes it its duty to furnish, its delinquency may constitute such a misuse or abuse of its franchises as would justify the State in instituting proceedings to have its franchises declared forfeited. But that is a matter in which the complainant has no concern, and a wrong over which this court has no jurisdiction.

It is an established principle of the law concerning corporations that the charter of a corporation will not be declared to be forfeited for misuse or abuse of its powers, except in a proceeding instituted directly for that purpose, by the government granting the charter. In such matters the courts will never act upon the relation of any individual; and the reason is that the matter is one which concerns the State alone. The State may exact the forfeiture or waive it, as may seem best to it for the public interests. 2 Kent, Com. 313; *Commonwealth v. Union Ins. Co.* 5 Mass. 230; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Kishacoquillas Turnpike Co. v. M'Conaby*, 16 Serg. & R. 140; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Slee v. Bloom*, 5 Johns. Ch. 366

The question whether a corporation has forfeited its franchises or not is one over which the common-law courts have exclusive jurisdiction, and over which this court has no control whatever in the absence of legislation. *Nat. Debt R. Co. v. Central R. R. Co.* 5 Stew. 755.

To give the complainant the writ it asks would be to deprive the defendant of the right to exercise its franchise; and this court would thus pronounce a judgment which, in its practical effect, would amount to a judgment of forfeiture. No judicial tribunal can do, by indirect, what it has no authority to do directly.

But I think it should be said in addition that if the defendant has been guilty of a breach of its statutory duty, its misconduct has not resulted in legal injury to the complainant. The complainant is not a consumer of the gas furnished by the defendant; no contract relations exist between it and the defendant; and so, if the defendant is not performing the whole measure of its statutory duty, its delinquency does the complainant no harm.

That provision of the statute which prescribes the quality of the gas which corporations organized under it shall supply was obviously designed for the benefit and protection of such persons as should become consumers of its gas; and such persons are the only persons who can be injured by its violation. Its violation invades no right of the complainant, and deprives it of nothing which the law secures to it; consequently it cannot be made the basis of any sort of judicial relief to it.

For all these reasons the complainant's application must be denied, with costs.

Charles W. KIMBALL *et al.*,

v.

John LEE *et al.*

1. The title acquired by an assignee for the benefit of creditors, although good as to the property assigned, is (as to assets in other States, whose policy it is not to recognize, as against the claims of creditors of the assignor domiciled therein, the validity of general assignments with preferences) liable to be defeated by attachments sued out of the courts of such other States by creditors domiciled therein, to recover their debts out of such assets.
2. An agreement made by the receiver of a corporation with the general assignee of a creditor of the corporation in another State, to pay a certain portion of the indebtedness of the corporation to the assignor, in satisfaction of the debt, in consideration of the assignee's promise to accept of such payment in compromise, and ratified by the court, is to be regarded in equity as a novation, and the obligation is thenceforward a new one between the receiver and the assignee; and the claims of attaching creditors of the assignor in this State, based upon the policy of this State in respect to assignments giving preferences and not asserted until

after the receiver had become liable to the assignee on said agreement, **cannot avail against that agreement.**

(Decided 1886.)

BILL for relief. On order to show cause why injunction should not issue. *Order discharged.*

The facts are stated in the opinion.

Mr. H. Wallace, for complainants.

Mr. C. Parker, for assignee.

Mr. J. T. Stockton, for receiver.

Runyon, Chancellor, delivered the following opinion:

The North River Construction Company, a corporation of this State, was by this court declared to be insolvent under the Act concerning corporations, and Ashbel Green, Esq., was appointed receiver January 12, 1884.

By an order of the Supreme Court of New York, made two days afterwards, he was appointed receiver in that State in aid of his receivership here. Among the claims against the corporation was one of large amount in favor of John Lee, for money due upon a contract between him and the corporation. Lee sued the company in the Supreme Court of New York for his claim, and in November, 1884, recovered judgment for \$52,304.89. On or about the 18th of December following he made a general assignment, with preferences, in New York for the benefit of his creditors. His assignee was Thomas B. Rutan.

The assets of the construction company consisted almost entirely of the stock and bonds of the New York, West Shore & Buffalo Railway Company. The railroad of that company had, at the time of the appointment of the receiver of the construction company, just been opened to Buffalo; but it was in an unfinished condition and the company was in financial embarrassment. In June, 1884, a suit for foreclosure of mortgage was begun against the railway company, and receivers were appointed thereunder.

Lee and others put in in that suit, by their answers, their claims to mechanics' liens, against the property of the railway company, for their work, etc., under their contract with the construction company. About 200 suits were begun, to which the receiver of the construction company was a party.

In July, 1884, the receiver, apprehending total loss of the West Shore bonds and stock held by him, in order to prevent it entered into and promoted a scheme of reorganization of the West Shore Company. To that end he called a meeting of the creditors of the construction company; and they, with but few and comparatively insignificant exceptions, agreed to authorize him to make a compromise, one part of which was that they should accept 50 per cent of the face value of their respective claims in full thereof, in cash, to be paid before January 5, 1886. He obtained the consent of the stockholders of the construction company also and he then effected an arrangement with the mortgage bondholders of the railway company, by which the decree in the foreclosure suit was entered, the property was sold and a new railroad corporation organized. He thus

obtained securities from which he raised the money necessary to carry out the compromise and pay the creditors of his company in accordance therewith.

Among the creditors who consented were Lee and Rutan, his assignee. The latter did so under special permission obtained from the County Court of Kings County, New York, by order made September 12, 1885, by which he was authorized to accept 50 per cent on the amount found due Lee on his claim against the railway company and the construction company, amounting to \$48,638.38 (the amount at which it was allowed by the receiver) and interest, and to execute the necessary papers to carry the compromise into effect; such payment to be made to the assignee on or before January 5, 1886. This order was made upon formal petition, and upon due proof of notice to Lee's creditors.

The receiver, very soon after the making of that order, made the agreement of compromise with Lee & Rutan.

It appears that an agreement dated New York, July 13, 1885, was signed by the creditors of the construction company, by which they agreed, with the receiver and with each other, that they would accept, in full payment and satisfaction of their claims against that company and the railway company on that account, 50 per cent of the face value thereof, as allowed by the receiver, provided notice was given on or before October 1, 1885, that the same would be paid in cash on or before the 5th of January, 1886; and they further thereby agreed to sign all necessary papers to carry out the agreement.

On the 26th of September, 1885, the receiver, at his office in the City of New York, gave to the assignee a written notice, signed by himself as receiver, that pursuant to the agreement 50 per cent of the face value of the claim of John Lee, without interest, would be paid to the assignee, in cash, on or before the 5th of January, 1886. The assignee has demanded payment of the money, but the receiver declined to pay, because of the stay granted in this cause.

On or about October 27, 1885, a writ of attachment was issued out of the supreme court of this State, at the suit of the Wallis Iron Works, a corporation of this State, against Lee, as a nonresident debtor; and by permission of this court it was executed by attaching the money in the receiver's hands for the Lee claim. The attachment was levied upon it as a claim of the said John Lee, defendant, against the North River Construction Company, in the hands of Ashbel Green, receiver of the said North River Construction Company, amounting to \$48,638.38. The claim of the Wallis Iron Works was, when the attachment was issued, held by the complainant Charles W. Kimball (it was assigned to him September 22, 1884), and the writ of attachment, although issued in the name of the Wallis Iron Works as plaintiff, was to his use. The bill is filed by Mr. Kimball, who is a resident of this State, and Elias T. Day, of Jersey City, also a creditor of Lee (he has applied and come in under the attachment) suing for themselves and such other creditors as may apply under the attachment; and its object is to obtain an adjudica-

tion that the assignment from Lee to Rutan is, by reason of its giving preferences, invalid as against Lee's creditors residing here, and to get a decree that the receiver pay over the money to the auditor in the attachment. On the filing of the bill an order to show cause why the receiver should not be restrained from paying over the money was granted, with an *ad interim* stay.

The assignment to Rutan was made December 18, six months after the appointment of the receiver. The order of the New York Court authorizing the assignee to make the settlement was made September 12, 1885, and the settlement was made very soon thereafter. The attachment was not issued until October 27, 1885, about a month after the receiver had made the settlement with the assignee. The assignee had, under his assignment, a good title to the property thereby assigned; but that title was (as to assets in States whose policy it was not to recognize, as against the claims of creditors of the assignor domiciled there, the validity of general assignments for the benefit of creditors with preferences) liable to be defeated by attachments sued out of the courts of those States by creditors domiciled therein to recover their debts out of such assets.

The receiver made the settlement with the assignee, without any manner of opposition or objection on the part of the creditors of Lee domiciled here. And that settlement was made in conjunction with other creditors of the construction company and as part of a plan into which they and other persons interested in the railroad and construction companies entered for their mutual benefit, and by which the means were raised by the receiver to pay the amount which the creditors agreed with each other and with him that they would accept in satisfaction of their claims.

Not only did the attaching creditor delay issuing the attachment until after the agreement of settlement had been made by the assignee under the sanction of a court (which sanction was specially obtained on notice to the creditors of Lee), but the attachment was not issued until after the receiver had notified the assignee that he would pay him the amount agreed upon between them and had so bound himself to pay it to the assignee.

The agreement between the receiver and the assignee must be regarded in equity as a novation of the debt. It was an agreement that, in consideration of the assignee's consent to accept the compromise, the receiver would pay him the amount agreed upon. Thenceforward the obligation was substantially a new one between the receiver and the assignee, the consideration of it being the compromise of the old debt, the title to which was, at the time of the compromise, in the assignee.

No claim of the complainants, based upon the policy of our law, can be of any avail against it now. They have waited too long. They have waited until the receiver has become liable, by special agreement, to pay the assignee. Before that time the liability was different. It was an obligation to pay the claim or the dividends thereon to the person or persons entitled thereto, and the title of the assignee might have been questioned. But now the obligation has been changed, by fair and wholly legiti-

mate means, into an obligation on the part of the receiver to pay the assignee. The complainants are barred by their laches; and the receiver is, under the circumstances, entitled to the protection of the court against the garnishment.

The order to show cause will be discharged, with costs.

Charles PERCIVAL

Joseph W. GALE.

1. An administrator has no power to increase the amount due upon a mortgage on the real estate of his intestate.
2. The question whether an administrator has received and used money for the advantage of the heir in discharging liabilities against the inherited estate, so as to charge the heir therewith, is to be raised and determined in the orphans' court, not in a suit in chancery.
3. Where more interest than was actually called for has been paid on a mortgage, the tender of such a sum as, together with the excess of interest paid, will equal the amount due on the mortgage, is a good tender in satisfaction of the mortgage.

BILL to foreclose a mortgage.

The questions raised are stated in the opinion of the Vice Chancellor.

Mr. Peter L. Voorhees, for complainant.
Mr. John W. Wartman, for defendant.

Bird, V. C., delivered the following opinion:

This bill is to foreclose a mortgage. The only question is as to the amount due. The complainant claims \$700 of principal, while the defendant insists that there is only \$600 due. The defendant made a tender of the \$600 before suit. He tendered nothing more, and now insists that the complainant had claimed that \$700 was the principal for a long time; and that he had paid interest on that sum in excess, for six years six months and eight days, so that the amount of the interest for that period on the \$100 was more than the interest due on the \$600 at the time of the tender. In other words, considering the amount thus paid in excess under a misapprehension, there were only \$600 due when the tender was made. At or before the filing of the answer the same amount was paid into court.

The bond and mortgage were given by Budd D. Gale to W. W. Bogart, who afterwards assigned them to the complainant. Bogart's testimony makes it very plain that the mortgage was, at one time, actually reduced from \$1,300 to \$600. After it was so reduced the mortgagor died. His widow became the administratrix of his estate. After the mortgage was so reduced in value, Bogart says that he advanced money to the administratrix; and in settlement it was found that \$100 were due to him, to secure which it was agreed that he should hold the said mortgage for \$700 instead of for only \$600. It appears that he received that amount when he assigned it.

The mother of the defendant was not only administratrix of the estate of the mortgagor, but was also guardian of her son, the defendant. The mother died in February, 1883. On August 4, 1884, the defendant became of age, soon after which he learned of the amount which had actually been paid on the bond.

As between this heir at law and the assignees of the mortgage, ought the claim for \$700 to be enforced? I think not. I believe that the mortgagor may voluntarily increase the amount due upon a mortgage in the manner above presented, because the land he is burdening is his, but I cannot perceive any ground for such right on the part of his administratrix. The administratrix had no power to execute a mortgage on the real estate of the intestate. She did not own the land and, in that capacity, had no interest in the land. Indeed, except in case of debts which the personal estate would not pay, she could not reach the land for any purpose, and then only through an order of the orphans' court.

Nor can it be said that it will be equitable to allow this \$100, at this time, because the estate of the intestate had the benefit of it. I say it would not be equitable, because there is no sufficient proof that the estate had the benefit of it. Besides, the pleadings are not framed to raise such an issue. And if that were possible, under the circumstances of this case, I think the court should wait long before entertaining the question at all. How can this heir at law meet such an issue in this court? How can he be called upon to answer whether or not that \$100 was used by the administratrix to his advantage in discharging the liabilities against his father's estate?

The orphans' court was the tribunal to raise and to determine that question, and the person to present it was the administratrix herself upon the filing of the account.

As to the proof, what is it? Most uncertain. There is the oath of the mortgagee that he advanced the money, and there the proof ends. Whether it was used for the estate or not in no sense appears. Therefore, to decree that this money was devoted to the interests of the estate would be making a decree without any proof for it to rest upon. Everyone would pronounce such course highly inequitable.

Was the tender good in law? As I understand the evidence, the interest had been paid on \$700 until May 1, 1884, and it had been paid at this rate for six years and six months after the mortgage had been reduced to \$600.

Finding as I have above, the interest paid in excess must be credited upon the principal. The interest so paid amounted to at least \$45.50, which would make the principal due May 1, 1884, \$549.50.

On October 4, following, the tender of the \$600 was made, at which time there was less than \$19 interest due, making the whole amount due less than \$588.50. Therefore, as the tender was made without demanding any change or without any other condition whatever, and as the only ground of refusing to accept it was that it was not enough, the law pronounces the tender good.

The complainant is entitled to the \$600 without costs, and the defendant is entitled to his costs.

I will so advise.

Jeremiah E. ADAMS

v.

Cord MAHNKEN *et al.*

1. Evidence on the question whether a mortgage, given to secure a usurious premium in addition to the debt, had been paid off, or whether the indebtedness secured thereby was included in a later mortgage, examined. Held, that the first mortgage had been fully paid before the second was executed and that recovery of the usurious premium paid was barred by limitation.
2. A draft drawn upon a fund not then in existence, and the value of which depended upon the result of a pending law suit, held, upon the evidence, to have been given as additional security for an existing indebtedness, and not in payment thereof.

BILL for relief. *Dismissed.*

On final hearing on pleadings and proofs. The evidence examined is set forth in the opinion.

Mr. J. Alward, for complainant.

Mr. A. C. Hartshorne, for defendant Mahnken.

Runyon, Chancellor, delivered the following opinion:

The object of this suit is to bring the defendants (who, from April, 1871, to April, 1882, were partners in the wholesale grocery business in the City of New York, under the firm name of Mahnken & Moorhouse) to an account with the complainant, who during that period was their customer and bought goods of them to sell at retail in his store in Elizabeth, in this State, in respect to certain business transactions which took place between them during the before mentioned period.

The bill alleges that about the 16th of August, 1872, the complainant borrowed \$2,000 of the defendants on a usurious contract between him and them for the payment by him to them of a premium of \$500 for the loan; that the payment of the \$2,500 with interest at 7 per centum per annum was to be secured by his bond and mortgage on real property of his in the City of Elizabeth; that the loan, which was of \$2,000 only, was made, and the bond and mortgage for \$2,500 were given accordingly; that in January, 1875, the complainant had paid up the interest on the bond and mortgage and \$500 of the principal; that then a new bond and mortgage of the same property for \$2,000 were given instead of the bond and mortgage for \$2,500, and the last mentioned mortgage was canceled of record; that the complainant afterwards, in August, 1878, on account of and in further dealings between him and the defendants, gave them another mortgage (for \$1,500 and interest) upon the same property, and other land also in the City of Elizabeth; that after the giving of the last mentioned bond and mortgage the complainant continued to deal with the defendants; that on or about the 30th day of March, 1881, he had paid up all the interest on the two mortgages of \$2,000 and \$1,500 respectively; that he was then desirous of paying his entire indebtedness

to the defendants and of redeeming his lands from the lien of those mortgages; that he was then the owner of an order given by one William H. Adams upon his attorney, Allen C. Clark, of Washington, D. C., calling for the sum of \$5,500, which order was accepted by Clark, and was considered good; that the complainant, wishing to dispose of that order and realize the amount due thereon, offered it to the defendants; and they made due inquiry about it and agreed with him that they would take it in payment of the mortgages and his further and other indebtedness to them, if any existed, and pay him the difference between the amount of the order and the amount which should be found due upon a proper statement of the account between him and them; and that as part payment of that difference they paid him, on the 30th of March, 1881, \$450, and promised to give him credit for the order on their books, and state the account, and account to him for the balance of that difference, and deliver up to him the bonds and mortgages receipted and canceled, and execute to him discharges of the mortgages.

The defendants dissolved their copartnership in April, 1882. Mahnken bought out Moorhouse's interest in the firm's property and assumed the payment of the debts. Mahnken has answered. Moorhouse has not. The former, in his answer, states that the \$2,500 mortgage was paid off before the \$2,000 one was given, and denies that the order was given in payment of the complainant's indebtedness, but alleges that it was given as additional security therefor.

The only questions discussed upon the hearing were whether the \$2,500 bond and mortgage were usurious, and whether the order was taken in payment of the complainant's indebtedness to the firm or merely as collateral security therefor.

That the loan of \$2,000 was made upon an agreement that in consideration thereof the complainant should pay to the defendant a premium of \$500 is established by the proof. It is urged, however, on the part of Mahnken, that that mortgage was paid off in full before the \$2,000 mortgage was given, and that the latter was given, not for part of the money secured by the \$2,500 mortgage but for an entirely different indebtedness. This claim is established by the evidence. The \$2,500 mortgage was paid off by payments made directly thereon before the \$2,000 mortgage was given.

The last payment (which was of \$150.13) was made January 9, 1875. The \$2,000 mortgage was given January 15, 1875. When it was given, there were \$2,548.58 due from the complainant to the defendants on book account. No part of the money secured by the \$2,500 mortgage was in any way included in the \$2,000 mortgage. As just stated, the last payment on account of the \$2,500 mortgage was made January 9, 1875. The bill was not filed until October 8, 1882, nearly eight years after that payment. Recovery of the premium paid upon the loan of \$2,000 secured by that mortgage is barred by limitation. Moorhouse has lived in this State ever since the mortgage was given. *Bruce v. Flagg*, 1 Dutch. 219.

Nor is the claim that the order was given and accepted in payment of all indebtedness of

the complainant to the defendants established. When that order was given (it is dated March 19, 1881) the complainant owed the defendants a large sum of money (about \$5,340) upon the two mortgages of \$2,000, and \$1,500 respectively, and upon a note of \$964.14, payable on demand, given to them by him April 27, 1880, on settlement for a balance of account due them March 1, 1880, and \$502.57 for a balance of account due them from him when the order was given.

At the time when the note for \$964.14 was given, the complainant's credit with the firm of Mahnken & Moorhouse was not good. As conditions of further credit it was then agreed between him and them that the balance of his indebtedness thereafter to be incurred should not exceed \$300, that he should pay all bills promptly within thirty days after they had been contracted, and should pay \$50 a month upon that note. From about the first of November, 1880, until the time when the order was given, he was unable to purchase any goods from them on credit, but was required to pay on delivery. From the time when the order was given, to the dissolution of the firm, he again had credit: and at the latter date he owed them on account, for goods sold and cash advanced from August 18, 1880, to August 16, 1881, a balance of \$1,121.11.

According to the weight of the evidence, the order was given as additional security for his indebtedness to the firm. It was drawn by William H. Adams upon Allen C. Clark, his attorney, and accepted by the latter. It directed the drawee, after deducting his fees and incidental expenses in the prosecution of the drawer's claims against the District of Columbia before the United States Court of Claims, and also \$1,100, the amount of a previous acceptance then outstanding, to pay to the order of Mahnken & Moorhouse \$5,500 out of any money that might be awarded to the drawer by the court of claims in his suits then pending against the District of Columbia in that court.

The claim mentioned in the order was for work done in Washington by William H. Adams (the complainant's brother), as contractor for certain municipal works there; and although the contract was made and the work done by him, they were made and done on behalf of the complainant also, who was a silent partner with him therein. The \$5,500 were due to the complainant for profits and money advanced for the works; and part of the \$2,000 borrowed of the defendants, which had gone into the works, was embraced in the \$5,500. It will be seen that the draft was upon no existing fund. Whether it would have any value or not depended entirely upon the result of a law suit.

The complainant and Mr. Moorhouse, indeed, both swear that the agreement between them (Mr. Mahnken appears to have been personally no party to it) was that the order was to be taken absolutely as satisfaction for the complainant's then indebtedness; and they also say that he was to receive from the firm the difference between the amount mentioned therein, \$5,500, and the amount of that indebtedness. That indebtedness at the date of the order was over \$5,340. They state that \$450 were paid to him at about that date on account of that difference. The two sums of \$5,340 and \$450 to-

gether make an amount greater by nearly \$300 than the amount mentioned in the order.

It seems very improbable that the firm would have agreed not only to accept such an order in satisfaction of his indebtedness to them and give up the mortgage security which they held, but, in addition, to advance him \$450 on account of a merely supposed difference between the amount of his indebtedness and the amount mentioned in the order.

On the one hand, the complainant, who is an interested witness, and Mr. Moorhouse, who, although he is disinterested, would seem to be unfriendly to Mahnken, testify to the existence of the agreement as alleged in the bill. On the other, there is the evidence of the defendant Mahnken, who is interested, and of Mr. Jansen, the book-keeper of the firm, who is entirely disinterested, and of Edward A. Mahnken, son of the defendant Mahnken.

Mr. Jansen testifies that before the order was given, Mr. Moorhouse, in his presence, pressed the complainant for payment, saying that they were not sufficiently secured by the mortgages and note, and that he wanted to be better secured; and the complainant then proposed to give the order as additional security, and Mr. Moorhouse accepted it as such. He also testifies that Moorhouse told him that he had received the order as additional security, and that the complainant was to have credit again on account of it. The order was never credited on the books of the firm, and the complainant was well aware of that fact but never complained of it. He also knew that he was charged on the books with the \$450 advanced to him at the time when the order was given. He received numerous statements of account after the order was given, from which, as well as from his examination of the books, he was apprised of the fact that he was not credited with the order. He attempts to avoid the force of this fact by saying that he very seldom looked over the statements that he received because, although his home was in Elizabeth, he was in business in Washington, and adds that he was "back and forth." His business in Washington, he says, was the business of contracting for making sewers, laying pavements, etc. He admits that from 1875 to the time of the commencement of this suit (October, 1882), he was in Washington but once.

Edward A. Mahnken, who was a clerk of the firm, testifies that Moorhouse, when he, Mahnken, asked him whether certain goods which he was about to send to the complainant, and which the latter had bought of the firm, should be so marked as that they should not be delivered without payment of the bill therefor, as had previously, from October, 1880, been the method adopted by the firm in their dealings with the complainant, answered: "No, it is all right now; I have got more security; I have got an order on Washington."

Mr. Mahnken, defendant, testifies that Moorhouse told him that the order was taken as collateral security for the payment by the complainant of his indebtedness to the firm. And here it will not be out of place to say that although Moorhouse swears that the order was left at the store of the firm during his absence at home by reason of illness, the complainant testifies that he gave it to Moorhouse himself

at the store, and he thinks Mr. Mahnken was not present but the book keeper was.

The defendant Mahnken also testifies that after the dissolution he called on the complainant for payment of his indebtedness to the late firm and offered to deduct 15 or 20 per cent from the amount, if the complainant would pay it; and that the latter said he would pay if he had the money. He says they referred to the Washington claim, and complainant said that he had got nothing from it and doubted very much whether he ever would get anything; that as soon as he got that money he would settle up, but that there was no depending upon it. He also swears that Moorhouse told him that he had to give the complainant some cash, but did not say how much, to get the order.

When the firm dissolved, a written agreement of dissolution was signed by Mahnken and Moorhouse. By it all the assets were assigned to the former, and bonds and mortgages are specially mentioned, the words "stocks, bonds and mortgages" having been interlined before it was signed, and therefore the attention of Moorhouse was drawn to it. He thus recognized the bonds and mortgages given by the complainant as valid existing evidences of debt, for the firm does not appear to have any other bonds and mortgages. He sold out all his interest in the assets, including them, to Mahnken for \$40,000, the latter to pay the debts.

There are other weighty reasons against accepting the complainant's version of the transaction under consideration. Not only were the bonds and mortgages and notes not surrendered, and the account receipted when the order was given, but there was no written evidence given of any undertaking by or on the part of the defendants to accept the order in discharge of all claims against the complainant, or to surrender the bonds and mortgages, and note and receipt his account. He left the bonds and mortgages and note in the hands of the defendants after giving the order. He says, indeed, that he demanded them from Moorhouse and was put off from time to time, but he not only took no steps to obtain them but never complained that they were not delivered to him. He never demanded them from Mahnken. When the relations of the parties to each other and the character of the order before adverted to and the conduct of the parties are considered, it seems quite clear that the order was not accepted as satisfaction but merely as additional security and that in order to get it as security Moorhouse advanced to the complainant, for the firm, \$450.

On the hearing, a motion was made on the part of the defendant Mahnken for leave to introduce evidence that the suit mentioned in the order has been decided adversely to the plaintiff therein, and so the order has proved to be utterly worthless. The decision upon that application was reserved until this time. The evidence would be irrelevant and immaterial. The motion, therefore, is denied.

The bill will be dismissed, with costs.

Charles BORCHERLING'S EXECUTOR

v.

Christina TREFZ *et al.*

If a bonus for the loan of money, which

if paid to the lender directly would render the loan usurious, is **paid to the agent of the lender** without the knowledge and against the will of the lender, he is not affected by the illegality of the transaction and may enforce a mortgage given him to secure such loan; but if the bonus is taken by the agent with the knowledge of the lender, then his mortgage must be declared usurious.*

BILL to foreclose a mortgage. *Defense sustained.*

On final hearing on bill and answer and proofs taken in open court.

The facts are stated in the opinion.

Mr. Cortlandt Parker, for complainant.

Mr. Joseph Coult, for defendants.

Van Fleet, V. C., delivered the following opinion:

This is a suit to foreclose a mortgage bearing date November 16, 1874, made by the defendants' testator to the complainant's testator, to secure \$20,000. The mortgage was payable in one year from its date, and bore interest at the rate of 7 per cent per annum.

The defense is usury. It is undisputed that in the negotiation of the loan secured by the mortgage the mortgagee's son acted as the agent of his father and, on the conclusion of the transaction, received from the mortgagor the sum of \$5,000 in addition to \$50 which the mortgagor paid him for making searches and drawing papers connected with the loan. The mortgagor paid interest on the \$20,000 at the rate of 7 per cent per annum; so that it will be seen that the sum which he actually received, \$15,000, cost him (for the period for which by the terms of the papers the loan was to run) the enormous sum of 43 per cent.

It is manifest that no honest business can be conducted successfully which purchases the use of money at such a price. This fact of itself makes it the plain duty of the court, as it seems to me, to examine this transaction with the most jealous scrutiny, and to denounce it as highly illegal, unless it satisfactorily appears that the mortgagee was in no way responsible for this extraordinary exaction. The design of the statutes against usury has been said to be to prevent avarice from preying upon necessity; but if this transaction must stand, and the device resorted to in this case to defeat the purpose of the law must be held to be beyond the reach of judicial correction, it is certain that our law has not accomplished its purpose and that the evil it was intended to correct still exists in full vigor.

The following statement presents all the material facts attending the making and execution of the contract of loan:

The mortgagor, through his book keeper, applied to the mortgagee for a loan of \$20,000, to be secured by mortgage; the mortgagee said he could make the loan, but in order to do so he would have to sell some of his securities, which he could only do at a great loss; to this the mortgagor's agent replied that if he would raise the money and make the loan the mortgagee would stand the loss. The mortgagee then said that his son was his agent, and that mortgagor's agent had better go and talk with

him. The mortgagor and his book keeper thereupon went to see the son and told him the object of their visit. The son said that he would see his father and talk with him about the loan. They subsequently saw the son again, when he told them that his father had the money, but that he (the son) had received an offer from other parties, of \$5,000 as commissions for procuring a loan of \$20,000; that he could get that from other parties, but if they were willing to pay the same sum they could have the money. At this time the mortgagor declined to take the loan on the terms proposed. Subsequently his necessities became so pressing that he was compelled to submit; and he accordingly sent his book keeper to the son to notify him that he would take the money on the terms offered. The son furnished the money for the whole loan. He owed his father, for collections previously made, between \$2,000 and \$3,000. This he paid, and the father raised the balance by selling United States bonds to his son. The son says: "I had money on hand which I wanted to invest, and so I concluded to take father's bonds at their market value."

The whole \$20,000 was drawn from bank by the son and delivered to his father and then passed back. Five thousand dollars was drawn on November 17, 1874. The whole of this sum was delivered to the mortgagor on the same day, and the bond and mortgage were at the same time delivered to the mortgagee. The mortgagor was required on the same day to sign a receipt under seal, acknowledging the receipt of the \$5,000. The remaining \$15,000 was drawn on November 20, 1874. The son, on the same day, delivered the money to his father; who at once laid it on a table in his son's office, at which his son, the mortgagor and the mortgagor's book keeper were sitting. The mortgagor was then required to sign another receipt under seal, admitting the receipt of the \$15,000, and stating that that sum, together with the \$5,000 previously received, made up the amount of the mortgage. This paper on being signed was given to the mortgagee, who immediately left the room where the parties were, and the door between that room and the one into which the mortgagee went was closed. The \$15,000 was then counted and \$5,000 of it was handed over by the mortgagor to the son. The son says that his father got no part of this money and did not know that he received it; that his father knew that he was in the habit of getting commissions for procuring loans, but he did not know what they were. The son further says that he told the mortgagor during the negotiation that if the loan was made, his fee would be \$5,000; and that he stated as the grounds of his charge that the loan was a large one; that the security offered was not the first lien, and that he could get a fee of that amount from other parties. The property pledged for the payment of the loan was, in the judgment of the son, sufficient to render the money entirely safe. The person who got the \$5,000 was the only child of his father and is the person now before the court asking that a decree be made that the mortgage sought to be foreclosed is a valid lien for \$20,000.

A charge of usury, whether made as the

*See *Demarest v. VanDenberg*, 3 Cent. Rep. 90.

ground of affirmative relief or as a defense, always presents a question of fact which, like other questions of fact, must be decided by the evidence. Under the statute in force at the time the contract under consideration was made, usury consisted in taking a higher rate of interest than that allowed by law; the prohibition of the statute being that no person should take, upon any contract, directly or indirectly, more than \$7 for the forbearance of \$100 for one year. Rev. p. 519.

The test question therefore, in this case is: Is it proved that the lender took, directly or indirectly, on this loan, a higher rate of interest than that allowed by law? That a sum was taken so far above that allowed by law as to make the bargain an exceptionally oppressive one to the borrower is a fact beyond dispute. But it is said that the \$5,000 was not taken as interest or bonus, but was paid as compensation to the lender's agent for services in inducing the lender to make the loan.

This, in my judgment, is a plain abuse of language. When money is given as compensation for services, the sum paid must, in order to be fairly entitled to be called compensation, bear some relation to the value of the services rendered. In such an affair as this it was not possible for any person, no matter how great his skill or valuable his time, to earn, by any service which it was possible for him to render to the borrower, a sum at all approaching in amount that which was paid. It is true that where, as in this case, the principal is the agent's father, it is always within the agent's power to say to the borrower: "My principal has the money you want but he will not let you have it unless I advise him to do so; and I will not so advise him unless you will give me, as a fee, the one fourth of the sum you desire to borrow."

If the borrower yields to such a demand, he does not make compensation for services but gives a *douceur*. In such a transaction the principal is entitled to the very best skill and judgment his agent can give; and he also has a right that his agent shall keep himself entirely free from the least temptation to betray him. If in such a transaction an agent clandestinely stipulates for the payment of a fee to himself as a condition of advising the loan, his bargain, in my judgment, is a corrupt one; and if he takes the fee he receives a bribe. No man can, at the same time, serve two masters having different or conflicting interests.

The evidence shows that this loan was under negotiation between two and three weeks. Suppose we say that the negotiations covered the longest period, three weeks, and that the mortgagee's son devoted the whole of each day, Sundays included, to argumentation to convince his father that he ought to make the loan, the whole period of his service would then have been twenty-one days, and his compensation at the rate of over \$230 a day. In a case where a charge, much less exorbitant in amount, was made by a lender under the guise of compensation for professional services, the court of errors and appeals, speaking by Mr. Justice Dixon, declared that the assertion that the money was received as compensation for services was incredible; but that it was quite manifest, on the contrary, that it was received

as a usurious bonus. And so the court adjudged the fact to be, in spite of the lender's positive affirmation, under oath, to the contrary. *Boyd v. Engelbrecht*, 9 Stew. 612.

It is manifestly idle to call the \$5,000 compensation for services. It was not paid as compensation for services, but for the loan. It was paid for the money. A payment for such a purpose contravenes the very foundation principle of the law against usury.

But it is said that the illegal payment was not made to the mortgagee. It is not necessary that it should have been, to infect the contract with usury. There can be no doubt that if the mortgagee had made this contract in person, and it had been agreed that the mortgagor should, as a condition of the loan, pay to the mortgagee's son a fee of \$5,000, the presence of that stipulation would have rendered the contract usurious. If the thing forbidden by law is done, the law is violated; and it is wholly unimportant by what particular method the violation is effected or who gets the fruit of its violation. The thing the statute prohibits is the taking of more than a fixed rate of interest for the use of money. The design of the statute is the protection of borrowers. Now, it is manifest that the law is just as effectually violated and the harm to the borrower is just as great when the spoil goes to the pocket of a stranger as when it goes to the pocket of the lender.

The important question in cases of this kind is: Was the bonus or illegal interest taken, no matter by whom, pursuant to the terms of the contract of loan with the knowledge of the lender? If it was the contract is usurious. That it was in this case would seem to be almost incontestable. It is undisputed here that the borrower first applied to the lender; that the lender said that he could make the loan but to do so he would be compelled to sell his securities at a loss, and that the borrower replied that he would stand the loss. At this point the lender sent the borrower to his son to arrange the terms of the contract. The son and the borrower did arrange them, and one of them was that the borrower should pay the lender's son \$5,000 for advising his father to make the loan.

In view of these facts, I think it is impossible to say that the lender did not send the borrower to his son to have just such a contract entered into as the son afterwards made. It will be remembered that the work of negotiation was almost complete; the minds of the parties had met on all the material parts of the contract; the lender had the money which the borrower wanted, or could readily raise it; he was willing to make the loan, but he wanted something in addition to legal interest; the borrower was willing to pay more than legal interest; the lender's son was a lawyer, the lender was not; and now, when they reach the point where it is necessary that a plan should be devised for the payment of more than legal interest for the money, the lender sends the borrower to his son. To my mind it is clear that his object in doing so was to have the difficult part of the contract arranged.

Besides, it will be remembered that two of the reasons which the son urged in justification of this extraordinary charge had special refer-

ence to his father. They were just such reasons as a greedy lender, dealing in person, would present to the mind of an eager borrower. The son says that he told the borrower that the loan was a large one and that the security offered was not a first lien. These considerations were such, it will be observed, as concerned the lender principally, if not exclusively. If the loan was made, the lender had to raise the money; the labor and loss of doing so were his; and if the security to be taken for the loan was insufficient or subject to any infirmity or disadvantage, the risk was the lender's. Mere form of speech, in such a matter, is wholly immaterial. The son may, in this transaction, appear, if we look merely at the form of his speech, to have been speaking for himself; but if we look at the substance of what he said we must see that what he said was said for his father and not for himself.

That the contract actually made in this case required the borrower to pay more than legal interest is free from all doubt. But suppose we say that the contract in this respect was unauthorized, and that the lender never meant or consented that his agent should place himself in a position where he would be under a very powerful temptation to betray him; then the lender was bound (according to one of the best established and most salutary principles of the law of agency) as soon as the fact, that his agent had transcended his authority and committed a fraud against him, came to his knowledge, to repudiate the contract and disavow it *in toto*. The moment a principal obtains knowledge that his agent has, in pretending to deal for him, exceeded his authority, the law calls upon him to act. He cannot toy with the situation; he must either own or disown his agent's act, and he must do so *in toto*; he cannot ratify part and repudiate the rest. In the language of *Judge Story*: "He must adopt the whole or none. A ratification of part, with full knowledge of all the material circumstances, operates as a confirmation of the whole." *Story, Agency*, § 250.

Now, while this is a well established rule of almost universal application, I am obliged to add that it seems to be authoritatively decided that contracts of the class under consideration do not fall within its operation, but that a lender may (where his agent has, without his knowledge and against his will, stipulated for the payment of a bonus to himself as a condition of the loan, and where it satisfactorily appears that the lender was free from the least intention to violate or evade the law against usury) enforce that part of the contract which he intended should be made and repudiate the rest. The leading case on this subject is *Condit v. Baldwin*, 21 Barb. 181; *S. C.* 21 N. Y. 219.

The doctrine established by this case has been followed in New York in *North v. Sergeant*, 33 Barb. 850; *Fellows v. Comrs. of Oneida*, 36 Barb. 655; *Bell v. Day*, 32 N. Y. 165; and by the Court of Errors and Appeals of this State in *Muir v. Newark Soc. Inst.* 1 C. E. Green, 537.

This doctrine was not adopted by the Court of Appeals of New York without a struggle; and since its adoption it seems to have been conceded that its soundness could not be defended; but it was adhered to in *Bell v. Day*, simply on the ground that it was better that

the law on such a subject should be considered settled than that it should be settled exactly in conformity to correct principles. In the case last mentioned, a majority of the judges who heard it were convinced that the doctrine was unsound, but two of them, *Chief Judge Denio* and *Judge John K. Porter*, nevertheless, voted to adhere to it on the ground of *stare decisis*, and it was thus maintained. But the law, so far as this court is concerned, must be considered settled.

The rule, then, to be applied in the solution of the case, under the view last stated, is this: If the \$5,000 was taken without the knowledge and against the will of the lender, he, notwithstanding the fact that the contract of loan was in fact usurious, is not affected by its illegality, and may enforce his mortgage; but if, on the contrary, the \$5,000 was taken with his knowledge, then he was a participant in the illegal exaction and should be required to bear its penal consequences.

The proofs leave little room for doubt that the lender knew, before he advanced the money, that a bonus was to be paid for the loan. The son says that his father knew that he was in the habit of charging fees or commissions for procuring loans, but his father did not know how much he received in this case. He does not, however, say that he did not tell his father how much he was to receive.

When the lender and borrower suspended their negotiations and the lender sent the borrower to his son, it will be remembered that the only part of the contract which was incomplete was that which should provide a method by which the lender should be reimbursed for the loss he would sustain on the sale of his securities. The son made that part of the contract. Did not the father want to know what it was? Would he ever have consented to make the loan until he knew? Or suppose we say that the father's intention, when he sent the borrower to his son, was that his son should negotiate the whole contract, arrange all its parts; still it would be necessary for him, in order to raise the money, to sell his securities and thus incur a loss, and he would, therefore, still be in a position where he would be naturally anxious to know how he was to be reimbursed, and unwilling to furnish the money until he had satisfactory information on that subject. There can be no doubt that he knew. His own conduct furnishes a very strong evidence on this point.

There is no dispute in the evidence that immediately after the father laid the last \$15,000 of the loan on his son's table, he left the room where the business was being transacted and went into the adjoining room, and that the door between the two rooms was closed. The mortgagor's bookkeeper says that the father remained in the adjoining room until the business was completed, and that he found him there when he went out; while the son says that he did not see his father again after he left the room until near the close of the day. There is no dispute, however, that he left. Now, why did he leave? His son, it is true, was there to represent him and to do for him whatever was necessary to be done; but an important contract involving \$20,000, to which he was a party, was in course of execution and at its

most interesting point; at the point where the money was to be handed over and the securities delivered and the final words spoken; he had no business or duty which called him elsewhere; he had a right to be in the room where the business was being transacted; his interest, as well as his curiosity, would naturally make him desire to be there; but he went away, and as soon as he was placed in a position where he could neither see nor hear what was done, one fourth of the sum secured by the mortgage he had just taken was paid to his son, as a fee for advising him to make the loan. Can there be a doubt in the mind of any person at all familiar with the motives which control human conduct why he went away? I have none.

The proofs convince me that the contract, on which the mortgage sought to be foreclosed is founded, was usurious; and therefore the defense must prevail.

SUPREME COURT.

ATLANTIC CITY WATER WORKS CO. v. ATLANTIC CITY.

1. Under the provision of the charter of Atlantic City authorizing the City to provide by ordinance "for a supply of water for said City," the City is **empowered to contract to pay a specified sum annually for a series of years for the use of water for fire purposes.**
2. The power of the City to contract for a water supply is **not limited to contracts for one year only**, by a subsequent provision of the charter empowering the City to raise by tax "from year to year" money to defray the expense of supplying the City with water.
3. A contract made by a city, under an ordinance which has not been annulled and which is not *ultra vires*, is **obligatory at law.**
4. It does not necessarily follow that, because a contract entered into by a city calls for payments *in futuro indefinitely*, such obligation was in excess of the limits of expenditure imposed upon the common council.

(Decided October 20, 1886.)

ACTION of covenant. Judgment for plaintiff.

The questions presented are stated in the opinion.

Mr. S. H. Grey, for plaintiff.

Messrs. Slape & Stephany, for defendant.

Beasley, Ch. J., delivered the opinion of the court:

This is an action of covenant founded upon articles of agreement entered into by the plaintiff and defendant, whereby the plaintiff covenanted to supply Atlantic City with water, in consideration of certain privileges granted by the municipality, and its stipulation to pay a specified sum annually for the use of the water

in the extinguishment of fires. The contract was to continue as long as the Company should comply with its obligations.

The declaration sets out this agreement in full, and assigned as a breach the nonpayment of sundry sums of money alleged to be due for water supplied to a number of fire hydrants which had been erected for the use of the City. A demurrer to this declaration was put in.

The incapacity of Atlantic City to enter into the contract stated in the declaration was the principal objection pressed upon the argument on the part of the defendant. It was insisted that so far as it related to Atlantic City the agreement forming the basis of the suit was an act *ultra vires*. But this contention, manifestly, is not sustainable. The charter of the City, granted in the year 1866, declares in express terms that the common council of the City shall have authority to provide by ordinance "for a supply of water for said City;" and in the present instance an ordinance was duly passed and the contract in dispute entered into in pursuance of its provisions.

Nor is it perceived how the general authority thus given is in anywise restricted by the eighth clause of this charter as was contended for by counsel. That section is in these terms, viz.: "That it shall be lawful for the city council of said City, by ordinance, to order the raising and cause to be raised by tax from year to year such sum or sums of money as they shall deem expedient for defraying (among other things) the supplying the said City with water." It was argued that inasmuch as the power of taxation was authorized to be used annually, for the purpose of supplying the City with water, thereby a limitation was implied; and that the municipal authorities could not make a contract on that subject to continue for a longer term than a year.

But the authority to provide water for the public is given to the common council by a previous section of this charter; and consequently, the clause just recited has not the restrictive effect ascribed to it. The power to raise money annually is quite as consistent with an agreement calling for annual payments through a series of years as it is with an agreement existing but for a single year. The construction claimed would debar the City from entering into any contract on any subject whose performance would endure beyond a twelve month. Most, if not all, municipal charters have a similar provision for annual taxation; and it has never been suggested that such a clause constituted a limitation on the power of the corporate body to make contracts.

It may be further remarked that the section, part of which has been above quoted, bestows upon the council the right to borrow money for all the purposes for which it is authorized to raise money by tax. So that it is apparent that an unlimited authority to obtain from loans the funds requisite for the performance of this contract originally existed in this City.

In the next place it was urged that the contract in question is perpetual, it being asserted that the City had not the capacity to bind itself for an indefinite period. In the formulation of this proposition the counsel of the defendant somewhat overstated the force of the contract referred to, for in point of fact it has not nec-

essarily indefinite extension in time; as by one of its clauses the City is empowered to put an end to it, whenever so minded, by a purchase of the works of the plaintiff.

But waiving this, the conclusive answer to the position is that the power to provide the City with a supply of water has been conferred by the Legislature upon the common council, in an unqualified form, and that the court has no competency to circumscribe such a grant. It is true that if the ordinance warranting the making of this contract was an act of gross indiscretion this court, by force of its prerogative to supervise corporations of this class, might (such ordinance having been brought before it by *certiorari*) have adjudged it to be invalid. But this ordinance has not been annulled; and not being an act *ultra vires*, the contract founded upon it is obligatory in law.

Finally, it was insisted that this covenant was illegal for the reason that it contravenes the supplement to the Crimes Act passed in 1876 (P. L. 1876, p. 16) which prohibits any board of aldermen or common council from incurring obligations in excess "of the appropriation and limit of expenditure provided by law for the purposes respectively of any such board."

Even upon the assumption that the provision referred to be applicable to the stipulations of a contract of this kind, the exception cannot prevail, inasmuch as the facts upon which the question depends are not present in this record. It does not follow because this covenant calls for payments *in futuro* indefinitely, that, of necessity, such an obligation was in excess of the limits of expenditure that the common council could not legitimately transcend. The court cannot assume, in the absence of an averment to that effect, that such was the state of affairs. For anything that appears in this record moneys may have been in hand, or an ordinance in existence authorizing the raising of funds, adequate to the disbursements required by this contract.

The plaintiff is entitled to judgment.

STATE, Cornelius C. VAN REYPEN,
Prosecutor,
v.

Board of Public Works of JERSEY CITY,
Mayor and Aldermen of Jersey City, *et al.*

- *1. The title of the members of the Board of Public Works of Jersey City cannot be questioned on a *certiorari* to review the proceedings of the Board.
2. Parties interested are not legally entitled to a hearing before the board of finance and taxation of Jersey City, upon the question whether that Board shall concur in a resolution of the Board of Public Works ordering a street improvement.

*Head notes by DIXON, J.

454

(Decided October 18, 1886.)

ON *certiorari* to review proceedings for a street opening. *Proceedings affirmed.*
Argued before Depue, Reed and Dixon, JJ.
Mr. John Linn, for prosecutor.
Mr. John A. Blair, for defendants.

Dixon, J., delivered the opinion of the court: This writ of *certiorari* is directed to the Board of Public Works of Jersey City, the Board of Finance and Taxation of Jersey City, and the Mayor and Aldermen of Jersey City, and requiring them to certify their proceedings for the opening of Pavonia Avenue from Tounelle Avenue eastwardly through the property of the prosecutor.

The first reason assigned for reversal of these proceedings is that the Board of Public Works does not legally exist. The argument presented in support of this reason is that the statutes concerning legislative commissions, which were approved March 6, 1877 (P. L. 1877, p. 54), and February 26, 1878 (P. L. 1878, p. 28), abrogated the previously existing mode of appointing the members of this Board by the Senate and General Assembly and did not constitutionally substitute any other method of appointment.

This argument involves an inquiry which cannot be made in the present controversy. It concedes that in legal theory there is such an entity as the Board of Public Works of Jersey City, but insists that the persons who assumed the functions of such a board had no legal authority for so doing. This is the oft repeated but always futile attempt to question collaterally the title of the *de facto* incumbents of public offices. If the Legislature had evinced a purpose to abolish the Board with all its powers, instead of a mere design to do away with a statutory mode of selecting its members, a very different question would now be raised; but we have found no evidence of such an intention.

This reason is insufficient.

The other reason alleged is that the Board of Finance and Taxation concurred in the resolution of the Board of Public Works for the opening of the avenue, without giving the prosecutor due opportunity to be heard in the matter. We think that the Board of Finance and Taxation was not under legal obligation to afford to the prosecutor any hearing whatever. The statute regulating the subject is the supplement to the city charter approved March 27, 1874 (P. L. 1874, p. 504, § 9), which substitutes the concurrence of the Board for the approval of the Mayor.

It has never been considered that parties interested had a legal right to a hearing before the Mayor, when resolutions affecting them were submitted to him; and we perceive no ground for claiming such a right in the fact that this Board is to act in his stead. The hearing to which parties are entitled on general principles is secured to them by statute before the Board of Public Works; but neither legislative enactment nor abstract justice requires more.

The proceedings brought up must be affirmed, with costs.

MARYLAND.
COURT OF APPEALS.

ROSENTHAL, *Appt.*,
v.
POOLE.

Money paid by an heir at law of an intestate, upon false representations, for services supposed to have been rendered in establishing his claim, concerning which there was no ground for litigation, held, on the facts, to be recoverable.

(Decided—1886.)

A PPEAL by defendant from a decree of the Baltimore City Circuit Court, in favor of complainant in a suit to recover back money paid under false representations, and to have a release canceled. *Affirmed.*

The facts are stated in the opinion.

Mr. Julian I. Alexander, for appellant.

Mr. John E. Semmes, for appellee.

Robinson, J., delivered the opinion of the court:

There is not much in this appeal, either in its legal aspects or in any other aspect, to commend it to the favorable consideration of the court. The facts out of which the controversy arises may be briefly stated as follows:

Thomas Dorney, a lunatic, died in the early part of the year 1882, leaving an estate of about \$100,000. Before his death, Rosenthal, the appellant, who was his committee, made a contract with one Noah Lemmon and five other persons, claiming to be the heirs of Dorney, by the terms of which Rosenthal was to establish their right to the estate, and in consideration of his services was to receive 15 per cent on the assessed value of the estate; in other words, they were to pay him \$15,000 if he succeeded in establishing their claim to the estate.

Shortly after the execution of this contract Dorney died, and some litigation followed as to who were his heirs and next of kin, which resulted, however, in favor of the parties represented by Rosenthal; and letters of administration on Dorney's estate were granted to Rosenthal, Caroline F. Carter, one of the distributees, and Francis Carter, her husband.

In January, 1882, a bill was filed for the sale and division of Dorney's real estate among the six distributees represented by Rosenthal. In all these proceedings the rights of Poole, the appellee, who lived in Pennsylvania and who was a half brother of Noah Lemmon and one of the heirs of Dorney, were entirely ignored. In June, however, while the bill for the sale and division of the real estate was pending, he made a visit to his half brother, Noah Lemmon then living in Baltimore, and while there made some inquiry about Dorney's estate, the reply to which was very indefinite, and without the slightest intimation by Noah of the proceedings for its sale and division between himself and others, to the exclusion of Poole. In the fall of that year, Carter, the husband of one of the distributees, and himself

one of the administrators of Dorney, made a visit to Poole, in company with Mr. Cox, a lawyer of Washington. Carter told Poole that he was one of Dorney's heirs, and as such was entitled to one seventh of his estate; that Noah Lemmon and others had filed a bill to divide the property among themselves; that they denied his, Poole's, relationship to Dorney, and there would be great difficulty in establishing his claim to the estate. A great deal more was said, which it is unnecessary to repeat; it is sufficient to say that Carter induced Poole to sign a contract agreeing to give him, Carter, one third of Poole's share in consideration of services to be rendered by Carter in making good Poole's claim as one of the heirs at law of Dorney.

Shortly after the execution of this contract, Cox, the attorney, wrote to Rosenthal, stating that he represented Poole, who claimed a one seventh interest in Dorney's estate. A petition was also filed by Cox in the orphans' court, asking that letters of administration of Dorney's estate be granted to Poole, as the oldest male heir and, therefore, the party entitled under the law. This application was resisted by Rosenthal and resisted, too, upon the ground that there was no relationship of any kind between Poole and Dorney.

On the 11th of December, while this application was pending before the orphans' court, Rosenthal, in company with Lemmon, made a visit to Poole. What took place between them at that time, we shall not now stop to consider. One thing is certain: on the evening of that day Rosenthal and Lemmon returned to Baltimore, and with them came Poole. On the next day, December 12, Rosenthal appeared in the orphans' court, and admitted that Poole was one of the heirs of Dorney and, as such, entitled to letters of administration. In fact, he admitted everything set forth in Cox's petition to be true, all of which he had but a few days before denied. Now, what do we find next? On the same day, letters of administration on Dorney's estate were granted to Poole and Rosenthal, and at the same time a contract was signed by Poole, in which he relinquished all claim to commissions on the estate and agreed to pay Rosenthal 15 per cent of his share of the property. Rosenthal proceeded accordingly to settle the estate, and for his services charged and was allowed \$15,000, one seventh of which, \$2,142, was deducted from Poole's share.

In the meantime suit was brought against Poole by Carter, on the contract made with him and which Poole at the instance and by the advice of Rosenthal had repudiated. After testimony had been taken the suit was compromised by the payment of \$2,500 to Carter by Poole, besides which Poole was obliged to pay \$400 as counsel fee, one half of which was received by Rosenthal. Poole, it thus appears, had paid over \$5,000 for services supposed to have been rendered by Carter and Rosenthal in establishing his claim to one seventh of this estate; a claim about which there never was any ground for litigation and about which there never was any contention after Rosenthal's visit to Poole.

The contract with Carter is not before us in this appeal; we are now dealing with the con

tract between Poole and Rosenthal, and under which Rosenthal deducted \$2,142 from Poole's portion of the estate.

And in dealing with this contract, we deem it unnecessary to state in detail what took place between the parties when it was made. Poole was an old man, over seventy years of age, very poor, unable to read or write; and it is enough to say that the testimony shows, beyond all question, that Rosenthal knew at the time all about Poole's contract with Carter, and further that Poole was induced to sign the agreement under which Rosenthal deducted the \$2,142 upon the faith of representations made by Rosenthal and Lemmon, which representations were in fact untrue. We forbear further comment upon the testimony, except to say a court of justice will not permit one to reap a benefit under a contract made under circumstances such as this record discloses.

Decree affirmed.

Daniel MYERS *et al.*, Appls.,

v.

STATE of Maryland.

1. The statute (Acts 1874, chap. 483, § 81) requires tax collectors "to pay at such times as the law shall direct;" the bond given by a collector provided "for payment at such times as the county commissioners shall by law direct." Held, that the variance was immaterial.
2. The provision in the bond of a tax collector for Carroll County, that he shall "pay to the county commissioners or their order" money which he shall receive, is not impaired by the Act of 1872, chap. 232, making it the duty of the treasurer of Carroll County to "receive the proceeds of all taxes levied in the county." Payment to the treasurer is, in law, payment to the commissioners.
3. The facts that a tax collector reappointed to office was, at the time, in default under a former appointment, and that the sureties on his new bond were not notified by the appointing authorities of his existing defalcation, will not avail as a defense to the sureties.
4. A tax collector will not be relieved from liability to account for taxes collected by him, by the omission of other officials to observe the statutory requirements that the assessment account shall be kept in a separate book, and that moneys for educational purposes shall be levied separately.
5. A payment by a tax collector, of money collected by him on the taxes for one year, in discharge of the taxes for previous years with which he is chargeable, is a breach of his bond.
6. Sureties on an official bond are estopped from denying the official capacity of their principal.

(Decided—1886.)

A PPEAL by defendants from a judgment of the Carroll Circuit Court, in favor of plaintiff in an action on a tax collector's bond. *Affirmed.*

The facts are stated in the opinion.

Messrs. William P. Maulsby, C. T. Reifsnider and C. E. Fink, for appellants.
Mr. D. N. Henning, for appellee.

Bryan, J., delivered the opinion of the court:

This action was brought by the State, on a bond executed by Daniel Myers and the other appellants.

At the trial in the circuit court evidence was offered on the part of the plaintiff to show that Myers had been collector of the county taxes in the third election district of Carroll County from May or June, 1872, continuously up to the 11th day of May, 1881; that he was on that day appointed by the county commissioners to collect the state and county taxes for that year; that when he was appointed he was allowed a salary of \$200 a year; that on the 26th of June the rate of taxation was fixed by the county commissioners; that afterward the clerk of the county commissioners, who was also the county treasurer, delivered to Myers a book which contained a list of the taxpayers of said district, No. 3, with a statement of their assessable property, which book was made up by the said clerk by computations or calculations of his own from data contained in a book labeled on the back "Assessment Book 1876, District No. 3"; that the clerk took from Myers a receipt, dated June 7, 1881, which stated that he had received of the county commissioners of Carroll County a copy of the property in the third election district of said county, assessable for county purposes, amounting to the sum of \$1,027,198, on which amount a tax of 50 cents (.975 remitted) on each \$100 valuation was levied by said commissioners for county and school purposes, amounting to the sum of \$5,140.87, etc.

Evidence was also offered tending to show that the date of the receipt was by mistake written June, instead of July; and it was also shown that on the 14th of November, 1883, Myers had confessed a judgment on the bond in suit for the sum of \$2,448.28.

Judgment had been confessed by all the obligors of the bond; but subsequently it was stricken out as against the sureties, who are now the appellants, and the cause proceeded to trial against them. They set up a number of defenses to the action. We find in the record two demurrers in their behalf, and a large number of pleas and prayers for the instruction of the jury.

It is maintained that the bond is void because it does not pursue the form required by the statute. It recites that Myers had been duly appointed, by the county commissioners for Carroll County, collector of the county taxes for the year 1881, imposed or to be imposed by the said county commissioners for Carroll County on the assessable property in the third election district of said county. And the condition is in these words:

"If the above bounden Daniel Myers, appointed collector as aforesaid, shall well and faithfully execute the office of collector of the county taxes for Carroll County as aforesaid,

and the several duties required of him by law, and shall well and truly account for and pay to the county commissioners for Carroll County, or their order, the several sums of money which he shall receive, or be answerable for by law, at such times as the county commissioners shall by law direct, then the above obligation to be void; otherwise to be and remain in full force and virtue in law."

The form of the condition substantially agrees with requirements of the statute. Acts 1874, chap. 483, § 81.

The principal variance which has been suggested is that the statute requires the collector to account for and pay at such times as the law shall direct; whereas, the bond in suit provides for payment at such times as the county commissioners shall by law direct. The statute was made for a great public purpose, which might not be defeated by minute and unsubstantial objections.

It is also said that as the Act of 1872, chap. 332, provides for the election of a treasurer for Carroll County, and makes it his duty to receive the proceeds of all taxes levied in the county, the collector could not lawfully comply with the condition of this bond. The Act is local, and applicable only to Carroll County. The treasurer is required to be clerk to the county commissioners, and it is made his duty "to receive and pay over, according to the directions of law or the order of the county commissioners, the proceeds of all taxes levied in said county."

Previous to the passage of this Act the county commissioners were invested by statute with the "charge of and control over the property owned by the county;" and since the passage of this Act the Legislature, by the Act of 1874, chap. 411, amended and re-enacted the statute, and preserved to them their powers in this respect. It is clear that the Act of 1872, for the appointment of a treasurer, cannot operate so as to impair or diminish them. He is the receiver and custodian of the money arising from taxes for the lawful purposes of the commissioners.

The Act of 1874, chap. 483, § 81, prescribed the same condition for a collector's bond as was required before the Act was passed for the appointment of a county treasurer. We are therefore required to hold, in view of this legislation, that payment to the treasurer is in law payment to the county commissioners.

Another ground for the avoidance of the bond is the alleged fraud of the commissioners in obtaining it. It appears that at the time Myers was appointed collector for the year 1881, he was a defaulter in considerable sums for taxes levied in 1880 and in previous years; and it is argued that it was the duty of the commissioners to inform the sureties of these defaults before the bond was executed, and that their failure to do so was a fraud which vacated it.

The question is not whether the bond would be rendered null and void by deception or by misrepresentation of the facts on the part of the county commissioners. The twenty-fourth plea explicitly set forth that the county commissioners fraudulently concealed the defalcations of Myers from the defendants, and that they were thereby induced to execute the bond. By overruling the demurrer to this plea, the court

below decided that it set forth a good defense to the action.

It is further maintained that an active duty rested upon the commissioners to give this information to the sureties; and cases have been cited in which it was held that the sureties were entitled to receive from the obligee a full and frank disclosure of such matters. This case must not be compared to a contract between private individuals, where one person is in the employment of another, and sustains towards him a confidential relation, by virtue of which sureties might infer that he was regarded by his employer as a person of integrity. Nor should it be likened to a case where the bond binds the sureties to a responsibility for defaults which have already occurred. The commissioners are public officers, who are authorized to appoint another public officer, and are required to take from him a bond for the faithful performance of his duty in the future. The sureties know the extent of the obligations which they incur by executing the bond, and they must determine for themselves how far they are willing to trust to the integrity of their principal. The commissioners are bound by their public duty to appoint to office persons of capacity and honesty. For a delinquency in this particular they are not, however, responsible to the sureties on the official bond.

The rights, duties and obligations of all parties in this transaction are settled by the law, and upon that they must stand or fall. It is not made a requisite to the validity of the bond that the commissioners should give any information to the sureties; and it would be an unreasonable construction to interpolate such a clause in the statute.

Before considering the other defenses set up in discharge of the bond, it is necessary to consider the statute under which the taxes were levied.

By the forty-first section, the clerk of the county commissioners is required to keep "an accurate account of the assessment or rate of taxes assessed upon taxable property of the county and how such assessment is disposed of, in a book to be kept for the purpose alone;" and within ten days after such assessment he is required to deliver to the collector a fair copy thereof, or a copy of so much thereof as it shall be his duty to collect.

By the forty-second section it is made the duty of the collector to proceed to collect taxes within thirty days after receiving this copy, and to pay the county taxes to the county commissioners, or their order, within six months; and it is also directed by the same section that all moneys levied for educational purposes shall be levied separately and distinctly from the other items of taxation, and a list thereof provided for the school commissioners of the county.

By the eightieth section it is enacted that if any collector shall fail to account for and pay over the money he has collected, or ought to have collected, within the time required by law, his bond may be put in suit and he shall be chargeable with interest from the time the money ought to have been paid.

The evidence shows that the book containing a statement of the assessment which was delivered to the collector was made up by calcula-

tions and computation from data contained in another book, and was not a copy from some other statement previously made and entered in a book kept for that purpose alone. It also shows that the money for educational purposes was not levied separately from the other items of taxation. When we consider the vital importance of the power of taxation, and its indispensable relation to all the operations of government, we cannot infer that the Legislature intended to make the levy of the tax void, and discharge the collector from responsibility for the money received by him from taxpayers, because these matters of detail were not observed. Their omission in no way concerned the collector or affected his rights.

Evidence was offered on the part of the defendants, tending to show that Myers had collected the sum of \$5,064.86, on account of the county taxes for 1881, and had paid it over to the county treasurer, and had directed it to be applied to the credit of the taxes for the year 1881, chargeable to him. There was evidence on the part of the plaintiff, tending to show that a portion only of this sum was directed by Myers to be applied to this credit, being the amount shown by eight separate receipts given him by the treasurer when the payments were made; and that the residue of this sum was applied, by his direction, to his defalcations for previous years.

If the commissioners or the treasurer knew that the money applied to the taxes due for previous years had been collected on the levy of 1881, certainly they would have had no right to permit such application; but in the absence of any knowledge of the sources from which it was obtained it was difficult to see how they could have prevented Myers from applying it to his indebtedness for any year which he might name. When the money was in his possession, there was nothing to identify it or to distinguish it from other funds under his control or rightfully belonging to him. The obligation assumed by his sureties was that he should pay the money in discharge of the tax levied, within the time required by law. If he paid it in discharge of previous taxes, it was as much a breach of his bond as if he had retained it in his own pocket. We think the law on this point is correctly stated in *Colerain v. Bell*, 9 Met. 499, and in *Gwynne v. Burnell*, 7 Cl. & Fin. 572.

Without enumerating the numerous rulings of the circuit court on the questions which we have been discussing, it is sufficient to say that they are in accordance with the views which we have expressed.

There are, however, other questions in the record. It is maintained that there is a variance between the bond described in the declaration and the one set out on oyer. There is a different collocation of phrases in the two instances; but the legal meaning and effect of the contract is the same.

The twenty-fifth plea is bad on demurrer, inasmuch as it is a special plea which in effect amounts to *non est factum*. Some of the pleas which were overruled are distinguishable from those which were sustained, by scarcely perceptible shades of difference. We think that the defenses sought to be made by them were clearly and distinctly made by the pleas which

were held to be good. Some of the pleas held bad on demurrer violate settled rules of proceeding. For instance, the first plea alleges general performance; whereas, the breach being set out in the declaration, it ought to have traversed, or confessed and avoided it. Others seek to make defenses from which the defendants were estopped. After the defendants signed this bond they could not deny that Myers was collector, or that he was answerable as collector, or that there were county commissioners of Carroll County. *Billingsley v. State*, 14 Md. 369.

The first exception was taken to the ruling by the court that a notice to produce certain receipts was sufficient. If parol evidence had been offered and admitted, of the contents of these receipts, we would have been required to review the action of the court; but the record shows that they were produced by one of the counsel for the defendants, and they were offered in evidence. We do not suppose that it is contended that they were not admissible.

In the sixth exception the court allowed the plaintiff to ask his witness a question which was leading in its form. Leading questions are, in general, objectionable and not to be permitted; but sometimes they may be properly used for the purpose of bringing the mind of the witness to the point about which it is desired to interrogate him. There are, of course, other occasions when they ought to be allowed. We think that it may safely be left to the discretion of the court conducting the trial to decide when they should be asked.

We have not found it necessary to take up the very numerous rulings in this case, one by one; but we have given them all deliberate consideration, and find no error which works an injury to the appellants.

The rule laid down in the plaintiff's sixth prayer for the computation of interest is less favorable to the plaintiff than it ought to have been. Interest ought to be calculated on the principal sum due, and the payments ought first to be applied to the extinguishment of the interest then due, and what remains ought to be applied to the reduction of the principal. This mode of calculating the amount of the indebtedness would produce a greater sum than the rule stated in the sixth prayer.

Judgment affirmed.

Martha Ann TAYLOR, by her Next Friend,
et al., Appts.,
c.

William BROWN, Sr., *et al.*

1. To justify the supreme court in reversing a judgment for the erroneous exclusion of evidence, it must appear that such exclusion worked an injury to the appellant.
2. Where the issue is as to whether property, undertaken to be disposed of by a will made by a married woman, belonged to the testatrix or to her husband, the will is not admissible as evidence against the husband, unless he, with full knowledge, acquiesced in the disposition made by the wife.

3. A provision in a will, by which the testatrix undertakes to dispose of property as her own, being a declaration in her own favor, is not admissible upon the question of ownership of the property, even in rebuttal of declarations made by her, in her lifetime, against her interest.
4. There must be an express promise to repay, to create a liability on the part of a husband for money belonging to his wife, appropriated by him with her consent.
5. If money arising from real estate of a married woman is paid to her husband with her knowledge and she recognizes it as belonging to him and it is deposited in a bank in their joint names, payable to either of them or to the survivor; then, in the absence of an express promise by the husband to treat the money as the wife's separate estate, he has the right, on her death, to draw it from the bank.

(Decided—1886.)

APPEAL from a judgment of the Court of Common Pleas of Baltimore City, in favor of defendants in an action by devisees to compel defendants to return certain moneys as part of the estate of testatrix. *Affirmed.*

This action was commenced in the Orphans' Court of Baltimore City, and issues sent to the Common Pleas for trial. At the trial in the court of common pleas a verdict was rendered for the defendants, and plaintiffs appealed to this court.

In the year 1865 a lease for ninety-nine years renewable forever was made to Mrs. Brown, of a lot of ground in the City of Baltimore on Howard Street. Subsequently certain buildings were erected upon this lot which were partially paid for by a mortgage upon said property given by Mrs. Brown. The property as thus improved was subsequently taken by the city in the opening of Park Avenue; and the net amount, after paying the mortgage, fees and expenses, of \$17,882.90 was paid over to Mrs. Brown July 29, 1871, by R. W. Templeton, who had represented the property in the condemnation proceedings. This payment was made by a check drawn in her favor by Templeton on the banking house of Johnson Bros. & Co. It was delivered to her by Templeton at his office in the presence of her husband.

On the same day Mr. and Mrs. Brown went together to the said banking house with the check, and received from it a check drawn to her order on the Commercial & Farmers' Bank, with which check they went together to the latter bank where she received the money and there delivered it to her husband. He wrapped the money up and about two hours afterwards in company with a friend took it home, counted it in the presence of his wife and friend, and locked it up in his safe.

Out of the money in this safe the sum of \$8,076.92, was expended in the purchase of a ground rent and certain leasehold property which were conveyed to the wife as her sole and separate estate. Another part thereof, the sum of \$2,000 was invested in her name upon a mortgage of certain property executed to her

by John Creagh, which was subsequently sold under the mortgage and the proceeds paid over to her by J. Sellman Shipley; and another part thereof, to wit: the sum of \$5,000, was deposited in the Eutaw Savings Bank of Baltimore, September 30, 1871, in the joint names of Sarah M. Brown and William Brown. Opposite their signatures on the bank book in the handwriting of the officer of the bank is the following entry:

"And to the survivor of them, subject to the order of either;" which entry, according to the long established usage of the bank, was made in all joint accounts for the convenience of the bank, whether the depositors did or did not request it. The customary pass book upon which a similar entry was made by the bank was issued in their joint names, upon which various deposits were credited from time to time and by which it appeared that various sums were withdrawn from the bank during Mrs. Brown's lifetime, sometimes being receipted for by William Brown, and sometimes by his wife.

February 27, 1875, a few days after Mrs. Brown's death, this account was closed by the withdrawal of the sum of \$6,538.07 by William Brown, which is one of the sums of money in dispute.

The plaintiffs offered to prove by William J. Taylor, the husband of Martha Ann Taylor, one of the plaintiffs, by whom she sues as her next friend, that shortly after the deposit of \$5,000 was made in the Eutaw Savings Bank, or a few days and not more than a week thereafter, the witness had a conversation with Mrs. Brown in the presence of her husband William Brown, one of the defendants; in which conversation she explained to the witness why her husband's name had been placed upon the pass book at the Savings Bank, and that her husband, who was present and heard the explanation, did not say anything or make any objection to it. The court, upon objection made by the defendants, refused said offer of proof, which is the ground of the plaintiffs' first exception.

The defendants, in order to show title in William Brown in his individual right to the sums of money in controversy, were allowed to put in evidence, by William Brown, Sr., and other witnesses, the declarations of Mrs. Brown made to them on different occasions, to the effect that all the money had been earned by her husband and none by her, and that it was all his to do as he pleased with; and were also allowed to prove by Thomas C. Butler, a lawyer, that, some three or four months before Mrs. Brown executed her last will and testament, which was prepared for her by J. Sellman Shipley, and executed by her in his presence and in the presence of her husband, William Brown told the witness that his wife wished to consult him about making a will, and took him to her house on Dalton Street, and she then and there told the witness while talking about the will "that the money was all her husband's and that she intended him to have it." The will was then offered in evidence by the plaintiff in rebuttal and, upon objection made was refused by the court; which ruling forms the ground of plaintiffs' second exception.

At the request of defendants the court granted the following instructions:

"If the jury find from the evidence that the

defendant, William Brown, with the knowledge and consent of his wife, came into the possession of any of the moneys of his wife, then, in the absence of an express promise to return or to account to her for the same as her separate property, the law does not raise any implied promise from such a taking and using to repay the same.

"Even if the jury find from all the evidence in the cause that the sum of money which was on deposit in the Eutaw Savings Bank at the time of the death of Sarah Ann Brown was part of the price paid by the city upon property taken under condemnation proceedings, and that the title to said property stood in the name of Sarah Ann Brown, his wife; nevertheless, if they further find that with her consent and full knowledge the same was received from the city and paid over to her husband, and was taken possession of by him, and that she recognized the money to be rightfully his, and acquiesced in his assumption of dominion over it; and that afterwards the same was deposited in said bank in their joint names, payable to the order of either of them, or to the survivor; then in the absence of an express promise on his part to treat the same as her separate property, he had the right to draw the same after her decease as his own money, and the verdict of the jury must be for the defendants on the first issue.

"That it is a question of fact to be determined by the jury from all the facts and circumstances, and from the whole course of the conduct and dealings between the husband and wife in connection with the declarations, acts and admissions of the wife, relating to the property which stood in her name, and to the beneficial interest of her husband therein, and to his efforts in acquiring the same (if they shall find any such acts, declarations or admissions), whether the said William Brown got the possession and control of the sums of money mentioned in the declarations, or either of them, with the knowledge and consent of his wife; and if with her knowledge and consent he took possession of them or either of them, and used and appropriated it as his own; then for any such sums as he so took and appropriated with her knowledge and consent, the plaintiffs are not entitled to recover, unless and only in respect of such sum as they shall find that he expressly promised to repay, or to appropriate to her separate use; and that the law does not imply, from the husband's using the wife's money for his own purposes with her consent, a promise to refund; nor is the relation of debtor and creditor thereby established between them, as it would be under the same circumstances between other persons."

Messrs. E. O. Hinkley and Benjamin Kurtz, for appellants:

William J. Taylor, the husband of Martha Ann Taylor, and through whom she sues as her next friend and through whom the offer of proof of the declaration of testatrix as to the reason why the husband's name was placed upon the bank book was made, was a competent witness.

Trahern v. Colburn, 63 Md. 99.

The offer was admissible as part of the *res gesta*. The presence of the husband's name on the bank book, and the bearing of this circumstance upon his right to the money, in connec-

tion with other evidence in the case, was the principal fact; and his wife's explanation of it, although given shortly afterwards, was admissible.

Graves v. Spedden, 46 Md. 536; *Handy v. Johnson*, 5 Md. 463; *Kobb v. Whitely*, 3 Gill & J. 189; *Central Bank v. Copeland*, 18 Md. 318; 1 Whart. Ev. § 262; *Whiteford v. Buckmeyer*, 1 Gill, 127; *Nusbaum v. Thompson*, 11 Md. 557; *Cooke v. Cooke*, 43 Md. 522.

The offer was admissible as an admission by a party to the record by acquiescence. The husband was present when the explanation, which was in derogation of his title, was made; and by his silence assented to it.

Batturs v. Sellers, 5 Harr. & J. 119; *Hayslop v. Gymer*, 1 Adolph. & E. 162; *Knight v. House*, 29 Md. 194; 2 Whart. Ev. § 1136; *Turner v. Brown*, 6 Hun, 338; *Green v. Harris*, 8 Ired. (N. C.) 210.

The offer was admissible against both defendants, because it was an admission by acquiescence by the real party in interest and who, the defendants contend, was the owner of the property.

1 Greenl. Ev. §§ 180, 181; 1 Phil. Ev. § 486; *Dent v. Dent*, 3 Gill, 482; *Davis v. Calvert*, 5 Gill & J. 269.

It was admissible also in rebuttal of the husband's evidence which had been given in this case, in explanation as to why the account was opened at the bank in their joint names.

Rev. Code, art. 70, § 4.

It was admissible also as part of the *res gesta* as showing a declaration of ownership made by one deceased, while in possession and control of the property in dispute.

Garner v. Smith, 7 Gill, 1; *Smith v. Morgan*, 8 Gill, 183; *Abend v. Mueller*, 11 Ill. App. 257; *Amick v. Young*, 69 Ill. 542; *U. S. v. Labbe*, 13 Blatchf. 60; *Roebke v. Andrews*, 26 Wis. 311, 318; 2 Whart. Ev. § 1168.

Mrs. Brown's will showing that she claimed and treated the money in the Eutaw Savings Bank, referred to, as her own, and only intended to give her husband a life estate in it, was admissible to rebut the testimony of her husband and other witnesses, as to declarations made by her, at and about the time the will was executed, that the money all belonged to her husband and she intended him to have it.

Smith v. Morgan, 8 Gill, 183; *Hall v. Monroe*, 28 Md. 114; *Clark v. Wood*, 84 N. H. 452.

The exclusion of the will from the jury practically told them that Mrs. Brown died intestate, which would entitle her husband to the possession of the money without administration, under the Act of 1798, chapter 101, which was in force at the time of Mrs. Brown's death on June 12, 1874.

Hubbard v. Barcus, 88 Md. 175.

Mr. Bernard Carter, for appellees:

The issue here is whether this money belonged to testatrix's estate at the time of her death. As there is nothing to show any change of ownership after it was deposited, the question whether it was hers at the time of her death depends upon the question whether it was hers or her husband's at the time it was deposited.

Murray v. Cannon, 41 Md. 466; *Taylor v. Henry*, 48 Md. 550.

The offer of the testimony of Taylor, husband of one of the devisees was an offer of a

declaration of a person whose title to the money is the very subject in dispute, to show title in herself, as against those whom it is attempted to charge with a *devastavit* because of their failure to treat the money as hers, and is inadmissible.

2 Whart. Ev. 1168, 1214.

Nor does the fact that it was made in the presence of William Brown, and that he did not make any objection to it, furnish any better ground for its admissibility, for there is no evidence that he heard it.

1 Greenl. Ev. 197, 199.

In a suit between him and those claiming under the wife, certainly no admission of his, made before the death of his wife and therefore before he became an administrator, can bind his coadministrator.

Dent v. Dent, 3 Gill, 482; *Mangun v. Webster*, 7 Gill, 78; *Beatty v. Davis*, 9 Gill, 220; *Mason v. Poulson*, 40 Md. 365; 2 Whart. Ev. 1210; 1 Greenl. Ev. 179, 180; *Hammon v. Huntley*, 4 Cow. 498; 2 Whart. Ev. 1199, 1199 a.

Nor can the explanation or declaration be admissible as a part of the *res gestæ* of the deposit.

"Declarations, to be a part of the *res gestæ*, must have been made at the time of the act they are supposed to characterize."

Miller v. State, 8 Gill, 145.

In the case just cited, the declaration in reference to the transaction was made in the evening of the day the transaction took place; but, being the narrative of a past transaction, was rejected.

Baltimore & O. R. R. Co. v. Allison, 62 Md. 482. See also 1 Whart. Ev. §§ 259, 261; 2 Whart. § 262; 1 Greenl. Ev. §§ 108, 110.

It is a familiar principle of practice that the plaintiff is bound to offer all evidence pertinent to maintain the issue on his part in chief; but that even when not compelled to enter into evidence in chief, on any particular subject, yet if he does he must exhaust his evidence on this point.

Bannon v. Warfield, 42 Md. 39; *Brown v. Ward*, 53 Md. 356.

The attempt to dispose in the will of the money in the Eutaw Savings Bank is, at the most, but a declaration that testatrix considered it her money.

No such declaration is admissible against the defendants here, where the very issue is whether it was her property.

2 Whart. Ev. 1101, 1102.

It is a fundamental principle that where a declaration of a person on a certain occasion is put in evidence by the adversary, this only entitles the person whose declaration is put in evidence to offer all that was said on that occasion and not what was said on other occasions.

2 Whart. Ev. § 1108.

Robinson, J., delivered the opinion of the court:

The following issues were sent by the Orphans' Court of Baltimore City, to the court of common pleas, for trial:

"1. Whether the sum of \$6,588.07, which at the time of the death of Sarah Ann Brown was deposited in the Eutaw Savings Bank, or any part thereof, belonged to her estate?

MD.

"2. Whether the sum of \$2,068.63, being the proceeds derived from the sale of certain property mortgaged by John Creagh and wife to Sarah Ann Brown, was part of the personal estate?"

At the trial of these issues, evidence was offered tending to prove that both of these sums belonged to Sarah Ann Brown; that an account was kept in the Eutaw Savings Bank, in the joint names of the said Sarah and her husband, William Brown, and the survivor, and subject to the order of either; and that the sum of \$6,588.07, thus on deposit in the bank, was paid on the order of the husband after the death of his wife.

On the other hand, evidence was offered on the part of the appellees, tending to prove that the money in question belonged to William Brown, the husband; and further, that if the wife had any claim or title to the money, it was paid to the husband, and used by him with her knowledge and consent.

During the trial, the appellants offered to prove by the witness Taylor that a few days after the deposit of \$5,000 in the savings bank, he had a conversation with Mrs. Brown in the presence and hearing of her husband, in which conversation she explained to witness why her husband's name had been placed upon the pass book of the bank, and to which explanation no objection whatever was made by the husband. The \$5,000 thus deposited, was part of the sum of \$6,588.07 paid to the husband after the death of the wife; and any explanation by her made in the presence and hearing of her husband, why it was deposited in their joint names and payable to the survivor, was clearly admissible. If no objection was made by him to such explanation, his silence might fairly be construed as an acquiescence in the truth of the statement made by the wife, and we do not see on what grounds the evidence was excluded. But the bill of exceptions does not set forth the explanation, to prove which the witness was offered; and for all that appears to the contrary, the explanation may have been wholly unimportant or immaterial.

To justify us in reversing the judgment, it must appear that the evidence objected to and excluded worked an injury to the appellants. As was said in *Lawson v. Price*, 45 Md. 183: "Before we can reverse the ruling excepted to, we must be able to see that the party really has grounds for exception, and may have been injured by what was done. For aught that appears, the answer of the witness may have been more favorable to the appellant than to the appellee." So here it is impossible for us to say that the appellants were in any manner prejudiced by the ruling below, because the record does not set forth either the purport or effect of the explanation offered in evidence.

We see no objection to the ruling in the second exception. The real issue before the jury was whether the money in controversy belonged to Sarah Ann, the wife, or to her husband; and the will of the wife in which she undertook to dispose of the money as her own was certainly not admissible as against the husband. It was nothing more or less than a declaration on her part that the money belonged to her; to make it admissible it must appear that the husband, with full knowledge, acqui-

esced or consented to such disposition on the part of his wife. The record does show that the will was executed in his presence, but it does not appear that it was read in his presence or that he had any knowledge of its contents.

In *Edelin v. Sanders*, 8 Md. 118, the objection was to the admission on the part of the defendant of his testator's will, whereby he disposed of certain property as his own, and which the plaintiff alleged had been conveyed to him, the testator, in secret trust. In disposing of this objection the court [p. 181] said: "Under no circumstances was the will of William Sanders competent testimony. To allow it to be given in evidence would be but to permit a party to testify in his own case and in his own behalf." And although a party is, under our Evidence Act, a competent witness in his own case, yet upon no principle can his unsworn declaration in his own behalf, not made in the presence of the party to be affected thereby, be offered in evidence.

But it is argued that if the will be not admissible as evidence in chief, it was admissible by way of rebutting the testimony on the part of the appellees. They had given in evidence the declarations of the wife, to the effect that the money in controversy belonged to her husband. Such declarations were admissible, upon the ground of being declarations against her interest; but her declarations made at an-

other time in her own interest are not admissible by way of rebuttal.

We see no objection to the several instructions granted by the court. They presented the law of the case fairly to the jury. If the money in controversy did in fact belong to the wife as her separate estate, and was appropriated by the husband to his own use with her knowledge and consent, the law does not, from such appropriation, imply a promise on the part of the husband to repay it. To create a liability on his part there must be an express promise to repay or return the same.

Then again; although the money on deposit in the savings bank was part of the price paid by the City of Baltimore for the consideration of property belonging to the wife, yet if the same was paid by the city, to the husband, with the wife's knowledge and consent, and she recognized it as belonging to him and acquiesced in his dominion and control over it, and the money was afterward deposited in the bank in their joint names, payable to the order of either of them or to the survivor, then, in the absence of an express promise by the husband to treat the same as her separate estate, he had the right upon her death, to draw the money thus deposited as his own.

So, finding no error in the ruling of the court which will justify us in reversing the judgment, it must be affirmed.

NOTE.—A wife's consent to her husband's receiving her legacy without annexing any conditions, does not deprive her of the benefit of an agreement, under which the testator's executors pay him the legacy, whereby he promises to invest it for her sole use. *State v. Relgart*, 1 Gill, 1; 39 Am. Dec. 628; *Bowie v. Stonestreet*, 6 Md. 430; *Whitridge v. Barry*, 42 Md. 151.

The agreement by a husband to make provision for his wife, out of her share of an estate on its being paid over to him, is valid and will be enforced. *Drury v. Briscoe*, 42 Md. 162; *Oswald v. Hoover*, 43 Md. 369.

A wife may acquire separate property in equity by an agreement with her husband, without the intervention of trustees. *McKenna v. Phillips*, 6 Whart. 571; 87 Am. Dec. 438 and note. 286

The wife's legacy paid to her husband continues her property after his death where he received it under an agreement to hold it for her use; this constituted him a trustee. *State v. Relgart*, 1 Gill 1, and 39 Am. Dec. 628.

A husband who survives his wife is entitled to all her choses in action, whether reduced into his possession in her lifetime or not. 1 P. Wms. 381; 3 Atk. 527.

If he can get them without suit, his title is perfect without letters. *Whitaker v. Whitaker*, 6 Johns. 112; *Schuyler v. Hoyle*, 5 Johns. Ch. 196.

The common-law rights of a husband in the property of his wife dying intestate is not altered by statute. *Barnes v. Underwood*, 47 N. Y. 351.

[R. D.]

NEW YORK.
COURT OF APPEALS.

Abraham HEWLETT *et al.*, *Appts.*,
c.

William ELMER, *Respnt.*

The court of appeals has no power to pass upon a question of fact arising upon conflicting evidence, in an action originating in a surrogate's court and reviewed in the supreme court; but only to determine whether there is any evidence upon which the decision of the court below might fairly and reasonably stand. **Chapter 229, Laws 1883**, amending subdivision 11 of section 3347 of the Code of Civil Procedure, has not enlarged the powers of the court of appeals in this respect.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a decision of the surrogate of the County of New York, overruling objection to the probate of a will. *Affirmed.*

The history of the case and the questions presented are stated in the opinion.

Memorandum of decision below, 80 Hun, 82.

Messrs. Edward Schenck and Henry L. Clinton, for appellants.

Mr. E. L. Fancher, for respondent:

The general term having affirmed the decision of the surrogate on the facts, there is no jurisdiction in the court of appeals to review those decisions on conflicting evidence.

Code Civ. Proc. § 1837; *Matter of Ross*, 87 N. Y. 514; *Davis v. Clark*, 87 N. Y. 628; *Marx v. McGlynn*, 88 N. Y. 357.

As there was sufficient evidence to authorize the decision of the surrogate, which was affirmed by the supreme court, it follows that this court should affirm the judgment.

Marx v. McGlynn, 88 N. Y. 369.

Even if the testimony presented a question of fact, upon which different minds might easily disagree, still this court must affirm the judgment of the surrogate and supreme court.

Matter of Darrow, 95 N. Y. 668.

Danforth, J., delivered the opinion of the court:

Samuel Wood made his will in July, 1872. He was possessed of a large estate and, after giving considerable sums of money to his relatives, provided through trustees for the founding and endowment of an institution to be called "The Samuel Wood Benevolent Institute," and a hospital similar to the institution known as St. Luke's Hospital in New York; at the same time declaring the purpose and object of the institute to be "to assist and maintain" such of his relatives and kindred, with certain exceptions, as shall in the opinion and judgment of his trustees need assistance; and giving to those relatives a right to free beds, bedding, attendance, support and maintenance in the hospital during life, if they shall so long need assistance, and a decent burial after death.

On the 20th of March, 1875, he executed a

codicil in due form by which he removed the hospital and the institute from the list of his beneficiaries, and named in their place "The Samuel Wood College of Music," which he desired to found. He dropped one S. from the list of executors, and substituted Elmer, the respondent, and Abraham Hewlett, in his place.

The testator died on the 20th of March, 1878. On the 26th of that month Hewlett presented the will and codicil to the surrogate of New York for probate, stating in his petition that he was a nephew, and the only heir and next of kin of the deceased.

No opposition was made to the will and it was admitted to probate on the 20th of April, 1878.

The executor S., above referred to, opposed probate of the codicil, but afterwards withdrew from the contest, and that instrument was also admitted to probate on the 10th of October, 1878.

On the 14th of that month Pearsall, one of the legatees under the will (claiming that he was cocontestant with S., and that the latter's withdrawal from opposition without notice to him rendered the decree irregular, and insisting that the codicil was invalid on the grounds: first, that the testator was of unsound mind and incompetent to make the same; second, that he was unduly and improperly influenced thereto by Elmer, one of the executors therein named, and other interested parties to him unknown), applied to have the probate of the codicil vacated and to be heard upon his objections.

Thereupon the surrogate made an order that he be allowed to contest the probate of the codicil, and with certain other persons proceed in regard thereto, and give such further or additional evidence in regard to it as they might be advised; and that the question of vacating the probate of said codicil be reserved until the close of said evidence, and the determination of such contest; and that, subject to the said right so given, the said decree admitting the said codicil to probate, and the letters testamentary issued thereon, should stand, with powers to the executors of the will to administer the estate under the will, so far as the same has not been modified by the said codicil.

Upon such testimony as the parties produced, it appeared to the surrogate, according to the recital in a decree made December 31, 1881, that the said Samuel Wood, at the time he executed the codicil was of sound mind and under no restraint "or influence of fraud;" and he adjudged that the decree of October, 1878, admitting the same, with the will, to probate as the will and codicil of said deceased, be ratified and confirmed.

The motion, therefore, to open the decree of October was denied and the letters issued thereon to Elmer were ratified and declared valid.

It was further adjudged that "the motion by counsel for said proponent, William Elmer, for allowance to his proctor and counsel be granted, and the amount thereof as well as allowances to the proctor and counsel for said contestant, Pearsall, be adjusted by an order to be herein entered at the foot of this decree."

The notice and petition of appeal recites that the only person intended to be made respondent is William Elmer. The appeal is from the whole of both decrees of the surrogate, viz.:

that of October, 1878, and that of December, 1881, except so much as relates to the probate of the will. The general term affirmed the decree in all respects.

We do not find in the record that the appellants here made any contest before the surrogate; and as it is conceded by all that the will is valid and must stand, it is exceedingly difficult, in view of the provisions of that instrument, to find in what manner they are, within the meaning of that term, aggrieved by the probate of the codicil. They might indeed share in the privileges of the institute and hospital, provided the trustees were of opinion they needed assistance; but an interest so contingent, and an enjoyment so dependent upon the discretion of another, can hardly constitute a right capable of enforcement in a court.

Moreover, the record before us shows that as to them the decision of October was final. It would seem therefore that the appeal might very well have been dismissed by the supreme court upon these grounds, which are also set up in the answer to the petition of appeal. The whole case, however, was considered by that court; and the appellants fail to satisfy us that there is any error in its decision.

In one of the printed briefs submitted to us in their behalf, we find a point made against that part of the decree of December which provides for costs to be paid the proponent Elmer, and costs to be paid the contestant Pearsall:

1. As to Pearsall: he is not a party to the appeal and the question affecting him cannot be considered.

2. As to Elmer: it does not appear what, if any allowance, has in fact been made to him; and the proceeding in that respect, so far as the learned counsel for the appellants have directed our attention to it, seems incomplete, and in its present condition is not the subject of review.

The remaining propositions in the same brief present a very material question; and if well founded, they show that upon the merits the surrogate and general term have, in some inexplicable way, been misled. These propositions are more than once repeated, and are placed upon the intelligible and plain assertions that by the undisputed evidence it is shown: 1, "That, prior to the execution of the codicil, decedent was in such a condition of mental enfeeblement or senile decay as to render him an easy prey to undue influence; 2, that taking advantage of decedent's mental condition, Elmer practiced upon him the grossest fraud and the rankest kind of undue influence, for the purpose of inducing him to make the codicil in question;" 3, that the execution of the codicil was the result of fraud and undue influence practiced upon him by Elmer; 4, that decedent continued in a state of mental enfeeblement or senile decay from the time of the execution of the codicil until his death.

Upon this statement a question of law is presented. If there is evidence leading to a different conclusion, it at most presents a case of conflict, and this alone, if our former decisions (*infra*) are correct, would not permit an interference with the judgment of the supreme court. In such a case the duty of weighing and comparing, and of drawing inferences from evidence, is imposed upon the surrogate, subject

to review by the general term, whose judgment, as we have frequently held, is quite independent of any view we might take of the same matter. *Davis v. Clark*, 87 N. Y. 628; *Matter of Ross*, 87 N. Y. 514; *Marz v. McGlynn*, 88 N. Y. 357; *Matter of Higgins*, 94 N. Y. 554; *Matter of Cottrell*, 95 N. Y. 829; *Matter of Darrow*, Id. 668; *Matter of Yates*, 99 N. Y. 94; *Matter of Valentines*, 100 N. Y. 607 [*S. C. 1 Cent. Rep. 76*].

These cases are placed upon the ground that an appeal to this court does not bring up for review a question of fact depending upon conflicting evidence; that such question remained with the court below, it being for us only to determine whether there is any evidence upon which its decision might fairly and reasonably stand.

A second or supplemental brief, however, submitted in behalf of the appellants deals entirely with this exposition of the duty and jurisdiction of this court, and is to the effect that a recent and, in this connection, hitherto unnoticed statute (Laws 1883, chap. 229), requires a qualification of the doctrine heretofore asserted by us.

We might very well dispose of this appeal without discussing the last contention; for in answer to the proposition that the proponent utterly failed to support the codicil before the surrogate, and that wholly undisputed evidence was arrayed against it, we have found it necessary to examine the entire body of testimony. Our opinion of its efficacy and force, of its probative quality and its persuasiveness, in no degree differs from that of the courts below. A restatement of the evidence is not necessary, nor a fresh recital of the circumstances which established the proponent's case. It has been carefully analyzed by the surrogate, and his views are concurred in by the general term. With those courts we agree. We find that the codicil expresses the mind of the testator; that he was not impelled to it by duress, fraud or deceit; and with this conclusion we should, under ordinary circumstances, leave the case; but the question as to our jurisdiction and duty to examine such a point upon conflicting evidence, is of general importance. It has been fairly raised and argued upon an Act of the Legislature which is claimed to be expressly directed to that purpose. It will affect other cases, and its construction, therefore, should not be postponed.

The provision referred to appears as an amendment to subdivision 11 of section 3347 of the Act containing the Code of Civil Procedure, in chapter 22, title 2, entitled "Provisions Regulating the Effect and Application of this Act." As originally passed, that subdivision limited (with some exceptions) the effect of chapters 14 to 20, both inclusive, to an action or special proceeding commenced on or after the first of September, 1880, that being the day on which those chapters took effect (§ 3356).

In 1881 (Laws of 1881, chap. 681), subdivision 11 was so amended as to provide that all appeals taken from any order, sentence, decree or determination of a surrogate's court, made or entered in such court on or after the first day of September, 1880, in any matter or proceeding pending or undetermined in such court on the first day of September, 1880, shall be taken

and perfected, heard and decided in conformity to the laws and practice regulating appeals from orders, sentences and decrees of surrogate's court in force in this State on the thirty-first day of August, 1880; and all appeals from any order, sentence, decree or determination of such court brought in conformity thereto since the first day of September, 1880, were declared to be "valid and effectual," with exceptions not material here.

The subdivision was again amended in 1888 (chap. 229), by inserting a provision that "All appeals to the court of appeals from any order or judgment of the supreme court affirming, reversing or modifying any such order, sentence, decree or determination of a surrogate's court, shall be taken and perfected, heard and decided in conformity to the laws and practice regulating appeals from orders, sentences and decrees of surrogates' courts, and the hearing and decision thereof, in force in this State on the thirtieth day of April, 1877."

This is the provision relied upon by the learned counsel for the appellants, in support of his contention as to the duty of this court to pass upon the facts according to the weight of evidence. We are unable to give it that effect. The former Code (Laws 1849, chap. 498, § 471) did not include appeals from surrogates' courts; and it was held that they remained subject to the Revised Statutes, and that upon appeal to this court from the judgment of the supreme court in a case arising before the surrogate, the facts and the law were both to be examined, upon the ground that such appeal was upon the merits, and authorized by the general language of section 11 of the old Code, which gave the court of appeals exclusive jurisdiction to review upon appeal every actual determination made at a general term of the supreme court, and was, says the court, "unrestricted by any other statute." *Schenck v. Dart*, 22 N. Y. 420.

So in *Robinson v. Raynor*, 28 N. Y. 494, a similar duty is maintained; "so far as questions are presented by the appeal." By the old Code (§§ 268, 272, 349), on an appeal from a decision by a single judge or referee, a review of a question of fact could not be had by the court of appeals; it was limited to the general term.

A decision by the surrogate, as we have seen, was unaffected by that Code; and hence there resulted, in regard to the same questions, a diversity of practice. In 1880 (chap. 245, § 1, sub. 4) the whole of the old Code was repealed, and by the new Code taking effect on the first of September, 1880, proceedings in the surrogate's court were regulated (chap. XVIII, § 2545), and the practice upon a trial by him of an issue of fact, and preparation of papers on which an appeal should be heard, assimilated to the proceedings upon and after trial by the court without a jury.

Exceptions might be taken to his rulings as upon such a trial as prescribed in article 3 of title 1 of chapter 10 of that Act. The provisions of that article relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment. And it also provided that an appeal from a decree or an order of a surrogate's court should

bring up for review, by each court to which the appeal is carried, each decision to which an exception is duly taken by the appellant as prescribed in that section.

It should be noticed that these provisions are applicable to each court in which the appeal may be heard, and therefore to the court of appeals as well as to the supreme court. Particular provision was made in regard to appeals to the supreme court (art. 4 chap. 18, § 2570), as to who might appeal, within what time, and how and upon what papers, and upon questions of law, or fact, or both; and when upon the facts it was declared that the appellate court should have the same power to decide the questions of fact which the surrogate had, and might in its discretion receive further testimony or documentary evidence, and appoint a referee. It was evident that these provisions applied to the supreme court only, and we so held in *Matter of Ross*, *supra*.

The jurisdiction of the court of appeals is designated and created by law. It has no other. *Batterman v. Finn*, 40 N. Y. 340; *Delaney v. Brett*, 51 N. Y. 78; *People v. Fowler*, 55 N. Y. 675.

It was defined (§§ 190, 191, New Code) as it had been under section 11 of the old Code. By section 190 it was given among other things exclusive jurisdiction to review upon appeal every actual determination made at a general term, by the supreme court, where a final judgment had been rendered in an action commenced in that court or brought there from another court and, section 471 (*supra*) having been repealed, included of course a judgment rendered upon appeal from a surrogate's court.

This general jurisdiction, however, was by section 191 made subject to various limitations, exceptions and conditions and was further restricted by section 1387, which, defining what questions are brought up for review by the court of appeals, expressly declares that a question of fact arising upon conflicting evidence, cannot be determined upon such an appeal, unless where special provision for the determination thereof is made by law. This section not only superseded the provisions of sections 268, 272 of the old Code, relating to a review upon appeal, of questions of fact arising upon a trial before a single judge or a referee, but imposed limitations upon the court of appeals, applicable to the determination of the general term upon such questions on an appeal to it from a judgment rendered in any court, including the decree rendered by the surrogate upon the trial by him of an issue of fact, for as we have seen (§ 2545), for the purposes of review, such decree is regarded as a judgment.

It is now argued by the appellants that the amendment of 1883 (*supra*) abrogates the provisions of section 1387, so far as appeals from cases originating in surrogates' courts are concerned, and restores as by re-enactment the laws relating thereto, which were in force on the 30th of April, 1877. At the time of its enactment, section 1387 had been construed by us in repeated instances, beginning with *Davis v. Clark*, *supra*, and followed by *Matter of Ross* and *Marr v. McGlynn*, *supra*, in all of which we placed our decision expressly upon the prohibition contained in section 1387.

The Legislature of 1883 must be deemed to

have had in mind the whole law, not only as expressed by the statutes, but by the decisions of the court concerning them; and it cannot be supposed that they intended by the later Act to interfere with the policy of the earlier one, which, dealing with the jurisdiction and powers of this court, emphatically declared that a question of fact arising upon conflicting evidence, cannot be determined by it, and expressly excepts such questions from those which an appeal brings up for review.

The Act of 1883 (*supra*) does not enlarge the appellate powers of this court but only regulates such appeals as by existing laws were permitted, and does not purport to add to the questions to be reviewed. In the absence of a contrary intention plainly expressed, it must be presumed that the Legislature did not intend to interfere with the prohibition so distinctly (§ 1337) imposed upon the court, and this view is supported by a consideration of the language of section 1333, where, anticipating that there might be a conflict in certain cases in the courts below, and consequent reversal of a judgment of the trial court upon a question of fact, the Legislature in the most formal and explicit words have declared that in such a case, authenticated in a prescribed manner, the court of appeals must review the determination of the general term upon the questions of fact as well as those of law.

It is not probable that less clear or unambiguous words would have been selected, if the purpose of the Act of 1883 (*supra*) had been to extend that jurisdiction over judgments of the surrogate's court, relieved of the condition expressed in section 1333, or by that Act as to such judgments to frustrate or destroy the limitations imposed by section 1337 (*supra*).

We see no reason, therefore, to depart from the decisions already made concerning our jurisdiction.

The judgment should be affirmed, with costs to the respondent to be paid by the appellants.

All concur except **Miller, J.**, absent.

Board of COMMISSIONERS OF EXCISE
OF the City of AUBURN, *Respt.*,
v.

Gurden F. MERCHANT, *Appt.*

1. The provision of Laws of 1857, chap. 628, § 11, that "Whenever any person is seen to drink in such shop * * * any spirituous liquors or wines forbidden to be drank therein, it shall be **prima facie evidence** that such liquors or wines were sold by the occupant of such premises * * * with intent that the same should be drank therein," applies only to cases where licenses have been granted to sell liquors in quantities less than five gallons, not to be drank on the premises, and to acts done while such a license was in force.
2. The rule of evidence prescribed by said section does not violate the constitutional guarantees of due process of law and trial by jury.
3. An instruction embodying said rule of

evidence, in a case where the facts warrant its application, is good at common law.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a judgment of the Cayuga Circuit Court in favor of plaintiff, in an action for penalties for violations of the Excise Laws. *Affirmed.*

The material facts and the questions presented are set forth in the opinion.

Reported below, 34 Hun, 19.

Mr. N. C. Moak, with **Mr. John D. Teller**, for appellant:

The appellant contends that the provision of the statute (making the fact that a person is seen to drink liquor in a shop, etc., *prima facie* evidence that the liquor was sold by the occupant of the premises with intent that it should be drank there) is not applicable to actions of this character; and also that it is unconstitutional, as it has the effect to deprive an accused party of his right of trial by jury.

People v. Lyon, 27 Hun, 180.

It has been held in Massachusetts that an action to recover penalties under a similar statute was of a criminal character.

Commonwealth v. Newell, 5 Gray, 76; *Commonwealth v. Tuttle* and *Commonwealth v. Burdick*, 12 Cush. 502, 506.

It is contended that while the rule may be that the Legislature may establish the effect of certain evidence, and shift the burden of proof from one party to another, and declare what may be presumptive evidence of certain facts, it has not the power to make the lawful act of one person presumptive evidence of the unlawful act of another, without any proof of his knowledge, complicity or consent.

State v. Bewick, 13 R. I. 211; *S. C.* 23 Alb. L. J. 487; *Wynehamer v. People*, 13 N. Y. 444.

Mr. F. D. Wright, for respondent:

The plaintiff may make a *prima facie* case by circumstantial evidence.

Vide Abb. Tr. Ev. p. 774; *State v. Hynes*, 66 Maine, 114; *Commonwealth v. Cotter*, 97 Mass. 336; *Vallace v. Ererts*, 3 Barb. 553.

Evidence of keeping liquors for sale is competent on the question of sale of the same.

Abb. Tr. Ev. p. 774; *State v. Wentworth*, 65 Maine, 234.

So the fact that it was a place of resort and that "persons went in sober and came out drunk" is competent on the question of the sale of intoxicating liquors.

Abb. Tr. Ev. p. 774; *Commonwealth v. Kennedy*, and *Commonwealth v. Van Stone*, 97 Mass. 224, 543.

Sale by a servant is *prima facie* by the master.

Abb. Tr. Ev. p. 774; *State v. Wentworth*, 65 Maine, 234.

This statute as to *prima facie* evidence, so far as it applies to a criminal case, was criticised in *People v. Lyon*, 27 Hun, 180; and by a majority of the court held to be unconstitutional. But it is clear that the Legislature, in civil cases at least, has the right to declare what shall be presumptive evidence of any fact.

Vide Hand v. Ballou, 12 N. Y. 543; *People v. Mitchell*, 45 Barb. 212; *Hickox v. Tallman*, 88 Barb. 608; *Donahue v. O'Connor*, 13 Jones & S. 297; *Howard v. Moot*, 64 N. Y. 262; *S. C. 5 Thomp. & C. 93*.

It has also been held by express authority that where a person enters a tavern or saloon and calls for whisky and it is furnished to him, the law implies a sale.

Vide State v. Jarrett, 85 Mo. 357; *Stack v. Lansing*, 32 Hun, 420.

Earl, J., delivered the opinion of the court:

The main question to be determined in this case is whether this action should have been commenced by the present plaintiff or by the board of charities and police for the City of Auburn; and upon this question our views have been sufficiently expressed in the case just decided against *Burtis*, and we refer to the opinion pronounced in that case [*ante*, 235].

Upon the trial of this action the judge charged the jury: "The law provides in such cases as this that upon proof being made of the fact that liquor was seen to be drank on the premises, that is *prima facie* evidence that it was sold with intent that it was to be drank upon the premises."

To this portion of the charge defendant's counsel excepted, and the exception is now relied upon as pointing out error fatal to the judgment.

In section 11 of the Excise Act (chap. 628, Laws 1857) provision is made for licenses to store keepers and shop keepers, authorizing them to sell spirituous liquors in quantities less than five gallons, not to be drank upon the premises.

Then in section 12 it is provided as follows: "Such license shall not be granted unless the commissioners are satisfied that the applicant is of good moral character, nor until such applicant shall have executed a bond to the People of this State * * * conditioned that * * * he will not sell or suffer to be sold any strong or spirituous liquors or wines to be drank in his shop or house or in any out house, yard or garden, appertaining thereto; and that he will not suffer any such liquor sold by virtue of such license to be drank in his shop or house or in any out house, yard or garden belonging thereto; and whenever any person is seen to drink, in such shop or house, out house, yard or garden belonging thereto, any spirituous liquors or wines forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises or his agent, with the intent that the same should be drank therein. On any trial for the offense last aforesaid, such occupant or agent may be allowed to testify respecting such sale."

It was undoubtedly this law to which the judge referred in his charge.

All the provisions in section 12 have reference to licenses to sell liquors in quantities less than five gallons, not to be drank upon the premises; and the rule of evidence prescribed applies only to cases where such licenses have been granted. The defendant had such a license from September 6, 1880, to May 1, 1881, when it was revoked.

Upon the trial the plaintiff gave evidence

tending to show violations of the license by the defendant by the sale of liquor to be drank upon his premises between September 1, 1880, and June, 1881; and the proof of sales was limited to that period.

The charge of the judge was authorized by the statute, if applied to drinking liquor upon defendant's premises during the time he had the license; but it was not authorized if applied to the drinking of liquor there before September 6, or after May 1. There was no specific, definite evidence that any of the drinking took place before the first or after the latter date, and if the defendant desired to have the charge so qualified as to apply only to drinking which took place while the license was in force, he should have called the attention of the judge to the facts, and requested the qualification; and now the charge must be treated as if it applied only to the period covered by defendant's license.

Thus the charge was authorized by the words of the statute. But the learned counsel for the appellant claims that this provision of the statute is unconstitutional, upon the ground that it violates the constitutional guarantees of due process of law and trial by jury. We think the claim unfounded. The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law.

It would not be possible to uphold a law which made an act *prima facie* evidence of crime over which the party charged had no control and with which he had no connection, or which made that *prima facie* evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act. But so long as the Legislature in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its Acts can be assailed upon constitutional grounds. Affidavits, in town bonding Acts, and tax deeds, have been declared to be *prima facie* evidence of regularity and validity; and numerous statutes of similar character are to be found in this and other States.

In *Commonwealth v. Williams*, 6 Gray, 1, it was held in a criminal prosecution for a violation of an excise law that a statute which provided that the delivery of any spirituous and intoxicating liquors in or from any building or place, other than a dwelling house, "shall be deemed *prima facie* evidence of a sale" was constitutional and valid.

In *State v. Hurley*, 54 Maine, 562, it was held that an Act which provided that "whenever an unlawful sale" of intoxicating liquors "is alleged and a delivery proved, it shall not be necessary to prove payment, but such delivery shall be sufficient evidence of sale," was constitutional.

In *Howard v. Moot*, 64 N. Y. 262, Allen, J., said: "The rules of evidence are not an ex-

ception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the Legislature. * * * It may be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus precluded the adverse party from showing the truth, would be void, as indirectly working a confiscation of property or a destruction of vested rights. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence."

Here the act, which is made *prima facie* evidence of an illegal sale, takes place upon the premises of the person charged; has some relation to and furnishes some evidence of the alleged illegal sale; and occurs in a place where liquors are authorized to be kept and sold. To make drinking the liquor, in such a place and under such circumstances, *prima facie* evidence of an illegal sale to the person drinking, violates no constitutional guarantee. It leaves a party ample opportunity to make his defense.

It is specially provided, what is now the general law, that the party can be a witness in his own behalf; and thus it can never be difficult for him to show what the facts really are. The burden of proof is not even really changed. The statute enables the prosecutor to make a *prima facie* case by proof of the drinking. But the defendant can show the circumstances attending the drinking; his relations thereto, and any other facts tending to absolve him from liability; and then, on the whole case, the burden still rests upon the prosecution to establish the alleged sale.

The defendant has the full benefit of jury trial and due process of law and a full and fair opportunity free from any undue hindrance or embarrassment to make his justification and defense. Hence, the charge resting upon the statute was not erroneous.

But the statute need not be invoked to uphold the charge. Under the circumstances of this case the drinking was good, common-law evidence of a sale in violation of the statute. The defendant kept liquor for sale and was shown to be engaged in selling it, to be drank upon his premises, quite indiscriminately to persons calling for it.

It is against all experience that he gave it away or that persons came there to drink liquor bought elsewhere. It was in his power to prevent the drinking which took place from glasses presumably furnished by him. Evidence of the drinking under such circumstances was certainly *prima facie* proof that the liquor was bought to be drank there and sufficient to justify the charge.

We are therefore of opinion that the judgment should be affirmed, with costs.

All concur except *Miller, J.*, absent.

Re PETITION OF Bradish JOHNSON to Vacate an Assessment, etc.

1. The determination of the commissioners appointed under the Act of 1872,

chap. 580, "In relation to certain local improvements in the City of New York," that a contract is free from fraud, is conclusive as to the validity of the contract. (*Re Kendall*, 85 N. Y. 302, followed.)

2. Surveyors' fees are a proper item of expense to be included in an assessment for a local improvement. (*Re Merriam*, 84 N. Y. 607, and other cases, followed.)

3. The expense incurred by a gas company in removing and relaying its pipes, consequent upon the construction of a sewer, is a proper item of expense to be included in the assessment for the sewer, where a city ordinance imposed the duty of such removal and relaying upon the company, and provided for the insertion of the expense thereof in the assessment. (*Re Deering*, 93 N. Y. 361, distinguished.)

(Decided October 5, 1896.)

CROSS appeals from an order of the Supreme Court at General Term in the First Department, modifying an order of Special Term by reducing an assessment for the construction of sewer in Seventeenth Street, in the City of New York, as to one item, and otherwise affirming the order. *Affirmed, except as to the modification.*

Statement by *Danforth, J.*:

The petitioner was the owner of property affected by the assessment; and by petition alleged "That said assessment is irregular and void, for the following reasons:

I. Because there is included in said assessment, and assessed upon his lots, the cost of work for which no contract was made, in conformity with the provisions of section 91 of the Charter of 1873; nor any bids made for doing said work or any part thereof, or any competition therefor.

II. That the work, for the expense of which said assessment is imposed, was done without any authority of law, and there are included therein expenses not authorized by law."

Upon trial it appeared that the whole assessment was \$255,251.17, and included surveyors' fees, \$22,870, and \$1,206.53, awarded the Manhattan Gas Light Company. The contract contained fixed prices for rock excavation, but none was required or done; and "that it was before the commissioners appointed under chapter 580 of the Laws of 1872; and was by them certified as free from fraud."

At special term the assessment was vacated; but upon appeal the general term modified the order. Both parties appeal to this court.

Mr. P. A. Hargous for petitioner:

The certificate of the commissioners under the Act of 1872, chap. 580, did not validate the assessment so that a valid assessment could be laid and imposed, when a substantial error existed in the assessment.

A distinction should have been made in the case of *Re Kendall*, 85 N. Y. 302, viz.: that the contract was validated as between the city and the contractor, and could therefore form the basis of a valid assessment, provided there was nothing included in the assessment on the property which was contrary to law and constituted a substantial error.

The certificate is only binding as between the city and the contractors.

Re Burmeister, 76 N. Y. 174.

The award to the Manhattan Gas Company, for expenses in removing and replacing the pipes, is an improper charge.

Re Deering, 93 N. Y. 361.

The ordinances of the city cannot make any provision for the assessment of property owners. This is the duty of the Legislature, and no legislative Act authorized it.

Re Houghton, 20 Hun, 395.

Messrs. E. Henry Lacombe, D. J. Dean and G. L. Sterling, for the Corporation of the City of New York:

This being a case neither of fraud nor reparation, the alleged irregularity in the letting of the contract is of no importance in view of the certificate of the commissioners under chapter 580 of the Laws of 1872.

Re Marsh, 21 Hun, 582; 83 N. Y. 481; *Re Astor*, 53 N. Y. 617; *Re Burmeister*, 76 N. Y. 174; *Re Kendall*, 85 N. Y. 302.

The contract, even if made in disregard of legislative limitations, has been ratified by subsequent legislation. By chapter 556 of the Law of 1880 this particular contract was recognized by the Legislature; and a further payment of money thereunder to the contractor, upon certain conditions, directed.

Brown v. Mayor, 63 N. Y. 239-244.

There is no specification in the petition showing any particular illegal charge.

In *Re Eager*, 46 N. Y. 109, and *Re Roberts*, 81 N. Y. 62, it is held that a reason not stated in the petition cannot be inquired into and that the petitioner must be confined to the special allegations in his petition.

See also *Rich's Case*, *Horn's Case* and *Miller's Case*, 12 Abb. Pr. 118, 124, 121.

The items included for surveyors' fees are proper charges.

Laws 1865, chap. 331, §§ 9, 10, 11, amended by Laws 1866, chap. 551, § 1; *Re Merriam*, 84 N. Y. 607; *Re Pelton*, 85 N. Y. 657; *Re Lowden*, 89 N. Y. 548; *Re Roberts*, 95 N. Y. 674.

The expense of removing and relaying the gas pipes was a necessary incident of the work. Rev. Ord. 1866; pp. 243, 244; Rev. Ord. 1880, §§ 166-171, pp. 105, 106.

The proposition that in these cases all the presumptions are in favor of the City is indisputable.

Re Hebrew Ben. Orphan Asylum, 70 N. Y. 476; *Re Bassford*, 50 N. Y. 512; *Re Williamson*, 3 Hun, 65-68; *Bigelow v. Boston*, 120 Mass. 326.

Danforth, J., delivered the opinion of the court:

So far as the petitioner's appeal touches the validity of the contract it must fail, because of the action of the commissioners, and for reasons which led to our decision in *Re Kendall*, 85 N. Y. 302, where they are fully stated, and in regard to surveyors' fees, *Re Merriam*, 84 N. Y. 607; *Re Pelton*, 85 N. Y. 651; *Re Lowden*, 89 N. Y. 548, are against him.

On the other hand the appeal by the corporation should succeed. The question presented by it relates to the item of \$1,206.53 awarded to the Manhattan Gas Light Company, "for the expense it may be (the contrary does not appear) of removing and relaying their gas pipes, in

consequence of the construction of the sewer in question, and in performance of a duty to do so imposed upon them by a city ordinance. Revision 1866, p. 243, § 16; *Id.* 1880, pp. 105, 106, §§ 166, 171.

The same ordinance declares that all expenses or damage incurred or sustained by such company shall form a portion of the expenses of such sewer and be assessed and collected in the same manner as the other expenses thereof. Its disallowance is not justified by our decision in *Deering's Case*, 93 N. Y. 361.

The assessment then in question was for regulating and grading a street; and an item similar to that now under consideration was rejected because the occasion which required it was not within the ordinances above referred to. It is otherwise with the case now before us. If the item was for a purpose different from that suggested, it was the duty of the petitioner to point it out, and establish an error if one existed. *Re Eager*, 46 N. Y. 109.

It is not even alluded to in the petition, and the proof is only that such an item forms part of the general sum.

The learned counsel for the petitioner calls our attention to the *Re Lilienthal*, 28 Hun, 641, and to the *Houghton Case*, 20 Hun, 395.

In the first, the opinion of the court does not appear; and we have no means of knowing the circumstances of the case or the view taken of them. The other seems to have turned upon a provision of the contract then in question.

In the case before us the contract is not produced, nor is there evidence that it contains the provision on which reliance was placed in the case cited.

So far therefore as the order of the general term modifies the order of the special term it should be reversed and the order of the special term affirmed; but in other respects the order of the general term should be affirmed and the petition dismissed, with costs to the City of New York.

All concur except **Miller, J.**, absent.

PEOPLE of State of New York, *Respts.*,
v.

Frank MONDON, *Appt.*

1. Where a coroner's inquest is held before it has been ascertained that a crime has been committed or before any person has been arrested charged with the crime, and a witness is called and sworn, his testimony (should he afterwards be charged with the crime) may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected and that he was suspected of being the criminal will not prevent his being regarded as a mere witness, whose testimony may afterwards be given in evidence against himself.
2. But if, at the time of the examination of a person before a coroner's inquest, it appears that a crime has been committed and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a person ac-

cused, and he is to be treated in the same manner as if brought before a committing magistrate; and an **examination** not taken in conformity with the statute **cannot be used against him on his trial** for the offense.

3. Hence where, after the finding of the body of one killed by violence, a **person was arrested, without warrant**, as the suspected murderer, taken before a coroner's inquest, informed that he was charged with the murder, and the alleged instrument of death was produced, and he was examined on oath before the coroner as to circumstances tending to connect him with the crime, and he denied all knowledge of the crime—the testimony thus given was not a voluntary confession and (it not appearing that he was informed of his rights or that he was not bound to answer questions tending to criminate him) **evidence thereof was not admissible** upon the prisoner's trial for the murder, and its admission was reversible error. (*People v. McMahon*, 15 N. Y. 384, followed; *People v. McGloin*, 91 N. Y. 241, distinguished.)
4. **Section 395 Code Crim. Proc.**, providing that a confession can be given in evidence unless made under influence of fear produced by threats or upon a stipulation for immunity from prosecution, **applies only to voluntary confessions** and does not change the statutory rules relating to the examination of prisoners charged with crime. (*Ruger, Ch. J., and Earl, J., dissenting.*)

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a conviction of murder in the first degree rendered at the Herkimer Oyer and Terminer. *Reversed.*

Reported below, 38 Hun, 188.

The question presented and the facts connected therewith are stated in the opinion.

Mr. H. Clay Hall, for appellant.

Mr. Eugene E. Sheldon, with *Mr. A. B. Steele, Dist. Atty.*, for respondents.

Rapallo, J., delivered the opinion of the court:

The appellant was convicted (at a court of oyer and terminer held in Herkimer County in May, 1885) of the crime of murder in the first degree, for killing one John Wishart, and was sentenced to death. On appeal to the supreme court the conviction was affirmed at a general term held at Syracuse in November, 1885. Boardman and Hardin, *JJ.*, delivered opinions for affirmance, and Follett, *J.*, delivered a dissenting opinion. The case now comes before us on appeal from the judgment of affirmance.

Numerous exceptions were taken at the trial; and after a careful examination we concur in the conclusions reached by the supreme court as to all of the points raised on behalf of the appellant, except the one upon which the learned judges who heard the case at general term differed in opinion; and we shall therefore confine our discussion to that point.

The question in difference was the admissibility in evidence, upon the trial of the prisoner, of statements alleged to have been made by him on his examination under oath at the coroner's inquest, held upon the body of the deceased after it had been found, which was a considerable time subsequent to the killing. The evidence connecting him with the crime, aside from his alleged confessions to members of his family and afterwards to the officer having him in custody, was circumstantial, but no question as to its sufficiency arises here.

After the finding of the body of the deceased, the defendant was arrested, without warrant, as the suspected murderer. While he was thus in custody, the coroner impaneled a jury and held an inquest; and the defendant was called as a witness before the inquest and was examined by the district attorney and by the coroner.

The prisoner was an ignorant Italian laborer, unfamiliar with the English language. He was unattended by counsel and it does not appear that he was in any manner informed of his rights, or that he was not bound to answer questions tending to criminate him. He was twice examined; on the first occasion the examination was taken by questions put either by the district attorney or by the coroner, and the result written down by the coroner who then read the evidence over to him, line by line, and asked him if he understood it and if it was the truth, and he said it was; and the coroner then reswore him to the deposition.

The coroner testifies that he came to the conclusion that the defendant did not understand English well enough to be examined; that on taking the evidence which was signed by him, no interpreter was used; that the interpreter was used on a subsequent day; that the defendant made no corrections or suggestions while the deposition was being read to him; that he (the coroner) became satisfied, after taking defendant's testimony on the first day, that it ought to be taken through an interpreter and thought they might get it a little better and a little fuller.

The court thereupon reserved its decision as to the admissibility of the evidence until the opening of the court on the following day.

The coroner was then asked various questions as to what the defendant had stated at the coroner's inquest; as to his having been on the ground where the body of deceased was found; as to when he had last seen the deceased alive; as to where deceased was then going; whether he was alone; as to the whereabouts of the defendant on the day the deceased disappeared; as to threats made by deceased to have the defendant arrested for marrying the daughter of deceased, while having another wife living; as to disputes between deceased and defendant on that subject; and other questions tending to establish the theory of the prosecution as to the motive of the defendant in committing the murder.

Some of the statements of the prisoner on his examination, as testified to by the coroner, confirmed the theory of the prosecution as to the hostile feeling between the prisoner and the deceased, and the quarrels which had taken place between them; but the others were denials of implicating circumstances.

Each of the questions thus put to the coroner,

as to what the prisoner had testified to, was specifically objected to. The objections were overruled and exceptions duly taken.

The deposition taken by the coroner, as before stated, was not offered in evidence; but the coroner in giving his testimony referred to it to refresh his recollection with respect to the testimony given by the defendant on the inquest. The coroner also testified that a club which was found near the body of deceased was produced at the inquest, before the taking of testimony began; that the defendant had then been informed that he was charged with the murder of deceased, and on the production of the club exclaimed: "Me no kill old John with that club;" and appeared nervous and excited.

It thus appears that when the prisoner was called upon to make his statements upon oath before the coroner, he stood in the attitude of an accused person, and was required to answer for himself, as a party, and not as a mere witness to aid the coroner in investigating the cause of the death of the deceased.

The cause of death was evident. The body had been examined, with the marks of violence plainly apparent: the bruised head, the fractured skull, and the broken club lying near it, with hair still adhering to it. It was evident that a crime had been committed. From the time that a felonious homicide was established the proceedings assumed the form of a criminal investigation, *Hendrickson v. People*, per Gardiner, J., 10 N. Y. 49.

By section 777 of the Code of Criminal Procedure it became the duty of the jury, if the death was occasioned by criminal means, to find who was guilty thereof; and on such finding the coroner was empowered to issue his warrant for the arrest of the guilty party, if not already in custody. From that time the prisoner occupied the position of a person accused of crime; and his situation was similar to that of such a person before an examining magistrate. "And although the tribunal might be different, yet, upon principle, his rights would be the same in both cases." 10 N. Y. 48.

In *Teachout v. People*, 41 N. Y. 9, Woodruff, J., in commenting upon the case of *McMahon v. People*, says: "The coroner was in such case substantially in the place of an examining magistrate; and the fact that the prisoner was held under an arrest without warrant could not make his protection against such an inquisition less imperative;" and at page 12 the same learned judge says that declarations made under examination, with such a charge depending, should be excluded except where obedience to the statutory precautions is observed.

The admissibility of examinations in evidence upon the trial of the offender, has been passed upon in many English cases, but the whole subject has been so thoroughly discussed in three cases in this court that it is not necessary to refer particularly to the English authorities.

In *Hendrickson v. People*, 10 N. Y. 13, the wife of the defendant died suddenly in the morning; and in the evening of the same day a coroner's inquest was held. The defendant was called and sworn as a witness upon the inquest. At that time it did not appear that any

crime had been committed, or that the defendant had been charged with any crime or even suspected, except so far as the nature of some of the questions asked of him might indicate such a suspicion. On his subsequent trial, on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, upon the ground that he was not examined as a party charged with the crime; that it had not even appeared that a crime had been committed; and that he had simply testified as a witness upon the inquiry as to the cause of the death.

In *People v. McMahon*, 15 N. Y. 384, the defendant was arrested by a constable, without warrant, on a charge of having murdered his wife. The constable took him before the coroner, who was holding an inquest on the body, by whom he was sworn and examined as a witness. It was held that the evidence thus given was not admissible on the prisoner's trial for the murder, and his conviction was reversed upon that ground. In the judgment all the judges who heard the case concurred.

The next case is *Teachout v. People*, 41 N. Y. 7. In that case the defendant appeared at the coroner's inquest, in pursuance of a subpoena to testify, and voluntarily attended. He was not under arrest, but was informed by one Dalley that it was charged that his wife had been poisoned and that he would be arrested for the crime. Before he was sworn he was informed by the coroner that there were rumors that his wife came to her death by foul means, and that some of those rumors implicated him, and that he was not obliged to testify unless he chose. He said he had no objection to telling all he knew. The learned judge delivering the opinion precludes it by a reference to these facts, as showing that the statements made were voluntary in every legal sense; and held that a mere consciousness of being suspected of a crime did not so disqualify him that his testimony, in other respects freely and voluntarily given, before the coroner, could not be used against him on his trial on a charge subsequently made, of such crime. On that ground he held the evidence properly admitted, at the same time referring with approval to the *McMahon Case*, and distinctly limiting the rule of exclusion to cases within its bounds.

The present case is identical in all its essential features with the *McMahon Case*. In both cases the prisoner had been arrested without warrant, as a suspected murderer. While under arrest he was taken by the officer having him in charge, before the coroner's inquest, and examined on oath as to circumstances tending to connect him with the crime.

The present case is even clearer than the *McMahon Case*, for here the homicide had been shown before he was examined, the prisoner was informed that he was charged with the murder, the alleged instrument of death was produced, and the prisoner was interrogated as to his motive for the alleged killing, his whereabouts, and other inculpatory matters.

There has been no case overruling the *McMahon Case*, and we are not referred to any decision, either in this country or in England, at variance with it, although there are many which sustain it and even go further in the direction of excluding examinations under oath.

before a magistrate, of persons afterwards put upon trial on criminal charges. *Rez v. Lewis*, 6 Carr. & P. 161; *Rez v. Davis*, 6 Carr. & P. 177; *Reg. v. Wheatland*, 8 Carr. & P. 238; *Haworth's Case*, 4 Carr. & P. 254, note.

The court at general term in the present case seemed to regard the case of *People v. McGloin*, 91 N. Y. 241, as sustaining the course pursued by the prosecution, and consequently overruling the *McMahon Case*, but a brief examination will show that there is no analogy between the two cases. The case of McGloin was not that of the examination of a prisoner on oath before a magistrate before whom he was taken involuntarily while in custody, and interrogated by the magistrate, who to all appearance had power to require him to answer; but it was a clear case of a voluntary confession. The prisoner was not taken before any magistrate. While under arrest he said to the inspector of police, who had him in charge, that he would make a statement. The inspector then said he would send for Coroner Herman to take it. The coroner was then sent for and came to police headquarters and took down in writing the confession dictated by the prisoner, the coroner asking no questions and not acting in any official capacity, but as a mere amanuensis, to take down the confession and prove the contents. Whether sworn or unsworn is immaterial, as the confession was in no respect compulsory, but was voluntarily offered by the prisoner. It was not taken before a magistrate, upon a judicial investigation against the person accused of the commission of the crime. It lacked this essential element of the *McMahon Case*, and is in no respect in conflict with it.

Section 395 of the Code of Criminal Procedure is also referred to as superseding the *McMahon Case*. That section provides that "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats; or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor."

The rule thus established is founded upon the common-law rule on the subject of confessions, but is much more definite and stringent. The rule as laid down in *Hawkins* is stated to be that "A confession, whether made under an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope or by the impression of fear, however slightly the emotions may be implanted, is not admissible in evidence."

By the section of the Code quoted, the fear which is required to exclude the confession must be a fear produced by threats, and the hope must be based upon a stipulation of the district attorney, promising immunity from prosecution for the crime confessed. But I do not apprehend that this provision was intended to apply to any but voluntary confessions, or to change the statutory rules relating to the examination of prisoners charged with crime. The Criminal Code retains the provisions of the Revised Statutes applicable to such examinations, which provisions are framed with reference to the constitutional provision that no person shall,

in any criminal case, be compelled to be a witness against himself. Art. 1, § 6.

In all the cases in which reference has been made to the subject, it seems to be conceded that an examination of a person arrested on a criminal charge, conducted in violation of the statutory provisions, would not be admissible in evidence against him on his trial for the offense. To take a prisoner before a magistrate, swear him, subject him to a minute interrogation as to the circumstances relied upon as evidence of his guilt and then use such an examination on his trial, would be a departure from our system of criminal jurisprudence which should not be tolerated; and whether the investigation were conducted before a committing magistrate or before a coroner's jury could make no substantial difference, provided it appeared that a homicide had been committed, and the prisoner was brought before the inquest as an accused person, and the object of the inquisition was to ascertain his guilt.

The *McMahon Case* held distinctly that an examination thus conducted before a coroner's jury could not be used on the trial of the prisoner; and after that decision has stood for nearly a quarter of a century as the law of the State it would require, for the purpose of overruling it, something much more definite than anything that can be found in the Penal Code or the Code of Criminal Procedure. There is nothing indefinite in the doctrine of that case as defined and limited in the *Teachout Case*; nor am I able to see that an adherence to it would in any way embarrass the administration of criminal justice in this State; while on the other hand it is not difficult to see that a departure from it would be subversive of some of the fundamental principles of our criminal jurisprudence. Nor is there anything in the exclusion of such evidence inconsistent with section 395 of the Code.

The evidence sought to be excluded is not a confession, certainly not a voluntary confession, but an official examination on oath of the prisoner while in custody, in which, although he admits some facts in regard to the relations between him and the deceased, he denies all knowledge of the crime; he denies having seen the deceased after he saw him on the railroad track on the day when he left his home; and he denies ever having been on the ground where the body was found.

These denials were much more important to the prosecution than any of the admissions contained in the examination, for they were met by the evidence of the prisoner's subsequent admissions to sheriff Brown, which, if true, showed that his previous statements under oath before the coroner's inquest were false.

This mode of examining and involving a prisoner arrested on a charge of crime is not sanctioned by the provision of section 395 of the Penal Code, which declares voluntary confessions made "in the course of judicial proceedings" admissible in evidence. Those words do not necessarily refer to a judicial examination of the prisoner, upon the subject of the charge made against him. The object of section 395 is to declare what confessions shall be deemed voluntary, and therefore admissible, whether made out of court to a private person, or in court, or in the course of any judicial pro-

ceeding between any parties. The examination of a prisoner upon oath before a magistrate, upon the subject of the charge made against him, is condemned in the *McMahon Case* and those upon which it rests, in the *Teachout Case* and by the statutes which prohibit such examinations. Code Crim. Proc. §§ 188, 198, 196; 2 R. S. 708, §§ 14-16.

The three cases which have been cited: *Hendrickson's*, *McMahon's* and *Teachout's*, draw the line sharply, and define clearly in what cases the testimony of a witness examined before a coroner's inquest can be used on his subsequent trial, and in what cases it cannot. Where a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn before the coroner's jury, the testimony of the witness (should he afterwards be charged with the crime) may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness whose testimony may be afterwards given in evidence against himself. If he desires to protect himself he must claim his privilege. But if at the time of his examination it appears that a crime has been committed and that he is in custody as the supposed criminal, he is not regarded merely as a witness but as a party accused, called before a tribunal vested with power to investigate preliminarily the question of his guilt, and he is to be treated in the same manner as if brought before a committing magistrate; and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense.

On this ground the judgment should be reversed and a new trial ordered.

Andrews, Danforth and Finch, JJ., concur.

Earl, J., reads dissenting opinion for affirmation, in which **Ruger, Ch. J.,** concurs; **Miller, J.,** not voting.

Earl, J., dissenting:

There was no difference of opinion in the supreme court and there has been none here, as to any of the questions involved upon this appeal, except as to the reception in evidence of the defendant's statements made at the coroner's inquest; and we all agree that this conviction should be affirmed, unless that evidence was incompetent.

The defendant was under oath when he made these statements, and under arrest without warrant, and had been informed that he was charged with the murder of Wishart; and hence the claim is made that the case of *People v. McMahon*, 15 N. Y. 884, is a precise authority for the exclusion of the evidence.

In that case it appeared that the defendant was arrested by a constable, without warrant, upon suspicion of being the murderer of his wife, and was taken before the coroner who was holding an inquest on her body; and he was there sworn and examined as a witness; and it was held that his evidence thus given was not admissible on his trial for the murder.

But that case was criticised and distinguished

in the case of *People v. Teachout*, 41 N. Y. 7, where it was held that statements made by the defendant under oath, at a coroner's inquest upon the body of the person murdered, were admissible against him upon his trial for the murder, although he knew at the time he was sworn that it was suspected that the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him and that he had a right to refuse to testify.

In both cases the prisoner was charged with the crime, and gave evidence knowing that he was so charged. In the latter case the defendant was not under arrest but was informed before he gave his evidence that he was going to be arrested for the crime. The fact that the prisoner was not under arrest does not distinguish that case from the former case. There can certainly be no difference in the evidential value of statements made under oath by one under arrest and charged with crime, and similar statements made by one charged with crime after he has been informed that he is going to be arrested.

The reasoning of all the cases on the subject shows that there can be no difference in principle or in law between such statements, and no ground for their exclusion in the one case which does not apply to the other.

The only circumstance, therefore, which distinguishes the latter case from the former is that in the latter case it appeared that the coroner, before the defendant was sworn, informed him that he was not obliged to testify unless he chose, and that the defendant said he had no objection to telling all he knew.

For aught that appears in this case, the defendant was informed, by the coroner or someone else, of his right to refuse to testify; that he perfectly understood his rights and in every sense voluntarily took the oath and made his statement. The district attorney had no occasion to prove these facts, as neither his attention nor the attention of the court was called to the absence of such proof or the necessity to make it.

It does not appear how the defendant happened to come before the coroner nor what information he had as to his rights before he was sworn. When evidence of these statements was offered at the trial, the only ground of objection stated in any case was that they were immaterial. The only ground of exclusion was that the defendant had not been informed, before he was sworn, of his right to refuse to be sworn and to testify; and that ground of objection should have been specially stated, as, if it had been, it might have been obviated by proof. We must now assume that that ground did not exist or was waived. Such is the rule in civil cases and it has been also applied in criminal cases. *People v. Murphy*, 63 N. Y. 590.

If we could see that the evidence was of vital and controlling importance in this case, or if we entertained any doubt of the defendant's guilt, we might be disinclined to this view of the case. But a careful reading of the evidence leaves upon our minds no reasonable doubt of his guilt; and the statements made by him before the coroner could have had neither an im-

portant nor a controlling influence upon the minds of the jury.

The relations between Wishart and the defendant, showing a motive for the murder, and his threats to kill him, were fully proved by other witnesses. His statements tended, if believed, to exculpate him; and the most material of them became important only as they were by other evidence shown to be untrue. There was much evidence of false statements made by him, when not under oath, after the disappearance of Wishart, of a character similar to those made before the coroner; and there was evidence, apparently reliable, that he confessed the murder.

Under such circumstances, assuming that the law remains now as it was when the cases above referred to were decided, we see no reason for holding that any error was committed by the reception of the statements in evidence; and for this we invoke the latter case as authority.

But this case is of such serious importance that we are unwilling to rest our decision entirely upon a ground which might seem to be narrow and technical, and therefore we proceed further.

Radical changes have been introduced into the law of evidence since the decision of the *McMahon Case*. A prisoner may testify in his own behalf, and section 895 of the Code of Criminal Procedure provides as follows: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

This language is plain and broad and makes every confession competent no matter how made or how obtained, with the exceptions mentioned. The defendant's statements were made in a judicial proceeding and this section is ample warrant for their reception in evidence upon his trial.

Confessions of prisoners, in judicial proceedings and to private persons, may be made or obtained under such circumstances as to deprive them of much value as evidence, but they may always be proved unless excluded by the exceptions mentioned; and then their weight, under proper instructions from the court, must be determined by the jury.

There is nothing in the previous history or condition of the law as to confessions which limits the meaning of this section or restricts the import of its general phraseology. That law was in a very unsatisfactory condition and many of its rules rested upon no philosophical or reasonable basis. The general rule was that the confessions of a prisoner in reference to the crime for which he was put upon trial, whenever and wherever made, were admissible in evidence against him, and were the most effectual and satisfactory proofs of guilt.

To this rule, however, there were exceptions. If the confessions were obtained or induced by threats or promises, they were excluded. The threats and promises might be quite slight, insignificant and indirect, and yet the cases are numerous where they were held sufficient to

render confessions obtained by them incompetent as evidence.

There was a difference of opinion among learned judges as to whether the threats and promises, to be effectual for the exclusion of the confessions, must have proceeded from the prosecutor or some public officer having the prisoner in custody or some authority over him, and not from a private person having no connection with the prosecution. If the confessions, however, were made after the threats or promises might be supposed to have ceased to have any influence upon the mind of the prisoner, they could be received in evidence. So, while it was necessary to the admissibility of a confession that it should have been voluntarily made, that is that it should have been made without the appliances of hope or fear, from persons having authority, yet it was not necessary that it should have been the prisoner's own spontaneous act. It might be obtained or induced by spiritual exhortations; by promises of secrecy, even confirmed by an oath; by causing the intoxication of the prisoner; by trick, deception or artifice; by illegal arrest; by promises of some collateral benefit; and yet none of these practices made the confession incompetent or required its exclusion.

These rules were uncertain, difficult of application. It applies to all confessions whether made in a judicial proceeding or to private persons, and its language is just as broad, comprehensive and sweeping in reference to one class as the other. The two classes of confessions were known in the law before that section was enacted. Judicial confessions were defined to be such as were made before a magistrate or in court, in the due course of legal proceedings, and all other confessions made to private persons were defined to be extrajudicial. 1 Greenl. Ev. §§ 216, 217.

Within the meaning of the Code, and the law as it before existed, these were confessions made in a judicial proceeding. The law as to judicial confessions was, before the Code, in as much confusion and uncertainty (and needed reformation as much) as the law in reference to extrajudicial confessions; and this may be shown by reference to a few reported cases.

In *People v. Hendrickson*, 10 N. Y. 13, the subject of judicial confessions was much investigated and discussed. In that case the prisoner's wife died from poisoning, and a coroner's inquest was held to ascertain the cause of her death. The prisoner was sworn and examined as a witness at the inquest, and there made certain statements as to his movements on the night of his wife's death and the circumstances attending it. He was subsequently indicted for her murder; and upon his trial the statements he made at the inquest were offered in evidence against him. They were objected to as inadmissible but were held to be competent evidence, upon the ground that the prisoner had not, when he made them, been charged with the murder. But it is clear that he was suspected of the murder and knew that he was so suspected.

Judge Selden wrote a dissenting opinion, holding that the statements were incompetent, upon the ground that such statements, made by one suspected of guilt and conscious thereof, were too unreliable to be received as evi-

dence. The learned judge seems to have been unconscious that his reasoning would exclude all confessions of a prisoner made after being charged with the crime, and even after he was conscious that he was suspected of the crime. But one judge concurred in the view that the statements were not competent evidence.

When the *McMahon Case* came before the same court, more than three years later, the judges comprising the court had been so far changed that only three of those remained who had taken part in the decision of the *Hendrickson Case*; and Judge Selden being one of these, wrote the opinion in which four of his associates concurred, and the same line of reasoning which had failed to convince in the *Hendrickson Case* prevailed. The statements of the prisoner made at the coroner's inquest were held incompetent, because at the time he made them he was charged with the crime. The ground of the decision was that a judicial oath, administered when the mind is agitated and disturbed by a criminal charge, may prevent free and voluntary mental action, and that thus the statements cannot be relied upon as evidence of guilt.

But what difference in reason can there be between the value of statements as evidence when made by a person charged with crime and when made by one who knows that he is suspected of crime and is conscious of guilt? Why should such statements, when made under the sanction of an oath voluntarily taken, be excluded, when they would be received if made under precisely the same circumstances not upon oath?

When the *Teachout Case* came to be decided more than twelve years after the *McMahon Case*, the composition of the court had been entirely changed, no one of the judges remaining who had participated in the decision of the prior cases. In that case the prisoner was not under arrest when he made his statements under oath before the coroner's jury; but he was informed that he was suspected of the crime and that he would be arrested for it, and the coroner told him that he had a right to refuse to testify; and the statements were held competent evidence. What difference could it make with the value and reliability of the statements, as evidence, that the prisoner was not under arrest when he made them, while he was informed that he was suspected and was to be arrested? Upon the reasoning of Judge Selden in both of the prior cases, it was wholly immaterial that he was informed that he had the right to refuse to testify.

In the *Hendrickson Case*, the learned judge said: "A statement made under oath before a coroner's jury, while the party is under arrest upon suspicion of guilt, is equally voluntary as if made as a witness in a case with which he has no connection;" and "It is certain that the statements of an accused person, made under oath, are never excluded on account of any supposed violation of the immunity of the party from self crimination."

In the *McMahon Case*, he said: "The statement, although made under oath and upon a judicial examination as to the crime, may still be admitted, if at the time it was made the person was not himself resting under any charge or suspicion of having committed the crime."

N. Y.

"That the idea of immunity or privilege does not lie at the basis of this rule of exclusion is proved by the fact that the evidence is equally inadmissible, although the person voluntarily consents to be sworn."

In the *Teachout Case*, the reasoning of Judge Selden in the two prior cases was emphatically repudiated; but without distinctly overruling the *McMahon Case* the court found a distinction which was regarded as of no importance by Judge Selden.

It is, indeed, quite difficult to perceive what difference in reason or in principle can be caused by the fact that the person was informed of his privilege not to testify, a fact which most persons know and which they must all be presumed to know; and it is even more difficult to understand how the statements of a person are in their nature more trustworthy and reliable after he has been so informed than they would be without such information.

The *McMahon Case* was, several years later, regarded by a learned judge as overruled by the *Teachout Case*. *People v. Montgomery*, 13 Abb. N. Y. 207, 251.

But even if that judge was in error it may well be doubted whether the rule laid down in the *McMahon Case* survived the legislation and the public policy thereby announced, which allowed prisoners to testify in their own behalf.

As we have seen the statements were there excluded because such statements, made under an oath voluntarily taken by a prisoner charged with crime, are in their nature too unreliable to be received as evidence. That ground of exclusion was utterly repudiated by the legislation referred to. If the sworn statements of a person before a coroner's jury, after he was charged with crime, were too unreliable to be received as evidence, much more would his sworn statements be unreliable, made upon his trial after indictment, when the question of his life or death was under investigation and to be immediately determined. It cannot be supposed that the Legislature meant to make that evidence, which in its nature was so infirm and worthless that it would be unsafe for a jury to rely upon it as a basis for their judgment. It would be quite an absurd spectacle to see a court exclude the sworn statements of a prisoner made before a coroner's jury, and at the same time receive his sworn statements made upon his trial for the crime.

Such was the state of the law as to judicial confessions when the section of the Code referred to was framed. The rule as finally settled, in order to make statements made by the prisoner under oath at a coroner's inquest (after he was charged with the crime) competent evidence against him upon his subsequent trial, required that it should be shown that he was advised of his right not to be sworn before he made the statements. If not so advised his statements so made were incompetent. But if the public prosecutor believed that the person was guilty, and fully intended to arrest and indict him, he had only to conceal from him his belief and intention and omit to charge him with the crime and then, although he was conscious of his own guilt and thus under the embarrassment created by such consciousness, he could examine him to any extent and procure

from him, while he was unadvised and unaware of his peril, damaging statements to be used against him upon his trial. A rule so absurd in its operation is of little use for the protection of persons charged with crime, and the court should not be astute to preserve it.

It must be conceded that the law makers intended to make and did make a radical change, by the section referred to, in the law in reference to extrajudicial confessions; and it is not unreasonable to suppose that they intended an equally sweeping change in the law in reference to judicial confessions. They evidently meant to abolish all the fine distinctions which before existed, and establish a plain and simple rule; and they wrote in the section all the exceptions which they intended to preserve, and no court should interpolate more. If it had been intended that judicial confessions should not be received in evidence against the person making them, unless he had been advised of his privilege not to make them, that exception, it is fair to presume, would have been made in the section. That section too, it may be observed, is in the line of all modern legislation upon the subject of evidence, the tendency of which is to permit all relevant and material evidence to be placed before the triers of fact, there to receive the consideration it deserves.

It cannot well be claimed that these statements were not a confession within the meaning of the section. It is true that they were not a confession of crime but rather exculpatory; a denial of the crime. But such statements have always, in all the books, been classed under the head of confessions. Whatever one says about the crime with which he is charged which tends to connect him therewith or makes evidence against him in reference thereto, whether he so intends it or not, has always been treated as a confession.

In the *Hendrickson Case*, Judge Parker said that "The law seems to be that the rule as to confessions applies not only to direct confessions, but to every other declaration tending to implicate the person in the crime charged even though in terms it is an accusation of another or a refusal to confess."

If the section of the Code referred only to formal or actual confessions of guilt, it would leave much the larger part of judicial statements made by prisoners entirely unprovided for.

The constitutional guarantee that "No person shall be compelled in any criminal case to be a witness against himself," was not violated in this case. Statements of prisoners made under oath have never been excluded on that ground. On the contrary, that ground of exclusion was expressly repudiated by Judge Selden in the *McMahon Case*. The defendant had been in this country for more than two years. All persons within the jurisdiction of the State are supposed to know its laws; and in the enforcement of this rule no distinction is made between foreigners and natives. 1 Story, Eq. Jur. § 111; Best, Ev. 48, 452.

We must assume that he knew that it was his privilege to decline to be sworn, and that he voluntarily took the oath and made the statements. It was not claimed upon the trial that he was ignorant of his privilege, or that he was under any compulsion when he took the oath.

He was therefore in no sense compelled to be a witness against himself.

The view we have taken of section 395 of the Code is sanctioned by the case of *People v. McGloin*, 91 N. Y. 24.

If the reasoning of Judge Selden in the *Hendrickson* and *McMahon Cases* was sound, the confessions there received should have been excluded; but they were held competent evidence both at common law and under the section referred to.

We are, therefore, of opinion that no error was committed in the reception of the statements of the prisoner in evidence and that the judgment should be affirmed.

METROPOLITAN TRUST CO. of the
City of New York, *Appt.*,

v.

TONAWANDA VALLEY & CUBA R.
R. CO. *et al.*, *Repts.*, and Farmers Loan
& Trust Co., *Appt.*

1. Unsecured claims of employees of a railroad corporation, for their services in operating the road, after default under a general mortgage thereon and before the appointment (in proceedings to foreclose such mortgage) of a receiver to operate the road during the pendency of such proceedings, do not have a preference over the mortgage lien; and the receiver should not be decreed to pay such claims or to issue his certificates therefor. (So held where the foreclosure proceedings were begun before the passage of the Act of 1886, chap. 376, in reference to the wages of employees of corporations for which a receiver has been appointed.)
2. A deficiency in the expenses of operating the road by the receiver in foreclosure, where the necessity of the expenses does not appear, should not be given a preference over the claim of a prior mortgagee of the road, who was not a party to the application for a receiver.

(Decided October 5, 1886.)

APPEAL by plaintiff and by the Farmers Loan & Trust Company, one of the defendants, from parts of an order of the Supreme Court at General Term in the Fifth Department, affirming an order of the Allegany Special Term, authorizing the receiver of a railroad corporation, appointed in a foreclosure proceeding, to pay certain claims. *Reversed.*

Reported below, 40 Hun, 80.

The defendant, the Tonawanda Valley & Cuba Railroad Company, is a corporation created in 1881, under the laws of the State of New York and by and through the consolidation of the corporate property and franchises of the Tonawanda Valley & Cuba Railroad Company, the Tonawanda Valley Railroad Company and the Tonawanda Valley Extension Railroad Company. Prior to this consolidation the Tonawanda Valley Railroad Company had issued mortgage bonds and had secured the same by a mortgage of all its prop-

erty and franchises to the defendant, the Farmers Loan & Trust Company.

By the joint agreement for said consolidation it was provided that the consolidated company should assume the payment of the principal and interest of such bonds as were outstanding, subsequent to the consolidation and on or about September 1, 1881, the consolidated company made its mortgage of all its property and franchises, to James D. Fish, as trustee, to secure the payment of an issue of its first mortgage bonds; thereafter said Fish resigned his position as such trustee and the plaintiff herein was appointed trustee in his stead.

On September 1, 1884, default was made in the payment of interest due on the last mentioned bonds, and thereafter, on November 29, 1884, this action was brought by the plaintiff, as trustee as aforesaid, for the foreclosure of the mortgage securing the same, and for the appointment of a receiver *pendente lite*.

Bird W. Spencer was, on the application of the plaintiff, at the commencement of this suit, appointed receiver at the defendant Railroad Company, *pendente lite*, and thereupon took possession of the property of the Corporation and assumed control of its operation, as provided in the order of appointment.

The defendant, the Farmers Loan & Trust Company, appeared and answered the complaint, alleging the priority of certain outstanding bonds secured by the mortgage made to it as aforesaid.

Thereafter and on October 19, 1885, on the petition of the receiver to be allowed to issue certificates to make payments on account of the operation of the road, and after a reference as to the facts, the order now under review was made at Special Term, providing among other things that he issue certificates to the employees and servants of the road, for labor and services in operating the road prior to his appointment and since September 1, 1884; and for deficiency for supplies, etc.

Messrs. Thos. G. Hillhouse and O. P. Buel, for plaintiff, appellant:

The court below erred in authorizing the issue of receiver's certificates of indebtedness having priority over the existing mortgages, for the payment of employees of the railroad whose claims had matured prior to his appointment, or for deficiency for supplies.

Dunham v. Cincinnati, etc. R. Co. 1 Wall. 254, 268 (68 U. S. bk. 17, L. ed. 584, 588); *Denniston v. Chicago, A. & St. L. R. R. Co.* 4 Biss. 414; *Galveston, etc. R. R. Co. v. Cowdrey*, 11 Wall. 482 (78 U. S. bk. 20, L. ed. 206); *Duncan v. Mobile & Ohio R. R. Co.* 2 Woods, 542; *Jerome v. McCarter*, 94 U. S. 784, and *Wallace v. Loomis*, 97 U. S. 146, 162 (Bk. 24, L. ed. 186, 895, 906); *Brown v. N. Y. & Erie R. R. Co.* 19 How. Pr. 84; *Fisk v. Potter*, 2 Abb. Ct. App. Dec. 188; *Gurney v. Atlantic, etc. R. Co.* 58 N. Y. 858; *Vatable v. New York, Lake Erie, etc. R. R. Co.* 96 N. Y. 49; *Atkins v. Petersburg R. R. Co.* 3 Hughes, U. S. C. C. 307; *Taylor v. Phila. etc. R. R. Co.*; *Mechanics & Farmers Bank v. Phila. etc. R. R. Co.* 7 Fed. Rep. 379; *Sliddy v. Atlantic, etc. R. R.* 3 Hughes, U. S. C. C. 320, 337; *U. S. Trust Co. v. N. Y. West Shore & B. R. R. Co.* 25 Fed. Rep. 800.

N. Y.

Mr. Herbert B. Turner, for Farmers Loan & Trust Co., defendant, appellant:

The power to appoint a receiver has been classed under the head of the *quia timet* jurisdiction of chancery. The remedy is a provisional or auxiliary one, exercised as an adjunct to the principal relief sought in the case.

High, Receivers, §§ 1-11; Bispham, Equity, § 576; Jones, R. R. Securities, § 458.

In England the power exists only by virtue of statute, the equity courts having declined to exercise it before authority to do so was expressly conferred by Parliament.

Gardner v. London, etc. R. Co. L. R. 2 Ch. App. Cas. 201.

But in the United States the power of a court of chancery to assume control of a railroad by the appointment of a receiver has been frequently exercised. The inherent authority of our courts of equity is deemed sufficient without legislative aid.

Davis v. Gray, 16 Wall. 203 (88 U. S. bk. 21, L. ed. 447).

A receiver has no greater right than a mortgagee to improve the mortgagor out of his estate.

Jones, R. R. Securities, § 533.

In *Denniston v. Chicago, etc. R. R. Co.* 4 Biss. 414, claimants for materials furnished an insolvent road were held not entitled to payment out of a fund in court arising from a sale of the corporate property, until the bonds were paid.

Material men who suffer their property to go into and become a part of the road consent to its being covered by the mortgages, and can acquire no lien to the prejudice of the mortgagees.

Galveston, etc. R. R. Co. v. Cowdrey, 11 Wall. 482 (78 U. S. bk. 20, L. ed. 206).

In *Meyer v. Johnston*, 53 Ala. 237; *S. C.* 9 Am. Ry. Rep. 454, the court held that floating indebtedness contracted for betterments and for the purpose of paying interest on the bonds could not take precedence of the claims of the bondholders secured by a prior mortgage; and this not only as to the *corpus* of the railroad's estate, but even as to the income, in the application of which no such prior claim could be recognized.

See also *Duncan v. Mobile, etc. R. R. Co.* 2 Woods, 542; *Wallace v. Loomis*, 97 U. S. 162 (Bk. 24, L. ed. 900); *Turner v. Indianapolis, etc. R. Co.* 8 Biss. 315; *Douglass v. Cline*, 12 Bush, 608; *S. C.* 18 Am. Ry. Rep. 273; *Foadick v. Schall*, 99 U. S. 235 (Bk. 25, L. ed. 839); *Union Trust Co. v. Souther*, 107 U. S. 592 (Bk. 27, L. ed. 488); *Coe v. N. J. Midland R. Co.* 31 N. J. Eq. 105; *Tommey v. Spartanburg, etc. R. R. Co.* 4 Hughes, 640.

In the *Peoria & Springfield Case*, the Supreme Court of Illinois refused to allow the payment, even to an innocent holder, of a certificate issued for indebtedness incurred before the receiver was appointed. Scott, J., says:

"Under the facts there can be no pretense, had the claim been presented by the payee named in the certificate, that he would have been entitled to have it paid out of any funds in the hands of the receiver." "Equitably the payee had no claim whatever on the trust property, and as the holders occupy his shoes they

stand in no better position in a court of equity when a fund is being administered."

Turner v. Peoria, etc. R. R. Co. 95 Ill. 134; 1 Am. & Eng. R. R. Cas. 348, 353, 357. See also *Kelley v. Receiver of Green Bay, etc. R. R. Co.* 10 Biss. 151; *Calhoun v. St. Louis, etc. R. Co.* 9 Biss. 330; *Miltnerberger v. Logansport, etc. Ry. Co.* 106 U. S. 286 (Bk. 27, L. ed. 117); *Ellis v. Boston, etc. R. R. Co.* 107 Mass. 28; *Brown v. N. Y. & Erie R. R. Co.* 19 How. Pr. 84; *Coe v. Columbus, etc. R. R. Co.* 10 Ohio St. 372; *Gurney v. Atlantic, etc. R. Co.* 58 N. Y. 558.

Mr. Edward C. Randall, for employees, respondents:

The contract of the mortgages of the railroad differs from the ordinary mortgage contract on land; the mortgages are different in form and substance; they cover different property and rights of property. The one is a mortgage not only of land but of a valuable franchise connected therewith, granted to corporate bodies by the Legislature; the other is upon the land alone, and the rules of law which govern it are not applicable to the former.

Duncan v. Trustees of Ches. & Ohio R. R. Co. 9 Am. Ry. Rep. 386.

The receiver is a person appointed by the court, upon application of the mortgage bondholders, to operate, manage and preserve the property *pendente lite*; he is the arm of the court. It is the duty of the court to operate, manage and preserve the trust fund when, upon application of the bondholders, it assumes control; and to do any and all things requisite and necessary to insure such preservation; and for that purpose the court may authorize the issue of certificates which shall constitute a lien upon the property prior to the mortgages.

Jones, R. R. Securities, §§ 538-550; Meyer v. Johnston, 53 Ala. 237.

I deem the following general propositions established, from the adjudications bearing on this case:

I. That when the bondholders took their security they impliedly agreed that the current expenses should be paid out of its current receipts before they had any claim thereon; by this receiver they sequestered all future income, and must be held to their original undertaking.

Burnham v. Bowen, 111 U. S. 776 (Bk. 23, L. ed. 596).

II. That the service of these employees has preserved the trust fund before and since the appointment of the receiver and enabled it to retain its business, and has resulted in substantial advantage to the mortgage bondholders; and that they are now estopped from objecting to payment therefor.

Douglas v. Cline, 12 Bush, 608.

III. The labor we performed before the appointment of this receiver was necessary for the maintenance and was essential for the preservation of the trust property; and it is the duty of the court to provide for the payment of such labor before as well as after the property came to its hands.

Burnham v. Bowen, supra.

IV. To preserve and manage the property, the receiver must be enabled to retain in his service the employees he found in the service of the road when he took possession, and it is the duty of the court to assist him so to do; and

this can only be done by providing for the payment of what is due them.

Fosdick v. Schall, 99 U. S. 236 (Bk. 25, L. ed. 339).

V. The labor done by these employees, and the benefit the bondholders have received in the increased value of the trust fund, and the necessities of the case, place the payment of such labor in the category of payments necessary for the preservation of the mortgaged property.

Miltnerberger v. Logansport, etc., R. Co. 106 U. S. 286 (Bk. 27, L. ed. 117).

VI. The bondholders must be held to do what the Company would have done if left in possession. The bondholders knew that these liabilities must be incurred. At any moment during all the three months the employees were working, they could have taken possession of and arrested the administration of this Company. Their interest was in default. Had this receiver not been appointed, this labor claim would have been paid. Their silence and inactivity must be construed as an estoppel.

Dow v. Memphis, etc., R. R. Co. 20 Fed. Rep. 260, 768.

VII. When the Company failed to pay interest, Sept. 1, 1884, and no interest having been paid since May, 1884, the Company being bankrupt and in default, the right of the bondholders to take possession was fully consummate; and their failure so to do made the officers of the Company agents of the bondholders to operate said road and employ such labor. They have ratified the acts of the Company, accepted the benefits and proceeds thereof, and are equitably bound to pay therefor.

Duncan v. Trustees of Ches. & Ohio R. R. Co. 9 Am. Ry. Rep. 386.

VIII. The referee reports as a fact that when the receiver took possession of this railroad he took \$1,400 of the earnings of said road into his hands, earned prior to his appointment, which was a part of the current fund, earned in operating said road by these employees. The receiver in his petition shows that the money has been expended by him in operating, managing and preserving this trust fund. Upon this money the employees had an equitable lien; and of so much of the earnings there has been a diversion, for which the court must make restitution beyond question. But we say we can go further. Where is the money earned by this road in September, October and November, 1884? It did not go where it was equitably bound to go; if it had, we would have been paid. I think we can assume that it was paid in the operation, management and betterment of said road; and we think that there has been therefore a diversion of the income of said road.

Fosdick v. Schall, supra.

IX. It is not necessary that the income should be diverted to the payment of bonded interest. The circumstances of the rendition of this labor created an equity superior to the mortgaged bondholders.

Union Trust Co. v. Souther, 107 U. S. 501 (Bk. 27, L. ed. 488).

X. The same equity that will entitle us to payment from income will entitle us to pay from the corpus.

Union Trust Co. v. Souther, supra.

XI. The equities of the employees were superior at the time of the appointment of the receiver, and they are no less so now.

XII. The mortgagees must be deemed to have assented to reasonable temporary credits, as necessary to preserve and manage the property, and whatever is necessary to accomplish this result must be taken as assented to by the mortgage bondholders. Such temporary credits before the appointment of the receiver must be recognized by mortgagees, and payment provided therefor.

Blair v. St. Louis, H. & K. R. Co. 22 Fed. Rep. 471.

XIII. If the court, upon application of the bondholders, had not arrested the administration of the road, we would have been paid in full. Such appointment cannot defeat our rights. The mortgagees must now do what the Company would have been bound to do if left in possession.

Barton v. Barbour, 104 U. S. 126 (Bk. 26, L. ed. 672).

XIV. The mortgage bondholders have received the benefit of this labor in betterments placed upon their property in the increased value of the property and its franchises. The employees' equities are superior to the mortgagees' and as such are entitled to compensation.

Mittenberger v. Logansport, etc., Ry. Co. supra; *Jones, R. R. Securities*, §§ 534-538.

The Constitution gives courts of equity the power and makes it their duty to protect, manage and preserve the trust fund. As a necessary incident to that duty is the right to provide the means of carrying the same into effect.

Jones, R. R. Securities, § 537; *Meyer v. Johnston*, 9 Am. R. Rep. 454.

The omission to provide for the payment of labor claims in the original order is no bar to their subsequent allowance.

Blair v. St. Louis R. R. Co.; *Mittenberger v. R. R. Co. and Union Trust Co. v. Souther, supra*.

Danforth, J., delivered the opinion of the court:

The appeal in this case is by the plaintiff and by the Farmers' Loan & Trust Company, one of the defendants, from so much of an order of the supreme court as authorizes Spencer, as receiver of the property, real and personal, easement, rolling stock and equipment, leases, franchises and all other rights and property whatsoever of the defendant, the Tonawanda Valley & Cuba Railroad Company, covered by the mortgage or deed of trust dated September 1, 1881, referred to in the complaint in this action, to pay or issue his certificates of indebtedness for the payment of the following items and amounts, namely: \$3,400.21 to the employees and servants of the railroad aforesaid, for labor and services in operating it prior to said receiver's appointment and subsequently to September 1, 1884; and also \$3,000 for deficiencies for supplies; and from so much as makes the certificates when issued a lien and charge on all the property of the defendant Railroad Company, prior to the lien of the several mortgages or deeds of trust upon the said railroad or upon any part thereof.

Notwithstanding the argument of the respondents' counsel, we are unable to discover any principle upon which the claims of the employees, for labor performed before the appointment of the receiver, can be so extended as to diminish or impair or postpone the lien of the mortgage, for the enforcement of which the action was brought, or the lien of the mortgage set up by the Farmers Loan and Trust Company. Both are prior in point of time to the respondents' claims; and we are referred to no statute which displaces them.

The Legislature has given the laborer a remedy in certain cases, against the stockholders of a corporation, upon default of the corporation to meet its obligations (Laws, 1860, chap. 140, § 10; of 1864, chap. 282, § 16); but the decree in this case goes much further and requires their payment out of the property of other creditors.

The argument in its support is that the value of the mortgage lien has been enhanced by the labor of the workmen.

It is easy to see that under such a plea the lienor might be entirely defeated, and the foreclosure of his mortgage rendered inoperative and useless. Such a result except upon his consent, the courts have no power to sanction. It is going a great way in that direction to permit, as it is true courts sometimes have permitted, a receiver of an insolvent railroad corporation to pay for materials and labor procured by him after his appointment, necessary to the running of the road it may be, but not to the winding up of the affairs of the corporation. The propriety of that practice we are not called upon to review; but notwithstanding the research of the respondents' counsel, no case has been cited where an unsecured creditor, however meritorious the consideration of his claim, has been given priority over a lien contracted for and in force when his debt was created.

When, as in this case, the plaintiff procures the appointment of a receiver, with power to control and operate the mortgaged railroad, he cannot well object to the depreciation of his security by expenses incurred for these purposes, but he may properly seek to have excluded any previous ones. Here the claimants are mere general creditors, with no special equities in their favor against prior creditors, nor have they an equitable lien upon any fund in court.

If there were any who occupied a different position, their rights are fully protected as against the plaintiff by the order appointing the receiver, who was directed to pay all the debts and balances due to the laborers theretofore employed by the defendant Railroad Company, for labor or services done, or due for supplies furnished in the operation of the railroad, and for which they have a lien. A different relation is established by the Act of 1885, chap. 376, which requires a receiver of such a corporation to pay the wages of its employees and laborers in prece to footreher debts or claims; but that statute was not in force when the proceedings now under review were had; and therefore, even if applicable to a receiver in a foreclosure case, cannot be invoked to sustain the order appealed from.

Here the appellants have the prior lien by mortgage; and upon general principles, from which the circumstances of this case require no

departure, are entitled to a preference. *Vatable v. N. Y., Lake Erie & West. R. R. Co.* 96 N. Y. 79.

As to the other items, viz.: deficiencies for supplies. If the appeal stood alone upon the notice of the plaintiff it might be that under the order appointing the receiver, it should be allowed to stand. That order directs him in effect to maintain and keep in repair, and operate the railroad and to pay the necessary expenses of so doing. It was made on plaintiff's request and plaintiff must abide by it. But with the other appellant it is different.

The Farmers Loan & Trust Company was not a party to the application for a receiver, and is not found to have acquiesced in it. The finding of the referee is that "The receiver, as such, while operating the road has incurred obligations to the amount of \$4,742 for supplies delivered for the use, and operating the road, consisting of coal, oil, hardware, repairs done by the Erie Railroad Company at its shops; freight and ticket balances, etc., a statement of which appears in exhibit "J" attached to the petition in this proceeding, and is under the head of 'Accounts payable April 1, 1885.' This the receiver calls his 'deficiency account,' and it does appear that he has no funds out of which to realize the money to pay this account, or any portion of the same."

We find no exhibit J in the case, but under "accounts payable April 1, 1885," a statement of names of creditors and amounts, but no statement of the consideration or cause of indebtedness, and nothing therein or in the finding of the referee to show that the debts or obligations were necessarily incurred. No brief has been submitted for the receiver or other party, in support of this last item; and we discover no ground on which it can stand.

We think, therefore, so far as appealed from, *the order of the general and special terms should be reversed; and the petition of the receiver, in respect to the items embraced in the appeal, denied, with costs, to the appellants to be paid by the receiver as such, and not individually.*

All concur except **Miller, J.**, absent.

Frederick McLEWEE, *Respt.*,

v.

Bolton HALL *et al.*, Impleaded, etc., *Appts.*

1. Where, in an action seeking to hold certain parties (here, the members of a firm) **liable as copartners** with the party (here, a corporation) to whom goods had been sold, it appears from the contract between defendants and the vendee that, **as between themselves**, they were **not copartners**, it is **essential to a recovery to show** that defendants held themselves out as copartners with the vendee, and that the vendee obtained credit on that account.
2. Evidence of **declarations** by the parties sought to be held liable as partners, going to show that they had become **owners of the corporation vendee** and were sustaining its credit, does **not tend to prove that a copartnership**

had been formed between them and the vendee.

8. Under a **complaint seeking to hold one liable as a partner for goods sold to another, proof of defendant's liability as purchaser and original debtor cannot be given**, without an amendment of the complaint.

(Decided October 5, 1886.)

APPEAL from a judgment of the Court of Common Pleas for the City and County of New York at a General Term, affirming a judgment at a Trial Term in favor of plaintiff in an action for goods sold and delivered. *Reversed.*

The action was brought against Hall and his partners, doing business under the firm name of Hall, Nicoll & Granbery (the present appellants), and against the United States Reflector Company, the complainant alleging that defendants were copartners, and as such jointly liable.

This claim was attempted to be sustained at the trial, mainly upon a written agreement between the firm of Hall, Nicoll & Granbery and said United States Reflector Company, as follows:

"This agreement, made and entered into in the City of New York, this 22d day of April, 1880, between Bolton Hall, Benjamin Nicoll and David W. Granbery, all of the City of New York, composing the firm of Hall, Nicoll & Granbery, parties of the first part, and the United States Reflector Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, party of the second part, witnesseth; that,

"Whereas, said parties of the first part contemplate assuming the control of the said United States Reflector Company, when, if ever, they shall be satisfied that the business of said company is a profitable one and that it fully realizes their expectations; and,

"Whereas, it is expedient that some arrangement should be made, whereby the profitability of said business may be determined by them, and the representations made by said company as to the character and volume of its business may be proven to the satisfaction of the said parties of the first part;

"Now, therefore, in consideration of the premises and of the mutual promises, covenants and agreements each to and with the other made as hereinafter set forth, and of the sum of one dollar each to the other in hand paid, the parties to this agreement do covenant, promise and agree to and with each other in the way, manner and form following, to wit:

"First. The said parties of the first part shall furnish the money necessary to execute the orders of The United States Reflector Company for goods manufactured and to be manufactured by it, in accordance with the claims and specifications of any and all the letters patent to it belonging or otherwise, by making advances of money to said company on such of said orders as they, the said parties of the first part, shall approve of; and when and so long as the said The United States Reflector Company shall be indebted to the said parties of the first part for money paid to it by their said firm, in discounting the bills and notes of said company,

received by it in the ordinary course of business, as set forth in section 5 of this agreement, then in that case it shall be obligatory upon said company; and the said company does hereby covenant, promise and agree to allow the said parties of the first part at their option to make such advances on each and every order that it may receive for its manufactured and to be manufactured goods, and to submit each and every order to said firm for that purpose, and to pay for such advance as hereinafter set forth; but when and so long as the said the United States Reflector Company shall be indebted to the said parties of the first part for money paid to it by said firm, in discounting the bills and notes of said company as set forth in said section 5 of this agreement, then in that case it shall not be obligatory upon said company to allow said parties of the first part to make such advances; but the said company may at its option apply to said firm for that purpose.

"Second. The said the United States Reflector Company shall and will assign, transfer and set over to said Hall, Nicoll & Granbery, at the time any such advance is made, the bill or order upon which they, the said parties of the first part, shall make such an advance as herein above set forth, with full power to collect and sue for the same and to receipt therefor on collection.

"Third. The said parties of the first part shall in all cases collect every bill or order so assigned to them as aforesaid, and upon which they have made an advance to said company as herein above stated; and out of the money arising from the payment thereof the said parties of the first part shall retain the amount advanced by them thereon as herein above mentioned, together with 6 per cent interest thereon from the date of such advance, and in addition thereto the amount of 25 per cent of the face of every such bill or order where the profits to the said company on the cost of making up the bill or order is 100 per cent, and in the same proportion when the said profit is less; but in no case the said parties of the first part shall receive less than 10 per cent on the amount advanced by them in addition to the amount so advanced on any bill or order as hereinbefore mentioned.

"Fourth. If the said company shall have on hand materials sufficient to make up the whole or part of any order or orders, the said parties of the first part will advance to the said company on the said material, estimated according to its market value, money sufficient to execute said order or orders on the same terms, at the same rates and in the same method as stated in the first, second and third articles of this agreement.

"Fifth. The said parties of the first part shall and will discount all such notes, bills, checks, drafts and accounts belonging to said the United States Reflector Company and received by it in the ordinary and usual course of its business, as they, the said parties of the first part, shall approve of, but not otherwise, at the rate of 6 per cent per annum.

"Sixth. The said the United States Reflector Company shall and will not, during the continuance of this agreement, borrow money on their orders or order for the goods manufact-

ured or to be manufactured by, under and in accordance with any letters patent to it belonging or otherwise, or allow its bills or notes to be discounted by any person or persons whomsoever other than the said parties of the first part.

"Seventh. This agreement shall be terminated at any time whatsoever, at the pleasure and option of the said parties of the first part, by a written notice to the company to that effect, served on its treasurer; and on the service of said notice, in the way and manner aforesaid, this agreement shall then cease and determine, and the parties of the first part hereto shall be absolutely and forever discharged and released from any obligation or liability hereby created, except that they, the said parties of the first part, shall have the right and they are hereby empowered to collect any bill or order upon which they have advanced, as provided in the first article of this agreement, and which may not have been collected by them at the time of the termination of this agreement as herein provided, and to receive and to retain out of the proceeds of said collection the amounts which, under the third article of this agreement they are entitled to.

"Eighth. Unless sooner terminated as hereinbefore provided, this agreement shall continue in full force and effect until the first day of February, 1881, and be binding on the parties hereto and their legal representatives and successors."

Independently of this agreement, evidence was adduced by the plaintiff and received by the court, under defendants' objections and exceptions, of declarations made by the defendants to the plaintiff and others to prove the liability of defendants Hall, Nicoll & Granbery; which declarations the plaintiff contended, and the court held and so instructed the jury, were competent and pertinent to establish such liability.

The jury found a verdict for plaintiff upon which judgment was entered. Defendants composing the firm of Hall, Nicoll & Granbery appealed to the general term, where the judgment was affirmed; and they appealed to this court.

At about the time the bill of goods in question was sold, another was sold to the same parties by the firm of Cassidy & Son, upon which a suit was brought against these defendants and a verdict and judgment given for plaintiffs. Upon appeal to the court of appeals the judgment was reversed (97 N. Y. 159), the court holding that the agreement in question and the acts and declarations of the parties were insufficient to establish a partnership.

Further facts appear in the opinion.

Mr. William H. Scott, for appellants:

As the action was not brought upon any original promise or any guaranty, but upon the claim that a partnership existed, the declarations of defendants are insufficient to uphold the plaintiff's right to recover.

Cassidy v. Hall, 97 N. Y. 170.

But assume for the sake of the argument that the whole testimony justifies the view that it was the understanding of the parties that Hall, Nicoll & Granbery were to pay for the goods; still the result would not be changed, in consideration of the conceded fact that the plaintiff also looked to the United States Re-

flector Company for payment of the bill, and that, in the first instance, the goods were charged and the bill presented to it, it being well settled by the decision in this State that "When the whole credit is not given to the person who comes in to answer for another, the promise is collateral; and in all such cases there must be an agreement in writing containing a sufficient consideration to support it."

Rogers v. Kneelund, 13 Wend. 114-121; 3 Kent, Com. 123; *Brady v. Sackrider*, 1 Sandf. 514; *Cowdin v. Gottgelreu*, 55 N. Y. 650; *Swift v. Pierce*, 13 Allen, 136; *Bugbee v. Kendricksen*, 180 Mass. 437.

Mr. Fred. M. Littlefield, for respondent:

The reason of the rule is obvious, that where credit is given by third persons on the faith of an apparent partnership the law will not permit them to become losers on account of any secret agreement or understanding of the apparent parties.

Am. Law Rev. Dec. 1881, p. 797. See *Brigham v. Clark*, 100 Mass. 430.

Representations, conduct, deportment and circumstances calculated or likely to induce the belief that the parties are partners will render them liable to creditors doing business with them under the impression so created.

Am. Law Rev. Dec. 1881, p. 800; *Burns v. Rowland*, 40 Barb. 868; *Vibbard v. Roderick*, 51 Barb. 616; *Stiles v. Meyer*, 7 Lans. 190; *S. C.* 64 Barb. 77; *Moss v. Jerome*, 10 Bosw. 220; *Fitch v. Hall*, 16 How. Pr. 175; *Irvin v. Conklin*, 36 Barb. 64; *Conklin v. Barton*, 43 Barb. 435; 5 Barn. & Ald. 147; 10 Barn. & Cress. 183; *Waugh v. Carver*, 2 H. Bl. 285-243; 19 Ves. 461; *McStea v. Matthews*, 3 Daly, 849; 8 Watts, 101; 63 Pa. 97; *Demuth v. Steinheimer*, 1 City Ct. Rep. 443 and cases cited; *Rice v. Burrett*, 116 Mass. 812; 44 N. H. 569; 22 Vt. 511; 51 Me. 52; 40 Ill. 455; 1 Smith, L. Cas. 7th Am. ed. 1306; 2 Greenl. Ev. p. 438, § 483.

It has frequently been held sufficient as to third persons to show a communion of interest in the profits, although it is not essential as to them that there be also a communion of interest in the property or capital used in the business.

Bronley v. Elliot, 38 N. H. 287; *Sheridan v. Medara*, 10 N. J. Eq. 469; *Winship v. Bank*, 5 Pet. 529 (30 U. S. bk. 8, L. ed. 216); *Leggett v. Hyde*, 58 N. Y. 272; 17 Am. Rep. 244; *Lengle v. Smith*, 48 Mo. 276; *Champion v. Bostwick*, 18 Wend. 184; *Heimstreet v. Howland*, 5 Denio, 68; *Fitch v. Harrington*, 13 Gray, 468.

Nor is it essential to them that there is no agreement to share the losses also.

Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797; *Pringle v. Leverich*, 16 Jones & S. 90.

A partnership may be proved against the parties by their declarations and admissions, whether verbal or in letters or other writings. 2 Greenl. Ev. p. 493.

It is of no importance whether such admission be made in express language to the person who acts upon it, or be implied from the general conduct of the party making it.

Taylor, Ev. 8th ed. § 839 and cases cited.

Admissions of the parties sought to be charged as partners, as well as their acts, are competent evidence to show a holding out to the world or to the parties dealing with them that they are partners.

Goode v. Harrison, 5 Barn. & Ald. 147; *Pal-*

mer v. Pinkham, 33 Maine, 32; *Dutton v. Woodman*, 9 Cush. 255; *Feld v. Tenny*, 47 N. H. 513; *Drennen v. House*, 41 Pa. 30.

There are some cases in which the doctrine of estoppel may be rested upon the broad ground of public policy.

Poillon v. Secor, 61 N. Y. 461.

If a lender of money to a firm stipulates for a right to control the business or the employment of the assets or to wind up the business, or if his advance is risked in the business or forms part of his capital in it, he ceases to be a mere lender and becomes, in effect, a dormant partner.

1 Lind. Partn. 24*.

When persons under the guise of a simple arrangement between the debtor and creditor, are merely trading as principals and putting forward as ostensible traders others who are merely their agents, they cannot, by such device, escape liability.

Molloo v. Court of Wards, L. R. 4 P. C. 419, 438.

Hall, Nicoll & Granbery held themselves out as partners, and are, therefore, liable to plaintiff and third parties.

Dailey v. Coons, 64 Ind. 545; *Dodd v. Bishop*, 80 La. Ann. 1178; *Buckingham v. Burgess*, 3 McLean, 364, 549; *Benedict v. Davis' Admrs.* 2 McLean, 347; 29 Ga. 285; 30 Ill. 396; 21 Iowa, 518; 18 La. Ann. 631; 20 La. Ann. 568; 22 N. J. L. 372; 8 Phila. 298; 11 Humph. 271; 4 Tex. 252; 14 Vt. 540; 32 Ark. 733; 25 Vt. 536; 116 Mass. 312; 80 Md. 1; 53 Ga. 98; 22 Vt. 511; 17 Vt. 446; 6 J. J. Marsh. 609; 2 Bush, 478; *Moss v. Jerome*, 10 Bosw. 220; *Burns v. Rowland*, 40 Barb. 368; *Irvin v. Conklin*, 36 Barb. 64; *Vice v. Anson*, 7 Barn. & Cress. 409; *Shaffer v. Randolph*, 99 Pa. 250.

The doctrine that a person holding himself out as partner and thereby inducing others to act upon the faith of his representations is liable to them as if he were in fact a partner rests upon the principle of estoppel.

Pickard v. Sears, 6 Adol. & Ell. 469; *Freeman v. Cooke*, 2 Welsb. Hurl. & G. 654.

It is wholly immaterial whether the person holding himself out as a partner does or does not share the profits or losses.

1 Lind. Partn. *48; *Ex parte Watson*, 19 Ves. 461; *Kirkwood v. Cheetham*, 2 Foster & F. 798; *Pringle v. Leverich*, 16 Jones & S. 98; *Re Jewett*, 15 Nat. Bank. Reg. 126; *Brown v. Leonard*, 2 Chitty, 120.

The existence of a partnership is a question of fact. This case was therefore properly submitted to the jury.

Eager v. Crawford, 76 N. Y. 97; *Butler v. Finck*, 21 Hun, 210; *S. C.* 10 N. Y. Week. Dig. 183; *Smith v. Hollister*, 32 Vt. 695; *Duinel Stone*, 30 Me. 384; *Jones v. N. Y. Cent. etc. R. R. Co.* 62 How. Pr. 450; Lind. Partn. *53 and cases cited. 54*; *Henshaw v. Root*, 60 Ind. 220; *Lewis v. Post*, 1 Ala. 65; 6 Man. & G. 928; 6 Q. B. 477; *Taft v. Warde*, 111 Mass. 518; *Scranton v. Rentfrow*, 29 Ga. 841; *State v. Wiggins*, 20 N. H. 449. See 14 Miss. 334; *Piermon v. Steinmyer*, 4 Rich. L. (S. C.) 309; *Whately v. Menheim*, 2 Esp. 608. See 13 Jones & S. 107; *Platner v. Platner*, 78 N. Y. 90.

Finch, J., delivered the opinion of the court: This action was brought against the defend-

ants as copartners, doing business as such under the name and style, as a firm, of the United States Reflector Company. Unless such a copartnership in fact existed, or was so represented to exist as to involve liability to third persons dealing upon the faith of the representations, the cause of action pleaded was wholly unproved and judgment should have gone for the appellants. The actual relation existing by their mutual agreement between the firm of Hall, Nicoll & Granbery, and the corporation organized and known as the United States Reflector Company was proved upon the trial. That agreement was in writing, entirely undisputed; and there is no pretense that as between the firm and the corporation any other agreement establishing their relations *inter sese* was at any time made.

We have already decided that the contract referred to did not make the firm and the corporation copartners and liable as such. *Cassidy v. Hall*, 97 N. Y. 159.

The plaintiff, therefore, under his pleading, could only recover upon the ground that although not in fact partners, yet Hall, Nicoll, & Granbery held themselves out as such, and the reflector company obtained credit on that account. The facts relied upon were very nearly those which in *Cassidy v. Hall* we held to be insufficient. They do show a sale to the corporation upon the verbal guaranty of the firm, the former being principal debtor, and the latter surety or the reverse; but they do not show or tend to prove a representation of an existing copartnership.

The plaintiff examined George Bridge, who was in the employ of the corporation and who applied to purchase for it the cross and gas fixtures sued for. Before attempting the purchase the witness told Hall that no one would trust the reflector company, to which Hall replied: "You must tell everybody the same as I have told you; we are the reflector company."

This indicated no partnership. It suggested something quite different. The inference which it justified was that the firm had become the owners of the corporation and were sustaining its credit, but not that a copartnership had been formed. The witness further explains that he was authorized by Hall to say that the corporation was "now in good condition" and that "Hall, Nicoll & Granbery were its backers." These representations were made to plaintiff, but he declined to sell upon them. In some form he evidently wanted the direct responsibility of the firm and was unwilling to sell without it. Finally Bridge, by the authority of Hall, promised that the firm would pay the bill; and thereupon the sale was made. The goods were delivered to the reflector company, charged to it, and the bill sent to it for payment.

Many letters from Hall to Bridge were produced. They showed a continued interference by the firm in the management of the business of the corporation, but an interference natural and proper under the written agreement which contemplated an effort to restore the company's prosperity and build up its business.

The plaintiff himself was called and gave his version of the representations leading to the sale. These were that the reflector company was backed and owned by Hall, Nicoll & Granbery, and was in good condition; that they controlled

its business and furnished the money; and that if he sold to it he should have his pay. The effort was to bolster up its credit by an assurance of the firm's interest in it and determination to aid it; but there was not a word leading to any inference or encouraging any belief that the firm and the corporation had formed a copartnership which was to be the proposed purchaser. On cross examination he shows that he perfectly understood the real relation existing and was not misled by even the suggestion of a partnership. He says: "I asked Bridge what relation Hall, Nicoll, & Granbery were to the reflector company, and where they were getting their money (Hall, Nicoll & Granbery) if they became security for the cross." Bridge answered that they controlled the company, not that they were partners with it; that all orders were submitted to them; that bills were paid and collected by them; that they bought for the company and reimbursed their advances from collections made by them. Other circumstances and incidents were shown, most if not all of which were considered by us in the *Cassidy Case*. Upon the question of partnership we are unable to see any substantial ground of difference between that case and the present one.

But there is another and graver question involved, although not raised in the appellants' brief. The firm did promise to pay this debt, as an inducement to the sale by the vendors. Whether that promise was original or collateral and whether the firm may not have become principal debtors for the goods is a very serious inquiry upon the evidence. Apparently that is the question which the court submitted to the jury upon the facts; and although outside of the pleadings, it was covered by the proof. But to that proof an objection was interposed by the defendants.

When the promise, "We will pay that bill," was first sworn to by Bridge, the defendants' counsel moved to strike it out, upon the ground that the whole theory of the action was a partnership; that what Hall said tending to induce that belief was pertinent, but the promise sworn to "seems without the limits of the pleadings." The court admitted the evidence "as against Hall" and the defendants excepted.

The promise to pay, even if original, was thus admitted only as against Hall, and the ruling cannot stand as a basis of the firm's liability as purchasers and original debtors. The question of pleading was squarely raised, and thereafter, without an amendment of the complaint, proof of the firm's liability founded upon a basis other than that stated in the pleadings could not be given and acted upon. To sustain the unpleaded cause of action the admission of the evidence was error which can only be cured by deeming the promise to pay merely evidence bearing upon the question of partnership. And although quite singularly, the court submitted this unpleaded cause of action to the jury, stating the inquiry to be, whether "Hall meant himself to be the purchaser, together with the United States Reflector Company," and adding that if the jury so found "the plaintiff would be entitled to a verdict, because the goods were sold, not only to the United States Reflector Company but to Mr. Hall," and although this charge evoked no

objection or exception from the defendants, yet we cannot ignore the fact that the evidence to sustain this unpleaded liability was objected to for that reason; and its erroneous admission, both as against the firm and as against Hall, cannot be resorted to, even to save what may be a very just verdict.

Possibly, on a new trial the pleadings may be so amended as to present the very serious question of the primary liability of the firm outside of a partnership; but as the case stands the judgment rendered was erroneous.

Judgment reversed; new trial granted, costs to abide the event.

All concur except **Miller, J.**, absent.

George W. CONSELYEA *et al.*, Exrs. of William Conselyea, Deceased, *Respts.*,
v.

Dudley BLANCHARD and John H. O'Rourke, *Appts.*, and George F. Drew and Charles L. Bucki, *Appts.*, Impleaded with Others.

1. **Orders drawn by a contractor, upon a county treasurer**, on account of work contracted to be done for the county, under a contract providing for a cancellation of the contract in case of delay, etc., on the part of the contractor, **no money** being at the time **due** on the contract, can operate only as assignments of money expected to become due, and they **become inoperative if**, by force of the provisions of the contract, **no money should afterwards become due** the contractor.
2. In such a case the fact that **orders** are given by the contractor before money becomes due under the contract **does not deprive the county of the right** to take any action in good faith deemed proper to secure performance of the contract and to protect its interests.
3. If, on default of the original contractor, the county, acting in accordance with the terms of the contract, employs another person, who was a subcontractor for a part of the work, to complete the work, the expense of such new arrangement being authorized to be deducted from the contract price, such subcontractor, on completion of the work by him, is entitled to the amount due both for the work covered by his original subcontract and for the additional work done by him; and his right to the money, applicable to such payment, is superior to that of holders of orders drawn thereon by the original contractor; and this, although, as matter of convenience, the bill for the whole work against the county was made out and audited in the name of the original contractor.
4. An order upon the person liable to pay for work contracted for, drawn by the contractor, in payment for materials used in the work, does not for that reason have priority over an order, the proceeds of which are not shown to have entered into the work.

5. A promise by a contractor, to pay for materials furnished, out of money to become due on his contract, does not operate as an equitable assignment of the fund or give an equitable lien thereon.

(Decided October 5, 1886.)

APPPEALS from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Special Term in favor of plaintiffs in an action for an injunction, and to establish a priority in orders drawn on a county treasurer. *Reversed.*
Memorandum of decision below, 35 Hun, 668.

Statement by **Earl, J.**:

On the 11th day of December, 1880, the Counties of Kings and Queens entered into a contract with the defendants Swift & Van Aken, to build a swing bridge over Newton Creek which separates those counties. The contract price was \$7,500, one half of which was to be paid by each county. The turn table of the bridge was to be the Blanchard and O'Rourke patent turn table.

The contract also contained the following provision: "Should the engineer at any time during the progress of the work be of the opinion that the work is being unnecessarily or unreasonably delayed, or that the contractor is willfully violating any of the conditions of this specification and shall certify so in writing, then the committee shall have the power to notify the contractor to discontinue all work or any part thereof under this contract. And thereupon the said contractor shall discontinue said work or such part thereof as the engineer shall designate; and the committee shall thereupon have the power to purchase, by contract or otherwise, as they may deem advisable, such quantity of material and to employ such labor and to use such material as they may find upon the line of such work, and to do any work that may be necessary to fulfill this contract or such part thereof as may be deemed necessary, and to charge the cost of such labor and material to the contractor; and the expense so charged shall be deducted out of such moneys as may be then due or at any time thereafter become due the contractor under this contract."

Swift & Van Aken entered upon the performance of the contract and after they had made some progress therewith they were paid by the two counties \$3,000. Afterward, before the completion of the contract, they gave orders upon the county treasurer of Kings County sufficient in form to operate as equitable assignments, which orders were dated and filed at the times mentioned below:

To William Conselyea for \$950, dated October 8, and filed October 10, 1881; to the same for \$600, dated October 11 and filed October 15, 1881; to Drew & Bucki for \$1,000, dated and filed October 20, 1881; to Blanchard & O'Rourke for \$1,250, dated December 28, and filed December 29, 1881.

Thereafter the bridge was completed and accepted by the two counties and the sum of \$4,000 remained due from them for the construction thereof, one half thereof from each county. The county treasurer of Kings County was willing and ready to pay the \$2,000 to the persons entitled thereto.

This action was commenced in May, 1882, by William Conselyea, since deceased; and the plaintiff claimed priority of payment out of the sum of \$2,000, due from Kings County, for the reason that his orders bore the earliest dates and were first filed with the county treasurer; and he prayed judgment that the county treasurer be restrained from paying any part of the sum to either of the other defendants, and that he be ordered first to pay the sum of \$1,550, the amount of his two orders, to him.

The defendants, the firms of Blanchard & O'Rourke, and Drew & Bucki, both answered, each claiming priority of payment out of the fund in the hands of the county treasurer.

The action came to trial at a special term and the court ordered judgment that Blanchard & O'Rourke be first paid the sum of \$250, out of the fund; that the plaintiffs who had been substituted in the place of William Conselyea, deceased, be next paid the sum of \$1,550, and that the balance of \$2,000 be paid to Drew & Bucki.

From the judgment thus ordered Blanchard & O'Rourke and Drew & Bucki appealed to the general term and from affirmance there to this court.

Mr. James Troy, for appellants Blanchard & O'Rourke:

It is claimed in the case by these appellants that the agreement between Blanchard & O'Rourke and Swift & Van Aken was violated on the part of the latter when they obstructed the former in the performance of the contract, by not performing the work necessary to be performed to enable Blanchard & O'Rourke to proceed, and in ignoring the demands of Blanchard & O'Rourke in this respect. Blanchard & O'Rourke were not in default, because obstructed by Swift & Van Aken.

Weeks v. Little, 11 Abb. N. C. 415; *Stewart v. Kaeltas*, 36 N. Y. 388; *Howell v. Gould*, 2 Abb. Ct. App. Dec. 418.

If Swift & Van Aken ever had an interest and property in the unfinished turn table, it was abandoned to Blanchard & O'Rourke by the breach and rescission. As to right to rescind, see *Graves v. White*, 87 N. Y. 463; *Bigler v. Morgan*, 77 N. Y. 812; *Morris v. Rexford*, 18 N. Y. 557; *Battle v. Rochester City Bank*, 3 N. Y. 88; *Murray v. Harway*, 56 N. Y. 846; *Bowen v. Mandeville*, 95 N. Y. 237.

The proceedings taken to procure the money by the presentation of bill, etc., were merely resorted to as the most convenient means of obtaining the money from the counties, and did not affect the right of Blanchard & O'Rourke.

Gallagher v. Nichols, 16 Abb. Pr. N. S. 337; *S. C.* 60 N. Y. 438; *Devlin v. Woodgate*, 34 Barb. 252; *Tallman v. Bresler*, 65 Barb. 369.

Mr. Tunis G. Bergen, for appellants Drew & Bucki:

The drawee in this case was a public officer, the county treasurer. In such a case formal acceptance was not necessary, but from the time of filing the treasurer became the trustee for the payee.

People v. Comptroller, 77 N. Y. 48; *Hall v. Buffalo*, 1 Keyes, 193; *Field v. Mayor*, 6 N. Y. 179.

When equity is called on to examine the consideration, it is submitted that the rule of equity

is this: "As between persons having only equitable interests, if their interests are in all other respects equal, then priority in time gives the better equity." In other words, priority of time is not the first ground of preference.

1 Pom. Eq. Jur. p. 455.

On grounds of public policy alone, the court should protect those who render service as against those who simply buy an order on such a fund. Courts of equity in this State have protected such interests on grounds of public policy.

The principle was laid down in *Bliss v. Lawrence*, 58 N. Y. 442; and in *Stover v. Eycleshimer*, 3 Keyes, 620.

Mr. J. Stewart Ross, for respondents:

The orders delivered to plaintiff by the defendants Swift & Van Aken for a valuable consideration, were assignments *pro tanto* of the fund to which they referred; and after the orders were filed with the county treasurer, he was bound to apply the fund, as it accrued, to the payment of the orders and to no other purpose.

Brill v. Tuttle, 81 N. Y. 454 and cases cited (reversing 15 Hun, 289); *People v. Comptroller*, 77 N. Y. 45; *Atty. Gen. v. Continental Life Ins. Co.* 71 N. Y. 325; *Munger v. Shannon*, 61 N. Y. 251; *Parker v. Syracuse*, 81 N. Y. 376; *Muir v. Schenck*, 3 Hill, 228; *Greentree v. Rosenstock*, 61 N. Y. 583; *Freund v. Importers, etc. Bank*, 76 N. Y. 352.

What is required by the authorities to give validity to an equitable assignment is a valuable consideration.

See *Tallman v. Hoey*, 89 N. Y. 539.

In the case of *Jones v. Mayor*, 90 N. Y. 387, the consideration was a prior indebtedness, and was held to have been a good consideration for such an assignment.

Earl, J., delivered the opinion of the court:

The only claim the plaintiffs have to share in the fund in controversy, and to have priority therein is based upon the two orders taken by their testator, for the first of which he paid \$850, and for the second of which he paid \$595. There was no evidence that the money thus advanced bore any relation to or had any connection with the bridge or its erection; and the plaintiffs claim priority of payment solely on the ground that these orders are prior in date to the other orders.

Blanchard & O'Rourke base their claim to priority of payment upon facts found by the judge at special term as follows: they were the owners of a certain patent for the construction of bridge turn tables which were known and designated as "Blanchard & O'Rourke patent turn tables;" and as such patentees they had the exclusive right to construct and use such turn tables; and Swift & Van Aken, by their contract with the two counties, were bound to furnish such a turn table.

For the purpose of performing their contract with the counties, Swift & Van Aken entered into contract with Blanchard & O'Rourke to furnish, supply and erect one of these turn tables for the price of \$2,500, of which \$2,000 was to be paid when the turn table should be complete, in running order, and accepted as such; and the balance, \$500, when the bridge should be accepted by the counties.

By the contract of Swift & Van Aken with

the counties, it was provided that the work on the bridge should be commenced within ten days and finished within sixty days after the completion and delivery of the central pier; and if there was delay beyond that time, they agreed to pay as liquidated damages to the counties the sum of \$50 per day for every day of such delay, the amount to be retained from the contract price stipulated to be paid by the counties.

By the contract between Swift & Van Aken and Blanchard & O'Rourke it was provided that the turn table should be completed within the time specified for the completion of the bridge.

After the making of the two contracts mentioned, and in or about the month of July, 1881, the central pier for the bridge having been completed and delivered, Swift & Van Aken entered upon the performance of their contract, and in that month, after doing some work thereon, they refused to proceed further under their contract until a payment was made to them which they were not entitled to, as the engineer in charge on behalf of the counties refused to certify therefor. Whereupon, the joint committee of the two counties duly authorized thereto took entire charge of the supervision of the work, and the engineer ceased to act further; and the committee, on the 21st day of July, for the purpose of inducing Swift & Van Aken to proceed with the work, although nothing was actually due them under the contract, reported a resolution to the boards of supervisors of the two counties, recommending a payment of \$3,000 to them on their contract, which sum was paid, upon such recommendation, by the counties.

On the reporting of such recommendation by the committee, Swift & Van Aken resumed work on the bridge; and on the passage of the resolution to make the payment recommended, they again ceased work. When such sum was paid to them they again resumed work on the bridge; and immediately thereafter again ceased work, and left the bridge unfinished, and thereafter absolutely failed and refused to proceed any further with the work, or to complete their contract.

Blanchard & O'Rourke duly proceeded with the erection of the turn table, and performed their contract in respect thereto, so far as the condition of the work to be performed by Swift & Van Aken permitted; but they were unable to fully complete and erect the turn table, for the reason that Swift & Van Aken had not, when they ceased to work, progressed to an extent sufficient to enable them to complete the same or further proceed therewith. Although they repeatedly demanded and required Swift & Van Aken to proceed with the erection of the bridge, so as to permit them to proceed with the erection of the turn table, they continually refused so to do, and in violation of their contract, hindered, delayed and prevented them from finishing the turn table and completing their contract. Swift & Van Aken were thus in default from July to October, 1881; and Blanchard & O'Rourke were not at any time in default.

In the month of October, while Swift & Van Aken were thus in default, there was a meeting of the joint committee at which Swift & Van

Aken refused further to perform their contract, and declared their inability so to do and their intention absolutely to abandon the performance thereof. Whereupon, Blanchard & O'Rourke notified the committee that they would not proceed with the building of the turn table unless payment of the amount which they were to receive therefor should be assumed by the committee and thus secured to them; and they being then and there in possession of the work and material already used by them in the building of the turn table so far as the same had progressed, declared their intention unless so secured, to remove the materials and not to furnish the counties with the turn table or to permit the construction or use thereof. Whereupon, the committee, having full power and authority so to do, requested them to erect the turn table and promised and agreed that on the completion thereof the counties would pay them the sum of \$2,500, and then and there, with the consent and concurrence of Swift & Van Aken, that sum was reserved, set apart, assigned and appropriated from the amount still unpaid to Swift & Van Aken, under their contract with the counties to and for the payment of Blanchard & O'Rourke upon the completion of the turn table; and the boards of supervisors of the two counties thereafter duly ratified the agreement.

Blanchard & O'Rourke, relying upon the agreement, thereupon agreed to proceed with the work, and did accordingly thereafter finish and complete the same. Swift & Van Aken did not thereafter proceed with the contract with the counties; and no money ever fell due to them thereunder, except as hereinafter stated. Blanchard & O'Rourke, with the consent of Swift & Van Aken, finished the contract of the latter with the counties and permitted them to have the ultimate benefit thereof and to receive the amount unpaid on the contract after first deducting the amount of \$2,500, so appropriated, assigned and set apart for paying for the turn table.

On the 29th day of December, 1881, the committee in pursuance of the agreement to pay Blanchard & O'Rourke for the turn table on the completion thereof and for the purpose of carrying out the agreement, duly certified to the boards of supervisors that the sum of \$5,000 was due to Swift & Van Aken, on account of their contract, one half thereof payable by each county; that \$1,250 of the same was to be paid by each county to Blanchard & O'Rourke, before any other sum should be paid to any other person, and that the balance, \$750, was to be paid by each county to Swift & Van Aken. The boards of supervisors severally adopted resolutions of the same tenor and effect.

On the 28th day of December, Swift & Van Aken delivered to Blanchard & O'Rourke an order on the treasurer of Kings County, requesting him to pay them the sum of \$1,250, out of any moneys due or to grow due on their contract, which order was filed with the treasurer on the next day. That order was so given in furtherance of the agreement made between the joint committee and Blanchard & O'Rourke, with the consent and concurrence of Swift & Van Aken; and it and the bill presented therewith and the auditing thereof, and other proceedings in relation thereto, were resorted to

and had in compliance with the agreement, and were mere matters of form resorted to and adopted for the purpose of obtaining the money in the usual and most expeditious way under the agreement and not otherwise, and were in no way intended to impair the rights of Blanchard & O'Rourke to the money under the agreement.

The trial judge not only found the foregoing facts, but he also found as conclusions of law, that there was nothing due to Swift & Van Aken from the counties, under their contract with them at the time they gave any of the orders involved in this action; that the counties and Swift & Van Aken had the legal right at any time during the existence of the contract between them to alter, modify or change the same in any way, provided it was done in good faith and without intent to defraud; that the agreement made between the committee and Blanchard & O'Rourke and Swift & Van Aken was made in good faith and for the best interest of the counties and of the other parties thereto, and was in all respects a valid and essentially necessary change and modification of the original contract; that at the time of making such change and modification of the contract Swift & Van Aken were in default in performance thereof, and then and there refused to proceed therewith or further to perform the same; that such refusal and the consent of Swift & Van Aken then given to the agreement between the counties and Blanchard & O'Rourke were a waiver of the notice required to be given to Swift & Van Aken under their contract on their failure to proceed therewith with reasonable diligence; that on such refusal and waiver the committee had the right and power, on behalf of the counties and under the contract between them and Swift & Van Aken, to proceed with and procure the erection of the turn table and charge the expense thereof to Swift & Van Aken and deduct such expense from the moneys yet unpaid on the contract; that Swift & Van Aken unreasonably hindered, delayed and prevented Blanchard & O'Rourke in the erection and completion of the turn table in violation of the contract between them; that Blanchard & O'Rourke did not, at any time or in any way violate the terms of such contract; that on such violation of the contract by Swift & Van Aken, Blanchard & O'Rourke had the legal right to abandon their contract and absolutely refuse to proceed further therewith, and also to remove and retain such materials as were still undelivered by them and were in their possession or under their control, and refuse to permit the further construction or the use of their patent turn table; that without such turn table the bridge could not be built or used as planned and projected; that Blanchard & O'Rourke had the right to make the agreement above mentioned with the counties, and the agreement was ratified and confirmed, and was in all respects valid and binding upon the counties and upon Blanchard & O'Rourke, and was and is unaffected by the former contract between them and Swift & Van Aken.

If some findings of fact are more favorable to Blanchard & O'Rourke than others, they have the right upon this appeal to claim the benefit of those which are most favorable to them, and so we have repeatedly held. *Schwinger v. Ray-*

mond, 83 N. Y. 191; *Bonnell v. Griswold*, 89 N. Y. 122.

It is impossible for us to perceive how, upon the facts found, a conclusion adverse to the claim of Blanchard & O'Rourke can legally or justly be reached.

The orders taken by Conselyea and by Drew & Bucki did not operate as assignments of any money then due, as none was then due under the contract. They operated as assignments of money which was expected to become due and which might become due under the contract. If after they were given, by the default of Swift & Van Aken or by force of provisions contained in the contract no money should become due to Swift & Van Aken, the orders would become inoperative.

The fact that the orders were given did not deprive the counties of the right to take any action in good faith under the contract which they deemed proper and necessary to secure its performance and to protect their interests. The orders did not bind them, except as to payments which might become due to Swift & Van Aken under the contract.

Before any money was earned or paid under the contract and before the orders were given, the engineer employed by the counties was discharged and the joint committee assumed the supervision and direction of the work under the contract, and by the consent of Swift & Van Aken were substituted in his stead.

After Swift & Van Aken had for some time been in default in their performance of the contract, they declared their inability to further perform, and absolutely refused further performance. Then the counties had the right to make any arrangements they could for the completion of the bridge, and deduct the expenses to which they should be subjected from the price stipulated in the contract. With the assent of Swift & Van Aken they agreed with Blanchard & O'Rourke that they should complete the bridge, and that if they would do so they would pay them the \$2,500 which they were to have for the turn table. At that time Blanchard & O'Rourke were absolved from further performance, and they had the right to remove all their materials and thus the bridge could not have been completed as planned. Relying upon the promise of the counties they resumed work, completed the contract of Swift & Van Aken and their own contract, and gave the counties the benefit of their patent turn table.

The \$2,500 never became payable to Swift & Van Aken but became payable only under the new agreement; and thus the orders given to Conselyea and to Drew & Bucki never applied or attached thereto. The effect of the agreement was to procure the performance of Swift & Van Aken's contract, but at an expense to the counties of the \$2,500, which they agreed to pay and were bound to pay, and which they could deduct from the contract price.

It matters not what form the subsequent transactions between the counties and Swift & Van Aken took. The order was given to Blanchard & O'Rourke, and the bill against the counties was made out and audited in the name of Swift & Van Aken; but all this was done to carry out the new agreement which had been made and without any intent to affect in any

way the rights of Blanchard & O'Rourke thereunder.

The court below held that Blanchard & O'Rourke were entitled to priority of payment only for the sum they expended in the completion of the contract of Swift & Van Aken after the new agreement; and as that sum was \$500 (one half payable by each county) that they could have priority only for \$250, on the fund now in question.

But that is only a partial view of the case. They had the right to remove all their materials and to absolutely refuse to construct and put up the turn table; and in consideration of the new agreement they left their material, gave the counties the benefit of their turn table and expended the \$500. For all this they were entitled to have the \$2,500 promised to them.

Therefore we are of opinion that Blanchard & O'Rourke were first entitled to have \$1,250 out of the \$2,000 held by the treasurer of Kings County.

For the purposes of this appeal we might stop here. But with the view to the new trial, something more may with propriety be said as to the rights of priority as between the plaintiffs and Drew & Bucki. The latter claim priority of payment over the plaintiffs, because the materials they furnished for which the order was given to them were actually used in the construction of the bridge, while there is no proof that the money paid by Conselyea was in any way used in the construction of the bridge or had any relation thereto. This claim is not well founded. It is sufficient that plaintiffs' orders were founded upon a sufficient consideration. That made them effectual as assignments.

While the money paid was not actually used upon the bridge, it might have been used to support the assignors, or to keep off their creditors or to maintain their credit while they were engaged in the performance of their contract. It might be a very embarrassing inquiry to trace the connection which money thus advanced could have with the performance of any contract. Its relation to the contract might be very remote and yet just as useful as if actually used in its performance.

If courts should enter upon the inquiry to which we are invited by Drew & Bucki, they would have very embarrassing equities to adjust; and great uncertainty would nearly always attend such assignments. Suppose money or materials were advanced or furnished to be used in the performance of a contract, but were not actually thus used or only so used in part, and orders were taken for the consideration thus furnished, sufficient in form to operate as equitable assignments; how, under the rule claimed by Drew & Bucki, could the equities of several assignees be adjusted? We think the wiser rule is to treat all assignments of the kind we are now considering, founded upon sufficient considerations, as standing upon the same footing, and we find no case which sanctions any other rule.

Drew & Bucki claimed that they obtained an order from Swift & Van Aken in June, 1881, before any of the other orders were given, which was filed with the county treasurer and mislaid or lost; and that their present order dated October 20, 1881, was taken for the same amount

in the place of the former one, and they gave evidence tending to sustain this claim. But there was no finding or request to find in reference to the former order. If upon the new trial they can satisfy the court that such an order was given, and that the last order was given as a substitute for that, then they will be in a position to claim priority over the plaintiffs.

It will not be sufficient for Drew & Bucki to prove that at the time they furnished these materials Swift & Van Aken promised to pay them out of the money which should become due to them upon the bridge contract. Such a promise does not operate as an equitable assignment of the fund, or give an equitable lien thereon. *Williams v. Ingersoll*, 89 N. Y. 508, 518.

We are therefore of opinion that the judgment should be reversed and a new trial granted, costs to abide event.

All concur except **Miller, J.**, absent.

Re ESTATE OF Elisha W. ENSIGN, Deceased.

1. **A divorced wife, however innocent, has no right to a distributive share in the personal estate of her divorced husband**, upon his death intestate. Hence, a divorced wife, who had been divorced on her own application (for the adultery of her husband) and who had released all interest in her former husband's real estate, is not entitled to notice of proceedings to probate his will.
2. **No intention to permit an innocent divorced wife to share in the personal estate of her divorced husband**, on his death intestate, is to be inferred from the terms of 2 R. S. p. 146, § 48, providing that "A wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate."
3. **The true theory of the statute is that**, from the date of the decree, no existing and vested rights are forfeited except by the express mandate of the statute, but that no future marital right or obligation can arise for or against either the divorced husband or wife.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fifth Department, affirming a decree of the Surrogate's Court of Erie County dismissing proceedings for the revocation of the probate of a will, and confirming the probate thereof. *Affirmed*.

Reported below, 37 Hun, 152.

The following are the facts, substantially, as found by the surrogate:

Elisha W. Ensign, a resident of the City of Buffalo, County of Erie, N. Y., died October 1, 1877, leaving personal property in said county. He left surviving, as his sole heirs at law and next of kin, his brother Charles Ensign and his sister Cornelia Hamilton, both of full age, residing in Buffalo, N. Y.

October 6, 1877, Charles Ensign presented to the surrogate of Erie County his petition showing that Elisha W. Ensign left a last will and testament dated December 1, 1866, and praying that such instrument might be proved, allowed and admitted to probate as the last will and testament of Elisha W. Ensign.

The petition was duly filed and Cornelia Hamilton appeared and consented thereto, and on the same day the instrument was proved and admitted to probate as the last will and testament of Elisha W. Ensign, and letters testamentary issued to Charles Ensign, executor, named therein. Charles Ensign died December 8, 1880; and on proceedings instituted by Cornelia Hamilton, she was appointed administratrix with the will annexed of Elisha W. Ensign.

May 24, 1867, Elisha W. Ensign was married to the petitioner in these proceedings, Jennie Ensign Martin, at Cincinnati, Ohio. They lived and cohabited as man and wife at New York City from the year 1868 to and including a portion of the year 1875. November 10, 1869, issue was born of such marriage which died within twenty-four hours of its birth.

On proceedings by the petitioner for divorce, commenced October 28, 1875, in the Court of Common Pleas in New York City, a decree of absolute divorce on the ground of the adultery of said Elisha W. Ensign was obtained December 18, 1875. Said decree of divorce ordered Elisha W. Ensign to pay as alimony the sum of \$25,000 in semi-annual installments of \$2,500 with interest, etc., and also directed Elisha W. Ensign to pay off a mortgage of \$18,500, etc.

December 28, 1878, the petitioner executed under seal, in consideration of the payment to her of \$10,000 by Charles Ensign, executor, etc., being the balance due of said alimony, to Charles Ensign as executor and to Cornelia Hamilton as sister and principal residuary legatee of Elisha W. Ensign, deceased, a release of all her dower and right and title of dower in and to all the lands and real estate of which said Elisha W. Ensign died seised.

In the month of December, 1877, the petitioner intermarried with one Edward Martin, whose wife she now is.

Thereafter said Jennie Ensign Martin instituted these proceedings to set aside the probate of the will of Elisha W. Ensign, alleging that she had not been served with any notice of the proceedings to probate such will and had never appeared therein (which facts were admitted in respondent's answer), and claiming to be entitled to a distributive share of the testator's personal estate had he died intestate.

The surrogate dismissed the appellant's petition, upon the ground that she was not entitled to notice of any of said proceedings, and that she was not and would not be entitled to any distributive share of the testator's personal estate had he died intestate.

Mr. Louis Marshall, for appellant.

Mr. S. S. Rogers, for respondent.

Finch, J., delivered the opinion of the court: A statutory construction, unchallenged for more than half a century, is assailed on this appeal.

That a divorced wife, however innocent, has no right to a distributive share in the personal N. Y.

estate of her divorced husband, upon his death intestate, has been conceded until a very recent period, but is now asserted to have been all the time a mistake which should at last be corrected.

A single provision of the statute relating to divorce gives color to the construction sought. Where the decree is founded upon the misconduct of the wife it is expressly provided that she "shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." [2 R. S. p. 146, § 48; 8 R. S. 5th ed. p. 237, § 61].

On the theory that this was a needed provision to bar the guilty wife of dower it is argued that it was thought also a needed provision to bar distribution; and the inference is drawn that without such prohibition, or where by reason of the divorced wife's innocence it could not apply, the Legislature supposed she would be so entitled and intended to leave her, when free from fault, in the possession of both rights to their full extent.

But it is quite evident that we have here an unnecessary and superfluous provision as it respects dower. In a previous part of the Revised Statutes (1 R. S. p. 741, § 8) it had already been declared that in case of a divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed. This provision was needed to cut off the inchoate dower of the wife in property of the husband acquired prior to the decree, and was useless beyond that, and so operative for that purpose only. The added provision of section 48 was therefore needless. It is conceded to have been a mere "repetition" having no excuse except that of over caution, which is sometimes as dangerous as neglect. In the same statute there is a second instance of the same superfluous legislation. It is provided that the dissolution of the marriage contract shall not affect the legitimacy of the children. 3 R. S. 5th ed. §§ 56, 57.

In *Wait v. Wait*, 4 N. Y. 95, it was said of this provision: "No one, however, will pretend that such a provision, though for greater caution it may have been wise to adopt it, was in fact necessary;" and the court admitted that this needless case bore "to some extent" upon the prohibition of dower in section 48.

There were thus, concededly, two instances of needless caution in the statutes under consideration, and others ought not to surprise us. Ascertaining that the clause relating to dower was useless we may expect to find that equally true of the following one relating to distribution. The revisers omitted it in their draft, but the Legislature added it. All that time no right to distribution had ever been conceded to the divorced wife, but the law had been administered to the contrary; and with the full knowledge of that fact in the mind of the Legislature, it is difficult to conceive an intent to change the rule in so important a matter, left to be evidenced merely by an indirect inference and not affirmatively and expressly declared.

The rule as it then stood rested upon very clear and definite grounds. The Statute of Divorce began with a provision permitting a marriage to be annulled for specific reasons. In such case no marital rights could exist on either side, since the decree adjudged that a lawful marriage had never existed. But then came

provisions for a dissolution of the marriage contract. In such case the contract is ended and terminated by the decree of the court. The relation of husband and wife, both actual and legal, is utterly destroyed and no future rights can thereafter spring out of or arise from it. Existing rights, already vested, are not thereby forfeited, and are taken away only by special enactment as a punishment for wrong. But future rights, dependent upon the marital relation and born of it, there can be none.

Thus, the wife's dower at the date of the decree is vested as an inchoate right, at least as against the husband, whether she be innocent or guilty, by the concurrence of marriage and seisin. It has fastened upon the land and follows it as an incumbrance and would become consummate upon the death of the husband in either event, but for the express mandate of the statute which forfeits it where the wife is the guilty party. But the wife, although blameless, acquires no dower right in lands conveyed to the husband after the divorce, because he was not seised during the coverture. *Kade v. Lauber*, 16 Abb. Pr. N. S. 288.

The coverture is ended and cannot serve to found a new right after its destruction. The existing inchoate right remains because it has already accrued, has not been forfeited by guilt, and does not depend upon the continuance of the marriage relation, but independent of that continuance becomes consummate by the death of him who was the husband when it sprang into being.

For the same reason (that future rights, dependent for their origin on the marriage relation, cannot arise after its dissolution—and which prevents the innocent wife from having dower in her husband's after acquired lands) it follows that she can have no distributive share in his personality. At the date of the decree she has no existing right in his personal estate. That is his. No fraction of it and no lien upon it are hers. He may sell it without her consent, give it away if he pleases, and bequeath it at his own free choice. If it remains his at his death, then the wife, if the marriage relation exists and has not become sundered, becomes "the widow" named in the Statute of Distribution; and at that moment for the first time arises her right in the personal estate dependent upon the existence of the marriage at the husband's death.

Administration is given, first, "to the widow." The law contemplates the possible existence of but one, and makes no provision for a struggle of priority between two or more. To "the widow" is given one third of the personal estate; and all the other provisions, allowing her occupation of her husband's house, and setting apart for her specific articles of household use, indicate the understanding of the Legislature that she only was "the widow" who held to the deceased at the date of his decease the relation of wife. Otherwise the statutes, meant to be both just and generous, become fomenters of discord and plan for bitterness and war.

The divorced wife is not "the widow." She may be the lawful wife of another man and the deceased may have lawfully remarried in another State, or by permission of the court in this; and it would follow, if the appellant is right, that a woman may be a widow although

her lawful husband is living, and that an intestate may leave two widows with equal rights to administration and distribution. Suppose that with unusual activity he should leave four, how would each have one third of the personality?

And were the children of any account in the scheme of distribution? In one event "the widow" is entitled to the whole surplus. The appellant's counsel solves the struggle by applying to the later wives, with a sort of grim humor, the maxim *caveat emptor*; but the suggestion is not quite adequate to unsettle the law and unite at desired points a severed bond.

When the court dissolves the marriage contract at the suit of the innocent wife, it is authorized to decree the payment to her of a suitable allowance. And why is that? If any marital right continues after the divorce, the wife remains entitled to her support and may enforce it in the ordinary way. On the contrary the statute recognizes that when the marriage tie is broken and the relation ended, no future rights will remain to the wife and no future obligations bind the husband which have their root in the marriage relation.

The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife which the divorce cuts off and forbids in the future. The tribunal granting the decree investigates the husband's financial condition, takes proof of the value of his property, and then makes a suitable allowance for her life, and so puts the decree and its power in the place and room of what is lost in the future.

If because the wife is innocent the marriage relation in any degree subsists as against the husband, we must confront the anomaly of a contract adjudged to have been dissolved and yet remaining not dissolved as to one of the parties, and read in the decree that both sides are freed from the obligations of the marriage contract when the court pronouncing it knows it to be false, since some obligations of the husband will remain.

The distinction drawn on behalf of the appellant between rights and obligations does not relieve the difficulty, for it is impossible to conceive of a right of the wife which does not impose upon the husband a corresponding obligation. The true theory of the statute is that from the date of the decree, no existing and vested rights are forfeited except by the express mandate of the statute; but since the marriage contract ends and the relation terminates, no future marital right or obligation can arise for or against either. In place of them stands the decree of the court, looking beyond the bond it is about to sever, recognizing the inevitable consequences to follow the uplifted arm and providing for the innocent wife or husband by its own mandate that reparation which, after the decree, is possible from no other source.

Nothing decided in *Wait v. Wait*, *supra*, upon which the appellant so much relies, is at all to the contrary. The question there was over the right of the innocent wife to dower in the lands of which her husband was seised before the divorce and, therefore, during coverture. The argument against that right assumed, as not open to contradiction, that the divorce

ended the marriage so that none of its future rights or obligations could survive, and then sought to show that the wife's inchoate dower was a mere possibility or expectation, having no tangible existence until in the future following the decree. This court met the argument exactly at that point and asserted as the sufficient answer, what we have already pointed out: that the wife's dower, by the concurrence of marriage and seisin attached to the land as a fixed and vested right not to be shaken off unless by her consent or some declared forfeiture or decree of the sovereign power; and then argued that the dissolution of the marriage operated prospectively only, and so had no retroactive effect upon a right already vested. Observe that the ground taken was not that the marriage relation in any respect survived the divorce. If it had been, the argument founded upon the character of the inchoate dower as a vested right would have been pointless and unmeaning. And while there are in the opinion expressions indicating a belief in some sort of continuance of the marriage relation after the decree, they were unessential to the decision and were not the ground upon which it stood.

The further argument of the appellant rests upon the statute against bigamy and our construction of it in *People v. Faber*, 92 N. Y. 146.

The statute relating to divorce prohibits the guilty defendant from marrying again, and a clause to that effect is usually inserted in the decree. This was needless and another instance of superfluous care, if the marriage relation survived the divorce as against the guilty party; and the express prohibition is here an argument against that theory of equal character and force with that derived by the appellant from section 48.

But in spite of the prohibition and because the divorced husband no longer had a wife living, it was held in *People v. Hovey*, 5 Barb. 117, that his after marriage, although punishable as a contempt, did not constitute the crime of bigamy. We overruled that decision, but not at all upon the ground that the divorced wife remained the culprit's wife, in any sense or respect; but for the reason that the statute, by its express words, disclosed an intention to make the crime of bigamy consist not only in marrying a second time while the first wife was living, but in so marrying while under the prohibition of the law, and during the life of the woman who had been the wife before the decree of divorce. We construed these specific words as intended to force such a case into the meaning of the statute which without them would not at all have embraced it, and without them they would have led us to affirm *People v. Hovey*. Surely nothing was further from our thoughts and from the careful reasoning of the opinion than an idea that the divorced wife remained a wife, as to the defendant, and that he was a bigamist for that reason. We held him to be such because the statute put him "in the situation" of one having a wife living, "for the purpose" of enforcing the statutory provision.

The recent legislation which permits a divorced husband, prohibited from remarrying, to do so after five years and with the consent of the court, and the class of cases which affirm the validity of such second marriage in

another State over whose boundaries our own prohibition does not extend, are alike inconsistent with any doctrine which makes the marriage relation as to either of the parties remain in existence after the dissolution of the contract and the severance of the bonds. With the exception of a single case in the supreme court, itself overruled, the statutes and decisions are in entire harmony with the practice and the rule which has so long prevailed. We are of opinion that it should not be changed.

The judgment should be affirmed with costs.

All concur except **Miller, J.**, absent.

Mary MAGUIRE, Admr., *Resp.*,

v.

George SELDEN *et al.*, *Appts.*

Statements by the owner of a mortgage, as to a third person's being authorized to receive payments thereon for him, not made to the party liable on the mortgage and not made to be communicated to him or to influence his conduct, will not estop the owner of the mortgage from afterwards denying the authority of such third person to receive payments.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Kings Special Term in favor of plaintiff, in a suit to foreclose a mortgage. *Affirmed.*

Memorandum of decision below, 84 Hun, 631.

The title to the mortgage became by assignment vested in plaintiff's intestate; and the title to the lands became vested in defendants. The matter in controversy respected the validity of of an alleged payment made by defendants to one Martin Evans, December 1, 1881, amounting to \$1,005.83. Defendants claimed that Evans was plaintiff's agent authorized to receive this payment on account of the mortgage; and that even if he had not actual authority, yet the plaintiff had so conducted herself as to lead the defendants to this belief. The court found the facts adversely to both of these claims and held that the payment was ineffectual, as Evans had no authority to receive it on behalf of plaintiff.

The facts are stated in the opinion.

Messrs. Estes & Barnard, for appellants:

Where a party has, by his declarations and conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admissions, if the consequences would be to work an injury to such other person.

Bank of Genesee v. Patchin Bank, 13 N. Y. 316; *Dezell v. Odell*, 3 Hill, 215-221; *McMaster v. Ins. Co. of N. Am.* 55 N. Y. 229; *Boardman v. Lake S. & Mich. S. R. Co.* 84 N. Y. 182; *Voorhees v. Olmstead*, 6 Thomp. & C. 172; *Blair v. Wait*, 69 N. Y. 113; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154, 157; *Carpenter v. Stilwell*, 11 N. Y. 73.

See 2 Pars. Cont. 5th ed. 798, and cases cited in notes.

It matters not whether the plaintiff designed to mislead. If her conduct and conversation was calculated to mislead, and actually did mislead, and defendant acted upon it in good faith, plaintiff is estopped.

Myra. etc. Bank v. Hazard, 30 N. Y. 230; *Boardman v. Lake S. & Mich. S. R. Co.* 84 N. Y. 182; *Cont. Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 575.

On the question of estoppel,

See also *Payne v. Burnham*, 2 Hun, 143; *Johnson v. Jones*, 4 Barb. 369; *Dunning v. Roberts*, 35 Barb. 467; *Lightbody v. N. Am. Ins. Co.* 23 Wend. 18; *Lynch v. Kennedy*, 34 N. Y. 151.

Possession of the bond and mortgage is sufficient evidence of authority of the holder thereof to receive payment, not only of interest but principal.

Megary v. Funtis, 5 Sandf. 376; *Williams v. Walker*, 2 Sandf. Ch. 325.

Mr. Charles J. Patterson, for respondent:

The court has found upon sufficient evidence that Evans had no actual authority to collect anything upon the principal of the mortgage, and that he never had possession of the papers. Under the settled rules applicable to cases of this character these facts are conclusive against the defendant's appeal.

Smith v. Kidd, 68 N. Y. 130; *Dunlap's Paley, Agency*, p. 274.

What was said to Wyckoff could not in any view create an estoppel in favor of Selden.

A statement can only create an estoppel in favor of the individual to whom it is made.

Mayenborg v. Haynes, 50 N. Y. 675.

To create an estoppel the party must have made a statement which was designed or calculated to mislead another to his injury. The party sought to be estopped must have been guilty either of fraud in willfully misleading, or of negligence in not observing that his words would mislead the other.

Victor v. International Nav. Co. 13 Jones & S. 129; *Blair v. Wait*, 69 N. Y. 113; *Herman, Estop.* p. 341, § 330.

The creditor is not bound to give any notice of the withdrawal of authority from his agent; but the debtor must see that the agent has the securities at each payment. Otherwise he pays at his own risk.

Williams v. Walker, 2 Sandf. Ch. 325.

Estoppels are strictly construed and the meaning of the words used will not be enlarged by construction to uphold an estoppel *in pais*.

Herman, Estop. p. 346, § 334.

Danforth, J., delivered the opinion of the court:

The execution and validity of the bond and mortgage were admitted; and the first question upon the trial was whether the sum secured by it had been paid. That was determined against the defendants by the trial judge, and his decision is not now controverted. It appeared, however, that the defendants, with intent to have it applied upon the mortgage, delivered money sufficient to make the payment to one Evans, under the belief that he was agent for the plaintiff and authorized to receive it; and the principal point now made is that the evidence required the judge to find from the words and conduct of the plaintiff that she

induced the belief upon which the defendants acted and so was estopped from denying that the payment to Evans was, as to the defendants, sufficient to discharge the debt. This too was a question of fact, to be determined by the trial judge; and upon it he found against the defendants.

The general term was of opinion that his conclusion was justified by the case made, and we think the testimony permits no other result. The mortgage was executed in May, 1875, to mature on the 30th of August, 1876, with interest, payable semi-annually; the plaintiff as administratrix became its owner in July, 1876. The defendants resided in Pennsylvania, and before October 28, 1881, bought the premises of one Lyons, subject to the mortgage. Wyckoff Brothers were the agents of Lyons in the fall of 1881, and at his request one of that firm called upon Mrs. Maguire to see if she wanted the principal. "She said she didn't want the principal, she wanted the interest." "I asked her," he says, "if she held the mortgage; she said she did; then I asked her again about the principal and she replied she didn't know much about that; also that she didn't know much about the papers, as Mr. Evans had charge of them."

Asked by defendant's counsel: "When you asked her whether she wanted the principal or not, did she say anything about seeing Evans then, or whether she had got to see him?" he said: "Yes, sir, I stated that she said Evans had charge of matters in regard to receiving and collecting interest, always. In the former part of my statement, I said that she said she didn't want the principal, she wanted the interest. I remember that she said she would have to see Evans about it."

Lyons testified, in substance, that while his wife owned the property, he had a general conversation with the plaintiff, in which she said Evans was her agent, and had her papers, and would act for her. These alleged conversations are denied by Mrs. Maguire. It is quite immaterial to inquire who of these witnesses should be credited.

The trial judge has found that Evans was not in fact the agent of the plaintiff for the purpose of receiving the principal of the mortgage; that he did not have the bond and mortgage, and that the defendants were not misled to the contrary by anything the plaintiff said or did. But however the plaintiff's statements, as testified to by the defendant's witnesses, are interpreted, they cannot help their case. They were not made to the defendants nor were they made to be communicated to them.

It so happened that Wyckoff afterwards was employed by the defendants. That was an accidental circumstance, not anticipated by the plaintiff and not sufficient to give the character of an estoppel to her statements, in favor of the defendants. They were not intended to influence their conduct, and however understood, could not be extended beyond the party to the transaction in relation to which they were made. *Mayenborg v. Haynes*, 50 N. Y. 675.

They were competent as evidence, but could have no greater effect. Some exceptions have been argued, but they seem to us without merit.

The judgment should be affirmed.

All concur, except **Miller, J.**, absent.

RE WILL OF ELIZA B. BECKETT.

1. **Declarations of the maker of a holographic will**, made previous to the time of its execution and publication, in conversations with the persons who subsequently witnessed the will, may be **admitted to aid** in showing a **publication** within the statutory requirements, where such previous declarations are closely connected with the act of publication by words used by the testator at the time of publication.
2. A **devise** of "all the money I die possessed of in several banks and bonds" is not void for **indefiniteness**.

(Decided October 5, 1886.)

A PPEAL by Robert C. Walsh and others, next of kin of Eliza B. Beckett, deceased, from a judgment of the Supreme Court at General Term in the First Department, reversing a decree of the Surrogate's Court of New York County, refusing to admit an alleged last will to probate. *Affirmed*.

Reported below, 85 Hun, 447.

The decedent was a widow and had an annuity of \$12,000 per annum, and a power to dispose, by will or instrument in the nature of a will, of a sum of \$25,000 out of her husband's estate. After her death the following was offered by the devisees named therein as her last will and testament:

"October 5, 1881.

My Last Will and Testament:

I leave and bequeath to my niece, Alice McBlair, all the money I die possessed of in several banks and bonds, besides all I bequeathed to her in my former will. I leave \$200 to my niece, Ellen Laffan, to use for the purpose I have explained to her in writing, and which she has promised to attend to faithfully. In case of the death of Alice, I desire all I have left to her to be divided equally between all my nieces, excepting \$1,000 for the suffering poor to the care of Father Doherty, Holy Innocents Church.

(Signed in the presence of two witnesses.)

Eliza B. Beckett.

Marie Deen,

104 East 54th Street.

Louise De Cassini."

This paper was wholly in the handwriting of the decedent, excepting the signatures of the witnesses.

The heirs at law contested the allowance of this alleged will to probate, on the ground among others of want of publication of the same as required by law. The surrogate refused to admit the alleged will to probate. Devisees appealed to the general term where the decision of the surrogate was reversed. Thereupon contestants appealed to this court.

Mr. Frederick S. Wait, for appellant Ellen Laffan:

There is no sufficient proof of a declaration made at the time by the testator, that the paper in dispute was her will.

Lewis v. Lewis, 11 N. Y. 220; *Seymour v. Van Wyck*, 6 N. Y. 120; *Gilbert v. Knox*, 52 N. Y. 125; *Ex parte Beers*, 2 Bradf. 163; *Wilson v. Hetterick*, 2 Bradf. 427; *Larabee v. Ballard*, 1 N. Y.

Dem. 496; *Woolley v. Woolley*, 95 N. Y. 281; *Mitchell v. Mitchell*, 16 Hun, 97; *affid.* 77 N. Y. 596.

A scrap of paper cannot be probated, in the absence of the "former will." A codicil referring to a will operates as a republication; and the two are to be regarded as but one instrument, speaking from the date of the codicil.

Payne v. Payne, 18 Cal. 291; *Moore v. White*, 6 Johns. Ch. 860; *Murray v. Oliver*, 6 Ired. Eq. 55; *Simmons v. Simmons*, 26 Barb. 68, 75; *Haven v. Foster*, 14 Pick. 540; *Negley v. Gard*, 20 Ohio, 310; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Hosea v. Jacobs*, 93 Mass. 68.

A codicil imports, not a revocation but an addition to or explanation or alteration of a prior will, in reference to some particular; and assumes that in all other particulars the will is to be in full force and effect.

Boyd v. Latham, Busbee, Law (N. C.), 365.

It is an established *prima facie* rule of construction that an additional legacy, given by a codicil, is attended with the same incidents as the original legacy.

Tilden v. Tilden, 13 Gray, 108; *Snow v. Foley*, 119 Mass. 102.

The declarations of the decedent, made prior and subsequent to the time of the signing of the paper in dispute, were incompetent as the issue was simply as to the sufficiency of the execution of the paper.

Waterman v. Whitney, 11 N. Y. 157; *Johnson v. Hicks*, 1 Lans. 150; *Marx v. McGlynn*, 4 Redf. 455, 461.

Messrs. Joseph S. Auerbach, Charles Francis Stone and Richard W. Stevenson, for appellants Robert C. Walsh and others:

The statute requires (and no case has in anywise changed the requirement of the statute) that the testator, at the time of subscribing or acknowledging his subscription, shall in the presence of the witnesses declare the instrument so subscribed to be his last will and testament. No former or subsequent declaration is sufficient.

Gilbert v. Knox, 52 N. Y. 125; *Woolley v. Woolley*, 95 N. Y. 281.

The information should be distinct and unequivocal.

Rutherford v. Rutherford, 1 Denio, 86.

The declaration must be unequivocal.

Lewis v. Lewis, 11 N. Y. 226.

The declaration made by Mrs. Beckett was equivocal and would be satisfied by a deed executed voluntarily. It did not inform the witnesses that it was a will, by excluding every other instrument from the mind. From the expression they did not know that the testator did not suppose the instrument was a deed.

Lewis v. Lewis, 11 N. Y. 227; *Ex parte Beers*, 2 Bradf. 164.

The fact that the will was holographic makes no difference in this case.

Wilson v. Hetterick, 2 Bradf. 427; *Brinckerhoff v. Remsen*, 8 Paige, 488; *Rutherford v. Rutherford*, 1 Denio, 83.

Messrs. Anderson & Mann, for Isabella Walsh and others, appellants:

Referred to the following decisions as to what constitutes a sufficient declaration:

Woolley v. Woolley, 95 N. Y. 281; *Seymour v. Van Wyck*, 6 N. Y. 120; *Mitchell v. Mitchell*, 16 Hun, 97; *S. C.* 77 N. Y. 596; *Lewis v. Lewis*,

11 N. Y. 220; *Gilbert v. Knor*, 52 N. Y. 125; *Ex parte Beers*, 2 Bradf. 163; *Wilson v. Hettrick*, 2 Bradf. 427; *Brinckerhoff v. Remsen*, 8 Paige, 488.

The issue in this case is as to the proper execution of the codicil. The declarations of Mrs. Beckett, whether written or verbal, are not competent evidence on this issue.

Waterman v. Whitney, 11 N. Y. 157; *Johnson v. Hicks*, 1 Lans. 150; *Marx v. McGlynn*, 4 Redf. 455.

Messrs. Strong & Cadwalader, for respondents Alice McBlair and Minnie McBlair, and the guardian of Alice McBlair:

Due execution may be established by the testimony of one or either of the witnesses, or against their testimony.

Rider v. Legg, 51 Barb. 260; *Reece v. Crosby*, 3 Redf. 74; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Neiheisel v. Toerge*, 4 Redf. 380; *Trustees, Auburn Seminary v. Calhoun*, 25 N. Y. 422; *Re Cottrell*, 95 N. Y. 329, and cases cited.

It is not important that the witnesses should subscribe in presence of each other. It is enough that each subscribe in the presence of and at the request of the testatrix.

Hoystradt v. Kingman, 22 N. Y. 372; *Willis v. Mott*, 86 N. Y. 492.

A literal compliance with the provisions of the statute is not required. A substantial observance of them will be regarded as sufficient.

Gilbert v. Knor, 52 N. Y. 125; *Trustees, Auburn Seminary v. Calhoun*, 25 N. Y. 422; *Gamble v. Gamble*, 89 Barb. 373; *Coffin v. Coffin*, 34 N. Y. 9; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Carle v. Underhill*, 3 Bradf. 101; *Seguine v. Seguine*, 2 Barb. 385; *Re Cottrell*, 95 N. Y. 329; *Lane v. Lane*, 95 N. Y. 494.

The testatrix need not in words declare the instrument to be her will; but it is enough if by words or acts she makes the fact known to the witnesses, and they sign at her request.

Brinckerhoff v. Remsen, 8 Paige, 496; *Remsen v. Brinckerhoff*, 26 Wend. 325; *Lewis v. Lewis*, 11 N. Y. 224; *Nipper v. Groesbeck*, 22 Barb. 670; *Moore v. Moore*, 2 Bradf. 261; *Robins v. Coryell*, 27 Barb. 557; *Peck v. Cary*, 27 N. Y. 9; *Re Gilman*, 38 Barb. 364; *Campbell v. Logan*, 2 Bradf. 90; *Lane v. Lane*, 95 N. Y. 494; *Trustees Auburn Seminary v. Calhoun*, 25 N. Y. 422; *Simmons v. Simmons*, 26 Barb. 77; *Coffin v. Coffin*, 23 N. Y. 15.

In *Van Hooser v. Van Hooser*, 1 Redf. 371, it was held that if the witnesses knew that the paper was the testator's last will and testament, from the communications made to them by him or in his presence, it is sufficient.

See also *Torry v. Bowen*, 15 Barb. 304; *McDonough v. Loughlin*, 20 Barb. 238; *Nipper v. Groesbeck*, 22 Barb. 670; *Gillman v. Gillman*, 1 Redf. 354.

In *Simmons v. Simmons*, 26 Barb. 77, it was held that the substance of the testator's intention is to govern.

In *Vaughan v. Burford*, 3 Bradf. 78, the will was in three lines, drawn by a witness, and read over to the testator and not a word said.

In *Re Pepoon*, 91 N. Y. 260, probate of the will was sustained where it was evidently intended as a legal and valid declaration of the intention of the testator, although the witnesses to it did not by their evidence fully establish

that the statutory requirements were complied with.

See also *Rugg v. Rugg*, 88 N. Y. 592; *Re Keltum*, 52 N. Y. 517.

In *Von Hoffman v. Ward*, 4 Redf. 244, a will was held properly published and executed where all that the testator said when the will was read over was: "Evidently I give all I possess to my mother." There was no evidence of any declaration of its being a will made by the testator to the witnesses. It was very brief and executed within a few hours of the testator's death and not prepared by him or by his special directions.

In *Nipper v. Groesbeck*, 22 Barb. 670, the testator said: "Bring me the will and I will write my name;" and this was held a publication.

The will being entirely in the handwriting of Mrs. Beckett is of itself a declaration by her that it is her last will and testament.

Gombault v. Public Administrator, 4 Bradf. 226; *Ray v. Walton*, 2 A. K. Marsh. 71.

Finch, J., delivered the opinion of the court:

The evidence in this case establishes that both of the subscribing witnesses understood from the words and acts of the testatrix, uttered and done at the execution of the will, that she knew the paper she was signing to be testamentary and desired them to act as witnesses thereto. Miss Deen swears that she knew the paper to be a will from the words addressed to her by the testatrix, and similar means of knowledge attached to the language in which she requested the signature of Miss De Cassini.

It is entirely certain that the testatrix understood the character of the paper which she executed; that she did exactly what she intended to do and without the possibility of mistake or imposition, for the will was a holograph; in her own handwriting from the declaration "My last will and testament" with which it began to and including the words "Signed in the presence of two witnesses" which immediately preceded her own signature.

While the primary and principal purpose of the statute requiring a publication at the time of the testamentary act was thus nearly secured and the danger of error or fraud reduced to a minimum, its bare possibility remained and the command of the statute still required obedience, since holographic wills are in no manner excepted from its terms. But in such a case criticism of the terms and manner of what is claimed to have been a sufficient publication need not be so close or severe as where the question whether the testatrix knew that she was executing a will depends solely upon the fact of publication.

It has often been held that a substantial compliance with the statute is sufficient. It requires no literal adherence to its own words and phrases, but permits the necessary information to be given in any manner adequate to the desired result. Where the testator cannot speak at all or only with difficulty he may communicate his knowledge by signs or by words to some listeners unintelligible. He must communicate it, however; but if he does that in a manner capable of conveying to the minds of the witnesses his own present consciousness that the paper

being executed is a will, that must necessarily be sufficient.

At the time of the execution of the will in controversy the testatrix did not once call it a will but spoke of it as a paper. To a stranger, the expression would fail to indicate what kind of a paper she understood it to be; and if no more than that was communicated to the witnesses it was not sufficient. But to them the indefinite and general expression was made definite and descriptive of a will by her own words connecting the expression with a previous conversation and referring the memory of the witnesses to it.

Miss Deen had been a subscribing witness to an earlier will of the testatrix, which the latter had declared to be such in express terms. The witness knew the relations subsisting between Alice McBlair and the testatrix. While Alice was a niece, she had been brought up from early infancy by Mrs. Beckett as a daughter, and loved and cared for as such. The witness knew also of the illness which had afflicted Alice and, for the time at least, had left her insane. Before Miss Deen was sent for to sign the will she had been told by Mrs. Beckett that the latter desired to make an alteration of the previous paper on account of Alice's sickness. Being sent for by a note she found the testatrix with this will before her. She asked Miss Deen if she would sign that paper on account of Alice's sickness; that she wanted to make alterations of a previous one on that account; and that "she was sorry to trouble me again to sign the paper."

The witness could hardly fail to correctly interpret Mrs. Beckett's meaning. In substance it was that the paper before her was intended as an alteration of a previously executed will, made necessary by the sickness of Alice; and that the signature of the witness was again, for a second time, desired for a similar paper, and in the same capacity as at first. Miss Deen did so understand it. She swears to that explicitly, and explains how and why it was that she knew from the words of the testatrix that the latter understood the testamentary character of the paper being executed.

Substantially the same thing is true of Miss De Cassini except that she was not asked what she understood from the language of the testatrix. At the Grand Union Hotel in New York, the night before starting for Litchfield, Mrs. Beckett told the witness that she was going to make a will; asked Miss De Cassini who she was, to see if she was "reliable;" told her about Alice and that all she had intended to give her; and then asked Miss De Cassini if she would be willing to sign that paper for her. The witness promised. She knew at the end of the conversation that Mrs. Beckett was intending to make a will for the benefit of Alice to which she, Miss De Cassini, had promised to be a witness. She was reminded of that promise soon after, while she was at Litchfield, and told that the case might come into court some day, but she need not be afraid. And finally when the will was ready for execution, testatrix said: "This is the paper I spoke to you about signing."

It is impossible not to see, taking the whole conversation together, that Miss De Cassini must have understood the testatrix to declare that the paper she signed was the will which she had said she intended to make, and to which,

as a witness, she had asked Miss De Cassini to promise her signature.

But it is objected that a declaration dependent upon a previous conversation for its meaning will not answer the requirement of the statute; and that the words of publication must at the time be complete in and of themselves. It may be that an imperfect and indefinite declaration cannot be made sufficient, by proof of a previous conversation not connected with the *factum* by the words of publication used. But here they were so connected by the very language of the testatrix, at the time of execution. She herself so referred to the previous conversations, so connected them with the paper then present as to make them an essential part of the communication, almost as completely as if she had formally repeated them. Looking at the substance of what occurred, and giving great importance to the fact that the will was a holograph, we are disposed to concur with the general term in holding that due publication was proved.

But there is a further difficulty to be considered: the testatrix had executed a previous will, which has not been found and cannot as yet be produced. No fact in the case points to its destruction by the testatrix, but every circumstance indicates that she never revoked or intended to revoke it. Under her deceased husband's will she had a power of appointment to the extent of \$25,000, which she could exercise in favor of her sisters or her nieces; but which, without her testamentary action, would leave that sum a constituent part of her husband's estate. The witness who drew the missing will is quite sure that she exercised that power of appointment, and asserts as the result of his memory that the sisters of the deceased, who are the present contestants, were not named or provided for in the will which he drew.

The will before us provides: "I leave and bequeath to my niece, Alice McBlair, all the money I die possessed of in several banks and bonds, besides all I bequeathed to her in my former will."

It is objected that this bequest is uncertain and indefinite and the property intended cannot be selected out and inventoried. So far as it passes by this will it is capable of identification. It transfers whatever money the testatrix had at her death which was on deposit or stood to her credit in any banks or was invested in and represented by bonds.

That is certain which may be rendered certain; and an inquiry as to her bank accounts and an examination of her securities would disclose what and how much would pass by the will. The added phrase "besides all that I bequeathed to her in my former will" tends to make the bequest independent of and separate from that contained in the former will. The word "besides" means in addition to, over and above, outside of, and separately from, what had been previously given. And the later bequest is so absolute and without condition, so surely intended to stand by itself and dictate its own effect that it may be operative, whether the earlier provision is known or unknown. *Re Greig*, L. R. 1 Prob. & Div. 72,

Nor does it alter the case to say that the sisters are thus unprovided for. It is quite doubtful whether the previous will gave them any-

thing; but if it did provide for them out of the \$25,000, its loss is alike their misfortune and that of Alice; and the latter should not lose what is given to her for that reason.

But they are not wholly unprovided for. They themselves tell us in their counsel's brief, that Mrs. Beckett had accumulated over \$40,000, of which \$30,000 was in banks and in bonds, and the balance in the hands of various parties, and in the form of furniture and silver ware. Something like \$8,000 or \$10,000 is thus apparently left undisposed of for the next of kin, and their struggle here is to secure the whole, at the expense of the manifest and clear intention of the testatrix. We think the effort should not succeed.

The judgment should be affirmed, with costs.

All concur except **Miller, J.**, absent.

Mary B. LYON, Exrx., et al., Appts.,

v.

Charles W. HERSEY et al., Resp'ts.*

The owners of a tract of standing hemlock entered into a contract by which they sold all the hemlock bark growing thereon, the bark to be cut and removed by vendees in quantities not exceeding a certain amount per year, the period being unlimited; the contract, after a description of the premises upon which the bark was grown, read as follows: "Said lots being in the vicinity of Moose River Tannery, said bark to be used in carrying said tannery on;" at the time of making the contract vendors were owners of said tannery, but subsequently it was conveyed to the vendees of the bark, and thereafter was accidentally destroyed. Held, that the clause "said bark to be used in carrying said tannery on," was neither an exception, reservation, condition nor limitation, and that the destruction of the tannery did not, as matter of law, annul the contract so as to entitle the vendors to retain the bark then uncut or to recover possession of that cut by the vendees under the contract but not removed.

(Decided October 5, 1886.)

APPPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Lewis Special Term in favor of defendants in a suit to have a contract declared ended, which authorized the cutting of hemlock bark from the land of plaintiffs' testator. *Affirmed.*

Memorandum of decision below, 35 Hun, 663. The facts and questions raised are stated in the opinion.

Mr. C. D. Adams, for appellants:

This action is brought by the owners of the land. They assume, under the power of the sale in the will, that the executors could sell bark on the tree. They insist that the expression in the contract "said bark" "from Brantingham lots" "to be used there in carrying said tannery on" is a limitation and not a condition,

for the executors could not make a condition under the power, as owners might.

Gerard, Titles, 2d ed. p. 124.

The suit is to declare the contract at an end by force of the limitation, and terminated May 15, 1883, when the Moose River Tannery was destroyed; also for an injunction.

44 N. Y. 489; 70 N. Y. 247.

It is a proper action for this relief.

Willard, Eq. Jur. 303; 73 N. Y. 516-524.

If the executors had given a deed of this bark, using the same language, no effect could be given to the language except as a limitation. The executors, under the power could not make a valid condition subsequent, in favor of the owners. Effect must be given to the restriction as a limitation, or not at all.

Gerard, Titles, 2d ed. p. 124.

"A limitation determines the estate (legal or equitable) absolutely, whatever be its nature."

Willard, Real Estate, 520 and cases cited.

For the doctrine of limitations and conditions, see *Id.* 102, 520; 4 Kent, Com. *126, 127; 9 N. Y. 35; 44 N. Y. 489; 70 N. Y. 247; 18 Pick. 527.

As to such a cause of action as this, the grounds of it and the relief given, see 18 Ves., 184; 6 Johns. Ch. 497; 2 Story, Eq. 929; 14 Abb. Pr. N. S. 266, followed in 24 Hun, 384; High. Inj. 1st ed. § 727.

Defendants cannot use this bark at the new tannery upon the ground that it is not very far from the old one, nor can they substitute the new for the old. In attempting to do so they are wrong doers.

Thomas v. Oakley, 18 Ves. 184. See 6 Johns. Ch. 497; 2 Story, Eq. § 929.

An injunction is now granted in all cases of timber, coals, ores and quarries, where the party is a mere trespasser; or where he exceeds the limited rights with which he is clothed.

18 Ves. 184; 6 Johns. Ch. 497; 14 Abb. Pr. N. S. 266, 269.

All the above cases hold that defendant was a trespasser and wrong doer, in acting beyond the provisions of the contract. As such wrong doers the defendants in this action are liable for the value of the peeled bark on the premises when this action was begun.

3 N. Y. 379; 14 Barb. 638; 2 Abb. N. Y. Dig. p. 516, 295; 9 Hun, 571.

There is no analogy between this contract and deeds of water power which refer to machinery to measure the quantity of power intended to be conveyed.

Groat v. Moak, 94 N. Y. 115.

Mr. Francis Kernan, for respondents:

The contract does not limit the use of the bark to carrying on the tanning business in the old tannery building. If that building is destroyed, the bark may be used in carrying on the tanning business in another tannery building owned by the holders of the contract, and situated in the same place or village, and on the same side of the river as the old.

2 Kent, Com. Marg. p. 556; *Cromwell v. Sedden*, 3 N. Y. 253; *Wakely v. Davidson*, 26 N. Y. 394.

The intent of the parties to a contract is to be ascertained not only by the language employed, but by the surrounding circumstances and the subject matter; and the intent as thus ascertained is to prevail.

*See S. C. ante, 126. Decision in relation to damages on injunction.

Hasbrook v. Paddock, 1 Barb. 635-637; *French v. Carhart*, 1 N. Y. 96; *Bancroft v. Winspear*, 44 Barb. 211; *Blossom v. Griffin*, 13 N. Y. 569; *Springsteen v. Samson*, 82 N. Y. 708.

The decision and reasoning of the court in analogous cases proves that the construction of the contract claimed by plaintiffs is not correct and that ours is correct.

Cromwell v. Selden, 8 N. Y. 253, 256, 258; *Olsted v. Loomis*, 9 N. Y. 424, 427; *Flak v. Wilber*, 7 Barb. 395, 402-404; *Wakely v. Davidson*, 26 N. Y. 387, 394.

The case cited from 18 Vesey, and mainly relied upon by the counsel for the plaintiffs in the court below, is plainly distinguishable from the case under consideration. In that case the defendant had a right to quarry and take stone from plaintiff's land "for all the purposes of Newton farm." He supplied all the purposes of Newton farm, and was taking stone also for other purposes.

See *Thomas v. Oakley*, 18 Ves. 184.

Euger, Ch. J., delivered the opinion of the court:

The complaint in this action was framed to procure a decree annulling an executory contract between certain of the plaintiffs as executors of the estate of Lyman R. Lyon, vendors, and the firm of C. J. Lyon as vendees, for the sale of the hemlock bark on the Brantingham Tract in Lewis County; and to determine the ownership of that portion of such bark as was then cut, but not removed from the premises.

The action is based upon the claim that the destruction of the Moose River Tannery rendered the performance by the vendees of an alleged implied agreement to use it therein impossible, and therefore that the title to such bark as then remained unused reverted to the owners of the land. The question arises under a clause in the contract following the description of the premises upon which the bark was grown reading as follows: "Said lots being in the vicinity of Moose River Tannery, said bark to be used there in carrying said tannery on."

At the date of the contract in January, 1871, some of the plaintiffs were the owners as trustees under the will of Lyman R. Lyon, of an undivided three eighths of said tannery; and Chester J. Lyon, also an executor, was the owner of the remaining five eighths; the whole consisting of a tannery and about 1,000 acres of land.

The said executors were also trustees with power of sale, under the will of Lyman R. Lyon, of the Brantingham Tract upon which there was then growing about 80,000 cords of bark. The contract provided, among other things, that "For the aforesaid bark on the tree, second parties agree to pay first parties fifty cents per cord; said bark to be paid for before removal from the land, unless otherwise satisfactorily arranged, and to remain the property of the estate until paid for." "The second party are not to cut more than 3,000 cords on the Brantingham Tract, per year," and are "to have the right and privilege to enter upon said lands to fell and cure said bark and remove the same, as is usually done by tanners."

The vendees after its execution immediately

entered upon the performance of the contract and by themselves and their assignees continued to cut, peel and draw away bark in each year for use in the Moose River Tannery, until May 15, 1883, when the tannery building was accidentally destroyed by fire. There then remained about 6,000 cords of bark uncut on the described premises. On June 12, 1883, the plaintiffs served a written notice upon the defendants claiming the right to terminate the contract by reason of the destruction of such tannery.

The customary period for cutting bark extends from June 1, to August 1, in each year, after which it is piled in the forest for airing and remains there until snow falls, when it is drawn to market for use the following season. If kept over the season its strength deteriorates and its value becomes diminished. It was customary for parties buying bark to make contracts for cutting and piling it as early as April or May, and in the present case it was proved that the defendants had entered into such contract at that time. They had thus, in good faith, incurred a large liability in the performance of their obligation to buy the bark before any question arose as to their right to cut and carry it away. The work of stripping the bark in question commenced about the first of June and had continued nearly two weeks before the vendors attempted either to put an end to the contract or to repossess themselves of the bark cut. On the first of August upwards of 2,500 cords of bark had been cut and piled upon the ground ready for the curing process, at an expense to the vendees of several thousand dollars.

In the year 1879, by virtue of a sale in partition of the Moose River Tannery property, the interest of the plaintiffs therein had become divested, and the defendants, or some of them as purchasers on such sale became the owners thereof and have ever since retained such ownership. The defendants, or some of them, also became the owners in 1879 of a large tract of land with a tannery thereon adjoining the Moose River Tannery property, and prosecuted the business of tanning in both of said tanneries up to the time of the destruction of the latter tannery.

Previous to the commencement of this action the defendants had claimed that the destruction of the Moose River Tannery did not annul their contract and that they had the right under it to cut bark on the Brantingham tract, for use in other places than the Moose River Tannery. The plaintiffs, on the contrary, claimed that the destruction of the tannery *ipso facto* annulled the contract and that thereby they became entitled to annul the contract and retain the title and possession of all bark uncut and recover possession of such as remained unremoved therefrom; and the logical effect of their contention would include all bark unused which had been previously paid for and removed from the premises by the vendees.

In discussing the questions presented it will tend to obviate the confusion produced by some misleading analogies, if we eliminate therefrom the consideration of the cases cited relating to exceptions and reservations in conveyances, since for obvious and well recognized reasons the language of this contract creates neither of those forms of estates. *Craig v. Wells*, 11 N. Y. 815,

The appellants' claim, if at all tenable, can be supported only by demonstrating that the clause in question created either a condition or a limitation.

We do not consider it very material whether it is one or the other, since if either it would terminate the defendants' interest, and the same result would be attained. If a condition, it must necessarily be a condition subsequent, for it could be called into operation after the possession and title of the property had changed and a diversion of its use by its vendees to a prohibited purpose had been attempted. *Bouv. Inst.* § 743.

Counsel on the argument upon both sides treated the provision as creating a limitation alone; but we are unable to agree with them and can see in it none of the qualities of such an estate.

The difference between a limitation and a condition is defined to be that in order to defeat the estate in the latter case it requires some act to be done, such as making an entry, to effect it; while in the former the happening of the event is in itself the limit beyond which the estate no longer exists, but it is determined by the operation of the law without requiring any act to be done by anyone. 2 Washb. Real Prop. 20.

It is also said that a condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger. The grantor or his heirs alone having the right to defeat the estate by entry for condition broken, a condition terminates an estate; a limitation creates a new one. 2 Washb. Real Prop. 22.

The attempt is here made, after an absolute grant of the bark, to cause the remaining bark to revert to the owners of the land in accordance with the rule governing broken conditions, instead of carrying it over to the new estate as a limitation requires. Even if such a rule could be applied, it would affect only so much of the property as was used in violation of the condition, and could not relate to that which had not been taken in possession and the right to which still rested in covenant. It is unnecessary, however, to pursue the distinctions and analogies between these different estates, as we are of the opinion that there is here neither condition nor limitation.

In the construction of all contracts under which forfeitures are claimed, it is the duty of the court to interpret them strictly in order to avoid such a result, for a forfeiture is not favored in the law. *Bouv. Inst.* §§ 730, 1814; *Duryea v. Mayor*, 62 N. Y. 594; *Lorillard v. Silzer*, 86 N. Y. 578.

While no particular form of words is necessary to create a limitation or condition, it is yet essential that the intention to create them shall be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for. *Craig v. Wells*, 11 N. Y. 315; *Bouv. Inst.* § 753.

It will be observed that there are in this contract no express words importing a limitation or condition; and if it is held to contain either, it must be inferred from some supposed intention of the parties drawn from other provisions in the contract, or from the nature of the act provided for, or the circumstances surrounding the

subject of the agreement. These are all legitimate sources of information from which to derive an understanding as to the intent of the parties and may properly be resorted to for that purpose. *Barruso v. Madan*, 2 Johns. 145; *Cunningham v. Morrell*, 10 Johns. 208.

It is also said that the ordinary technical words by which a limitation is expressed relate to time, and are *durante, dum, donec*, etc.; but that the use of any of these terms, ordinarily expressive of a condition or a limitation would be an unsafe test of the true nature of the estate. The word "proviso" or "provided" itself may sometimes be taken as a condition, sometimes as a limitation and sometimes as a covenant. 2 Washb. Real Prop. 21.

It would seem to be quite clear that the object designed to be secured by the insertion of the clause in question was to provide for the continuous employment of the tannery in the business of tanning, and was adopted mainly if not altogether for the benefit of the vendors or the owners of the tannery property. No limit is assigned for the duration of the estate or the quantity sold. It is all of the bark in the Brantingham Tract, to be taken in quantities not exceeding 8,000 cords per year.

The period during which the right was to extend was unlimited and would not be less than ten years, and might be extended for an indefinite term. The vendors were the owners of a large interest in the tannery property, and had a material interest in giving it continuous employment, and thus adding to its value; while the vendees would not seem to have any object in restricting their own control over the property purchased.

We cannot therefore assent to the interpretation that the object of the parties would be satisfied by the use of the bark in the vicinity of the tannery referred to. The real question, therefore, is whether that object was intended to be secured by a limitation or by a covenant.

The language of the contract is: "said bark to be used there in carrying said tannery on." If any contingency is here expressed as one upon which a right depends, it cannot be one other than a use contrary to the one pointed out. The plaintiff has assumed that the destruction of the tannery, as matter of law, rendered the use of the bark therein impossible, and therefore *ipso facto* terminated the defendants' rights under the contract.

This contention cannot be sustained. There is nothing in the case to show that the defendants did not intend to rebuild the tannery; and nothing to preclude them from doing so and using the bark in the renovated structure. An interpretation which should confine the use of the bark to the particular building existing in 1871 would be unreasonable and motiveless, as no object of the vendors could be served by such a use which would not be equally promoted by its employment in another building of similar capacity in the same location.

Neither did the expressed intention of the vendees to use the bark in another locality set in operation the limitation, if one existed, or authorize the vendors to consider the contract at an end. In order to have such an effect, the notice must be of an intention not to perform some act amounting to a condition precedent; and this we have seen is not such a condition.

Bogardus v. N. Y. Life Ins. Co. 101 N. Y. 323 [S. C. 2 Cent. Rep. 150].

We therefore return to a consideration of the event, if any, which the parties had in mind as a limitation in framing their contract. As we have said, there is nothing indicating an intention to limit the duration of the estate or the quantity sold, the words importing simply a restriction of the use to be made of the bark. The language imports that its actual use at a place other than the one prescribed should be the event upon which the claim in question should have its operation; and there is nothing in the circumstances of the case tending to show any other intention. Such a use would necessarily destroy the subject of the contract or deprive it of its merchantable value, and render its ownership after that event a matter of no importance.

It cannot therefore be reasonably contended that such a contingency would be regarded by its vendors as a desirable occasion for its reclamation or the right of its possession after that time as a profitable thing to be secured. Long before this contingency could occur it was provided that the vendees should pay for the bark and become entitled to its ownership and possession; and there is nothing in the language of the contract or the circumstances of the case to show that the vendors entertained any expectation that their interest in the property would survive the transfer of the title. The contract provided for the sale of all the bark on the Brantingham Tract; and express provision is made for the retention of the title and possession, as security for the purchase price; but no language indicates an intention to reserve it for any other purpose.

The pecuniary interest of the vendors in the improved property was slight as compared with that of the vendees; and in the absence of language plainly expressing such an intention, it is not reasonable to impute to them a design to subject it to a forfeiture, after it had been made valuable almost wholly by their expenditures upon it.

Neither can it be reasonably claimed that the parties contemplated that bark cut, paid for and drawn to the tannery in strict conformity to the contract, before its destruction, should by that event be forfeited to the vendors, however great the lapse of time which should follow thereafter.

In view of all the circumstances we must, therefore, hold that the parties intended by the clause in question only such security as a covenant afforded for the performance of the stipulation in question.

The case of *Thomas v. Oakley*, 18 Ves. 184, cited by the plaintiffs, has no application. There the owner of a quarry sold so much of the stone therefrom as was needed for "all the purposes of Newton Farm." This language is descriptive merely and constitutes the only definition of the property intended to be sold; and it was properly held that the vendees acquired no right to stone to be used for other purposes than Newton Farm.

In the present case, however, the right to take all of the bark on the Brantingham Tract was contracted for, and the only limitation of quantity was that contained in the proviso restraining the right to peel to 3,000 cords a year.

S. Y.

Groat v. Moak, 94 N. Y. 115, was a case arising under a reservation in a grant of water power, and is obviously inapplicable to this case.

The case of *Craig v. Wells*, 11 N. Y. 315, 322, seems to us quite decisive of the questions raised here. There a water power was granted, with a prohibition against its use for any other purpose than certain uses specified in the deed. It was held that the language of the grant did not constitute either a condition, limitation, reservation or exception; although if construed in connection with certain bonds executed therewith it was said that a covenant might be implied from a consideration of the several instruments simultaneously executed. *Selden, J.*, says in relation to the language then under consideration, that "It is a mere limitation of the use which the grantee shall make of the thing granted; a naked prohibition. No right to the use of the water is saved to the grantor. This prohibition is inconsistent with the title conveyed by the deed and is clearly void. If one conveys land in fee simple, and neither excepts any part, nor reserves anything to himself out of it, but restricts the grantee to a particular use of the land, this restriction is void, as repugnant to the proprietary rights of an owner in fee. Such a restriction may be imposed and would be good as a condition or a covenant, but in no other form." See also *Congregation Shaaer Hash Moin v. Halliday*, 50 N. Y. 664.

It is claimed by the respondents that the subsequent acquisition of the Moose River Tannery by the vendees in the contract deprived the plaintiffs of any interest in the performance of the stipulation in question, and amounted to a surrender of their right to insist upon its performance. We think, however, that a subsequent change in the condition of the parties did not reflect any light upon the intention existing in regard to it at the time of its execution, and therefore has no bearing upon its interpretation. If the clause in question be regarded as a covenant, such change might affect the damages, if any, recoverable for a breach thereof; but in the absence of an express agreement to affect, a modification would not have any other effect.

The judgment should be affirmed, with costs.

All concur except *Rapallo, J.*, not voting, and *Miller, J.*, absent.

Charles LICHTENBERG, *Appt.*

v.

Elizabeth HERDTFELDER *et al.*, *Respts.*

1. **One who**, in a suit brought after a decedent's death to foreclose a mortgage made by decedent in his lifetime, has obtained a judgment for deficiency against decedent's executors, in their representative capacity, cannot maintain an action to set aside a fraudulent conveyance of real estate made by decedent in his lifetime and to subject such real estate to his judgment for deficiency.
2. **The reclamation of real estate conveyed by a decedent in his lifetime in**

fraud of creditors, and its sale for payment of his debts, **must be accomplished in the statutory method** by the decedent's executors, whose action may be compelled by the surrogate; and this, although one of the executors is the grantee in the fraudulent conveyance.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the New York Special Term dismissing the complaint in an action to set aside certain conveyances as fraudulent. *Affirmed.*

Reported below, 33 Hun, 57.

Statement by **Earl, J.**,

The complaint in this action shows the following facts: in 1873 George Herdtfelder, for the purpose of securing the payment of \$4,000 with interest, executed and delivered to the plaintiff his bond, and as collateral thereto a mortgage upon real estate, executed by himself and the defendant Elizabeth, his wife. Subsequently, in the years 1874 and 1875, Herdtfelder and wife conveyed certain real estate by several deeds to the defendant Heinlin and certain other real estate by several deeds to the defendant Kreuder; and subsequently in the lifetime of Herdtfelder, Heinlin and Kreuder by several deeds conveyed the same real estate to the defendant Elizabeth, and all these conveyances were without consideration and made with intent to hinder, delay and defraud the creditors of George Herdtfelder. He died September 21, 1876, leaving a last will and testament, in which he nominated his wife and Frederick Pink and Charles T. Stephan as executors. The will was admitted to probate and the three executors named duly qualified as such and took upon themselves the duties of executors.

Thereafter in April, 1877, the plaintiff commenced an action to foreclose his mortgage, in which the executors and others were made defendants. There was a judgment of foreclosure and a sale and a deficiency of \$3,126.96, for which a judgment was entered and docketed against the executors. In September, 1878, the executors made their final accounting in the surrogate's court, in which the plaintiff's claim upon his judgment was admitted. The whole value of the estate in the hands of the executors was the sum of \$528.45, which was wholly inadequate for the payment of the debts of the testator.

This action was commenced on the 29th day of January, 1879, against Elizabeth Herdtfelder, Heinlin and Kreuder; and the judgment prayed for in the complaint is that the several conveyances above mentioned be adjudged fraudulent and void as to the plaintiff, and that a receiver be appointed to sell the real estate conveyed or so much thereof as may be sufficient to satisfy plaintiff's judgment.

The defendants Elizabeth and Heinlin appeared and answered, putting in issue the allegations of fraud. The defendant Kreuder did not answer.

The action was brought to trial at a special term and before any evidence was given, the

counsel for the defendants moved to dismiss the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action; and the court granted the motion and gave judgment to the defendants dismissing the complaint. From that judgment the plaintiff appealed to the general term, and from affirmation there to this court.

Messrs. Coudert Brothers and Paul Fuller, for appellant:

The creditors' judgment, being against executors, was a sufficient basis for the action without any execution. In the present case, there was no judgment recovered against the debtor before his death, as was the case in *Adsit v. Butler*, 87 N. Y. 585; nor was there an absence of any judgment at all, as in *Allyn v. Thurston*, 53 N. Y. 622; *Estes v. Wilcox*, 67 N. Y. 264.

Where a judgment has been recovered against the debtor who thereafter dies, execution may be issued against his estate by leave of the court and of the surrogate.

Code Civ. Proc. §§ 1890, 1881.

Therefore the courts hold the plaintiff not excused from issuing it.

Adsit v. Sanford, 23 Hun, 49; *affd.* in 87 N. Y. 585; *Schmitz v. Langhaar*, 88 N. Y. 511-512.

Where the levy cannot be made it is excused. *Stewart v. Beale*, 7 Hun, 421; *Estes v. Wilcox*, 67 N. Y. 266.

In the present instance, although it is true that the deficiency judgment did not create a lien on the property of the deceased, yet the filing of this bill in equity and of the notice of *lis pendens* did create such a lien.

Ocean Nat. Bank v. Olcott, 46 N. Y. 19, 22; *Beck v. Burdett*, 1 Paige, 308.

By this equity action the creditor perfects his lien and is placed within the requirements of *Southard v. Benner*, 72 N. Y. 426, to wit: he is in a situation to subject the property to the payment of his judgment, upon the removal of the obstacle by the judgment prayed for in the bill.

Code Civ. Proc. § 1823.

A decree that the deficiency be paid out of the estate in their hands in due course of administration was the only judgment that could be had against the executors.

Glacius v. Fogel, 88 N. Y. 440; *Leonard v. Morris*, 9 Paige, 90.

And a judgment so rendered in a foreclosure suit against the executors of a deceased mortgagor is "a final adjudication between the parties, by a competent tribunal, as to their rights, conclusive in another court."

Glacius v. Fogel, *supra*.

No other judgment could be rendered, the mortgagor having died before the mortgage became due.

Glacius v. Fogel, 88 N. Y. 439; *Leonard v. Morris*, 9 Paige, 91, 92.

No other judgment being possible, equity will not leave the creditor powerless, and the action will be maintained.

Geery v. Geery, 63 N. Y. 256; *Babcock v. Booth*, 2 Hill, 183.

Equity recognizes such an action as the present as virtually auxiliary to administration in the surrogate's court, the fact being evident that the relief sought could not be had in such court.

Chipman v. Montgomery, 63 N. Y. 221.

No authority to sue was necessary. The present action was brought in January, 1879, while section 1628 of the Code, under which the special term dismissed the action, did not take effect until September 1, 1880.

See Code, § 3356.

Moreover, section 1628 is not applicable to an equitable suit like the present; it merely forbids another action at law, to recover a debt which can be recovered in an action of foreclosure.

Equitable, etc. Society v. Stevens, 63 N. Y. 844; *Scotfield v. Doscher*, 72 N. Y. 498; *Vanderbilt v. Schreyer*, 91 N. Y. 396.

The action was properly brought by the creditor and not by the executor, under the Statute of 1858.

Devey v. Moyer, 72 N. Y. 78, citing cases; *Gardner v. Lansing*, 28 Hun, 416; *Fort S. Bank v. Leggett*, 51 N. Y. 554; *Bate v. Graham*, 11 N. Y. 242. See also *Eccringham v. Vanderbilt*, 12 Hun, 75, 78.

Mr. Isaac Kugelman, for respondents:

The judgment set forth in the plaintiff's complaint is a part of a mortgage debt; and this action cannot be maintained without leave of the court in which the foreclosure action was pending.

Code, § 1628.

This is not only the rule as established by the Code, but was the law before.

2 R. S. 199, § 153.

The want of authority to sue is not a defense necessary to be pleaded and proved affirmatively by the defendant; but on the other hand, the fact that leave to sue was granted must be alleged.

Scotfield v. Doscher, 72 N. Y. 491.

A judgment against executors or administrators of a deceased party is not binding upon nor does it in any way affect the real estate of the decedent; nor can such real estate be sold by virtue of any execution issued upon such judgment.

2 R. S. 6th ed. p. 733, § 12; Code Civ. Proc. § 1823. See *Osgood v. Manhattan Co.* 8 Cow. 612; *Sparkler v. Davis*, 8 Cow. 132; *Baker v. Kingsland*, 10 Paige, 366, 368.

Until the creditor has obtained a judgment at law for his demand against the debtor, and the return of an execution unsatisfied, an action in equity cannot be maintained to set aside conveyances as fraudulent and void.

Dunlery v. Tallmadge, 32 N. Y. 457; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561. See also *Allyn v. Thurston*, 53 N. Y. 622; *Estes v. Wilcox*, 67 N. Y. 264; *Adee v. Bigler*, 81 N. Y. 349; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Miller v. Miller*, 7 Hun, 208; *Adsit v. Sanford*, 23 Hun, 45; *Adsit v. Butler*, 87 N. Y. 585; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369; *Bergen v. Carman*, 79 N. Y. 146.

As against Mrs. Herdtfelder, the grantee in the conveyance sought to be set aside, and the children of George Herdtfelder, the plaintiff is only a contract, not a judgment creditor.

Laws 1887, chap. 460, § 72.

Chapter 172 of the Laws of 1843, amending the Act of 1837, makes the judgment against the executors *prima facie* evidence of the debt before the surrogate, on an application to sell the decedent's estate for the payment of his debts.

Judge Folger in Sharpe v. Freeman, 45 N. Y.

802, in commenting upon these statutes, so far as the effect of a judgment against the executors, says: "This still excludes the idea that it is evidence in any other court, or that the debt is yet a judgment debt." "It excludes the idea that the judgment is evidence against the heir at law, or that the claim assumes the character of a judgment debt."

Earl, J., delivered the opinion of the court:

It appears from the opinion of the judge who presided at the special term that he gave judgment against the plaintiff, for the reason that he had not obtained leave to sue under section 1628 of the Code. At the general term, as appears from the opinion there pronounced, the judgment was affirmed because no execution had been issued upon plaintiff's judgment.

We think this action is without precedent and that the judgment should be affirmed, but not for the precise reasons stated in the courts below.

Plaintiff's judgment was obtained subsequently to the death of the testator, in an action against his executors in their representative capacity, and did not become a lien upon any real estate left by him; and no execution could be issued thereon against any real estate. It was provided in the Revised Statutes (2 R. S. 449, § 12) that "The real estate which belonged to any deceased person shall not be bound or in any way affected by any judgment against his executors or administrators; nor shall it be liable to be sold by virtue of any execution issued upon such judgment; and subsequently the same provisions were incorporated in the Code, § 1823.

Executions authorized by 2 R. S. 88, § 28, and by the Code, §§ 1825, 1826, are such only as can be issued against personal assets which are in the possession or under the control of the executors or administrators, and have no relation whatever to real estate.

The conveyances, therefore, which the plaintiff seeks to set aside are no obstruction to any lien he may have, or to the enforcement of any execution which he may be able to issue. If the conveyances should be set aside, he would not be able to sell the real estate by virtue of his judgment or any execution issued thereon; and hence this is a case where he is not entitled to the equitable relief which he seeks. *Spring v. Short*, 90 N. Y. 538.

If the plaintiff could obtain the judgment which he seeks, it would result that without having any lien upon the real estate he would obtain satisfaction of his claim in preference to the other creditors of the testator. The law gives no preference to a vigilant creditor in the estate of a decedent. It impounds his estate for the benefit of his creditors; and no creditor can by any procedure or any degree of vigilance obtain any preference over others. This scheme of the law would be violated if such an action as this could succeed.

The lands, although conveyed by the testator in his lifetime, were assets which could be appropriated for the payment of his debts. Chap. 314, Laws 1858.

If the facts stated in the complaint are true, it is the duty of the executors to pursue the real estate and reclaim it for the benefit of the persons interested in the estate of the testator;

and no one creditor can appropriate it for his sole benefit. *Southard v. Benner*, 72 N. Y. 424. *Spring v. Short*, *supra*; *Crouse v. Frothingham*, 97 N. Y. 105.

The fact that the fraudulent grantee is one of the executors furnishes no insurmountable obstacle. If she should refuse to restore the lands to the estate, she could be removed from her office of executrix, and then the remaining two executors could, under the Act of 1858, disaffirm the conveyances of the real estate and bring an action to set them aside. Or the two executors could commence the action, making the executrix a defendant, and in such action obtain for the estate the relief demanded. If the two defendants refused to commence the action upon the application of the creditors or some of them, they could be compelled to commence it by an order of the surrogate, who has ample power to that end under section 2481 of the Code.

Here it does not appear that any application was made to the surrogate, or to the two executors; and there is no reason whatever for not pursuing the orderly method pointed out by the statute, for the reclamation of this real estate and its sale, for the payment of the debts of the testator.

We are, therefore, of opinion that there is no basis for the maintenance of this action, and that the judgment should be affirmed, but without costs.

All concur except *Miller, J.*, absent.

Jane E. OLIVE, Admrx., *Appt.*,

v.

WHITNEY MARBLE CO., *Respt.*

1. In an action for damages for death caused by the explosion of a boiler owned by defendant, which was at the time in the charge of the vendor thereof for the purpose of being repaired by it on its own account, it being claimed by plaintiff that the explosion resulted from the negligence of a servant of defendant, assisting vendor's servants (of whom deceased was one) in testing the repairs, held, on the facts:
 - (a) That in the absence of proof on the part of plaintiff, it must be presumed that defendant's servant either volunteered to aid vendor's servants, or was requested by them to do so; in either event he was not the servant of defendant in what he did, and defendant was not responsible for his acts.
 - (b) That defendant's servant was not guilty of negligence.
 - (c) That no responsibility was cast upon defendant if the accident occurred from any defect in the boiler which employer of deceased was bound to repair.
2. It is not sufficient, after an accident, to show that the acts of one charged with negligence were improper and caused the accident; but plaintiff must show that such person knew or had reason to know that the acts were improper and dangerous.

(Decided October 5, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of nonsuit of the Jefferson Circuit Court in an action to recover damages for the negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Memorandum of decision below, 36 Hun, 640.

Messrs. O'Brien, Emerson & Ward, for appellant:

In determining the correctness of a nonsuit the following rules are to be observed: 1. That the plaintiff is entitled to the most favorable inferences from the evidence, and that all contested facts are to be deemed established in plaintiff's favor. 2. Where, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible or as to which persons might differ, it is for the jury to decide.

Hewitt v. Watertown, 34 Hun, 626; *Rehberg v. Mayor*, 91 N. Y. 137, 141; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; *Williams v. Syracuse Iron Works*, 31 Hun, 392; *Vooper v. Mayor and Tice v. Munn*, 18 N. Y. Week. Dig. 98, 143; *Justice v. Lang*, 52 N. Y. 323.

The action is not based upon contract but is founded in tort and arises out of a violation of the duty of every man to so manage his property as to inflict no unnecessary damage upon his neighbor.

Farwell v. Boston, etc. R. R. Corp. 4 Met. 49; *appd. Coon v. Syracuse & U. R. R. Co.* 5 N. Y. 495; 1 Bl. Com. 481.

The boilers in question were the property of defendant. There is no evidence that the sale was a conditional one or that any right was reserved by defendant to reject or return them, and no pretense that defendant claimed any such right.

Nash v. Weaver, 23 Hun, 516; *Morey v. Medbury*, 10 Hun, 540; *Bacon v. Gilman*, 57 N. Y. 656; *Smith v. Edwards*, 29 Hun, 493; *Hurd v. Cook*, 75 N. Y. 454; *Groat v. Gile*, 51 N. Y. 431.

The fact that the Watertown Steam Engine Company had guaranteed the boilers to be good and sent men to repair them for that reason made no difference with the title.

Voorhees v. Earl, 2 Hill, 288; *Cary v. Gruman*, 4 Hill, 625, 626; *Rust v. Eckler*, 41 N. Y. 488; *Fogg v. Francis*, 9 N. Y. Week. Dig. 130; *Kiernan v. Rocheleau*, 6 Bosw. 148; *Gillespie v. Torrance*, 25 N. Y. 306; *Royce v. Burt*, 42 Barb. 661; *Nichols v. Townsend*, 7 Hun, 375.

Even if this firing up was for the sole purpose of testing the repairs, it would make no difference with the result.

Coughtry v. Globe Woolen Co. 56 N. Y. 124; *Declin v. Smith*, 89 N. Y. 470.

The trial court nonsuited the plaintiff solely upon the ground that the evidence did not show that the boilers were in charge of defendant. This court cannot uphold the nonsuit upon other grounds than those specified by the trial court.

Wisser v. O'Brien, 44 How. Pr. 209; *Colleran v. Kennedy*, 94 N. Y. 684; *Jordan v. National Shoe & L. Bank*, 74 N. Y. 471.

As the deceased was not a coservant of Newcombe, the defendant was liable for any in-

juries sustained through his negligence; and this notwithstanding the servant may have acted contrary to his directions and was guilty of a violation of his duty, as long as he is acting within the scope of his employment.

Quinn v. Power, 87 N. Y. 585; *Rounds v. Del. Lack. etc. R. R. Co.* 64 N. Y. 129; *Coe-grove v. Ogden*, 49 N. Y. 255; *Hoffman v. N. Y. Cent. etc. R. R. Co.* 87 N. Y. 25; *Lynch v. Met. El. R. Co.* 90 N. Y. 77; *Whitaker v. 8th Av. R. R. Co.* 51 N. Y. 295; *Schultz v. 3d Av. R. R. Co.* 14 Jones & S. 211; *Leviness v. Post*, 6 Daly, 331; *Peck v. N. Y. C. & H. R. R. Co.* 70 N. Y. 587; *Higgins v. Waterbollet Turnpike Co.* 46 N. Y. 23; *Shea v. 6th Av. R. R. Co.* 62 N. Y. 180.

If a servant is directed to test a boiler at 150 pounds and carelessly tests it at 200 the master is liable for injuries sustained thereby.

Ochsenbein v. Shapley, 85 N. Y. 214.

That the servant's act was not contemplated by the master is no excuse from liability.

Lynch v. Met. El. R. Co. 24 Hun, 506.

The master is responsible for injuries caused by the negligence of his servants within the general scope of their employment, notwithstanding the negligent acts are wanton and even willful. In an action against the master the only question is whether the wrongful act was done in the course of the employment or outside of it.

Mott v. Consumers Ice Co. 78 N. Y. 548; *Rounds v. Del. Lack. etc. R. R. Co.* 65 N. Y. 129; *Jackson v. 2d Av. R. R. Co.* 47 N. Y. 274. See also, *Coughty v. Globe Woolen Co.* 56 N. Y. 124; *Devlin v. Smith*, 89 N. Y. 470.

Where an accident is of such a nature that it could not usually, or according to the ordinary course of things, happen without the want of proper care, negligence is presumed and the burden is cast upon defendant to relieve itself of that presumption.

Seybolt v. N. Y. Lake Erie & W. R. R. Co. 95 N. Y. 562; *Heeg v. Licht*, 80 N. Y. 579; *Russell Mfg. Co. v. New Haven Steamboat Co.* 50 N. Y. 121; *Mullen v. St. John*, 57 N. Y. 587; *Roberts v. Johnson*, 58 N. Y. 618; *Brignoli v. Chicago & Gt. East. R. Co.* 4 Daly, 182; *Walker v. Erie R. Co.* 63 Barb. 260; *Curtis v. Rochester & Syr. R. R. Co.* 18 N. Y. 534; *Spinner v. N. Y. C. & H. R. R. R. Co.* 67 N. Y. 153; *Lyons v. Rosenthal*, 11 Hun, 46.

Accordingly, it has been repeatedly held that as steam boilers do not when properly managed usually or ordinarily explode, the fact of such an explosion is presumptive evidence of negligence, and the burden is cast upon the owner of removing the presumption.

Caldwell v. N. J. Steamboat Co. 47 N. Y. 282, 293; *S. C.* 56 Barb. 425; *Roe v. Stevens, etc. Trans. Co.* 21 Am. Law Reg. 522; *Ill. Cent. R. R. Co. v. Phillips*, 55 Ill. 194; *Peoria R. R. Co. v. Reynolds*, 88 Ill. 418; *Fay v. Davidson*, 13 Minn. 528; *McMahon v. Davidson*, 12 Minn. 357.

As the act of letting in the water or steam which caused the explosion was done by direction of defendant's engineer it bound the defendant.

Gleason v. Amesell, 11 N. Y. Week. Dig. 159; *Althoff v. Wolfe*, 22 N. Y. 355; *Simons v. Monier*, 29 Barb. 419.

It was the duty of the engineer to see that a sufficient quantity of water was kept in the

boiler, and it was also the duty of defendant to keep the boiler clear of scales and to examine it for that purpose as often as was necessary.

King v. N. Y. C. R. R. Co. 4 Hun, 770; *Hawley v. Northern Cent. R. R. Co.* 82 N. Y. 370; *Vosburg v. Lake Shore, etc. R. R. Co.* 94 N. Y. 374; *Near v. Del. & Hud. Canal Co.* 82 Hun, 557; *Durkin v. Sharp*, 88 N. Y. 225; *Disher v. N. Y. C. & H. R. R. R. Co.* 12 N. Y. Week. Dig. 277.

It was not necessary that the explosion should have been occasioned by any particular one of these causes. The rule is that where several proximate causes contribute to an accident and each is an efficient cause, without which the accident would not have happened, it may be attributed to all or any of them.

Ring v. Cohoes, 77 N. Y. 83; *Pollett v. Long*, 56 N. Y. 200; *Ellis v. N. Y. L. E. & W. R. R. Co.* 95 N. Y. 546.

A nonsuit cannot be granted upon the ground of contributory negligence, unless the undisputed facts show the omission or commission of some act the law adjudges negligence. The negligence must appear so clearly that no construction of the evidence or inferences drawn from the facts will warrant a contrary conclusion.

Stackus v. N. Y. C. & H. R. R. R. Co. 79 N. Y. 464; *Payne v. Troy, etc. R. R. Co.* 83 N. Y. 572; *Wolfkiel v. 6th Av. R. R. Co.* 38 N. Y. 49; *Weber v. N. Y. C. & H. R. R. R. Co.* 58 N. Y. 451; *Kain v. Smith*, 89 N. Y. 375.

The absence of contributory negligence may appear as well from circumstances as direct evidence.

Morrison v. N. Y. C. & H. R. R. R. Co. 68 N. Y. 643; *Johnson v. Hud. Riv. R. R. Co.* 20 N. Y. 65; *Jones v. N. Y. C. & H. R. R. R. Co.* 10 Abb. N. C. 200; *affd.* 28 Hun, 364; *Massoth v. Del. etc., Canal Co.* 64 N. Y. 524; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; *Justice v. Lang*, 52 N. Y. 323.

The fact that the deceased was in a proper position, engaged in his work with nothing to indicate that he was in an improper place, or unnecessarily exposed to danger, or did any act to contribute to the accident, is sufficient to sustain a finding that he was not guilty of contributory negligence.

Devlin v. Smith, 89 N. Y. 470, 475; *Smith v. Boston Gaslight Co.* 22 Alb. L. J. 396.

Even if there had been no proof whatever, as to whether deceased was or was not guilty of contributory negligence, but simply evidence that he was found dead, it would have been a question for the jury as to whether he exercised proper care and caution.

Dorland v. N. Y. C. & H. R. R. R. Co. 19 N. Y. Week. Dig. 76; *Haye v. Gallagher*, 72 Pa. 186; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; *Justice v. Lang*, 52 N. Y. 323.

The act of Dashno in letting the steam on the south boiler was not, under the circumstances of the case, negligence.

It was the duty of defendant to see that the boilers were kept in a proper condition, and Dashno had the right to assume that this duty had been performed and that the boiler was not overheated and contained a sufficient quantity of water to make the letting in of steam a harmless operation.

Kain v. Smith, 89 N. Y. 375; *Fuller v. Jewett*, 80 N. Y. 48; *Vosburg v. Lake Shore & M. S. R. Co.* 94 N. Y. 874.

At all events it was a question for the jury as to whether Dashno acted as an ordinary careful and prudent man would under the circumstances. If he did he was not negligent.

Salter v. Utica, etc. R. R. Co. 88 N. Y. 43; *Kellogg v. N. Y. C. & H. R. R. Co.* 79 N. Y. 76; *Stuckus v. N. Y. C. & H. R. R. Co.* 79 N. Y. 468; *Unger v. 42d St. R. R. Co.* 51 N. Y. 497.

It is sufficient if it appears from the whole case that a party was not chargeable with any want of care.

Moody v. Osgood, 54 N. Y. 488, 496.

There was no privity of contract between Dashno, plaintiff and defendant; and consequently the rule which exempts the master from liabilities for injuries sustained through the negligence of a co-servant has no application.

Farwell v. Boston, etc. R. R. Corp. 4 Met. 49; *Perry v. Lansing*, 17 Hun. 84.

Dashno is to be regarded as a third person, so far as deceased was concerned. The deceased had no control over him and consequently was not in any way chargeable with his negligence.

Robinson v. N. Y. C. & H. R. R. Co. 66 N. Y. 11; *S. C.* 65 Barb. 146; *Cosgrove v. N. Y. C. & H. R. R. Co.* 13 Hun. 329; *Platz v. Cohoes*, 24 Hun. 101; *Spooner v. Brooklyn City R. Co.* 54 N. Y. 230; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Callaghan v. Rome, W. & O. R. R. Co.* 13 Week. Dig. 395.

When an injury results from the negligence of the employer he is not exonerated from liability because the negligence of a co-servant has also contributed to the accident.

Ellis v. N. Y. L. E. & W. R. R. Co. 95 N. Y. 546; *Booth v. Boston & A. R. R. Co.* 73 N. Y. 38; *Cone v. D. L. & W. R. R. Co.* 81 N. Y. 206; *Flike v. Boston & A. R. R. Co.* 53 N. Y. 549; *Harvey v. N. Y. C. & H. R. R. Co.* 19 Hun. 556; *Dyer v. Erie R. Co.* 71 N. Y. 228.

To make out a cause of action it was only necessary to allege and prove that the deceased was killed through the negligence of the defendant and its servants.

Code Civ. Proc. § 1902.

This certainly was alleged and proved. The fact that the plaintiff went further than this and alleged other facts not essential to make out a cause of action is of no consequence, so far as defendant is concerned. The recovery was for the same negligent act of the deceased in either case. The defendant was not misled, and at most it was an immaterial variance which the trial court properly disregarded.

Code Civ. Proc. §§ 539, 540; *Robinson v. Wheeler*, 25 N. Y. 252; *Thomas v. Nelson*, 69 N. Y. 118; *Place v. Minster*, 65 N. Y. 89; *Oyer v. Oyer*, 19 N. Y. Week. Dig. 318; *Smith v. Lippincott*, 49 Barb. 398; *Fells v. Vestvali*, 2 Keyes, 152; *Rose v. Bell*, 38 Barb. 25; *Carter v. Hope*, 10 Barb. 180; *Dubois v. Beaver*, 25 N. Y. 123; *Catlin v. Gunter*, 11 N. Y. 368; *McComber v. Granite Ins. Co.* 15 N. Y. 495; *Poirer v. Fisher*, 8 Bosw. 258; *Underhill v. N. Y. & Harlem R. R. Co.* 21 Barb. 489; *Saunders v. Ayer*, 32 Hun. 420.

The only repairs required or which were made were in the seam which attached the dome to the shell of the boiler, where there was a trifling leakage of steam. Therefore the only risks plaintiff's intestate assumed was such as arose from this

particular work. No motion for nonsuit was made upon this ground. If it had been, the defect in the evidence, if any, could have been supplied. For this reason a nonsuit cannot be upheld on appeal, upon grounds not suggested in the court below.

Booth v. Bunce, 81 N. Y. 246, 251; *Colleras v. Kennedy*, 94 N. Y. 634; *Adams v. Greenwich Ins. Co.* 70 N. Y. 166; *Atkins v. Elwell*, 45 N. Y. 758; *Murphy v. People*, 63 N. Y. 590; *McDonald v. North*, 47 Barb. 580; *Osgood v. Toole*, 60 N. Y. 475; *Brown v. Cayuga, etc. R. R. Co.* 12 N. Y. 486; *Isaac v. N. Y. Plaster Works*, 8 Jones & S. 277.

The defendant, by not objecting upon this ground, assumed that the question was not in the case and cannot now raise the point upon appeal.

Paige v. Fazakerly, 36 Barb. 392; *McDonald v. Christie*, 42 Barb. 86; *Wiasser v. O'Brien*, 3 Jones & S. 149; *Hill v. Heermans*, 17 Hun. 473; *Osgood v. Toole*, 60 N. Y. 475; *Cooper v. Bean*, 5 Lans. 322; *Rue v. Perry*, 63 Barb. 41; *Austin v. Burns*, 16 Barb. 643; *Jencks v. Smith*, 1 N. Y. 90, 94.

Mr. John Lansing, for respondent:

The defendant, while the plaintiff's intestate was engaged in making the repairs, owed no duty to him, to furnish safe, proper and suitable machinery for the purpose of making such repairs; or skillful, careful and experienced persons to operate the same.

Murphy v. Caralli, 3 Hurl. & Colt. 462; *Murray v. Currie*, L. R. 6 C. P. 24; L. R. 2 C. P. Div. 205; *Ditberner v. Rogers*, 66 How. Pr. 85-89; *McCafferty v. Spuyten Duyvil, etc. R. R. Co.* 61 N. Y. 178, and cases cited.

The master is liable to his servant for negligence in the employment of incompetent servants or the furnishing of improper and unsafe machinery.

Wright v. N. Y. C. R. R. Co. 25 N. Y. 562-565, and cases cited.

But such negligence must be proved and knowledge of the defect or insufficiency of the machinery must be brought home to the master, or that he was ignorant of the same through his own neglect.

Wright v. N. Y. C. R. R. Co. 25 N. Y. 562-566, and cases cited.

Without such evidence plaintiff could not recover.

Gibson v. Northern Cent. R. R. Co. 22 Hun. 289, 292.

The boilers were put into the hands of the plaintiff's intestate and his companion Dashno, for the purpose of reparation and not for use as machinery. He assumed the risks incident to such employment.

Murphy v. Boston & A. R. R. Co. 88 N. Y. 146-151, 152; *Brick v. Rochester, etc. R. R. Co.* 98 N. Y. 211, 214, 216.

The mere fact of the explosion is not evidence of negligence; so held in the case of an explosion of a steam boiler in a saw mill.

Young v. Bransford, 12 Lea (Tenn.) 232.

The boiler was in charge of the mechanics, Dashno and the plaintiff's intestate. The defendant could not be negligent in a matter over which it or its agents or servants had no control.

Ferguson v. Hubbell, 97 Y. Y. 507-510; *Hexter v. Webb*, 2 Cent. Rep. 439; *Edmundson*

v. Pittsburgh, etc. R. R. Co. 1 Cent. Rep. 868;
Hoppin v. Worcester, 1 New Eng. Rep. 278;
Bailey v. Troy, etc. R. R. Co. 57 Vt. 252.

Earl, J., delivered the opinion of the court:

This action was brought to recover damages for the death of Joseph Olive, caused by the explosion of a steam boiler owned by the defendant at Gouverneur in this State. The material facts are as follows:

The defendant bought two boilers of the Watertown Steam Engine Company in September or October, 1883. They were placed side by side, to furnish power for the same machinery and were used until May 8, 1884, when the southerly boiler exploded. The vendor guaranteed that the boilers should be good, constructed in first class manner, and of good material. Shortly before the explosion the defendant discovered that there were defects in the boilers and notified the vendor thereof and requested it to repair them. In compliance with this request and to fulfill its contract and guaranty with the defendant, the vendor sent from Watertown one Hislop, the foreman of its boiler shop, and one Dashno, a boiler maker, to make the necessary repairs upon the boilers. They examined them and found that they leaked steam and needed calking and some new rivets and bolts.

Hislop told Dashno what to do and that he should have the boilers fired up and steam on and examine them thoroughly and not leave them until everything was perfect and right. He then returned to Watertown and had some bolts made and sent Olive, a boiler maker who had been in the employ of the vendor for many years, with the bolts to Gouverneur with instructions to aid Dashno in making the repairs, and told him "to help get the rivets driven and see that everything was all right before he came home and left the boilers; to fire the boilers up and test them before he came home and see that everything was all right."

Dashno and Olive went to work upon the boilers and when they had substantially finished one, Newcombe (who was the defendant's engineer and who was also killed by the explosion) put fire under the boilers. It does not appear at whose request he did this. It must be presumed that he did it at the request of the boiler makers, for the purpose of making the tests which they had been instructed to make. The only witness who lived to tell what took place immediately before the explosion detailed a conversation which occurred between Newcombe and Dashno, who was at the time upon the south boiler, as follows: "Dashno asked Newcombe how much steam was on the north boiler. Newcombe said ninety-five pounds. Dashno then said, 'How much on this (the south boiler)?' Newcombe said 'twenty-five pounds.' Dashno then said, 'Open the door in the further (north) boiler.' Newcombe said, 'Let the steam on it' and he would risk it. Dashno then stepped up towards the smoke stack. He hadn't hardly made his move when the explosion came. When Newcombe said let the steam on, Dashno made some objection. He did not want to, and Newcombe told him he would risk it, to let the steam on. The explosion then took place."

N. Y.

The plaintiff claims that Newcombe was both unskillful and careless and that the defendant is responsible for his acts. There was no proof whatever that the defendant had any notice that he was unskillful or that he was in fact unskillful. There is no proof whatever or just inference that he was then acting for the defendant.

The vendor had undertaken on its own account to make these repairs, and then to test the boilers to see if the repairs were adequate; and it must be presumed, in the absence of proof on the part of the plaintiff, who has the burden of establishing her case, that Newcombe either volunteered to aid the boiler makers or was requested by them to aid in making the tests. In either event he was not the servant of the defendant in what he did, and it did not become responsible for his acts.

But we should reach the same conclusion on this branch of the case, if we assumed that Newcombe was the servant of the defendant in what he did, as there is no sufficient evidence and no just inference of any carelessness on his part. The proof does not show with any certainty what caused the explosion. No experts were called upon the subject. It was probably caused by letting steam or cold water into the boiler. But even if it was thus caused it does not follow that Newcombe was careless. It does not appear that there was anything to indicate danger to him in what he did. The water gauges indicated a sufficiency of water in the boilers, and there is no proof that they were out of order or that he ought to have known that they were out of order. For aught that appears he believed and had the right to believe that his acts were perfectly proper and safe. It is not sufficient now after the accident to show that they were in fact improper and caused the explosion.

But the plaintiff should have shown that he knew, had reason to know or ought to have known, that they were improper and dangerous. This was not shown, and carelessness which put human life in peril should not be presumed or found upon a mere scintilla of evidence.

But the plaintiff also claims that the boiler which exploded was in an improper and unsafe condition, and that on account thereof the defendant is liable for the accident. It did not owe the same duty to Olive which would have been due to an employee into whose hands the boiler was placed for use. To such an employee it would have owed the duty of reasonable care and diligence to see to it that the boiler was in a safe and proper condition for use.

Olive was there to repair this boiler; and if the accident occurred from any of the defects which the vendor, his employer, was bound to repair, no responsibility was thereby cast upon the defendant. Olive assumed all the risks incident to such defects. If there had been any concealed dangerous defects known to the defendant, it would have been bound to notify the boiler makers of them. But it did not guaranty that the boiler was safe. It does not appear that anyone had knowledge of any concealed defects in the boiler, making it dangerous. It was new, had been used but a few months and had been cleaned every two weeks. There is no evidence that it ought to

have been examined or cleaned more frequently.

There is no evidence of any carelessness on the part of the defendant in reference to the condition of the boiler, or that it was unsafe when placed in the hands of the boiler makers for repairs. The accident might have been due entirely to the act of Newcombe, and it certainly was not shown that it was due to any defect in the boiler. The jury might have guessed that there was a defect, but there was not sufficient evidence of it to form the basis of a verdict.

We are, therefore, of opinion that the non-suit was proper and that the judgment should be affirmed, with costs.

All concur except **Miller, J.**, absent.

Lawson A. LONG, Admr., *Respt.*,

Richard H. STAFFORD, *Appt.*

1. The death of a joint principal debtor upon a lease does not discharge the joint liability of the debtors, or the separate liability of his estate.
2. The date of entry of final judgment against a party deceased after verdict and before judgment (Code Civ. Proc. § 768) is immaterial; and such judgment may be entered *nunc pro tunc* as of the date of the verdict, where the provisions of the Code of Civil Procedure, § 1210, as to entry of memorandum of the party's death are complied with.
3. A judgment entered upon a verdict against a party since deceased is not void for the reason that notice of motion therefor was given only to the attorney of record of the deceased party.
4. Under the Code of Civil Procedure, § 1000, the court may, at any special term held by any judge, modify an order of a trial judge staying judgment on a verdict pending a hearing on exceptions in the first instance at general term, so as to allow entry of judgment.
5. The objections which, under the Code of Civil Procedure, § 1939, a defendant not served in an original action may oppose to the judgment therein, when sought to be enforced against him, are limited to legal valid objections which a party to the judgment might make, and must go to the validity and efficiency of the judgment; the objection that the original cause of action has become barred by the Statute of Limitations since the original judgment is not available.

(Decided October 5, 1886.)

APPEAL from a judgment of the Superior Court of Buffalo at General Term, affirming a judgment of the Trial Term in favor of plaintiff in an action to charge a judgment upon a defendant who had not been served in

the original action to recover for rent and damages. *Affirmed.*

The facts and questions raised are set forth in the opinion.

Messrs. Sprague, Morey & Sprague. for appellant:

A judgment in an action against joint debtors can be enforced only against the joint property of all the defendants, and the separate property of the defendant served.

Code Civ. Proc. § 1935.

By the death of Scheffer, the joint liability at law of Scheffer and Stafford and the separate liability of the estate of Scheffer for the payment of the rent were discharged and terminated. The only action that would then lie was a separate action against Stafford.

Getty v. Binase, 49 N. Y. 385; *Richter v. Popenhausen*, 42 N. Y. 378; *Risley v. Brown*, 67 N. Y. 160; *Bradley v. Burwell*, 8 Denio, 61.

The discharge of the estate of Scheffer from liability is not prevented by section 758 of the Code of Civil Procedure.

Whatever joint liability there was, antedated by several years the Code of Civil Procedure. *Randall v. Sackett*, 77 N. Y. 480.

There was no authority of law for the order made at special term, directing the entry of judgment of May 28, 1882, *nunc pro tunc* as of January 25, 1875. The Code of Civil Procedure, § 768, furnishes the practice for the entry of judgment after the death of the party, upon a verdict in his lifetime, in those cases where the cause of action survives and there is no legal obstacle to such entry. The force and effect of such a judgment is defined by section 1210.

An inspection of sections 768 and 1210 shows that those sections apply only to cases where the cause of action survives the death of the party.

Tuomy v. Dunn, 77 N. Y. 515.

The authority of all agents and attorneys is dissolved by the death of the principal. Hence an order cannot be taken by default against a party after his death, by service upon the person who had been his attorney during his lifetime.

Warren v. Eddy, 82 Barb. 664; *Adams v. Nellis*, 59 How. Pr. 387; *Bellinger v. Ford*, 21 Barb. 311; *Austin v. Monroe*, 4 Lans. 67; *Putnam v. Van Buren*, 7 How. Pr. 81; *Beach v. Gregory*, 2 Abb. Pr. 208; 1 Wait, Act. & Def. 444.

There was not a valid renewal and continuance of the original written lease, because there was no attempt to make or purport to make any modification of the lease, and because it did not comply with the condition expressed in it. A covenant of contract under seal cannot be modified by parol.

Coe v. Hobby, 72 N. Y. 141; *French v. New*, 28 N. Y. 147; *Delacroix v. Bulkeley*, 18 Wend. 71.

The parol agreement for two years from May 1, 1871, was void because not in writing; and because this parol contract was void by the Statute of Frauds, it did not modify or affect the original lease. A valid contract cannot be avoided by a void agreement.

Delacroix v. Bulkeley, *supra*.

Hence, the landlord was only entitled to recover for the use and occupation of the prem-

ises during the term they were actually occupied.

Thomas v. Nelson, 69 N.Y. 118.

In any aspect of the case, the right to recover rent for these premises after they were vacated, August 31, 1871, is barred by the Statute of Limitations. In the most favorable view for the plaintiff, the tenancy which arose out of this void agreement, followed by occupation and payment of monthly rental, was a tenancy from month to month and could be determined by either party at the end of each month, or could be terminated by a month's notice.

People v. Darling, 47 N.Y. 666; *Anderson v. Prindle*, 28 Wend. 616; *Steffens v. Earl*, 40 N.J.L. 128; *People v. Goelet*, 14 Abb. Pr. N. S. 130; *Banks v. Carter*, 7 Daly, 417; *Gibbons v. Dayton*, 4 Hun, 451.

The trial court erred in the admission of the question: "What is your judgment as to the injury you sustained?" It has often been decided that the measure of damages cannot be proved in this way. Witnesses are to give facts, and the jury is therefrom to estimate the damages.

Teerpenning v. Corn Exch. Ins. Co. 43 N. Y. 282; *Morehouse v. Mathews*, 2 N. Y. 514; *Richardson v. Northrup*, 66 Barb. 86; *Thompson v. Dickhart*, 66 Barb. 604; *Van Deusen v. Young*, 29 N. Y. 36; *Schermerhorn v. Tyler*, 11 Hun, 549; *Fish v. Dodge*, 4 Denio, 311-318; *Green v. Plank*, 48 N. Y. 669.

The trial court erred in excluding the evidence offered by defendant to show that Scheffer received a discharge in bankruptcy on June 28, 1876. Such a discharge releases the bankrupt from all debts, claims, liabilities and demand which were or might have been proved against his estate in bankruptcy. It effectually discharged Scheffer from all liability for this indebtedness.

U. S. R. S. § 5119; *Monroe v. Upton*, 50 N. Y. 593-597; *Clark v. Rowling*, 3 N. Y. 216; *Ruckman v. Covell*, 1 N. Y. 505; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12-16.

The Statute of Limitations bars the action, unless the original written lease under seal was continued in force by the oral negotiation between Lydia P. Long and this defendant. The only witness to that negotiation was plaintiff herself. She was the party plaintiff and an interested witness; hence, the question as to whether the fact was as stated by her should have been submitted to the jury.

Gildersleeve v. Landon, 78 N. Y. 609; *Honeyger v. Wettstein*, 94 N. Y. 252-261; *Kavanagh v. Wilson*, 70 N. Y. 177; *Elwood v. W. U. Tel. Co.* 45 N. Y. 549.

Mr. O. O. Cottle, for respondent:

The Statute of Limitations had not run when the summons in the original action was served on one of the joint debtors; and it cannot be pleaded here as a bar to the original cause of action. The Statute of Limitations will not be available until twenty years after the entry of the original judgment.

Maples v. Mackey, 22 Hun, 228; *affd.* in 89 N.Y. 146.

The original judgment was valid. The court had jurisdiction by service of the original summons; and its proceedings, even had they been irregular, which they were not, were valid until set aside.

N. Y.

Spalding v. Congdon, 18 Wend. 548; *Maples v. Mackey*, 15 Hun, 533, 587; *Bissell v. N. Y. Cent. & H. R. R. Co.* 67 Barb. 385; *Schaetler v. Gardiner*, 47 N. Y. 404; *Wesson v. Chamberlain*, 3 N. Y. 331; *Bank of Orange v. Brown*, 1 Wend. 81; *Herring v. N. Y. Lake Erie & West. R. R. Co.* 63 How. Pr. 497; *Orleans Co. Nat. Bank v. Spencer*, 19 Hun, 569; *Cromwell v. Hull*, 97 N. Y. 209.

The court had power to vacate the stay of proceedings and allow judgment to be entered *nunc pro tunc*.

Post v. Hathorn, 54 N. Y. 147; *Scranton v. Baxter*, 3 Sandf. 660; *Springsted v. Jayne*, 4 Cow. 423; *Ryghtmyre v. Durham*, 12 Wend. 245; *Spalding v. Congdon*, 18 Wend. 548; *Crawford v. Wilson*, 4 Barb. 504; *Mackay v. Rhinelanders*, 1 Johns. Cas. 408.

The extent of the plaintiff's demand is established by the original judgment. The plaintiff had only to give evidence of the defendant's liability.

Code Civ. Proc. § 1933.

The lease was one for six months or for two years and six months, at the option of the lessees; and the agreement to pay rent was co-extensive with the entire term. By holding over and paying rent according to the lease after the first six months had expired, the lessees elected to continue the lease; the condition for written notice was waived, and the lessees were estopped from alleging that the notice had not been given.

Viany v. Ferran, 5 Abb. Pr. N. S. 110; *House v. Burr*, 24 Barb. 535; *Kelso v. Kelly*, 1 Daly, 419; *Kramer v. Cook*, 7 Gray, 552; *Graham v. James*, 7 Robt. 468; *McAdam, Landlord & T.* pp. 27, 32, 33.

If it had not been a continuance of the lease, it would have been a lease for a year at the rent agreed upon; and that would have been sufficient to sustain this action.

Conway v. Starkweather, 1 Denio, 113.

Evidence that John H. Scheffer had been discharged in bankruptcy was immaterial; and it was not error to exclude it. Bankruptcy is a personal defense, of which no one but the bankrupt can take advantage. There was no offer to prove that the defendant Stafford had been discharged. His liability remained unaffected.

Hartness v. Thompson, 5 Johns. 160; *Van Bramer v. Cooper*, 2 Johns. 279; *Oruikshank v. Gardner*, 2 Hill, 333; 2 Cowen's Treatise, 3d ed. 482.

There was no evidence to go to the jury that Mrs. Long had released the defendant; the talk they had about his selling out to Frank E. Scheffer did not tend to show a release of Stafford from liability, according to Stafford's own statement of it.

House v. Burr, 24 Barb. 525.

After verdict the attorneys who represented the parties at the time of the trial may continue to do so until judgment is entered. If notices are required they may be given by or served on such attorneys. If notice of motion for leave to enter judgment *nunc pro tunc* was necessary, service on the attorney who appeared in the trial was proper.

Spalding v. Congdon, 18 Wend. 548; *Scranton v. Baxter*, 3 Sandf. 660; *Springsted v. Jayne*, 4 Cow. 423; *Crawford v. Wilson*, 4 Barb. 528, 524.

The action as brought is maintainable against the defendant Stafford, the surviving joint debtor.

Morrey v. Tracey, 92 N. Y. 581; *Lane v. Satter*, 51 N. Y. 1.

Earl, J., delivered the opinion of the court: On the 24th day of October, 1870, Lydia P. Long, the intestate, executed to the defendant and John H. Scheffer, a lease of a store in the City of Buffalo. The lease was under seal and executed by the lessor and lessees, and was for six months, to commence on the first day of November, 1870, at a rental of \$25 per month, with a provision for a continuance for two years longer, as follows:

"And it is further agreed that the party of the second part shall have the privilege of continuing the lease for two years from May first, 1871, to May first, 1873, at the annual rental of \$600, to be made in monthly payments in advance, on the first day of each and every month during said lease, by first giving written notice to party of the first part on the first or during the month of February, 1871, of such intention."

The lessees entered into possession of the store and paid the stipulated rent at the rate of \$25 per month until May first, 1871; and after that date they continued to occupy the store until September first, 1871, paying the stipulated rent at the increased rate of \$50 per month. The store was then vacated and no rent was thereafter paid.

In 1874 the intestate commenced an action in the Superior Court of Buffalo against the lessees and Frank E. Scheffer to recover the rent from September first, 1871, to May first, 1872, and damage for the breach of certain covenants contained in the lease. The summons was served upon the two Scheffers, but not upon Stafford.

The Scheffers appeared and answered; and upon the trial of that action the court dismissed the complaint as to Frank E. Scheffer and the jury rendered a verdict in favor of the plaintiff against the other two defendants for \$497.11. The entry of the judgment was stayed, and the court ordered the exceptions taken by the defendant to be heard at the general term. They were not brought to a hearing and John H. Scheffer died in 1881. Upon a motion made at a special term of the court on behalf of Mrs. Long, notice of which was given to the attorney for the defendant Scheffer, the court made an order May 23, 1882, vacating the stay of proceedings so far as to permit her to enter judgment *nunc pro tunc* as of the day upon which the verdict was rendered, to wit: June 25, 1875; and judgment was thereupon entered for damages and costs, for the sum of \$621.08, containing a provision that the plaintiff have execution against the joint property of the defendants Scheffer and Stafford and the individual property of Scheffer.

Thereafter, on the 25th day of May, 1882, Mrs. Long commenced this action to charge the judgment upon the property of the defendant Stafford. He put in an answer and, upon the trial of the issues thus joined, the court ordered a verdict in favor of the plaintiff, for \$976.03. She having died her administrator was substituted as plaintiff.

The Code, § 1933, provides that such a judgment as Mrs. Long obtained against Scheffer and Stafford as joint debtors is evidence only of the extent of the plaintiff's demand, after the liability of the defendant not served has been established by other evidence; and section 1937 authorizes an action by the plaintiff in such a judgment against the defendant not summoned, to procure a judgment charging his property with the sum remaining unpaid upon the original judgment.

The defendant's answer in such an action is, by section 1939, "restricted to defenses or counterclaims which he might have made in the original action, if the summons therein had been served upon him when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defenses or counterclaims which have arisen since it was rendered."

The defendant makes several objections to the judgment rendered against him in this action which we will notice separately.

1. It is claimed that by the death of Scheffer the joint liability of Scheffer and Stafford and the separate liability of the estate of Scheffer, for the payment of the rent, were discharged; and the cases of *Getty v. Binsee*, 49 N. Y. 385, and *Risley v. Brown*, 87 N. Y. 180, are cited to uphold this claim. But those authorities and the principle decided by them have no application to this case, as Scheffer was not a mere surety, but was a principal debtor. The argument of defendant's counsel, built upon this claim, therefore fails.

2. It is objected that the court had no authority to make the order *nunc pro tunc*, for the reason that notice upon the persons who had been the attorneys for Scheffer was insufficient; and also for the reasons stated in the opinion in *Tuomy v. Dunn*, 77 N. Y. 515.

The Code, § 763, provides that if a party dies after verdict and before final judgment, the court must enter final judgment in the name of the original parties; and section 1210 provides that when judgment is entered in such a case, a memorandum of the party's death must be entered with the judgment in the judgment book, indorsed on the judgment roll, and noted on the margin of the docket of the judgment; and that such a judgment does not become a lien upon the real property or chattels real of the decedent, but establishes a debt to be paid in the course of administration.

The latter section was complied with in this case, and the two sections were authority for the judgment entered as against the deceased defendant. The fact that the judgment was entered *nunc pro tunc* as of the date of the verdict rather than as of the date of entry, harmed no one connected with his estate, as it could in any event be paid only in the course of administration. The date of which the judgment was entered was a wholly immaterial circumstance as the effect of the judgment as against the estate of the deceased was in no way influenced thereby and in no way depended thereon.

In the case of *Tuomy v. Dunn*, there was no compliance with section 1210; and the effort was to enter a judgment which would be a lien as of the date of the verdict and would thus have a preference in administration upon the estate of the decedent.

The entry of the judgment was a mere formal matter which the court could have ordered without notice to anyone without rendering it liable to assault as entirely void. Even if the service of notice in this case upon the attorneys was improper, it was at most an irregularity and not a fatal defect.

So far as the joint property of the two defendants was concerned, the practice was not regulated by the two sections of the Code quoted. The stay of proceedings was the act of the court; and as to such property, it had the common-law authority to enter judgment *nunc pro tunc* as of the date of the verdict. The right of courts of record to exercise such authority has been always asserted and cannot now be well disputed.

3. But it is further claimed that under section 1000 of the Code no judge but the one who made the order staying proceedings and ordering the exceptions to be heard in the first instance at the general term could make the order; and that the revocation in this case was not made by the order of such a judge. Here the order was not entirely revoked; it was simply modified so as to allow the entry of judgment. This the court could do at any special term held by any judge. The section should be construed not as a limitation upon the power of the court, but as a limitation upon the power of a judge out of court.

But it is not necessary to notice more particularly the objections made to the order and judgment. They were not void if irregular, and they could not be attacked collaterally, even by the representatives of Scheffer. Much less could Stafford assail them collaterally. There was no irregularity in reference to them which affected any of his substantial rights.

Section 1939 reserves to a defendant situated like Stafford the right to make "objections to the judgment." But what objections? It may not be easy to answer this question. They must at least be legal, valid objections, such as a party to the judgment might make and not such as have always been excluded. They must be such objections as go to the validity and binding efficacy of the judgment.

4. The judgment in the original action was evidence against Stafford, of the extent of plaintiff's demand; and all plaintiff was bound to do was by other evidence to establish the joint liability of the defendant with Scheffer for that demand. This plaintiff did. The lessees entered upon the prolonged term of two years, provided for in the lease with the consent of the lessor, and paid the rent up to September first, 1871 at the increased rent.

Without alluding to the evidence of an express waiver of the written notice to take the further term, such notice must be held to have been waived by the act of the parties to the lease. Their act in the continued occupancy of the store and the payment and receipt of the increased rent can have no other meaning or significance, except that of an election to take the store for the new term. Whether the requirement of written notice was for the benefit of the lessees only, or for the benefit of both lessor and lessees, they were competent to waive it by parol; and a waiver is to be implied from their conduct.

There is no proof that Mrs. Long ever agreed
N. Y.

to accept the surrender of the store, and thus to terminate the lease prior to May first, 1872. On the contrary, she refused to accept the key when tendered to her. The fact that she took it from the place where the lessees left it against her will and entered the store has no significance. The defendant therefore continued liable for the rent to May first, 1872.

5. It is also objected that plaintiff's demand for rent was, at the time of the commencement of this action, barred by the Statute of Limitations. But this was a proceeding to charge the defendant with the original judgment; and unless that was barred, the cause of action was not barred. *Maples v. Mackey*, 89 N. Y. 146.

Besides, the defendant's original liability was upon the lease; and as that was under seal there is no ground for holding that the Statute of Limitations barred plaintiff's claim.

We have now noticed the principal objections made by the defendant against the judgment; and a consideration of the whole case has led us to the conclusion that the verdict was properly ordered for the plaintiff and that the judgment should be affirmed, with costs.

All concur except Miller, J., absent.

DECISIONS IN CASES IN WHICH NO OPINIONS WERE WRITTEN.

(October 12, 1886.)

Arthur BRIESEN, *Appt.*,

v.

LONG ISLAND R. R. Co., *Respnt.*

Mr. Sandford H. Steele, for appellant.

Mr. E. B. Hinsdale for respondent.

Judgment reversed, new trial granted, costs to abide event. (On opinion in *Cogswell v. N. Y., N. H. & H. R. Co.*, ante, 225). All concur.

James S. MORTON, *Respnt.*,

v.

METROPOLITAN LIFE INS. CO. *et al.*,
Appts.

Messrs. Wm. H. Arnoux and *Albert G. McDonald*, for appellants.

Messrs. Hugo Hirsch and *B. F. Watson*, for respondent.

Judgment affirmed with costs, on opinion below. All concur.

Robert W. GLEASON, *Respnt.*,

v.

James W. SMITH, *Appt.*

Mr. J. Noble Hayes, for appellant.

Mr. Charles F. Wells, for respondent.

Judgment affirmed, with costs. All concur.

Henry WEHLE, *Appt.*,

v.

Albert KARUTZ, *Respnt.*

Mr. A. J. Vanderpoel, for appellant

Mr. A. Simis, Jr., for respondent.

Motion for reargument denied, with costs. (See 102 N. Y. 690.)

Isabella B. CLUTE, *Respt.*,
v.
Jacob KNIES *et al.*, *Appts.*
Mr. Wm. McCrea, for appellants.
Mr. T. J. Clute, for respondents.
Motion for reargument denied, with costs.
(See 102 N. Y. 377; S. C., 3 Cent. Rep. 380.)

PEOPLE, *ex rel.* WELLER, *Respt.*,
v.
Charles DeKay TOWNSEND, *Appt.*
Mr. John E. Parsons, for appellant.
Mr. H. E. Sickels, for respondent.
Motion to amend remittitur granted, without costs. (See 102 N. Y. 480; S. C. 3 Cent. Rep. 426.)

Bessie J. CUMMING, Infant, *etc.*, *Respt.*,
v.
BROOKLYN CITY R. R. Co., *Appt.*
Messrs. Morris & Pearsall, for appellant.
Messrs. Carpenter & Roderick, for respondent.
Motion to correct calendar granted, without costs.

Erastus S. PROSSER, *Respt.*,
v.
FIRST NATIONAL BANK of Buffalo, *Appt.*
Messrs. Crowley & Laughlin, for appellant.
Messrs. Greene, McMillan & Gluck, for respondent.
Motion to withdraw appeal denied, without costs.

SYRACUSE WATER CO., *Appt.*
v.
City of SYRACUSE, *Respt.*
Motion to advance cause denied, without costs.

SYRACUSE WATER CO., *Appt.*,
v.
CENTRAL CITY WATER WORKS CO., *Respt.*
Motion to advance cause denied, without costs.

Bridget MULCAHEY, *Respt.*,
v.
Francis C. DEVLIN, *Appt.*
Motion to dismiss appeal granted, under section 191 of the Code of Civil Procedure, with costs.

J. Daniel ACKERMAN *et al.*, *Appts.*
v.
Marcus BROUNSTEIN, *Respt.*
Mr. Samuel R. Stearn, for appellants.
Messrs. Jenney, Brooks, Marshall & Ruger, for respondent.
Motion to dismiss appeal granted, with costs of appeal, but without costs of motion.

Julius M. WILE *et al.*, *Appts.*
v.
Marcus BROUNSTEIN, *Respt.*

Mr. Samuel R. Stearn, for appellants.
Messrs. Jenney, Brooks, Marshall & Ruger, for respondent.
Motion to dismiss appeal granted, with costs of appeal, but without costs of motion.

David A. SAHLEIN, *Appt.*,
v.
Marcus BROUNSTEIN, *Respt.*
Mr. Samuel R. Stearn, for appellant.
Messrs. Jenney, Brooks, Marshall & Ruger, for respondent.
Motion to dismiss appeal granted, with costs of appeal, but without costs of motion.

Re Application of City of ROCHESTER,
Appt.,
to
Acquire WATER RIGHTS of Geo. R. SMITH *et al.*, *Respts.*
Mr. Ivan Powers, for appellant.
Mr. Theodore Bacon, for respondents.
Motion to dismiss appeal granted, with costs of one appeal, and \$10 costs of motion.

(October 19, 1886.)

Mary E. POST, *Exrx.*, *etc.*, of John Earl,
Respt.
v.
William B. DINSMORE, *Pres.* Adams Exp. Co., *Appt.*
Mr. Wm. D. Guthrie, for appellant.
Mr. Abel E. Blackmar, for respondent.
Judgment affirmed with costs. All concur.

Re Judicial Settlement of Accounts of Gilbert A. WOOD, *Exr.*, *etc.*
Messrs. Louis Marshall and C. C. Brown, for appellants.
Mr. D. A. King, for respondent.
Order affirmed, and judgment absolute ordered on stipulation, with costs. All concur.

Ignatz THALHEIMER, *Appt.*
v.
Ferdinand HAYS, *et al.*, *Respts.*
Mr. John Van Voorhis, for appellant.
Mr. J. B. Perkins, for respondents.
Appeal dismissed with costs. All concur.

PEOPLE, *ex rel.* Hudson C. TANNER, *Appt.*
v.
Supervisors of HERKIMER COUNTY, *Respt.*
Mr. William Tiffany, for appellant.
Mr. Myron G. Bronner, for respondent.
Appeal dismissed with costs. All concur.

PEOPLE, *ex rel.* Julia G. JEROME, *Appt.*,
v.
REGISTRAR of ARREARS of City of BROOKLYN, *Respt.*
Mr. James B. McKewan, for appellant.
Mr. Almet F. Jenks, for respondent.
Order affirmed, with costs. All concur.

NEW JERSEY.
COURT OF CHANCERY.

SPRAGUE *et al.*,

v.

DREW *et al.*

1. The question being as to the consideration for the conveyance by aged parents, of all their estate to one of their children; held, on the evidence, that such consideration consisted of an undertaking by the child to whom the property was transferred to pay to the next of kin of the parents, on their decease, a certain sum of money in addition to maintaining the parents during their lives, etc., and that said sum due the next of kin was a lien upon the land.
2. This lien for a portion of the consideration for the conveyance not being of record was a latent equity in favor of the next of kin and as such was not binding upon an assignee, without notice and for value, of a mortgage upon the land made by the child to whom it had been conveyed, although the original mortgagee had notice of such lien.

(Decided (October 26, 1886.)

BILL for relief. *Decree advised.*

The nature of the case and the facts and questions raised are set out in the conclusions filed by the Vice Chancellor.

Messrs. Martin & Conklin, for complainants:

It is one of the most familiar and well settled principles of a court of equity that the vendor of real estate has a lien over for the purchase money.

Brinkerhoff v. Vancisev, 3 Green, Ch. 251; 2 Story, Eq. Jur. § 1217; *Crawford v. Bertholf*, 1 Saxt. 458.

The vendee is regarded as the trustee for the vendor.

2 Story, Eq. Jur. p. 441, § 1217; *Graves v. Coutant*, 4 Stew. 779.

Although the equitable right of vendor's lien has been differently treated and recognized in different States in the Union, there is no State in the Union where it has been put on higher grounds and treated more favorably than by the courts of the State of New Jersey, and it has always been treated as a substantial right.}

Graves v. Coutant, *supra*.

"Where a man delivers a deed for property and does not get the purchase money, an equitable lien arises at once in his favor of exactly the same nature, as far as the court of chancery is concerned, as if he had taken a mortgage in writing, sealed and delivered."

Id.; *Armstrong v. Ross*, 5 C. E. Green, 109.

The lien exists, not only as against the vendee but also as against persons holding under him with notice. Our court of equity has followed the leading case of *Mackreth v. Symmons*, 15 Ves. 329.

Graves v. Coutant, 4 Stew. 779-780; *Corlies v. Howland*, 11 C. E. Green, 311; *Brinkerhoff v. Vancisev*, *supra*.

It will also prevail against those who take

title by act or operation of law from such grantee, without notice; in which case the assignee holds, subject to the equities existing against his grantor.

Corlies v. Howland, *supra*; 2 Story, Eq. Jur. § 1228; 2 Sudg. Vend. 880.

Neither will the taking of the purchaser's note or bond for the unpaid purchase money impair the lien.

Graves v. Coutant, 4 Stew. 781; *Brinkerhoff v. Vancisev*, 3 Green, Ch. 251.

Nor will the recovery of a judgment upon such note or bond; for until there is payment the lien will remain.

Graves v. Coutant, *supra*; *Dudley v. Dickson*, 1 McCart. 252.

To constitute the lien, as against a purchaser under the original vendee, there must be notice of the indebtedness and that the indebtedness arose upon the purchase money.

Brinkerhoff v. Vancisev, 3 Green, Ch. 251.

But it is not necessary that there should be notice that the indebtedness constitutes a lien on the land. *Id.*

Neither is an express agreement necessary to create the lien; it results as an incident to the sale, unless it is expressly waived, or unless there are such special circumstances as show that the parties did not intend that the lien should exist. *Id.*

Notice of improperly registered mortgage given to secure purchase money is sufficient notice.

Armstrong v. Ross, 5 C. E. Green, 120.

The Statute of Limitations does not affect such a lien; because the vendee or the purchaser from him, with notice, stands in the relation of a trustee or mortgagor for the unpaid purchase money.

Graves v. Coutant, 4 Stew. 779; *Lewis v. Hawkins*, 23 Wall. 119 (90 U. S. bk. 23, L. ed. 118).

The burden of proof is upon the purchaser, to establish that in the particular case, the lien for unpaid purchase money has been intentionally displaced, or waived by the consent of the parties.

Mackreth v. Symmons, 15 Ves. 342-9; 2 Story, Eq. Jur. § 1224.

In a suit practically of the same character as this, it was held that although an action might be maintained by an administrator, yet there "would be serious difficulties in the way," and "suggesting, therefore, these embarrassments," "it is sufficient to say that it is a more convenient practice, and is not open to legal objection, * * * to institute these suits."

Haston v. Castner, 4 Stew. 701.

If a person make a promise to another, upon lawful consideration, for the benefit of a third person, such third person may maintain an action, even at law, upon it.

Joslin v. N. Jersey Car Spring Co. 7 Vroom, 141; *Cubberly v. Cubberly*, 6 Stew. 82; *Pruden v. Williams*, 11 C. E. Green, 210.

The assignee of a mortgage takes it subject to all equities and defenses existing between the original parties at the time of the assignment, whether they be latent or not.

Stevenson v. Black, 1 Saxt. 388; *Bolles v. Wade*, 3 Green, Ch. 459; *Jacques v. Esler*, 3 Green, Ch. 461, and other cases cited in *Stewart, Dig. Mortgage*, v. f. page 776; 3 C. E.

Green, 484; 7 C. E. Green, 600, 606; See *Woodruff v. Morristown Sav. Inst.* 7 Stew. 178; *De Witt v. Van Sickle*, 2 Stew. 209; *Bennett v. Hadsell*, 8 C. E. Green, 174.

Ordinarily "the existence of the marriage relation is not enough to make admissions or declarations made by either (husband or wife) competent against the other;" but "it is enough to show that the declarant was the agent of the other in the matter involved, and acting as such when the declaration was made."

Abb. Tr. Ev. p. 166; 4 Barb. 222; 2 E. D. Smith, 250; Rose, N. P. 75.

Messrs. Kendall and Van Blarcom, for defendants.

Bird, V. C., filed the following conclusions:

This bill is filed to determine whether Mr. and Mrs. Sprague, two aged people, conveyed all their real estate and assigned all their personal to their daughter Mary J. Drew, upon condition that she should discharge a mortgage on the land, of \$1,000, and should pay the other outstanding obligations of Mr. S., and should allow a daughter to have her home on the premises during the lifetime of the parents, and should keep and maintain the parents during the rest of their lives, and should decently bury them at their death, and should pay to the children of Mr. S. the sum of \$3,000; or whether the said lands were conveyed and the said personal property assigned upon all of said conditions being kept and performed by Mary J. Drew except the last one; *i. e.*, the payment of the said \$3,000.

The parents being dead the contest is between all of the children, except Mary J. Drew and the brother Josiah on the one hand, and Mary J. Drew and Josiah on the other.

What was the transaction between the parents and the daughter? There is nothing in writing except the deed for the land and two unexecuted bonds and a mortgage. The deed was executed by the parents; but the bonds and mortgage which purport to have been drawn for Mary J. Drew and her husband to execute are not signed. The parents being dead, the only other persons who knew anything about the transaction, from being present or from participation therein, are Mary J. Drew and her brother Josiah. Parol testimony must be relied upon chiefly. The unexecuted papers throw some light on the question.

Although the burden is on the complainants, yet the natural order of investigation will be to ascertain as far as possible what took place between the parents and Mary Drew, from those who were present at the time they came to an understanding. This leads me to note what Mary says in her answer and testimony. In her answer she says her father sent for her and spoke of the age of himself and wife, and said unless they got help he would be without means of burial; and prepared to convey to her his lands and all goods and chattels, upon the condition that Mary would agree to assume and pay a bond and mortgage on said lands, of \$1,000, and pay the other debts against said Samuel, and put the dwelling house in comfortable repair, and support and maintain her said parents during their lives, and suitably bury them, and allow their daughter Susan to have a home in said

dwelling and keep a cow on said lands so long as she remained single. In her testimony these things are substantially repeated. But she says that her father told her that he had offered the farm to his son Josiah, but that he had refused to take it. Josiah had the deed prepared for the farm, had his parents execute it, and delivered it to his sister Mary.

But Mary goes somewhat further in her testimony; she admits that she said she took the farm for \$4,000, but qualifies the force of this, by saying that there was \$1,000 mortgage upon it, and that the \$3,000 was to go to the support of her parents, and added: "and that was little enough to do." She says that her mother handed her some papers during the last year of her life, which must have been during 1878, and about one year after the date of the deed, and said to her: "Take these notes and these papers and lay them away." The bonds and mortgage referred to were among the papers. Mary says that she turned them over and saw the bonds, but did not read them, adding: "I did not read them until after her death; then I got them out and read them." She admits saying "they hadn't been signed and should be laid away." Afterwards, she produced her deed and these bonds and mortgage and showed them to her sister, Mrs. V.

As stated, the only other person who had any personal knowledge of the transaction, was the son Josiah. He was called as a witness by Mary. He says that Captain Van Blarcom (an able and experienced lawyer) drew the deed. He says that his father told him "to have the deed made out for Mary, if I didn't want the farm; he offered it to me if I would take it at \$4,000, and take care of them, and pay his liabilities; he said it was worth \$4,000, after taking care of them, and paying his liabilities; he said Mary would take it, if I didn't want it."

At the request of his father, he at once had the deed prepared to Mary, had it executed and acknowledged, and delivered it to Mary, who requested him to have it recorded. Josiah also had the bonds and mortgage prepared. He says that they were prepared after the deed was executed, and adds that his parents did not know that he had them written, and says: "I had them a few days, and then gave them to mother, and she said she didn't want them signed; she said by the time they got the debts paid and them taken care of it would be enough for them to pay."

Upon cross examination Josiah said that his father told him that Mary was to have it for the same that it had been offered to him, Josiah.

In the next place I will present what the witnesses, called by the complainants, say that Mary told them about the transaction, and what she did with reference to a settlement, which it is urged, she would not have said and done, had not the complainant's view of the case been the true one. Mr. W. heard Mary ask his wife (a sister of Mary) to come to her house February 14, 1884, and tell her that there was \$3,000 to be divided among the children, but that her husband had an account to bring it down to \$864 for keeping the old folks. He also says that on the 14th of February, 1884, at such meeting, these bonds were claimed, but that Mary said they were not signed, and refused to

produce them; and that Mary's husband claimed that he had taken care of the old people and would have pay for it.

This witness says that Mary told him a few days afterwards that the bonds and mortgage were to be signed, but that it had been neglected; and that after they had put the second mortgage on the place, her mother said she need not sign them. He also says that at the meeting February 14, 1884, the husband of Mary made a statement of his claim, in which he charged himself with rent for the farm, and charged the old people with board, and had a balance due the heirs at law of \$864. This is the same account which Mary spoke of, and it was on this occasion presented and insisted on by her husband in the presence of Mary. Why any charge for board or any credit for rent, if the understanding was that Mary was to have the farm for the promise of boarding her parents and paying their debts and making repairs?

In 1878 the next year after the deed was delivered, Mary told Mrs. W., another sister, that she had agreed to give \$4,000 for the farm, to pay the \$1,000 mortgage, "keep the old folks," and "after their death pay the heirs \$3,000;" and she added, "there were papers to that effect."

Mary told the same witness after the death of their father "that she would stay on the place and would be able to keep it, if they didn't all call on her at once." Just prior to February 14, 1884, the witness said to Mary: "If you have papers to show that the heirs are not entitled to anything, why don't you produce them and that will settle it? And Mary said: I haven't any and don't want any. I want the heirs to have what is coming to them."

Mr. Welsh, a carpenter, who was in the employ of Drew after he took possession of the farm, says that while there at work, Mrs. Drew told him that she was to give \$3,000 and keep her parents their lifetime, and that she was to assume the debts and pay the \$3,000 to the heirs.

W. H. S., one of the complainants, says that his sister Mary told him in the spring of 1877 that she was to pay \$4,000 for the place, pay the debts, keep the old folks, and had given bonds for \$3,000, which was to be divided amongst the heirs; and he says John S. D. told him the same thing before he took possession of the farm.

Mr. E. S., another complainant, corroborates what Mrs. W. says, to the effect that Mary said that she had no papers to show that she was to have the place for taking care of her parents; but that she wanted the heirs to have what was coming to them.

In the spring of 1877 Mary told her sister Susan that she was to have the place for keeping her parents and giving the heirs \$3,000. Susan also says that on another occasion she was with her sister Mary, when the latter was searching for an insurance policy, and adds: "I said, Isn't that it, and she said, 'No, that is them bonds;' and then she said, 'Not signed yet, but they ought to be and laid out of here; this is not a safe place for them.'"

In the third place, let other and independent facts and concurrent circumstances and events be considered. Many of these go towards sustaining the view expressed by complainants. For example, the deed declares that the considera-

tion was \$4,000. It contains full covenants of warranty and seisin, with the exception only of the \$1,000 mortgage, but Mary took the deed with the provision therein that she was to assume and pay off that mortgage as part of the purchase money. I am satisfied the true consideration was \$4,000. No part of that sum has been paid, unless the debts, other than the mortgage, were also to be paid as part of the said \$4,000. Mary does not pretend that she has paid any part of it, except the debts. This fact being unquestioned, the heirs (or more strictly speaking, the next of kin) are entitled to the \$3,000; for the deed, it will be observed, makes no provision for the support of the grantor and his wife, nor for the repair of the dwelling, nor for funeral charges.

In plain reason, then, part of the consideration was \$4,000. That must stand uncontrovertibly fixed. If there was any other consideration, it must have been in addition to the \$4,000. I can imagine no ground for supposing that any element entered into the contract to diminish or exhaust the said \$4,000; for if the estimated value of the lands had been \$4,000, and the estimated value of the debts and services, care and maintenance, had been \$4,000, everyone making any pretensions to a knowledge of the law would have had the real contract expressed in the deed.

But the counsel understood his business. He saw that the deed was absolute on its face and that Mary had a supreme advantage over her parents, if she chose to exercise her legal rights, should the deed go forth unaccompanied with any paper expressing the conditions upon which Mary took the farm; and hence the same counsel who drew the deed drew also two bonds and a mortgage on the lands conveyed; the bonds for Mary to sign, and the mortgage for both Mary and her husband. One of said bonds was in the penal sum of \$3,750, and the condition was that if Mary should the said Samuel Sprague keep and maintain on the farm and in the dwelling house conveyed by him to said Mary, by deed of even date with said bond, and should provide for him in sickness, and at decease of said Samuel Sprague "well and truly pay the sum of \$1,875 to the then surviving children of the said Samuel Sprague," etc.; and in case of failure to perform any of said conditions in the lifetime of said Samuel Sprague, should then pay the said \$1,875 to the said Samuel Sprague, then the said bond should be void, etc.

The other bond was to the mother and to secure the payment of \$1,125, but in all other particulars like the one just recited. These papers taken together with the deed made the transaction complete; and had they been executed, as no doubt counsel intended, this controversy would have been unknown. There can be no doubt that it was the express understanding that these bonds and this mortgage were to have been executed. Nor can there be the least doubt that the deed and the bonds express the agreement between the father and the daughter Mary, although the bonds were not signed. It is absurd to suppose that the grantor would so completely uncover his head as he did by this deed, with full covenants of warranty, unless his old age had brought on imbecility.

One point, very different in its character re-

mains. Josiah took a mortgage from Mary and her husband for \$700. This he assigned to the defendant Givens for value. Is this mortgage so held by Givens, prior to the lien of the \$3,000, being so much of the unpaid purchase money? It certainly would not be prior in the hands of Josiah, for he knew that the purchase money was not paid. But Givens paid the \$700 and interest and was ignorant of the incumbrance in favor of the grantor. This incumbrance or lien, not having been made manifest by any record (in other words, being unknown to Givens, either constructively or actually), it is what is known as a latent equity in favor of the next of kin of the mortgagor's grantor. It is, therefore, not an equity between the mortgagor and mortgagee, which the assignee of the mortgagee would be bound by whether he took with notice or not; but being latent, he is not bound without notice, even though his assignor had full notice. And purchasing *bona fide*, and paying the consideration in full, even though a large part of that consideration was an existing indebtedness, his title prevails over such latent equitable title. *Traphagen v. Hand*, 9 Stew. 384.

The complainants are entitled to the \$3,000. The defendant Mary J. Drew is liable for this sum to her brothers and sisters, according to the terms and conditions expressed in the unsigned bonds. This amount, with interest from the date of the death of the intestate, is a lien on the lands conveyed to Mrs. Drew, but subsequent to the liens of the two mortgages given to Martin and the one held by Givens. Givens is entitled to costs from the complainants.

The complainants are entitled to costs from the defendants Mary J. Drew and her husband, and from Josiah Sprague. The costs of complainant will also be declared to be a lien on the lands.

AMERICAN DRAMATIC FUND ASSOCIATION

William F. LETT *et al.*

1. Where legacies are given generally and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge upon the real as well as personal estate.
2. A devise to the American Dramatic Fund held good as a devise to the corporation, the American Dramatic Fund Association, it appearing that such corporation was intended by the testatrix to be the recipient.

(Decided October 23, 1886.)

BILL for legacy. On final hearing on pleadings and proofs. *Decree for complainant.* The facts and questions raised are set out in the opinion.

Mr. C. Parker, for complainant.

Mr. A. C. Hartshorne, for defendant Brown, administrator.

Runyon, Chancellor, delivered the following opinion:

This suit is brought to recover a legacy of

\$3,000 given by the will of Mrs. Anne D. Wallack to the complainant, as it alleges, by the name of the American Dramatic Fund. The bill is filed against William F. Lett, who was the acting executor, but who was removed in 1883, and George W. Brown, who was appointed administrator *de bonis non cum testamento annexo* in his stead. Lett is now the owner of the residuary estate by purchase thereof.

By the will, which was made in 1873, the testatrix, who died in 1879, gave all her estate, real and personal, after payment of her debts and funeral expenses, to her husband, James W. Wallack, for life (he predeceased her) and gave her executors power to sell and convert into money all her real estate after the decease of her husband or with his consent, in his lifetime, and to invest the proceeds; and directed them after his death to pay out of her estate an annuity (to Nannie Taylor) and certain legacies of specified sums of money, and the residue of the income to the testatrix's mother, Mrs. Caroline Blake, for life; and she directed that upon the decease of her mother, her executors pay to Mrs. Margaret C. Blake, widow of Dr. Lewis W. Blake, \$2,500, in case she should be unmarried; to the American Dramatic Fund \$3,000; and to the institution known as Sister Irene's Foundling Hospital, \$3,000. She ordered that the rest of her estate descend and be distributed according to the laws of this State, regulating descents and distributions in cases of intestacy. One of the annuitants, Mrs. Caroline Blake, is dead.

Two questions are submitted for decision: one is whether the legacy in dispute is charged upon the testatrix's real estate, and the other is whether the complainant is entitled to it.

That the legacy is charged upon the real estate there can be no doubt. The testatrix directs her executors to convert her real property and invest the proceeds and pay the income thereof to her husband for life, and upon his decease to pay out of her estate the annuity to Nannie Taylor, and certain legacies of specified sums of money, and the rest of the income to her mother for life; and on the death of her mother, she gives and directs her executors to pay out of her estate a legacy of \$2,500 (in a certain contingency), the legacy in dispute and another, and gives all the rest, residue and remainder of her "estate, real and personal" to descend and be distributed, etc.

Where legacies are given generally and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge upon the real as well as personal estate. *Corvine v. Corvine*, 9 C. E. Green, 579; Hawk. Wills, 299.

The complainant is a benevolent corporation of the State of New York, located in the City of New York. The objects of the Corporation are, according to the charter: to raise by subscription, donations and bequests from members thereof and others, by theatrical benefits and annual festivals, a fund to be devoted to making provision for the support of members thereof who by age, sickness or accident, are incapacitated from pursuing their professional calling, and for the support of the widows and orphans of the members, and for the purpose of defraying the funeral expenses of members.

and for such other similar purposes as the Corporation shall deem meet and expedient.

The testatrix, who was a tragedian, was a member of the Association at the time of her death, and had been such since 1851. Her husband, who was also a tragedian, was a member. Her mother, her step-father and two uncles of hers were members. The Corporation is commonly known by the name of the American Dramatic Fund. The word "association" is seldom used as part of its name in speaking of it. There is no other corporation or association of the same or similar name. A misnomer of a corporation in a devise, grant or obligation will not prevent it from taking or recovering in its true name. *Upper Alloways Creek Township v. String*, 5 Halst. 323; 1 Pow. Dev. 338.

If the description of the person, whether natural or civil, in a devise, be made with sufficient certainty, so that the person intended may be distinguished from every other person, trifling omissions or misprisions will not make the devise invalid; for the use of names or descriptions is but to make a distinction between person and person; and therefore it is sufficient if the person be so called or described that he or it may be distinguished from every other. 1 Pow. Dev. 338.

Where the legatee or devisee is inaccurately named or described so that there is no one who fully answers the name or description, the court will, if possible, gather from the contents of the will and the surrounding circumstances who was meant. Theo. Wills, 111.

These familiar principles have been so frequently applied in this court as to render any citation of instances wholly unnecessary. There can be no doubt that in the bequest under consideration the testatrix intended to give the legacy to the complainant.

The administrator did not enter upon his duties as such until June, 1885 (the bill was filed in December, 1884), although he was appointed in April, 1883; but there would seem, from his own testimony, to be enough assets in his hands. The bill has been taken as confessed against him.

There should be a decree against both of them, with costs; but as to the administrator, the decree should be for payment of the legacy and the costs out of the assets of the estate in the due course of administration.

Louis STETTANER

v.

NEW YORK & SCRANTON CONSTRUCTION CO. et al.

1. A complaint seeking the compulsory production of the books of a corporation for examination on the part of a stockholder, on the ground only that complainant has been refused permission to examine the books with the aid of an expert accountant, does not present a case for equitable relief.
2. The power conferred upon the Chancellor by section 50 of the Act concerning corporations (Rev. p. 186), to compel the production of the books of a corporation, is limited to the special case of a corporation of this State unlawfully

keeping its books out of the State; and the Act does not confer upon the court of chancery any power over corporations which it did not theretofore possess, except that which is specifically given.

(Decided October 27, 1886.)

BILL for general relief. On general demurrer. *Demurrer sustained.*

The facts and questions raised are set forth in the opinion.

Mr. John W. Taylor, for defendants, demurrants:

This is virtually an application to this court for a *mandamus* to enforce a legal right, if a right at all; and for obtaining the enforcement of that right the appropriate remedy is a writ of *mandamus* which is, moreover, adequate and complete.

See High. Extr. Rem. § 308; Taylor, Corp. § 585; 2 Lindley, Partn. p. 809.

The complainant was not entitled either at law or in equity, to have an examination of all the books and affairs by an expert; certainly not unless he avers his own ignorance and incompetency.

See Taylor, Corp. § 585; 2 Lindley, Partn. p. 809.

There has been no demand or refusal, so far as the board of directors is concerned, all of whom are made defendants.

2 Lindley, Partn. p. 810; *Ree v. Wilts & Berks Canal Nav. Co.* 3 Adol. & Ellis, 477.

If it is the duty of the directors (assuming that the Company has absolutely ceased to do business) to call a stockholder's meeting and wind up the Company, that duty is not sought to be enforced and cannot be enforced, under the bill as it stands.

Streit v. Citizens Fire Ins. Co. 2 Stew. 21.

The accounting etc. prayed for cannot be had without making all the shareholders defendants, or by suing on their behalf. All the shareholders are quite as much interested as the complainant, in the accounting. Although this is not one of expressed causes of demurrer, is hereby assigned *ore tenus*.

Story, Eq. Pl. § 484; 1 Dan. Ch. 5th ed. 583; *Barrett v. Doughty*, 10 C. E. Green, 879.

Mr. C. Parker, for complainant.

Runyon, Chancellor, delivered the following opinion:

The case stated in the bill is that the New York and Scranton Construction Company was incorporated under the Act concerning corporations in February, 1881, and carried on its business from the time when it was organized to about May 7, 1882; that its assets were from time to time distributed among its stockholders in pursuance of resolutions of the board of directors, and that on the 7th of May, 1882, the president gave notice to the stockholders that pursuant to a resolution of the board the assets remaining in the treasury would be distributed ratably among the stockholders by the treasurer, at his office in New York, on and after that date, upon surrender by the stockholders of their stock certificates; and that a full exhibit of the financial affairs of the Company had been prepared for the inspection of all stockholders at that office.

It further states that since May 7, 1882, the Company has carried on no business and has not exercised any of its franchises; that all its debts and liabilities are paid and discharged; that it has not been dissolved; that no exhibit of the financial affairs of the Company was made as promised in the notice, but that all that was exhibited was a so-called "trial balance" sheet from which the complainant could not ascertain whether what the directors proposed to pay him was his full share to which as a stockholder he was entitled; that for that reason he refused to take the offered dividend until he should have had an opportunity (for which he then applied) to examine the books with the aid of a proper expert accountant; permission to do which the treasurer refused to give, alleging that he was in such refusal obeying the orders of the board.

The bill also states that thereupon the complainant refused and ever since has declined to take the dividend; that either soon after or shortly before that time, Mr. W. S. Dunn, the president, publicly promised and pledged himself to give the stockholders a full explanation, so that they could see for themselves that they had received or were about to receive all that was due to them as stockholders, but he never did so although the complainant from time to time reminded him of his promise; that in February, 1885, the complainant and another stockholder united in a letter to the president, in which they reminded him of his promise and requested him to give them an opportunity to examine the books with an expert accountant; that in reply he said that the request was a reasonable one, that he had long ago offered to give them full access to the books and any information they desired; that he was no longer president, and had referred their letter to Mr. F. A. Potts, president of the New York, Susquehanna and Western Railroad Company, who had all the books and papers of the Construction Company; and added that if Mr. Potts should not give them every facility which they might desire in order to make a thorough examination he would, if they would call upon him, see to it that such facilities be afforded to them; that they called upon Mr. Potts who fixed a day (the third day of March then next) upon which they were to come to his office accompanied by an expert accountant to make the examination; that on that day they went according to the appointment, to make the examination, but they were not permitted to do so; that Mr. Potts was absent but his clerk handed them a note from Mr. Dunn to them in which he said that, at the suggestion of the attorney of the Company and in obedience to the request of prominent stockholders and officers of the Company who deemed the demand for an examination of the books by an expert an insult and a reflection upon them, he was induced to say that while they should personally have every opportunity they might desire to examine the books and records of the Company at all convenient hours, such permission would not be given to anyone accompanying them nor to any expert specially employed; that that denial was not because of any apprehension whatever as to any transaction which had occurred in the history of the Company, but simply because of a desire to resent a personal

affront that seemed to be contemplated by the action of the complainant and his fellow stockholders; and that if in the course of a personal examination, they should have need of any explanation he or the treasurer if called upon would cheerfully give it.

The bill further states that afterwards in the same month of March, the complainant wrote to the treasurer and asked and received from him the before mentioned "trial balance," and that at about the same time he met Mr. Potts and remonstrated with him for denying the privilege he had formerly said he would accord, and Mr. Potts said that he had nothing to do with the matter; that he was simply the custodian of the books.

The suit is brought against the Company and the directors, and the bill prays that it may be decreed that the directors were and are trustees of the property and books of the Company for the stockholders; that being such they should make manifest to the stockholders, upon reasonable request, the particulars of the management of the property; that if it can be done without incommoding the management of the business and without involving loss or risk in the management, the directors should, on such reasonable request, admit any stockholder personally, or by his lawfully constituted agent, attorney, servant or accountant, or with the aid of such person, to examine the books, etc.; and that no distribution of assets can bind the stockholder or release the directors unless the stockholder assents thereto.

The bill also prays that the defendants may be required to give the desired account in this court and bring the books, etc., into court for examination, and that the directors may be required to pay the complainant his share of the assets. It also prays an injunction against Mr. Potts, to prevent him from parting with the books, etc.

The defendants have demurred.

The case made by the bill is that the Corporation has ceased to do business, although its term of existence has not expired, and that it has not been dissolved. It has paid its debts and divided its remaining assets among the stockholders. The complainant has demanded permission to examine the books with the assistance of an expert accountant and the permission has been refused so far but only so far as to deny him the aid of the accountant. In extending to the complainant leave to examine the books himself without the assistance of an expert accountant, the president tendered the aid of himself and the treasurer to give all necessary or desired explanation in the course of the examination. There is no allegation that the complainant is not competent to examine the books for himself. There is no charge of fraud or mistake or of mismanagement of the affairs of the Company. Nor (it may be remarked in passing) is it averred that the demand was made upon the board of directors, the members of which are made defendants with the Company; although it is stated that they have deposited the books with Frederic A. Potts as their agent, and that the complainant has demanded from each one of them the privilege of examining the books, but it has been denied.

The general jurisdiction of this court over

corporations does not, in the absence of express statutory authority, extend to the power of dissolving them nor does it include the power of winding-up their affairs, except under peculiar circumstances. The rights and duties of corporations are in general regulated by the common law; but where there is no plain and adequate remedy at law, and a case is presented which calls for equitable relief, a suit in equity may be maintained.

To induce this court to interfere with the management of the affairs of a corporation, or to justify it in so doing, there must be some special equitable reason, some wrong done or about to be done, for which the law will not afford adequate redress, as in *Cramer v. Bird*, L. R. 6 Eq. Cas. 148, where a company was extinct, and the directors had a surplus of assets after paying the debts which they refused to distribute. It was there held that a suit in equity might be maintained to compel distribution.

In this case it is not averred that the complainant has been or is about to be defrauded in the distribution of the assets. He does not allege that the portion set off to him in the final distribution is not his full share of what was then divided or that what was set off to him in the former distribution was not his full proportion of the assets which were then distributed. What he says is that he does not know whether he has been defrauded or not and cannot say whether he has received his full share in the former distributions or whether what has been set off to him in the last one is or is not his full share. To ascertain how the fact is he wants an opportunity to examine the books and papers of the Company, with the aid of an expert accountant; so that until he shall have examined the books he cannot say whether he has been aggrieved or not in the distributions. It may be that upon such examination it will be found that he has no ground of complaint on that score. He does not allege that any unlawful act has been done in the management of the affairs of the Company nor that any is meditated. Clearly, his only ground of complaint and only claim to relief now is that he has been refused permission to examine the books with the aid of an expert accountant. But that alone is not a ground for equitable interference. The law furnishes him with an adequate remedy in the writ of *mandamus*. High, Extr. Rem. § 308; *State v. Einstein*, 17 Vroom, 479.

It is urged on his behalf that the Legislature, by the fiftieth section of the Act concerning corporations (Rev. p. 186), has conferred upon this court power to compel the production of the books of a corporation. But the power conferred by that section is granted in the special case of a corporation of this State unlawfully keeping its books out of the State. The authority thus given is to be exercised in a summary way and in a special case. It is conferred not only upon the chancellor, but also upon the chief justice and each of the associate justices of the supreme court. It cannot properly be construed to confer upon this court any power over corporations which it did not possess before the passage of the Act, except that which is specifically given. The Act is indeed a remedial law and it must, notwithstanding its penal character, be construed liberally—*Huyler v. Cragin Cattle Co.* 18 Stew. Eq. 392 [S. C. 2 N. J.

Cent. Rep. 204]—but it will not admit of such a construction as to confer upon this court the power to compel the production of the books of a corporation for inspection and examination in cases not contemplated by the Act.

This court has of course power to compel such production for the purpose of obtaining evidence to be used in a cause; but the object of the application here is to ascertain whether there is any ground of complaint, in reference to the conduct of the directors, against whom no charge is made nor any imputation cast. No reason is presented for calling them to an account in this court, except the allegation that they deny the complainant's right to have the aid of an expert accountant in his examination of the books, and accordingly refuse to permit him to examine the books unless he do it without such assistance. The complainant sues for himself alone, to obtain permission to examine the books with professional aid to see whether he has cause of suit or not. Should an opportunity be accorded to him and should he fail to discover any fraud or mistake or culpable mismanagement this suit would be at an end. Should he find such ground of relief he would be compelled to amend his bill in order to introduce it. The law gives him an adequate remedy to enable him to discover whether he is aggrieved or not. If he shall find that he is aggrieved this court will be open to him.

The demurrer will be allowed.

Harriet COLLINS *et al.*,
v.

Christopher A. BERGEN *et al.*

1. Where an aggregate fund is given to several persons **nominatim**, to be divided among them in **equal shares**, if one of them dies before the testator the share of such decedent will **lapse**, unless an intention to give a right of survivorship may be deduced from other parts of the will.
2. Where the share which thus lapses is a part of the residuary estate it does not pass to the other residuary legatees as part of the residue, but must be deemed **intestate estate**.

(Decided October 30, 1886.)

BILL for construction of will, etc. On final hearing upon pleadings and stipulation of counsel as to the facts.

The facts and questions raised are set out in the opinion.

Mr. John F. Harned, for complainants.

Mr. Martin V. Bergen, for defendants.

Runyon, Chancellor, delivered the following opinion:

James Folwell, late of the County of Camden, died April 6, 1867. By his will he provided as follows: "Second, I direct my executors herein named to pay or cause to be paid unto Sarah Green, my housekeeper, the net income or interest arising from my property, either in bonds or mortgages, notes or stocks, during her natural life; and at her death I give and bequeath

to my sister, Leah Ann Davis, the sum of \$100. I also give and bequeath, after the death of Sarah Green, the one half of all my residuary estate unto my three sisters, Mary Little, Susan Sharp and Hannah Kemble, share and share alike, being the third part of said devise to each of them. The other remaining half of my estate I give and bequeath after the death of Sarah Green, to Rachel Collins my wife's daughter, Catherine Collins her sister and Harriet Collins, these three sisters. I bequeath to each of them the third part of one half of my residuary estate, as before noted, after the death of Sarah Green. To Mary Ann Horner of Philadelphia I give and bequeath the sum of \$200."

Sarah Green died November 5, 1884. Hannah Kemble and Rachel Collins both died before the testator. The former died in 1868 before the making of the will, and the latter died in 1864. Each died intestate, leaving issue. Susan Sharp and Catherine Collins both died after the death of the testator and before the death of Sarah Green. Both died intestate leaving issue.

The questions presented for decision are the following: whether the residuary gifts in remainder were vested or contingent; whether the shares of Hannah Kemble and Rachel Collins lapsed or whether they went, on the testator's death, to the surviving residuary legatees in remainder; that is, whether the share given to Hannah Kemble went to Mary Little and Susan Sharp, and the share of Rachel Collins to Catherine and Harriet Collins.

The residuary gifts in remainder were vested and not contingent upon the event of the legatees surviving Sarah Green. *Howell v. Green*, 2 Vroom, 570.

Whether the legatees in remainder of each half of the residuary fund who survived the testator were entitled to the whole of the gift given to them and their deceased co-legatee, depends upon the decision of the question whether those gifts are to individuals or to a class. The rule is that where an aggregate fund is given to several persons *nominatim* to be divided among them in equal shares, if one of them died before the testator, the share of such decedent will lapse.

The gift in this case is to six persons by name, to each one third of one half of the residuary estate in remainder. The testator gives one half of that estate to his "three sisters, Mary Little, Susan Sharp and Hannah Kemble, share and share alike, being the third part of said devise to each of them." He previously gave \$100 to his sister Leah Ann Davis. The other half of the residuary fund he gives to Rachel Collins his wife's daughter, Catherine Collins, her sister and Harriet Collins, these three sisters; and adds that he bequeaths to each of them the third part of one half of his residuary estate after the death of Sarah Green. Rachel, Catherine and Harriet Collins were not sisters but were sisters-in-law, and the first named was not the testator's wife's daughter, but her daughter-in-law.

In *Cresswell v. Cheslyn*, 2 Eden, 128, where a testator gave the residue of his personal estate to his three children, naming them, share and share alike, as tenants in common and not as joint tenants, and by a codicil revoked the gift as to one of them, giving to the legatee instead

of it a pecuniary legacy, it was held that the residuary third, the gift of which was so revoked, did not belong to the two other residuary legatees. See also *Clark v. Phillips*, 17 Jur. 888; *Re Stanhope's Trusts*, 27 Beav. 201; *Hærgal v. Harrison*, 7 Beav. 49.

It is true that the mere fact that the testator in a devise or bequest to persons mentions them by name is not conclusive upon the question whether the gift is to those persons as a class or as individuals. But the rule is as above stated and there is nothing in this case to take it out of the rule.

Where the gift is to persons *nominatim* the intention to give a right of survivorship may be deduced from other parts of the will. The cases cited by the complainants' counsel, *Jackson v. Roberts*, 14 Gray, 548; *Schaffer v. Ketell*, 14 Allen, 528 and *Stedman v. Priest*, 103 Mass. 298, are instances of such construction.

In the case in hand there is nothing to indicate any intention to give to the residuary legatees in remainder as classes and not as individuals. The fact that the testator intended to give one half of the residuary fund to his three sisters of the whole blood (Leah Ann Davis was his sister of the half blood) upon whom he bestowed it and the other half to the three sisters-in-law, wives of his wife's sons, is not evidence of such intention any more than the gift of the whole to the six *nominatim* in equal shares would have been. The shares of Hannah Kemble and Rachel Collins, who died in the testator's lifetime, lapsed, and being shares of the residue they did not pass to the other residuary legatees as part of the residue. *Hawk. Wills*, 42. Consequently the testator must be held to have died intestate as to them.

The President, Directors and Company of
the SOMERSET COUNTY BANK
v.

John V. VEGHTE.

1. The plea of the **Statute of Limitations** is good in equity as well as at law.
2. Where complainant's claim is based upon a fraud which defendant has concealed, the statutory period will not, in equity, be considered to have commenced until the fraud is discovered, or until it would have been discovered had reasonable diligence been exercised.
3. Where the alleged fraud was in the embezzlement by defendant, while acting as complainant's cashier, of their money intrusted to his hands, the claim is cognizable at law, and the statute applies to it in equity.
4. Direct trusts, as between trustee and cestui que trust, are not reached by the statute.
5. Where the bill contains only a general charge of fraud and waives an answer upon oath, discovery in aid of complainant's charge of fraud is waived also.

(Decided October 28, 1886.)

BILL for account. On argument of plea in bar. *Adjudged good.*

Messrs. Bartine & Griggs, for complainants.

Mr. F. J. Frelinghuysen & Mr. A. A. Clark, for defendant.

Runyon, Chancellor, delivered the following opinion:

The bill states that in 1862, after the Bank was incorporated, it appointed the defendant its cashier, and that he assumed the duties and emoluments of the office accordingly and took into his custody all the moneys, securities, papers, books and accounts of the Bank, and so became bound to account to the Bank therefor; that he continued to hold the office continuously for twelve years; that during the whole of that time and while he was cashier, he kept an account in the Bank in his own name as county collector; that he so falsified and manipulated his accounts and books of the Bank that at or about certain dates mentioned in the bill he fraudulently embezzled and appropriated to his own use certain specified sums of money, together amounting to \$2,214.60, so far as discovered, which belonged to and were held in trust by the Bank and which it was obliged by law to pay and which it did afterwards pay to the collector of Somerset County; that when in 1874 the defendant, at the end of the twelve years, ceased to be cashier of the Bank he was at once made and became president of the Institution, and thereupon assumed the responsibilities and emoluments of that office and continued therein until 1880; and that while continuing in the offices of cashier and president, he fraudulently concealed the fact of his embezzlement, so that the complainants did not and could not discover it by reason of such fraudulent concealment, until they employed an expert to examine the books in May and June, 1881, when they first learned of the embezzlement.

The bill prays answer without oath, and prays for an account and for a decree that the defendant pay what may be found due upon the account.

The defendant has pleaded to the whole of the bill. By the plea he denies the imputed embezzlement, concealment and fraud and the alleged falsification and manipulation of the account; denies that he is indebted to the Bank in the sums mentioned in the bill or any of them, and avers that the moneys with the receipt and embezzlement whereof the bill charges him (but he denies the embezzlement) were embezzled more than six years before he was served with any process of this court to answer the bill or any process whatever to account therefor. He expressly denies that by reason of his alleged fraudulent concealment the complainants could not discover the embezzlement if there had been any, until they employed an expert to examine the books and accounts in May and June, 1881; and alleges that any failure to make such discovery, if there had been any embezzlement or subtraction of funds as charged, was due to their own neglect and carelessness; that for nine years (from 1874 to the time of filing the bill) the complainants had cashiers other than the defendant, and that if there had been such embezzlement or subtraction of funds as is charged against him, it must have been known to such cashiers and to the other officers of the

N. J.

Bank. The plea then sets up the Statute of Limitations in bar to the whole of the complainants' demand.

The complainants' counsel insist that the plea is not good because it sets up the Statute of Limitations as a bar to a claim that the defendant fraudulently obtained the complainants' money and fraudulently concealed the fact that he had done so, up to a period within six years before the time of filing the bill. The plea of the statute is a good plea in equity as well as at law. Where the complainant's claim is based upon a fraud which the defendant has concealed until sufficient time has run to enable him to set up the statute, the statutory period will not, in equity, be considered to have commenced until the fraud is discovered, or until it would have been discovered had reasonable diligence been exercised. *Todd v. Rafferty*, 8 Stew. 254; Story, Eq. Jur. § 1521.

It is not so at law. *Bd. Chosen Freeholders of Somerset Co. v. Veghte*, 15 Vroom, 509.

Direct trusts as between trustee and cestui que trust are not reached by the statute. But the case in hand is not one of those to which the statute is not applicable. The alleged fraud was in the embezzlement by the defendant while acting as cashier of the complainants, of their money intrusted to his hands. The claim against him arising therefrom is one cognizable at law. If so, the statute applies to it in equity. *Kane v. Bloodgood*, 7 Johns. Ch. 90; Angell, Lim. § 178.

The complainants' counsel insist that in the case of *Williams v. Reilly*, 14 Stew. 137 [3 Cent. Rep. 673], it was held that one who was sued in this court for dereliction and malfeasance, in an office similar to that held by the defendant, could not avail himself of the Statute of Limitations. In that case the suit was indeed against the defendant for dereliction and malfeasance in the office of treasurer of a savings bank, and it was held that the Statute of Limitations was not a defense to the bill; but it was so adjudged, on the ground that he was a member of the board of managers of the bank, and the object of the bill was to charge him in the interest of the depositors, with dereliction of duty as a manager holding an office of special trust, the office of treasurer, in the management.

It was held in *Williams v. McKay*, 18 Stew. 189, that the managers of a savings bank stand in the relationship of trustees to the depositors, so that the Statute of Limitations will not be a bar against a charge of mismanagement on their part which occurred more than six years before the filing of the bill.

The plea in this case is what is known as an anomalous plea, because it is partly affirmative and partly negative; affirmative, in setting up the statute; and negative, in denying the fraud. Story, Eq. Pl. § 802; Lang. Eq. Pl. § 101.

And that is the form of a plea of the statute in such a case. Mitf. Eq. Pl. 269, Story, Eq. Pl. § 754.

It is a rule that anomalous pleas must always be supported by an answer in *subsidiū* as to the allegations which constitute the replication and as to all charges of evidence, if any, in support of such allegations. Lang. Eq. Pl. § 101; Bea. Pleas in Eq. 171.

The plea in this case is not accompanied by

an answer. No objection is made however to it on that account. On the subject of concealment the bill merely alleges that the defendant, while cashier and president, concealed the fraud so that the complainants did not discover it until 1881; and it prays answer without oath.

A mere unsworn general denial would therefore have answered the call of the bill in respect to the alleged concealment. The object in requiring the answer is to obtain a discovery which may prove a case which will displace the bar. But where the bill contains a general charge of fraud merely, with no specification, and waives answer upon oath, discovery in aid of the complainant's charge of fraud is practically and substantially waived also.

In view of these considerations and of the fact that no objection is made upon the ground that the defendant has not answered, the requirement of the rule may, in this case, very properly be disregarded.

The plea is good in form and substance.

Eliza McMONIGLE

v.

Bridget McMONIGLE *et al.*

1. A decree for a **specific performance** will not be granted upon **uncorroborated evidence of the complainant**, where a defendant denies the making of the agreement sought to be enforced.
2. A **widow is not bound to pay rent** for the occupancy of the house in which she and her husband dwelt before his death, until after the **assignment of her dower**.
3. Where **no one appeared to claim the realty** by descent, the **widow is entitled to reasonable compensation for collecting the rents** thereon, when she is called upon to account.
4. A **widow cannot claim reimbursement** for money expended in the **improvement of her husband's property**, when it appears that such money, in the main, was derived from her husband's business, and her earnings therein, and was voluntarily contributed to make such improvement; and it seems probable that a conveyance of real estate executed to her by the procurement of her husband secured to her a much larger sum than she possessed at the date of her marriage.

(Decided November 1, 1886.)

BILL for partition, etc. On final hearing upon pleadings and proofs.

Mr. H. A. Drake, for complainant.

Mr. R. S. Jenkins, for Bridget McMonigle, widow.

Ranyn, *Chancellor*, delivered the following opinion:

The bill is filed by Eliza McMonigle, a sister of Patrick McMonigle, late of Gloucester City in this State, deceased, who died without issue and intestate, July 4, 1881, against his widow and the complainant's sisters, who with her are

the heirs at law of the decedent. It alleges that he in his lifetime was seized in severalty of five contiguous lots of land in Gloucester City, and that in March, 1863, another lot was conveyed to him and his wife Bridget, by Richard Price; that in December, 1880, they conveyed that lot to her sister Catherine Friel, in order that the latter might convey it to her, which she did in March, 1881, and that the consideration of the conveyance by him of his interest in that property to Catherine Friel was an agreement between him and his wife that if he would do so she would release and convey all her interest, including her right of dower, in all the other property, to his sister Eliza, the complainant, for the equal benefit of Eliza and his other sisters; and the bill further states that after having by that means induced him to convey his interest in the Price property she refused to carry out the agreement on her part. Since her husband's death the widow has continued to live upon one of the five lots, in the house in which she and her husband resided at the time of his death.

The bill prays that the widow may be required to perform specifically the before mentioned alleged agreement and that she may account for the rents collected by her, and it prays partition of the five lots. By her answer the widow denies the agreement. She avers that the improvements put upon the five lots were placed there by her and her husband jointly, and that she contributed thereto a large amount of her own money; but she claims only her dower and compensation for collecting the rents and taking care of the property since her husband's death, which she says she was compelled to do because no one appeared to claim the property by descent from him.

The evidence upon the subject of the agreement is by no means such as to establish it. It is principally the testimony of the complainant herself. She swears to admissions which she says were made to her by the widow in her husband's lifetime. They are to the effect that Patrick would not agree to execute the deed to Catherine Friel for his wife's benefit until the latter agreed to join him in a conveyance of the other property to the complainant in trust for the benefit of herself and her sisters. She also swears that Bridget gave her the reasons which induced her to obtain the conveyance to Catherine Friel. The statement which she says Bridget made on the latter head is rambling and incoherent and to a considerable degree unintelligible.

As to the alleged admissions, Mrs. McMonigle denies absolutely and positively that she made them; and there is no substantial corroboration of the complainant's statement. Mr. Gorman, the scrivener who drew the instrument, indeed says that when the deed to Catherine Friel was signed by Patrick he, the scrivener, understood that there was some agreement between Patrick and his wife; that she promised to do something which she had not done and which Patrick wanted her to do. He says he did not pay much attention to the conversation and cannot recollect whether what Patrick wanted his wife to do had any relation to the making of the deed to Catherine Friel or not. He says also that there were no other deeds that he knows of, which Patrick and his wife proposed to ex-

ecute at that time; that he thinks Bridget directed him to draw the deed to Catherine Friel and that Patrick was not with her when she gave the direction; that Bridget, he thinks, had some trouble to get her husband to his, the scrivener's, office to sign that deed; but he also says that he cannot say that he recollects any such agreement between them as that which the complainant says Bridget stated to her was the inducement to her husband to sign the Friel deed. He says he knows of no such agreement.

The testimony of Mrs. Gorman, his wife, furnishes no corroboration. She testifies that Patrick called upon her at a time which she cannot fix, and requested her to tell her husband "not to go on with those papers, for Bridget would not sign them; that he had signed and she would not." But it does not appear that he had directed the scrivener to draw any papers. Moreover, from the statements of the witness as to Patrick's appearance and manner it would seem probable that at that time he was not entirely sane. Further, on the part of the widow it is proved that her husband had, as he and she supposed, conveyed his interest in the property to her in November, 1867, by a deed from him to her, for the consideration of \$1, which deed was recorded in the same month. Mrs. McMonigle says that the deed to Catherine Friel was made because she had learned, when she was taking proceedings to dispossess a tenant of the property for non-payment of the rent, that that deed was not valid because it was made by a husband to his wife directly; and she is corroborated in this to a certain extent, at least, by the testimony of Mr. Gorman.

The widow is entitled to her dower in the property of which partition is sought. She must account for the rents received by her since her husband's death, but will of course be entitled to proper allowances for taxes, expense of repairs, interest upon incumbrances, etc. For aught that appears she is entitled to reasonable compensation for collecting the rents. Her dower has never been assigned to her. She is therefore not bound to pay rent for the house which she has occupied since her husband's death. As before stated it is the house in which she and he dwelt when he died.

The claim which she set up upon the hearing, to reimbursement for moneys of her own expended in the purchase of the five lots and improvements thereon in the lifetime of her husband, cannot be allowed. It is quite clear from the evidence that the money which she says she so contributed was, in the main at least, derived from her husband's business and her earnings therein and was voluntarily contributed to the purchase and improvement of her husband's property. It seems quite probable that the conveyance of the Price property to her secured to her all the money (\$650) which she claims to have had when she was married and much more besides. She was married in 1858, and that property was conveyed to her and her husband in 1868. Her husband conveyed his interest in it to her in 1867.

The consideration of the deed from Price appears to have been \$600. They afterwards improved the property by building upon it. It may be remarked that the consideration mentioned in the deed to Catherine Friel is \$3,000.

N. J.

This is probably some indication (it may be but slight however) as to what the improvements upon the property cost, and if so, it may well be that in that property she has all her separate estate. It may be added that although she alleges in her answer that she spent her own money in improvements upon the property of which partition is sought she does not allege that she spent any in the purchase of the land; and as before stated, in the answer she claims only her dower and compensation for collecting the rents since her husband's death.

Henry A. HURLBUT *et al.*, Exrs. of Hutton,

v.

Charles Gordon HUTTON, Anna Mary Hutton, Countess de Moltke-Huitfeldt, *et al.**

John N. WHITING *et al.*, Exrs. of Hutton,

v.

Adele HUTTON, Marquise de Portes, *et al.*

1. An expression in a will of an **intention** on the part of the testator to **convey** property at a future time, to his daughter-in-law, can **not** be construed to be a **devise**.
2. To create a **devise by inference** the implication must be a necessary one; there must be such a strong probability of an intention to devise that an intent to the contrary cannot be supposed.
3. The **exercise of a power given by will to executors, to sell** at public or private sale and to assign, grant and convey real and personal property on such terms as in their judgment will be most beneficial to the estate, **must be left to their discretion**, where there is no allegation of abuse or intended abuse of such discretion by the executors.
4. Where a **will provides that certain loans and advances, made by the testator to his daughter's husband, shall be a part of and be deducted from the daughter's share** of his estate, and the **securities** therefor be **assigned to her**; if her share is not sufficient to pay the amount of such loans and advances, **she will not be entitled to the securities** until she shall have paid the balance.
5. A matter, heard upon petition and answer thereto during the progress of a cause and disposed of by a **decretal order**, can **not be reheard** as a matter of course upon the final hearing of the cause.
6. In an action for the construction of a will, **the court will not give direction to the executors** upon a state of facts which is merely **hypothetical**.

(Decided October 23, 1886.)

BILLS for construction of will, etc. On final hearing on pleadings and proofs.

*See Hutton's Exrs. v. Hutton, 2 Cent. Rep. 213; Landon v. Huitfeldt, 3 Cent. Rep. 379.

The facts and questions raised are set out in the opinion.

Mr. Cortlandt Parker and **Mr. E. H. Landon** of N. Y., for executors.

Messrs. Frederick Frelinghuysen, A. P. Whitehead of N. Y., and **Benjamin Williamson**, for Countess de Moltke-Huitfeldt.

Messrs. Benjamin Williamson and A. P. Whitehead, for Marquise de Portes.

Mr. T. N. McCarter and **Mr. John Cadwalader**, of N. Y., for Charles G. Hutton.

Runyon, *Chancellor*, delivered the following opinion:

Benjamin H. Hutton, late of West Orange in the County of Essex, died February 17, 1894. His wife was then dead. He left three children, Major Charles Gordon Hutton, Anna Mary, Countess de Moltke-Huitfeldt, and Adele, Marquise de Portes. The two daughters are widows. Madame de Moltke has no issue. Madame de Portes has two children, the present Marquise de Portes and the Comte de Portes. Mr. Hutton left a will with seven codicils. By the residuary clause, the 12th, of the will he provided as follows:

"All the rest, residue and remainder of my estate, real as well as personal, of whatsoever nature and wheresoever situate, I give, devise and bequeath unto my executors, their heirs, executors and administrators, as joint tenants and not as tenants in common, in trust:

"1. To set apart and make a valuation and estimate of the same in gold or silver coin of the United States, or the equivalent of such coin in currency, so called, according to the then market rate of such coin in currency, and thereupon to invest (so far as shall not already be done) and keep invested a sufficient amount and fund not less than two hundred thousand dollars (\$200,000), reckoned in American gold or silver coin as aforesaid, to pay the income of such amount and fund to my wife Ann Hutton Gordon Hutton, during her natural life.

"If the income of the said fund shall not amount to the sum of ten thousand dollars (\$10,000) per annum, reckoned in such gold or silver coin, then my executors shall take from the proceeds or income of the remainder of my said estate, or its income, a sufficient sum from time to time as may be necessary to insure to my said wife the said sum of ten thousand dollars (\$10,000) in such coin per annum, payable half yearly as aforesaid.

"2. After deducting the foregoing bequest of two hundred thousand dollars (\$200,000) for the benefit of my wife, I desire my executors to set apart all the rest and remainder of my said residuary estate, and to add to and estimate with the same the sum of one hundred thousand dollars (\$100,000) (provided in and by said contract of marriage, referred to in the second article hereof, to be paid to my daughter Adele, and her husband), and thereupon to divide the aggregate, or sum thereof, into three parts as follows: one part of forty (40) per cent and two parts of thirty (30) per cent each, and after such division to invest, if not already done, and keep invested, one of said parts of thirty (30) per cent, less the sum of one hundred thousand dollars (\$100,000) in gold or sil-

ver coin, so as aforesaid heretofore contracted to be paid by me to my daughter Adele, and her husband, which I direct to be deducted from said thirty (30) per cent, and apply the income of said thirty (30) per cent, after such deduction, half yearly to the use of my said daughter Adele during her natural life, free from the control or interference of her husband, or from any liability for his debts; and upon her death to assign and pay the same to her issue and their heirs in equal shares *per stirpes*. But if she die without issue, then to my issue *per stirpes*, or if none of my issue be then living, to my next of kin, in equal shares *per stirpes*.

"3. The other thirty (30) per cent of such aggregate I direct my executors to invest so far as not already done and keep invested and apply the income thereof half yearly to the use of my daughter Anna, wife of the Count Harold de Moltke-Huitfeldt, during her natural life, free from all control, interference or dominion of her husband, and from any liability for his debts; and after her death, assign and convey the principal of said thirty (30) per cent to her issue and their heirs in equal shares *per stirpes*. But if my daughter Anna shall leave no issue at the time of her death her surviving, and her husband Harold the Count de Moltke-Huitfeldt, shall survive her, the sum of thirty thousand dollars (\$30,000) in gold or silver coin of the United States, part of the moneys herein directed to be invested for her benefit, shall be paid to her said husband absolutely, and the remainder of said thirty (30) per cent to go to my issue, or if none of my issue be then living to my next of kin in equal shares *per stirpes*.

"4. If the remaining forty (40) per cent of said aggregate above described shall amount to four hundred thousand dollars (\$400,000) I direct my executors to pay to my son, Charles Gordon Hutton, the sum of fifty thousand dollars (\$50,000) reckoned in American gold and silver coin (which I give him absolutely, and advise and request him to invest and keep invested in real estate); and my executors are thereupon to invest, so far as not already done, and keep invested the remainder of said forty (40) per cent of said aggregate, and apply the income thereof half yearly to the use of my said son during his natural life. If the said forty (40) per cent shall not amount to the sum of four hundred thousand dollars (\$400,000), I direct that the whole of the said forty (40) per cent be so invested and the income thereof applied to the use of my son as hereinabove directed, and upon his death, pay, assign and convey the principal or capital of such sum or fund to his issue in equal shares *per stirpes*, and in fee simple; or if he leave no issue him surviving, but leave his present wife him surviving, to keep invested the sum of thirty thousand dollars (\$30,000) reckoned as aforesaid in American gold or silver coin at its nominal or lawful value, and apply the income thereof half yearly to her use during her natural life, if she remain so long unmarried, or during her widowhood, if she marry again, and upon her death or remarriage (whichever shall first occur) to pay, assign, convey and deliver the same to my issue then surviving and their heirs in equal

shares *per stirpes*; or for want of such issue to my next of kin then surviving, and their heirs, in like shares *per stirpes*.

"5. Should either of my said children die leaving no issue him or her surviving, the share of the residue of my estate devoted primarily to the benefit of such child (except as respects the share set apart for my son and his issue; and in case my son's present wife survive him, the fund of thirty thousand dollars (\$30,000) contingently appropriated for her benefit during her life, and except the thirty thousand dollars (\$30,000) above bequeathed to Harold, the Count de Moltke-Huitfeldt, husband of my daughter Anna, is to go to increase the shares of such residue held by my executors in trust for the benefit of the survivors and their issue respectively.

"6. After the death of my said wife the said fund of two hundred thousand dollars (\$200,000) set apart for her use, is to be divided in equal shares among my three children Charles Gordon Hutton, Anna, Countess de Moltke-Huitfeldt, and Adele, Marchioness de Portes (all of whom are now residing in France), respectively; or if either of my said children shall not survive me, to his or her issue respectively, or leaving no issue, to the survivor or survivors of my said children, and if all be dead to their issue *per stirpes*, absolutely. If at the time of my death all my children shall be dead, leaving no issue, then the said fund to go to my next of kin *per stirpes*."

"I have heretofore become responsible for certain sums of money loaned to the Marquis de Portes (husband of my daughter Adele), by Auguste Seydoux, Seiber & Company, on his estate of Portes, in or near Mire Poix, France; and, as I may make further loans and advances on said estate or may purchase the same, it is my will that the whole of such loans, advances or purchase money shall form part of and be deducted from the share or interest of my daughter Adele, in and to my residuary estate, as provided for as before mentioned; and that the same and the securities taken upon such loans be assigned and transferred to her as and for her sole and separate estate as aforesaid, and be subject in all things to the provisions of my will in respect of her said share. In the event of my purchasing or becoming the possessor of the said estate of Portes in France, I give and devise the said estate of Portes to my daughter Adele, if she survive me; if not, to her issue by the said Marquis de Portes. If my daughter Adele shall not survive me or shall die without issue, then the said estate of Portes shall go to my issue and their heirs; or if there shall, at the time or her death, be no issue of mine living, then to my next of kin, in equal shares, *per stirpes*.

"If the share of my said residuary estate herein above provided to be paid to my daughter Adele after deducting the said sum of one hundred thousand dollars (\$100,000) referred to in the second article of my will, be insufficient to pay the amount of loans and advances I may have made at the time of my death on the said estate of Portes, then and in that case I direct that the excess of such advances over and above such share of my daughter Adele after such deduction be assumed and paid by my said daughter and lawfully secured as a lien upon the said estate and paid to my said

executors at such time and manner as may be just and reasonable."

By the first codicil (made June 6, 1870), he made the following provision:

"Having purchased in the year 1867, of Mr. Richard Lalor Power, his estate of Bilhere, and also certain other lands and premises near Pau, Basses Pyrenees, in France, and now owning the same absolutely in fee, it is my will that if, within three years after the date of my death, the said Richard Lalor Power, or any other person in his behalf, shall pay to my executors the amount actually paid by me for and on account of the said estate and the said lands and premises, and the mortgages thereupon, as appears by my books of account, together with interest thereon at the rate of 7 per centum per annum, I hereby authorize and empower my executors to convey, by good and sufficient conveyance, all the said estate of Bilhere and the said other lands and premises near Pau, as aforesaid, to the said Richard Lalor Power, his heirs and assigns, as he may direct.

"If, within three years from the date of my death, such payment shall not have been made by the said Power, or in his behalf as aforesaid, I order and direct my executors to sell the said estate of Bilhere, and the said other lands and premises, at public or private sale, to the best advantage practicable, and after applying the proceeds of such sale to the payment of all amounts which may have been, up to that time, paid by me for or on account of the said estate and lands and mortgages thereon, to invest the surplus, if any, arising on such sale, in United States or state stocks or bonds, and to pay the income thereof, annually, to Sarah Gordon Power, wife of the said Richard Lalor Power, during her natural life; and after her death to pay the principal, and any accrued interest there may be, to Bimba Power and Mary Power, daughters of said Sarah Gordon Power, or the survivor of them, in equal shares, or in case of the death of either the said Bimba or Mary before the death of their said mother, to their issue *per stirpes*. Such payment to be for the sole use and benefit of the said Bimba and Mary, as their separate estate, free from all interference, control or debts of their respective husbands.

"If this disposition of the said property so purchased of the said Richard Lalor Power, and of its avails shall, by the laws of France, in any manner affect or impair the rights of any heirs, then it is my will that, unless my said heirs shall in such manner as is required by such law, signify their assent to such disposition of the said property and its avails, and transfer their respective shares in the surplus thereof, after payment of my advances thereon, to the said Richard Lalor Power or the said Sarah Gordon Power and her daughters, in accordance with the provisions of this codicil; then, and in that case, an amount equal to the share or proportion of such surplus which those of my heirs who shall not consent to such disposition of such surplus would inherit by law, shall be deducted from that portion of my said estate which is by my said will bequeathed to such heirs so not consenting, and shall be paid out of the bulk of my residuary estate to the said Richard Lalor Power or the said Sarah Gordon Power and her two daughters, in the contin-

gencies and events hereinabove provided for in respect of the said persons respectively."

This codicil contains the following also:

"If my daughter Anna shall have issue who shall, at the time of her death, be dead, then I direct my executors (after deducting thirty thousand dollars for her husband, Count Harold de Moltke-Huitfeldt, and to be paid over by them to him) to pay the said thirty (30) per cent and its avails to my issue; or if none of my issue be then living, to my next of kin, in equal shares *per stirpes*."

The third codicil (made June 10, 1872), contains the following provision:

"I change and modify subdivision 4, of article 12 of my said will, which relates to my son Charles Gordon Hutton, as follows:

"I direct my executors to deduct from the forty per cent bequeathed in said subdivision, for the use of my said son and his heirs, such amount as shall be found charged on my said books of account under the heading 'Charles Gordon Hutton, special account.' If at the time of my death all the said debts of my said son shall not have been paid, and there shall be charged to him in said special account on my said books a sum less than two hundred thousand dollars, and not otherwise, I hereby direct my executors to deduct from said forty per cent, a sum which when added to the amount so charged to my said son on said special account shall not exceed, in the whole, the sum of two hundred thousand dollars, and to apply such sum to the payment of such of the said debts as may remain unliquidated, in such manner and proportion as my said son shall designate.

"Out of the residue of the said forty per cent after such deduction shall have been made, if there shall be so much, I direct my executors to pay to my said son the sum of fifty thousand dollars, and the whole of such residue, if it be less than fifty thousand dollars, which I give to him absolutely, and request and advise him to invest and keep invested in real estate; and the remainder, if any, of said forty per cent after such deduction for said debts and said sum of fifty thousand dollars, as herein provided, I direct my executors to invest and keep invested as they may see fit, and pay the income arising from such remainder to my said son during his life, and after his death to pay the principal of such remainder to his issue in equal shares *per stirpes* and in fee simple; and if my said son leave no issue him surviving, but leave his present wife surviving him, I direct my executors to invest the sum of thirty thousand dollars of such remainder, if there be so much, and the whole thereof, if it be less than such sum, and keep the same invested as they may see fit, and pay the income arising therefrom half yearly to her use during her natural life, if she remain so long unmarried, or during her widowhood if she marry again; and upon her death or remarriage (whichever event first occur) to pay, assign, convey and deliver the same to my issue then surviving and their heirs, in equal shares *per stirpes*, or for want of such issue, to my next of kin then surviving and their heirs, in like shares *per stirpes*.

"In no event shall the sum so charged to my said son in my said books of account be deducted from, or otherwise affect or impair

the amounts provided and directed in and by my said will to go to my wife and to my two daughters, or any of the other legatees, besides my said son.

"And in no event shall more be paid to or received by my said son than the forty per cent so as aforesaid bequeathed to him in and by my said will, less the amount charged to him on my said books of account under the said heading of 'Charles Gordon Hutton, special account.'

"No interest is to be charged to my said son in the said account on my books."

The fourth codicil (made August 2, 1873), provides as follows:

"I change and modify so much of the twelfth (12th) article of my said will as relates to the payment of the bequest to my son, Charles Gordon Hutton; and also so much of the second codicil to my said will as relates to the bequest to said Charles Gordon Hutton, as follows:

"I direct my executors, after deducting, in pursuance of the terms of the said codicil, the sum of two hundred thousand dollars (\$200,000) from the forty (40) per cent provided in the said twelfth (12th) article to be invested for the benefit of my son, to invest and keep invested the remainder of said forty per cent as they may see fit, and pay and appropriate from time to time, as may be necessary, the income and avails thereof to the maintenance and support of my said son and of his wife, and the maintenance, support and education of their children, severally as well as jointly, in such way as may befit their circumstances and station in life during the life of my said son; and after his death, I direct my executors to deduct from the fund then in their hands, for the benefit of my said son and the several members of his family, the sum of thirty thousand dollars (\$30,000); and to divide the remainder thereof into as many shares as there shall be children of my son then living (or who being dead shall leave issue); and to pay to each of said children, when he or she shall respectively attain the age of twenty-five years, an equal share of said fund as so divided, and also to pay to such issue, equally, the share to which their parent would have been entitled had such parent attained the age of twenty-five years.

"Each of said children and the issue of any child deceased shall, in the meantime, receive so much of the income of the share so bequeathed to them respectively until the time of the payment of said principal, as herein provided, as in the discretion of my executors may be necessary for their proper maintenance, support and education.

"The income from the said thirty thousand dollars (\$30,000) so deducted from such remainder of said forty per cent to go to Henrietta McCarty, the wife of my said son, until her death or marriage, and the principal to be distributed, in case of her death or marriage, as provided in the said second codicil to my said will.

"Fifth. In all other respects than as herein provided I confirm and declare the said will, and the first and second codicils thereto, to be in full force and effect."

The sixth codicil (made June 22, 1875), contains the following provision:

"I am about to dispose of the estate of Bil-

here, near Pau, in France, mentioned in the foregoing codicil to my last will and testament; and to provide, in the manner contemplated by such codicil, for Mrs. Sarah Gordon Power and her two daughters, Bimba Power and Mary Power. In the event of my making such disposition or any arrangement and provision for the said persons, it is my will that all the provisions of the foregoing codicil to my said will relating to the said estate of Bilhere and to the said Sarah Gordon Power, Bimba Power and Mary Power, respectively, shall be and hereby are revoked and canceled."

The seventh codicil (made November 19, 1880) contains the following:

"I am about conveying to Mrs. Henrietta Hutton, wife of my son Charles G. Hutton, the house and lands at Bilhere, as now occupied by my son, for her separate use and benefit; this grant of this property is not to be charged against my son or his said wife as an advancement or otherwise; nor is it to affect any provision of my will in behalf of my said son or of his said wife."

It appears from the evidence that in October or November, 1880, the testator directed his son to have a deed from him to the latter's wife, for the Bilhere property, drawn up. It was drawn accordingly, but on account of the illness of the testator it was not presented to him and he died without executing it. The property consists of two parcels of land on one of which is a small house. The testator's son occupied the premises with his family for several years before and up to his father's death without rent; the testator giving him the use thereof and making an allowance of \$2,000 a year to each of his, the testator's, two daughters during the same time for the payment of house rent. While the son was so occupying the premises, the testator sold part of the property upon which was a stable upon which, in fitting it up and arranging it, the son had gone to considerable expense. There was also upon it a small stone house which the son had built for his coachmen and other men servants.

In consequence of that sale the son was compelled to rent the stable and the small stone house from the purchaser. The son made, at the suggestion of the testator, certain improvements in the dwelling house upon the property at a cost of about \$5,500. He paid taxes and assessments upon the property, and filled in the land to a very considerable extent. He claims that his expenditures upon the property were made under an understanding with the testator that the latter was to give him the property. And he claims also that under all the circumstances of the case he is entitled to a decree awarding the property to his wife.

In 1881 the testator, with the consent and at the request of his three children, lent \$50,000 to the wife of his son, taking as security her bond dated September 6, in that year, payable in one year, with interest; and an agreement from her to give him a mortgage upon her share (one third) of her deceased father's real estate in the City of New York, for the partitioning whereof proceedings were then pending, so soon as such share should be set off in severalty to her, or to pay him the money out of her share of the proceeds of the sale of the property in case it should be sold under those proceedings. The money

was borrowed for her husband's benefit and went to him.

On or about July 24, 1874, the testator executed with the Marquis de Portes in France, in accordance with the law of that country, an *antichresis* upon the estate de Portes, which acknowledged a loan of 280,000 francs and provided for a credit of 100,000 francs more, to be appropriated to the improvement of the estate. The testator, it is alleged, advanced all of the latter sum, and in addition to that money advanced other large sums; and there stands charged upon his books of account, up to and including January 1, 1885, the sum of about \$240,000, as having been paid out under the *antichresis* for the benefit of the estate de Portes at the request of the Marquis de Portes and his wife, the testator's daughter. The *antichresis* by its terms was given to secure not only the payment of the 280,000 francs and the credit of 100,000 francs and the interest upon those sums, but also the repayment of all charges and other items.

Of the questions specifically presented by the bill in the case first above mentioned (*Hurlbut v. Hutton*), it is necessary to answer but two. The others have been disposed of by arrangement or agreement of parties. One of the questions to be considered is whether any part of the legacies to Charles Gordon Hutton should be applied to the payment of the \$50,000 loan to his wife, and the other is as to what disposition the executors should make in reference to the Bilhere property. Of the questions presented by the cross bill of the Countess de Moltke-Huitfeldt and the Marquise de Portes, but two remain. One is whether the provision for the payment of \$50,000 to Charles Gordon Hutton provided for in the fourth section of the residuary clause of the will, and referred to in the third codicil, was not revoked by the above quoted provision of the fourth codicil. The other is whether it is not the duty of the executors to set off to the two daughters, at their option, "certain real estate" of the testator on account of their legacies.

By the bill in the case secondly above mentioned (*Whiting v. de Portes*), the complainants ask directions as to whether they shall, when the affairs of the estate de Portes shall have been fully settled and ascertained, charge the moneys due the testator therefrom against his daughter Adele (Marquise de Portes) and deduct them from the bequests to her; and if so, from which of them; and whether any part of the advances or payments is to be remitted to her or for her benefit, and what disposition the executors are to make of the *antichresis* and its several provisions according to the laws of France; and if, upon the accounting in respect to the payments and advances, the amount due shall be found to be greater than the value of the estate, whether they shall proceed to sell the estate and charge any remainder or deficiency to the account of Madame de Portes, or whether she shall have her election to take the estate at its fair value to be ascertained by appraisement; and whether, in case the advances exceed the appraised value, the excess is to be charged to her against the bequests in her favor; and whether, in case of an appraisement, it should be found that the amount of the valuation of the estate exceeds the amount due for

advances, Madame de Portes and her children, the present Marquis de Portes and Comte de Portes, may be directed and required to pay off the amount due for advances and take a discharge or assignment of the *antichresis*; and the bill further prays that in case Madame de Portes and her children refuse to pay or otherwise adjust the money due for the advances, the executors may be instructed how to proceed to enforce the *antichresis* according to the laws of France and to hold Madame de Portes liable so far as the bequests to her are concerned for any deficiency. The executors ask also whether they are to charge the \$100,000 provided for in the antenuptial agreement between Madame de Portes and her late husband and known as her *dot*, with the payment, so far as it will go, of the advances made for the estate de Portes. They also inquire whether in case of the death of Madame de Moltke without issue, the 30 per cent mentioned in the residuary clause of the will, the interest whereof is payable to her for life, will on her decease go to the executors to be held as part of the estate for the benefit of her brother and sister for life, with remainder to their issue; or whether it will go immediately to the brother and sister or their issue.

The \$50,000 loan was made by the testator to the wife of Charles G. Hutton. She gave him her bond with an agreement pledging her own separate property to secure the repayment of the money with interest. Her husband admits that the loan was for his benefit and that the security therefor was given with his knowledge and at his request and that he received the money; he insists that the loan was amply secured. The bill gives no reason for seeking payment of the loan out of the legacies to him. The executors do not appear to have failed in any effort to collect the money. Indeed they do not appear to have attempted to collect it. Nor do they suggest that there is any obstacle in the way of collecting it. There seems to be no occasion for either asking or giving instructions on the subject. Nor does there seem to be any occasion for considering what equity would require, in case the money so lent at the request and for the benefit of the husband, upon the wife's bond and agreement, must be lost to the estate unless it be retained out of the money coming to the husband under the will.

As to the Bilhere property; the first reference to it is made in the first codicil where the testator provides for the conveyance of the premises by his executors to Richard Lalor Power, his heirs or assigns, on the payment to the executors within three years from the date of the testator's death, of the amount actually paid by the testator for and on account of the property and the mortgages thereon, with interest. He provides also that if Power should not make such payment within the limited period, his executors shall sell the property, and after applying the proceeds so far as necessary, to making such payment, invest the surplus for the benefit of Powers' wife for her life, with remainder to her two daughters or their issue. By the sixth codicil (which was made in 1875) he declares that he is about to dispose of the property and to provide in the manner contemplated in the fifth codicil for Mrs. Powers and her two daughters; and provides that in the event of his making such disposition or any pro-

vision or arrangement for those persons, all the provisions of the fifth codicil relating to the property and to Mrs. Powers and her daughters be revoked and canceled.

By the seventh codicil (which was made in 1880, about five years afterward) he says: "I am about conveying to Mrs. Henrietta Hutton, wife of my son Charles G. Hutton, the house and lands at Bilhere; as now occupied by my son, for her separate use and benefit; this grant of this property is not to be charged against my said son or his said wife as an advancement or otherwise, nor is it to affect any provision of my will in behalf of my said son or of his said wife."

Charles G. Hutton says that at or about the time of making that codicil (November, 1880) the testator said to him that he would convey the property to his, Charles G. Hutton's wife; and he further says that he was directed to have a deed drawn accordingly and he did so, but that it was not executed, merely because of the testator's illness. In fact it was never presented to him for his signature, although he lived for more than three years afterwards. He did not die until February, 1884. That he was capable of doing business after the time of making the seventh codicil sufficiently appears from the fact that the loan of \$50,000 to his son's wife was made in September, 1881, nearly a year afterwards.

The property in question did not pass to Charles G. Hutton's wife by the clause in the seventh codicil. That clause is merely expressive of an intention on the part of the testator to convey the property at a future time to his daughter-in-law; and it provides that in the event of his making such conveyance, the grant should not be charged to her or to her husband either as an advancement or in any other way; and that it should not affect any provision in the will in favor of either of them; that is, in case he should convey the property to her, it was to be regarded as a gift, independent of any provisions of the will in favor of them or either of them. This mere expression of an intention to grant by deed or other appropriate conveyance *inter vivos* is not and cannot be construed to be a devise. The provision is not only not a devise, but it is not even expressive of an intention to devise. The law upon the subject of implied devises is thoroughly settled. The policy of the law and the leaning of the courts is against the doctrine of devises by implication. *Holton v. White*, 8 Zab. 380.

To create a devise by inference the implication must be a necessary one; there must be such a strong probability of an intention to devise that an intent to the contrary cannot be supposed. 2 Pow. Dev. 199.

Said Lord Eldon in *Dashwood v. Peyton*, 18 Ves. 27, 41: "I find no authority for holding a mere recital, without more, to amount to a gift or demonstration of an intention to give." Even where a testator in the codicil recites that by his will he has made a devise or bequest, which does not there appear, the codicil does not, by such recital, create that bequest or devise.

Sir John Romilly, M.R., in *Re Arnold's Estate*, 33 Beav. 163, 171, where a testator bequeathed all his real and personal estate to a person whom he named, but stated that on his (the testator's) death his father's property would, under his father's will, devolve upon his nephews, which

was not the fact, for it formed part of the testator's estate, it was held that the father's property did not pass, under the will. *Circuit v. Perry*, 23 Beav. 275.

The law upon the subject is clearly laid down in *Denise v. Denise*, 10 Stew. 163. See also *McCoury's Errs. v. Leek*, 1 McCart. 70.

In the case before me there is no recital of a devise nor any expression or indication of any intention to devise. The testator merely said that he meant soon to convey the property to his daughter-in-law. He lived for several years afterwards and never made the gift. The presumption is that he changed his mind in reference to the matter. But whether he abandoned the design or not is of no consequence. It is enough to say here that he did not devise the property to the daughter-in-law. Nor is there any evidence of any contract upon which, if such claim were made in the pleadings, it could be held that the testator was bound either to convey or devise the property to his daughter-in-law, and that, in view of the fact that he neither devised nor conveyed, equity would decree a conveyance by his heirs or devisees.

It may be added that for aught that appears the provision in the first codicil for the benefit of Mr. Power is still in force. The three years from the time of the testator's death within which Mr. Power had the privilege of buying will not expire until February, 1887; and the contingent provision for the benefit of Mrs. Power and her daughters is for a sale by the executors after the expiration of the three years in case Mr. Powers should not purchase.

Nor can this court give the executors directions as to the conveyance of the Bilhere property. Whether they can convey it or not depends upon the law of France. It is in evidence by the opinion of an expert in the law of that country, introduced by the consent of parties, that under those laws the executors cannot convey it and that the title to the property is in the children of the testator; by the first codicil the testator (in view of the fact that his executors might not be able, under the law of France, to make conveyance of the property as directed by that instrument) directs that in case of such inability on the part of the executors his children be practically put to an election. No question has as yet arisen on that head.

As to the \$50,000 which by the residuary clause of the will and by the third codicil the testator expressly directs the executors to pay to his son; by the will the testator orders that if 40 per cent of his residuary estate shall amount to \$400,000, the executors shall pay to his son \$50,000 (which he gives to him absolutely) and that they shall invest the residue of the 40 per cent for the benefit of his son for life; the principal, upon his son's death, to go to his son's family.

By the third codicil he provides for the deduction of \$200,000 from the 40 per cent and then directs that out of the residue of the 40 per cent his executors pay to his son \$50,000, if there be so much left; and if there should be less than that sum left, that they pay him the whole of the residue; and if there should be any remainder after deducting the \$250,000 from the amount of the 40 per cent, that it be invested for his benefit for life and that they pay the principal at his death to his issue.

X. J.

By the fourth codicil referring to the twelfth article of the will and to the third codicil (which he designates as the second, probably because having previously revoked the second codicil he regarded it as if it had never been made) he directs that his executors—after deducting in pursuance of the terms of the third codicil, the \$200,000 from the 40 per cent which it is provided in the twelfth article of the will shall be invested for the benefit of his son—invest and keep invested the remainder of the 40 per cent and pay and appropriate, as may be necessary, the income and avails thereof to the support of his son and his son's wife and the maintenance, support and education of their children, etc.; and that after his son's death they distribute and dispose of the fund as directed by that (fourth) codicil.

The sole object of the testator in modifying by the fourth codicil the provisions of the will and of the third codicil in respect to the 40 per cent, was to provide for the payment or appropriation during his son's life, of the income of the money to be invested to the support of his son and his son's wife and the support and education of their children (by the will and the third codicil he had directed that it be paid to his son alone), and to make a different disposition of the fund after his son's death from that which was made by those instruments.

There is no evidence in the provisions of the fourth codicil that he intended to deprive his son of the \$50,000. What he deals with there is the fund which by the will he had provided should be invested for the benefit of his son. His language is: "I direct my executors, after deducting in pursuance of the terms of the said codicil (the third) the sum of \$200,000 from the 40 per cent, provided in the said twelfth article to be invested, etc." But he had not by the will directed that the 40 per cent be invested; but only so much of it, if any, as might remain after deducting the \$50,000. And by the third codicil he had directed the investment of only so much of the 40 per cent as should remain after deducting the \$200,000 and the \$50,000. By both the will and the third codicil he had given to his son the \$50,000 absolutely and with his special advice and request as to the manner in which he should invest it, in real estate. He does not by the fourth codicil revoke that gift expressly nor does he refer to it. Had he intended to revoke it, it is reasonable to presume that he would have done so expressly. The fund which he had in mind in the provision of the fourth codicil was evidently not the 40 per cent, but only that part of it which by the will and third codicil, taken together, he had directed the executors to invest; that is, what should remain after deducting the \$50,000 and the \$200,000. The son is entitled to the \$50,000.

As to the question whether it is the duty of the executors to set off to the testator's daughters at their option certain real estate (not designated) of the testator on account of their respective legacies; the will gives the executors full power to sell at public or private sale and to assign, demise, grant and convey, for such terms or estates, and on such terms as shall in their judgment be most for the benefit of the estate, all the testator's property real and personal. It manifestly would not be proper to direct the

executors to convey to the daughters at their option real estate of the testator on account of their legacies. It might or might not be to the interest of the estate to do so. That matter, in the absence of any charge that the executors have abused or meditate an abuse of the discretion given to them by the testator for the benefit of his estate, must be left to their discretion.

It remains to consider the question presented as to the duty of the executors in reference to the de Portes estate. The testator, speaking at the date of the will, says that he has become responsible for money lent to the Marquis de Portes by Auguste Seydoux, Seiber & Co., upon the estate of Portes; and that he may make further loans and advances upon that estate or may purchase it; and he then provides that the whole of such loans and advances or purchase money shall form part of and be deducted from the share or interest of his daughter Adele (wife of the Marquis de Portes) in and to his residuary estate, and that the same and the securities taken upon such loans shall be assigned and transferred to her as and for her sole and separate estate and be subject in all things to the provisions of the will in respect to her share; and that in the event of his purchasing or becoming the possessor of the estate, he gives and devises it to her if she should survive him; but if she should not survive him, he gives it to her issue by the Marquis de Portes; and if she should not survive the testator or should die without issue, then the estate shall go to the testator's issue and their heirs; or if there should, at the time of her death, be no issue of the testator living, then it shall go to his next of kin.

He also provides that if her share of the residuary estate after deducting the \$100,000 referred to in the second article of the will, should be insufficient to pay the amount of the loans and advances which at the time of his death he might have made upon the estate de Portes, then and in that case he directs that the excess of such advances over and above her share after such deduction of \$100,000 previously mentioned, be assumed and paid by her and lawfully secured as a lien upon the de Portes estate, and be paid to his executors at such time and in such manner as may be just and reasonable.

The provisions of the will in reference to the subject under consideration are plain, explicit and comprehensive. The testator, stating that he had become guarantor for money lent to the Marquis de Portes by Seydoux, Seiber & Co., upon the estate de Portes, and that he might make other loans and advances upon the estate or might purchase it, directs that the whole of such loans or advances form part of and be deducted from the share or interest of his daughter Adele in and to his residuary estate, and that the loans or advances and the securities taken therefor shall be assigned and transferred to her as and for her sole and separate estate, etc., and in case he should purchase the estate he devises it to her if she should survive him, but if she should not survive him, he devises it to her issue. Her share of the residuary estate after deducting the \$100,000 payable under her marriage contract, appears to be sufficient to repay

the loans and advances with the interest; for, according to her answer, the executors have paid the \$100,000 over to her.

It appears also by the answer that the testator advanced the money to pay the loan made by Messrs. Seydoux, Seiber & Co., and that the amount is covered by the *antichresis*. Whatever is due upon a proper accounting to the testator's estate for the loans and advances and interest thereon, is chargeable upon Madame de Portes' residuary share. Should that not be sufficient to pay the amount, she will not be entitled to the securities until she shall have paid the balance.

It is not necessary to give direction to the executors in reference to the disposition to be made at the death of Madame de Moltke of the 80 per cent the income thereof is given to her for life. The direction sought has reference to a state of facts which is merely hypothetical.

During the pendency of this suit a petition was filed by the daughters of the testator, to get the aid of the court in filling the quota of executors. Two of the executors named in the will predeceased the testator. The appointment of one was revoked by a codicil. Two declined to serve. Two qualified. The person whose appointment was revoked by the codicil was, on the application of the executors who proved the will, appointed an executor by the Supreme Court of the State of New York. Since that time one of the two who qualified under the testator's appointment has died. By the will the testator authorizes and empowers and requests his executors, and from time to time all other persons who may have been appointed and qualified as such, whenever the number of those of them who have qualified shall have been reduced by death, resignation, removal, or other incapacity, to three, to join with the persons of full age beneficially interested in his estate and competent to act, in appointing by deed other persons, not exceeding three at any one time, to be executors and trustees with them of and under the will; and provides that upon such deed being presented to and filed and recorded with the proper court, magistrate or officer, the persons so appointed be, upon qualifying, executors of and trustees under the will, in like manner and with like powers and discretion as those originally named thereunder; the same to every practicable purpose and intent as if so originally named.

The matter came on for hearing upon the petition and answer thereto, before one of the Vice Chancellors and was duly heard and considered by him. His conclusions are before me. He advised that an order be made fixing a time and place when and where the parties interested should name persons from whose number one could be selected for appointment according to the will. The matter was disposed of by a decretal order. It cannot be reheard as a mere matter of course upon the final hearing. Although it was heard upon petition (and answer thereto) and the cause was not formally set down for hearing upon that point, it was substantially so set down. I must treat the matter as having been duly disposed of upon final hearing. It may be added that no application was made for a rehearing.

PATERSON, NEWARK & NEW YORK
R. R. CO. *et al.*
v.

Charles KAMLAH.

1. Where **possession of land** has been taken for a public work (here, for a **railroad**), and the work has been constructed upon it but **no compensation** has been made for the land, if the company in taking possession has acted in **good faith**, under acquiescence of the owner, or by mistake as to the property or as to the validity of the authority given it so to occupy, and the property is in public use, **equity will not permit the company to be disturbed** in its possession, provided it makes compensation if equity shall so require.
2. The **facts** that a railroad company has been permitted by the owner of land to take possession of it for the purposes of its road and, with the necessary expenditure, adapt it to such uses, and occupy it accordingly for a long time, are **evidence of an agreement** that the **company shall have the land** upon making proper compensation.
3. In such a case, if the company has power to **condemn the land** it may proceed to do so and be **protected by injunction** in its possession in the meantime; if it has not power to condemn and equity demands that it make compensation, the **court should ascertain the compensation** by an issue or reference; and compensation may thus be fixed even if the company has power to condemn.

(Decided November 3, 1886.)

BILL for relief. On motion to dissolve preliminary injunction. Upon bill and answer and affidavits annexed to each. *Motion denied.*

Mr. Charles L. Corbin, for defendant, for the motion:

The owner does not lose his right to his land because it is occupied and used by a railroad. The right is not lost, even where the occupation is by consent of the owner.

Coster v. New Jersey R. R. & T. Co. 3 Zab. 227, 230; *affd.* in 4 Zab. 730; *Hetfield v. Cent. R. R. Co.* 5 Dutch. 571, 575.

There is no equitable right shown for enjoining the action of ejectment.

Trenton Water Power Co. v. Chambers, 1 Stock. 471, 473; *North Hud. Co. R. R. Co. v. Booraem*, 1 Stew. 450, 456; *Mayor v. Fitzpatrick*, 8 Stew. 97; *New York & G. L. R. Co. v. Stanley*, 8 Stew. 283; *Crofts v. Middleton*, 8 DeG. M. & G. 192; *Balt. & H. R. R. v. Algire*, 68 Md. 819.

Mr. Cortlandt Parker, for complainants, *contra*.

Ranyn, Chancellor, delivered the following opinion:

The bill states that in July, 1886, the defendant began an action of ejectment in the supreme court of this State, against the complainants, the

Paterson, Newark & New York Railroad Company and the New York, Lake Erie & Western Railroad Company, to recover possession of certain land in Belleville Township, in Essex County, described in the bill; that he is prosecuting the suit to trial and judgment; that the land is part of the railroad route of the Erie Company and is now in the occupation and possession of that company as part thereof; that at the time of the institution of that suit there were and had been for a long time, and are now, as many as thirty trains of cars daily running thereon for the accommodation of the public between Newark and Paterson; that the complainants cannot cease to run their trains over the road; that they are forbidden to do so; and that the land for which the action was brought is indispensable to them in the discharge of the duty imposed upon them by their charter; that the Paterson & Newark Railroad Company was incorporated in 1864; that afterwards it was duly organized and entered upon the business of constructing its road; that it surveyed and determined upon and filed its route which crossed the land in question; that it became necessary for the company to have and use that land; that it thereupon took possession of it claiming to have a right to it, and that from and ever since such taking possession, the land has continuously been occupied as and for part of its route; that such possession was taken contemporaneously with the filing of the route in the secretary of state's office, which took place April 25, 1865; that in 1867 the Paterson & Newark Railroad Company leased its road to the Erie Railway Company for a term not yet expired; that through foreclosure proceedings and certain authorized conveyances, the right of the latter company to the lease and the demised premises, including the land in question, became vested in 1878, in the New York, Lake Erie & Western Railroad Company and that under other proceedings in this court the property and franchises of the Paterson & Newark Railroad Company were sold to certain persons who were duly incorporated as the Paterson, Newark & New York Railroad Company, which is now the lawful owner of the land subject to the lease.

The bill further states that owing to the lapse of time, the changes of the officers of the Companies, the death of most of those who had to do with the Paterson & Newark Railroad Company in its early history, the changes of counsel and the death of some of them, and the rather loose and careless manner in which the business of that Company was transacted in the first years of its existence, the complainants have great difficulty in determining their rights to the property in question and greater difficulty still in making proof of them; that a study of the early minutes of the Company shows that much of the right of way was given by the owners of the land and that in such cases it seldom happened that any deed was taken; that sometimes the owners of land signed agreements, more or less formal, evidencing their intention to give such right; that sometimes the agreements stipulated that depots should be established in the neighborhood of the owner's other land, and sometimes they stipulated that fences should be built and maintained by the company, and that some-

times they provided that the road should within a specified time be connected with other roads; that the minutes and records show that very little land in the Township of Belleville was acquired either by purchase or by condemnation, but that most of that which was acquired by the Company was given under a contract that the Company would build the road and establish and maintain a station at Belleville; that in 1868 the directors agreed with the contractor to pay him \$120,000 for obtaining all then unobtainable right of way, which money was paid to him for that purpose and an entry was made in the minutes that all such right of way had been actually obtained; that in a suit brought in this court by one DeWitt and others it appeared that he and other owners of land crossed by the railroad in the Township of Belleville signed an agreement in writing, by which they bound themselves to convey the right of way to the Company, free of all charge therefor, and licensed the Company to occupy it at once, and construct and maintain its railroad there, imposing no condition further than that there should be established, by connection or otherwise, a continuous line of railroad to the City of Newark and also a depot at Belleville; that that agreement, which was made in 1871, had been lost when the suit against DeWitt and others was brought, and that it still is lost; that in that suit its existence was established and its contents were stated by both parties without any material difference; and that the names of all the signers were not given, but only those who signed in relation to the parcel of land in question in that suit, but that it appeared that there were others.

The bill charges that the owners of the land in question in this suit, agreed to give the right of way. It further states that it was in 1866 that the Company took possession of the land and built its railroad upon it. It prays a decree for specific performance of such agreement as the complainants may be able to establish, and that if they can establish no agreement nor show cause why they should hold the land, it may be decreed that the defendant convey to them upon receiving from them due compensation to be fixed by this court.

The defendant by his answer, while he denies that the Company took possession under or by virtue of any agreement or conveyance, admits that the road was laid over the land many years ago (he says it was in 1867 or 1868) and that the Company took possession without protest. It appears by the answer that such taking of possession was with his knowledge.

On the filing of the bill an injunction was granted restraining the defendant from proceeding in the action of ejectment. The defendant now moves to dissolve it.

That the complainants had, upon the statements of the bill, a right to the injunction on the ground of discovery cannot be denied. In *Garle v. Robinson*, 3 Jur. N. S. 633, the complainant alleged seisin of his father for many years before his death and before the making of his will, and possession under the will ever since; and that the defendant for the first time raised a claim to the premises thirty-three years after the death of the complainant's father, through certain persons; and that the complainant could

not discover whether any such persons had ever been interested in or connected with the premises. The court granted an injunction to restrain an ejectment by the defendant until an answer should have been made to the complainant's bill for discovery of the character or right in which, and the persons through whom, the defendant claimed, and of the nature and particulars of his claim, and how (not speaking of the proof) he made it out.

The question is whether the complainants are entitled to a continuance of the injunction now that the discovery has been made. The claim for relief presents a double aspect. The complainants insist that they have a good legal title which, if they can establish it (to which end they pray discovery), will entitle them to a perpetual injunction, and that failing that, they have a good equitable title in which, under the circumstances, they ought to be protected.

If the court is satisfied that they are acting in good faith, they are entitled to a continuance of the injunction. They and those under whom they claim have not only been in open and notorious possession of the property as part of their railroad for about twenty years, as the complainants allege and the defendant admits, but they have had such possession with the full knowledge of the defendant for the whole period, and they have used it and still are using it as part of their very important line of public transportation. Where possession of land has been taken for a public work and the work has been constructed upon it but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner or by mistake as to the property or as to the validity of the authority given it so to occupy, and the property is in public use, equity will not permit the company to be disturbed in its possession, provided it makes compensation if equity shall so require.

Trenton Water Power Co. v. Chambers, 1 Stock. 475; *Carson v. Coleman*, 3 Stock. 106; *Pickert v. Ridgefield Park R. R. Co.* 10 C. E. Green 816; *N. Y. & Greenwood Lake R. R. Co. v. Stanley*, 7 Stew. 55; *North Hud. Co. R. R. Co. v. Booraem*, 1 Stew. 450; *Beaufort v. Patrick*, 17 Beav. 60; *Wood v. Charing Cross R. Co.*, 33 Beav. 290; *Deere v. Guest*, 1 Myl. & Craig, 516; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Craig, 784; *Langford v. Brighton, etc. R. Co.*, 4 Ry. & Can. Cas. 69; *Powell v. Thomas*, 6 Hare, 300.

If in this case the Company has power to condemn, it may, if necessary, take proceedings in condemnation to gain legal title and it should under the circumstances be protected in its possession by this court until it shall have done so. *North Hudson Co. R. R. Co. v. Booraem*, *supra*.

If it has not power to condemn and equity demands that it make compensation, this court should itself ascertain the compensation, either by means of an issue or of a reference. And the compensation may thus be fixed even if the Company has power to condemn.

It is argued that the opinion of the court of errors and appeals in *N. Y. & Greenwood Lake R. Co. v. Stanley*, 8 Stew. 288, is in contrariety

to the views above expressed; that that court there said that an injunction in such a case as this could not be maintained except where there was an agreement for the land between the defendant or those under whom he claims and the company, or those under whom it claims, which has not been carried out and upon the faith of which there has been an expenditure of money.

The court in the language referred to was not laying down the rule to govern all such cases, but was speaking merely with reference to the circumstances of that particular case. And if it is to be understood as laying down such rule, this case is within the rule. Where a company has been permitted by the owner of land to take possession of it for the purposes of its railroad and to occupy it accordingly and with the necessary expenditure of money adapt it to such uses, and has permitted it so to occupy and use it for a long time, the facts are evidence of an agreement that the company shall have the property upon making proper compensation.

In this case, according to the answer, the Company took possession about 1867 or 1868 (the bill says it was earlier, in 1866); and the defendant permitted it to do so without protest and in view of negotiations for payment. The defendant offered to convey the right of way provided the Company would grade a certain avenue in connection with its work upon its railroad route. The agent with whom the negotiation was made replied that he would report the offer to the Company and that he presumed that it would accept it. Sometime after that an engineer of the Company came to the defendant and stated that the offer was refused. Afterwards and during the lifetime of James Fisk, Jr., there was a project on the part of Fisk in behalf of the Erie Railway Company to run trains for rapid communication between New York and Newark, stopping at a station above Belleville on the defendant's property; the defendant at once called upon Fisk and offered, in case that plan should be carried out, to convey to the company the right of way and land for a depot, but the answer says the plan was abandoned. About 1873 he made frequent applications to Mr. Atterbury, an officer of the Erie Railway Company (and afterwards of the New York, Lake Erie and Western Railroad Company), in New York, for payment for his land. The claim was recognized by Mr. Atterbury as a valid one and negotiations were kept up intermittently until about 1882, when Mr. Atterbury requested the defendant to make out a statement of the value of the land, and referred him to the solicitor of the Company in this State, who was also a director. The defendant frequently applied to the latter accordingly for payment but without success. It appears from this statement that the Company was permitted by the defendant to take possession of his land and build its road upon it upon the understanding that it was in some way to make compensation for it. The facts as stated by the answer are evidence of an agreement to that effect.

The motion to dissolve will be denied, but without costs.

H. J.

William CASPERSON, Admr., etc.,

v.

Charles H. DUNN *et al.*

1. The right of an administrator with the will annexed to apply to the court for instruction is limited to matters of difficulty in his own administration.
2. It is the duty of an administrator with the will annexed to take charge of and preserve **personal property specifically bequeathed** in trust, until a trustee is appointed to receive it.

(Decided November 4, 1886.)

BILL for construction of will, etc. On final hearing on pleadings and proofs. The facts are stated in the opinion. *Mr. M. P. Grey*, for complainant. *Mr. E. S. Fogg*, for defendants.

Runyon, Chancellor, delivered the following opinion:

The bill is filed by the administrator with the will annexed of Mrs. Susan Eliza Dunn, deceased, late of Salem County, for a construction of her will and instructions as to the administrator's duty thereunder.

By the will, which is dated April 22, 1879, the testatrix, after ordering payment of her debts and funeral expenses, gave all her estate to her trustee thereafter appointed, and to his successor in the trust, in trust for the execution of the will and for the uses and purposes therein-after mentioned and more particularly set forth. She then gave to the trustee and his successor the property on which she resided (a lot in the City of Salem, with a house and barn thereon), together with all the furniture, goods and chattels (including the cow) about the premises; the trustee to have and hold them in trust, for the use, occupation and enjoyment thereof by her husband and her son James during the term of the natural life of the former; and she gave them from and immediately after her husband's death to her two sons, Charles and James, for life, in equal shares, and to the survivor of them for life, with remainder in fee to their lawful issue; and in case they should leave no issue living at the time of their respective deaths, she devised and bequeathed the same in fee to certain other persons whom she named.

She then gave to her trustee and his successor, her lumber yard lot in Salem, with the appurtenances, stock in trade, horses, wagons and personal property, in trust for the use, occupation and enjoyment of her husband and her son Charles during the life of the former; and to the further use and on the further trust that her husband and Charles should conduct, superintend and carry on the lumber business there, with her capital there invested; the net profits to be paid over by the trustee to them in equal shares for their sole and separate use; and she gave the lumber yard with the appurtenances as aforesaid described after her husband's death to her two sons James and Charles, in equal shares and to the survivor of them during their lives and the life of the survivor, with remainder in fee to their lawful issue; and in case neither they nor either of them should leave lawful is-

sue living at the time of their or his death, she gave the before mentioned subject of the devise, in fee, in equal shares, to certain other persons whom she named.

She then gave to Charles and James for life in equal shares, and to the survivor of them, for life, certain other real property, with remainder in fee to their lawful issue living at their respective deaths, and in case they should die leaving no lawful issue living at the time of their respective deaths, then she gave the remainder in fee to certain other persons whom she named. She then gave all the rest and residue of her estate to her trustee and his successor in the trust, to have and to hold the same in in trust for the use, occupation and enjoyment of her husband and her son Charles for the life of the former and from and immediately after his death she gave it absolutely to James and Charles in equal shares and to the survivor of them.

She then appointed a trustee but required him to give good security to be approved by one of the judges of the Orphans' Court of Salem County, and provided that in case of his death, resignation or refusal to act, that court should appoint some person or persons trustee or trustees in his stead. She appointed the same person, whom she had named as trustee, executor and also trustee and guardian of the person and property of her son James who was an imbecile.

By a codicil made June 14, 1888 (her son James was then dead) she directed her trustee to apply \$3,000 of the amount (\$3,500) of a certain life insurance policy which she held, to the payment of a mortgage upon her residence, and to hold the rest (\$500), together with a mortgage of \$1,000 which she held upon "the Snitcher farm," and invest the \$500 upon mortgage and pay the interest of the \$1,500 to her husband for life, and after his death to her son Charles for life; and, after his death she gave the principal and interest to his issue and if he should die without leaving issue, then she gave the principal and interest to certain persons whom she named.

She then gave to her son Charles in fee part of the land which by the will she had devised to him and his brother for life. She then substituted another person as executor and trustee instead of the person appointed by the will, and provided that if at any time her husband should desire to retire from the lumber business for any cause, her trustee or his successor should have full power and authority to sell and dispose of one half of that business and her capital invested therein, and invest the proceeds for the use of her husband; and she "revoked her appointment of a trustee over her son Charles and gave and bequeathed the said property to him in fee simple without the intervention of any trustee whatever as to such property as was therein intended for him."

The testatrix died in May, 1885. Before her death she received the \$3,500 upon the life policy and paid off the mortgage of \$3,000 upon her residence. The balance (\$500) of that money cannot be traced or identified. The person named in the will as executor and trustee refused to prove the will or to act as trustee. The complainant was appointed administrator *cum testamento annexo*, but no one has been found willing to accept the trusteeship. The estate has

substantially been settled. The lumber business referred to in the will and codicil was carried on up to the time of the testatrix's death by her husband and Charles, under the firm name of E. W. Dunn & Son, Agents, she being the principal; and the business is still carried on by them. According to the bill, at her death there was a large stock of goods on hand there; and there were many book accounts and sundry notes, judgments and evidences of debt in the business in favor of the testatrix; and there were also accounts and notes due from her therein. She owned at her death the property before mentioned as her residence with the usual articles of household furniture therein, and she owned and kept a cow there also.

The complainant asks instruction first, as to whether he has power to sell the business of the lumber yard, the stock in trade, etc. (not including the real estate) in case the testatrix's husband and son or either of them should, before a trustee shall have been appointed, refuse to carry on or superintend the business; and also as to what power he has in the premises; second, whether he should deliver the personal estate remaining in his hands after paying the debts, to anyone other than a trustee to be appointed under the will, or one appointed to carry out the trusts thereby created; third, what parts of the testatrix's property vest in the trustee and what parts go to Charles in fee without the intervention of a trustee; and fourth, which, if any, of the trusts created by the will and codicil will continue after the death of the testatrix's husband, and if they or any of them will so continue, as to what part or parts of the property, and for what period of time.

The complainant is merely administrator with the will annexed. The trusts under the will do not devolve upon him. His right to come into this court for instructions is confined to matters of difficulty in his own administration. As to those in which the trustee and his *cestui que trust* alone are interested, the complainant has no right to the opinion of the court, and it would not be proper for the court to give it. And so too as to the construction of devises in the will with which he has nothing to do. In the subject of the third and fourth questions, except as to Charles' right to the personal property, he has no interest and consequently can have no adjudication thereupon.

The will gives the testatrix's lumber yard lot with the appurtenances, stock in trade, horses, wagons and personal property to the trustee in trust to have and to hold them in trust to the use, occupation and enjoyment of her husband and Charles for the life of the former; and upon the further trust that they shall conduct, superintend and carry on the lumber business there with her said capital there invested, and that the trustee shall pay over to them, in equal shares, the net profits thereof. They are both still living and, as before stated, they were carrying on the business at the time of her death and have been carrying it on ever since as contemplated by the will, except that there has been no trustee.

According to the testimony of Charles, the business is active and solvent. By the codicil the testatrix provides that if at any time her husband should for any reason desire to retire from the business, the trustee shall have full

power and authority to sell and dispose of one half of her capital invested therein and invest the proceeds for the use of her husband; and she revokes the appointment of a trustee over Charles and gives and bequeaths said property to him in fee simple, without the intervention of any trustee whatever as to such property as therein (in the codicil) intended for him.

It is the duty of the administrator to take charge of and protect and preserve the personal property given by the will to the trustee, in connection with the devise of the lumber yard respectively, until a trustee shall have been appointed to receive it. Those bequests are of specified portions of the testatrix's personal estate and they are specific bequests. 2 Wms. Exrs. 1158, 1159; 2 Redf. Wills, 457.

The gift of the residue of personal property is a general legacy. It is the duty of the executor to get in all the estate whether specifically bequeathed or otherwise, and to preserve the property specifically bequeathed. 2 Wms. Exrs. 1440.

Nor is Charles entitled to have half of the personal property which is given in connection with the lumber yard paid or delivered over to him now. The testatrix intended that her capital in the business should remain therein until the business should be terminated by the voluntary retirement of her husband therefrom or by his death. The complainant as administrator should collect the money invested in the lumber business and should pay the testatrix's debts incurred in that business. He is chargeable with the one and liable for the other. There is now no one to receive the legacy. The administrator is also chargeable with the testatrix's personal property at the residence and is liable to account for it. That too is given to a trustee but as yet there is none.

Margaret TANTUM

v.

William P. ARNOLD.

1. **Speculations in stocks and securities on margins are wagers** within the Act to prevent gaming (Rev. p. 458) and therefore **unlawful**; and **securities given** to secure a broker against losses therein are void. Equity has jurisdiction on a bill filed against an assignee, taking with notice of such illegality, to order such securities to be **delivered up**.
2. Where the **securities consisted of assignments of mortgages and a note with a mortgage securing it**, it was held that complainant had a right to have them declared void for illegality of consideration and to have them **delivered up and canceled**, and to have the mortgages which were assigned also delivered up, and as ancillary to the relief she was entitled to an **injunction restraining** defendants from **parting with** such instruments.

(Decided November 1, 1886.)

BILL for relief. On general demurrer. *Over-ruled.*

The facts and questions raised are set out in the opinion.

X. J.

Messrs. James Buchanan and G. D. W. Vroom, for demurrant.

Mr. John H. Backes, for complainant:

In the buying and selling of stocks upon margin, where the margin is only used as a cover for the indemnity of the broker against losses and the stocks purchased are not intended or contemplated to become the property of the purchaser, the transactions (being merely dealings in the difference of the prices) are wagering contracts and contrary to the policy of our law and void.

Baldwin v. Flagg, 9 Stew. 48; 11 Stew. 219.

The relief prayed, *i. e.*, that the instrument be delivered up, and the jurisdiction to be exercised by the court in granting it, are sustained by the English courts and also those of New York; although in a number of cases the court denied its equitable aid where the instrument was void from matter appearing on its face.

Simpson v. Howden, 3 Mylne & C. 97; *Bromley v. Holland*, 7 Ves. 16; *Threlfall v. Lunt*, 7 Sim. 627; *Earl of Milltown v. Stewart*, 3 Myl. & Craig, 18; *Eastbrook v. Scott*, 3 Ves. 456; *St. John v. St. John*, 11 Ves. 585; *Hamilton v. Cummings*, 1 Johns. Ch. 528; *Noah v. Webb*, 1 Edw. Ch. 608.

Relief will not be denied on the ground that complainant is *particeps criminis*.

Carlisle v. Cooper, 8 C. E. Green, 241; *Vandoren v. Staats*, 2 Penn. (N. J.) 887; *Munt v. Stokes*, 4 Term. Rep. *561; *Wooden v. Shotwell*, 8 Zab. 487.

The contract is not a criminal one. The first and second sections of the Gaming Act (Rev. p. 458) simply declares them void; there are no penalties attached for engaging therein; parties are disabled from making the transaction the basis of a contract and it ought to be treated simply as void, neither party being *in delicto* in the strictest sense of the word, and the complainant having parted with her property without consideration it should be delivered up to her.

Hutchinson v. Targee, 2 Green, 886; *Mount v. Waite*, 7 Johns. 484; *Jaques v. Goughly*, 2 Wm. Bl. 1073; *Lacause v. White*, 7 Term Rep. *535; *Holman v. Johnson*, 3 Cowper, 341; *Huncke v. Francis*, 3 Dutch. 59.

The law against gaming is designed for the prevention of vice producing widespread injury.

Flagg v. Baldwin, 11 Stew. 226.

Where the transaction is against policy it is no objection that the plaintiff himself was a party in that transaction, which is illegal.

St. John v. St. John, 11 Ves. 585; *Shirley v. Ferrers*, 1 Bro. Ch. 41, 539.

Gaming securities should be decreed to be delivered up, notwithstanding both parties had participated in the fraud; because public policy would be best served by such a course.

Snell, Eq. Pr. 518.

The law regards the welfare of society as paramount, and in enforcing the law, courts cannot impair its efficiency or cripple its operations by considerations affecting the interests of those who are *particeps criminis*.

Den v. Shotwell, 3 Zab. 473; *Huncke v. Francis*, 3 Dutch. 59.

Runyon, Chancellor, delivered the opinion of the court:

The bill states that on the 9th of June, 1882,

the complainant (who is the wife of Jerome Tatum) assigned a bond and mortgage for \$500, owned by her, to Charles W. West, now deceased; that on the 23d of the same month she assigned to him another bond and mortgage of hers for \$2,200; and that on the 16th of October following she indorsed to him a promissory note for \$4,000 made by her husband to her order; and she and her husband gave to him a mortgage upon real property of hers to secure the payment of the note; that the assignments of the two bonds and mortgages and the indorsing of the note and the giving of the mortgage to secure the payment thereof were all without consideration; and that her husband induced her to make the assignments and indorse the note and give the mortgage, by promises and persuasion; and that she did all those things at his request and in obedience to his commands; and that the securities were given as margins to secure and pay losses already accrued and which might accrue and become due to West from him in speculations in fluctuations in the price of stocks and other securities in which her husband was the customer and West the broker; that her husband commenced and continued those dealings with West, by putting up cash as margins; and that when he exhausted his ability to raise cash for the purpose, West proposed to accept, and agreed to take in lieu of cash, such collaterals as margins as he might induce the complainant to furnish him for such purpose, West knowing that she was able to furnish collaterals and that her husband was without any means to continue such speculations; that it was stated in the mortgage given by her that it was given to secure a promissory note given by her husband and indorsed by her as collateral security for stock margins; that West never demanded of her payment of the note, but twice required her and her husband to renew it and they did so; that he retained the original note and the two notes given in renewal; that up to March, 1884, he treated the two mortgages which she assigned to him as her property, surrendering them to her from time to time in order that she might collect the interest thereon; that on the 24th of March, 1884, West (alleging that her husband had sustained large losses in the stock gambling transactions before mentioned and so was indebted to him in many thousand dollars beyond the amount of the money secured by the three mortgages) assigned the mortgages without any consideration to the defendant his brother-in-law; that the assignment was merely colorable and that it was not intended that any title to the mortgages should pass thereby, but that West made it because he was aware of the illegality of his dealings with the complainant's husband and sought in this way to induce her to believe that the defendant was a *bona fide* holder of the instruments.

The bill prays that the assignments made by the complainant of the two mortgages, the indorsement of the note and the mortgage given by her and her husband may be decreed to be illegal and void and may be canceled accordingly, and that the two mortgages assigned by her may be delivered up to her; and it also prays an injunction.

Transactions of the character of those stated in the bill (speculations in stocks and securities

upon margins) are wagers within the Act to prevent gaming and are therefore unlawful; and securities given to secure the broker against losses therein are void by virtue of the provisions of the Act. *Flagg v. Baldwin*, 11 Stew. 219.

The third section of the Act provides that all promises, agreements, notes, bills, bonds, contracts, judgments, mortgages, leases or other securities or conveyances which shall be made, given, entered into or executed by any person where the whole or any part of the consideration thereof shall be for money, property or thing in action whatsoever, laid, won or betted in violation of the first section, or for reimbursing or repaying any money knowingly lent or advanced to help or facilitate such violation, shall be utterly void and of none effect. Rev. p. 468.

The instruments in question were given to West as security against losses in stock gambling transactions between him and Mr. Tatum. West's assignee now holds them; but he paid nothing for them and he took them with full notice of the illegality of West's title thereto. He holds them according to the bill, by a title merely colorable. The Act makes the assignments and the note and mortgage securing it utterly void and of no effect. There can be no doubt that equity has jurisdiction to order that they be delivered up and canceled and that the mortgages which were assigned be also delivered up. Story, Eq. Jur. § 908; 2 Pom. Eq. § 938.

The fact that the assignments and note are illegal and void and that the fact of the illegality does not appear upon the face of those instruments would give this court jurisdiction to entertain a suit to compel the defendant to deliver them up. Ad. Eq. 175.

But the jurisdiction even as to them does not depend upon that circumstance. 2 Pom. Eq. § 938; *Baker v. Williams*, in Blunt's note to *Ramsden v. Shadwell*, 1 Ambl. 269.

The assignments and the note and the mortgage securing it being void for illegality of consideration, the complainant has a right to have them declared to be so, and to have them delivered up and canceled and to have the mortgages which were assigned also given up; and as ancillary to the relief she is entitled to an injunction restraining the defendant from parting with the instruments. The suit is in accordance with and in furtherance of the policy of the law.

Whether the provision of the fourth section of the Act (that if any such sale, conveyance, lease or mortgage of either real or personal estate, as is made void in the preceding section shall be made, the same shall inure to the use of the heirs or legal representatives of such vendor, bargainor, lessor or mortgagor, and shall vest the whole estate and interest so attempted to be transferred in such property, to all intents and purposes, in such heirs or legal representatives in the same manner as though such vendor, bargainor, lessor or mortgagor had died intestate) was not designed to affect those persons alone who pay gambling debts with their own property, and whether it applies to those who, like the complainant, are induced by another person to pledge their property for the gambling debt of such other person, especially

where the circumstances are such as this case presents, are questions which it is not necessary to pass upon at this time.

The demurrer will be overruled.

Theodore V. FROST

v.

Ellen FROST.

Where a man, guilty of illicit intercourse with a woman, supposing her to be pregnant as the result thereof, furnishes her with the means of producing an abortion, and criminal proceedings are lawfully instituted against him for the latter offense and, being under arrest, he chooses, as a means of release, to marry the woman, the constraint under which he enters into the marriage constitutes no ground for annulling it.

(Decided October 30, 1886.)

BILL to annul a marriage. On rehearing of decree advised by special master acting as advisory master. *Bill dismissed.*

The facts are stated in the opinion.

Mr. James Chapman, for complainant:

When a consent in form is brought about by force, menace or duress, a yielding of the lips, but not of the mind, it is of no legal effect. Fraud or duress may render marriage void. *Bish. Mar. & Div.*

Where the will is under constraint the consent in form is not consent in fact.

A marriage is void when it is good for no legal purpose.

1 *Bish. §§ 164, 166.*

Pothier says: "Fraud is no less contrary to freedom of consent, required for marriage, than violence;" and the Scottish law defines it to be: "Some overruling moral necessity whereby a certain state of the will is brought about which would not have been so without deceit."

Blackstone defines marriage to be "Ability to consent; willingness to consent and actual consent."

"Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract."

McClurg v. Terry, 6 C. E. Green, 225. See also *Carris v. Carris*, 9 C. E. Green, 518.

"There can be no binding contract where the physical act of concurrence therein has been coerced through the duress of imprisonment."

6 Mo. 110.

Mr. Samuel G. H. Wright, for defendant:

A marriage induced by the fraudulent representations of the woman that she is pregnant, when in fact she is not, will not be set aside.

Bish. Mar. & Div. § 191; Hoffman v. Hoffman, 80 Pa. 417.

A man who has himself been guilty of antenuptial incontinence with the woman he afterwards marries is not entitled to a divorce because she happens to be pregnant by another at the time of his own transgression, concerning which she deceived him.

States v. States, 10 Stew. 195; *Bish. Mar. & Div. § 190.*

N. J.

That the marriage was induced by representations that the husband was the father of the unborn child, when in fact it is the child of another, is not sufficient to avoid the marriage.

Scroggins v. Scroggins, 3 Dev. 435; *Foss v. Foss*, 12 Allen, 28; *Crehore v. Crehore*, 97 Mass. 330; *Long v. Long*, 77 N.C. 304; *Carris v. Carris*, 9 C. E. Green, 517.

It must be an extraordinary fraud alone that will justify an avoidance of the marriage bond.

Carris v. Carris, *supra*.

The defendant was lawfully in custody, for the warrant was regularly obtained and the arrest properly made.

Seyer v. Seyer, 10 Stew. 211.

When the court is satisfied that antenuptial incontinence has taken place, the charge of unlawful threat or menace, or fraud or duress must be most fully and satisfactorily established before the court will annul the marriage.

Seyer v. Seyer, 10 Stew. 210; *Carris v. Carris*, 9 C. E. Green, 510.

Runyon, Chancellor, delivered the following opinion:

The bill is filed to annul the marriage between the parties, upon the ground of fraud and duress.

The complainant admits that he had illicit intercourse with the defendant before the marriage. She subsequently alleged that she was pregnant by him. He declined to marry her but made provision for her by an agreement up to and during her contemplated confinement. He fulfilled the agreement. Afterwards she made a complaint against him before a justice of the peace that he had furnished her with medicine to produce an abortion. He was arrested upon the charge. Being unable to procure bail he went to the defendant's house and asked her to withdraw the charge. She did not consent to do so, but went with him and the officer in whose custody he was, to the office of the justice. After they arrived there the officer said to the magistrate that she wished to withdraw the charge. To which the justice replied that it could not be done and informed the accused that he must marry the woman, give \$1,000 bail or go to jail. The accused being unable to get bail offered to marry the woman. He asked her if she was willing to marry him and she answered him: "Just as you like." After she had thus given her consent they were then and there married accordingly. The evidence is contradictory as to whether they lived together after the marriage.

It is proved that the accused gave the medicines to the woman; and it is admitted that one of them at least was such as is given to produce miscarriage. It was undoubtedly furnished to her for that purpose.

The complainant insists that the circumstances establish the fact that the marriage was the result of unlawful duress by means of criminal proceedings. Where a man who has been guilty of illicit intercourse with a woman marries her under the constraint of proceedings against him in bastardy, lawfully instituted in respect of the actual or apprehended result of such unlawful commerce, or where he marries her under the constraint of arrest in a suit for damages for seducing her, such constraint does not of itself constitute a valid ground for annul-

ling the marriage. *Sickles v. Carson*, 11 C. E. Green, 440; *Seyer v. Seyer*, 10 Stew. 210; *Jackson v. Winne*, 7 Wend. 47; *Scott v. Shufeldt*, 5 Paige, 43.

Where a man has been guilty of illicit intercourse with a woman and, supposing her to be pregnant as the result thereof, furnishes her with the means of producing abortion for the purpose of preventing the apprehended birth of the offspring, and criminal proceedings are lawfully instituted against him with a view to punishing him for the latter offense, and being under arrest thereon, he chooses as a means of release to marry the woman, the constraint under which he enters into the marriage constitutes no ground either in law or morals for annulling it.

In this case it is not denied that if the arrest had been in lawful proceedings in bastardy the constraint would not have constituted unlawful duress; but it is urged that the fact that it was under criminal proceedings makes an essential difference. I cannot see the distinction. The charge was not a false one. It was true. The accused had by his conduct towards the woman rendered himself liable to the penalties of the criminal law. To obtain his release and immunity for his criminal conduct he deliberately chose to marry her.

There is no evidence of any conspiracy nor of any fraud. If a man who has committed a rape should, after his arrest for the crime, seek to escape the consequences of his offense by marrying the victim of his violence, he could not in a court of conscience, obtain a decree nullifying the marriage on the ground that he was under duress when he entered into it and that but for the duress he would not have been willing to marry the woman. This case does not differ from that in principle. The dictates of justice no less than the policy of the law, forbid that a man should in any such case be permitted to annul his marriage on the ground of the duress of his imprisonment for his crime.

The master advised that the bill be dismissed. There is no error in his conclusion.

SUPREME COURT.

STATE, Inhabitants of EATONTOWN,
Prosecutors,
v.

Inhabitants of SHREWSBURY.

*1. To gain a legal settlement under the first clause of § 1 of the **Poor Act** (Rev. 1834) the pauper must have been seised of a freehold estate, of the value of \$130, and have dwelt thereon, or in the township in which the estate was situate, for one continuous year.

2. The statute does not require the continuous actual presence of the party, but will be satisfied by an unbroken residence on the estate or in the township. The continuity of such dwelling will not be broken by absences for business or pleasure which are temporary and ac-

companied with a continued intent to return when the purpose of the absence has been accomplished.

(Decided November 5, 1886.)

ON certiorari to the Monmouth Sessions, to review proceedings for the removal of a pauper. *Affirmed.*

Argued before Scudder and Magie, JJ.

The facts are stated in the opinion.

Mr. James Steen, for prosecutors:

To constitute a dwelling house, in a statute against arson, it must be a habitation for man, and usually occupied by some one lodging in it at night.

State v. Warren, 33 Maine, 30.

And in a burglary a dwelling house is "a house in which the occupier and his family usually reside, or in other words dwell and lie in."

Whart. Crim. Law, *sub titulo*.

An out house, "if it be made a sleeping place for any of the servants of the dwelling house, may be deemed a distinct dwelling house."

Armour v. State, 3 Humph. 379.

The court below confuses "dwelling," "residence" and "domicil." But "domicil and residence are not synonyms."

Bartlett v. New York, 5 Sandf. 47, 48; *Foster v. Hall*, 4 Humph. 348.

"Resident" and "inhabitant" are not synonyms.

Supervisors of Tazewell Co. v. Davenport, 40 Ill. 197.

It follows, therefore, that under our statute mere domicil is not enough. Dwelling implies actual presence. That a domicil is not enough to gain a settlement by commorancy, see *Reading v. Westport*, 19 Conn. 561.

A person may have two domicils.

Greene v. Greene, 11 Pick. 410.

Having two places of residence he may elect which shall be his domicil.

1 Woodbury & M. 9.

He may have his residence at one place and his domicil at another.

Bartlett v. N. Y., *supra*.

The legislative interpretation of the term "one full year" is as follows: "Shall have lived at least one whole year at one time, either on the place by him, her or them purchased or hired for at least five pounds yearly rent in such place, or have served one master or mistress the said term of one full year in such place."

2 Nevill, p. 217 (1758), revising 1 Nevill, 256 (1740).

Law of 1774 (Patterson, p. 26).

Jefferson v. Pequannock, 1 Green, N. J. L. 187.

Kindred expressions in other States are always interpreted to mean unbroken, continuous terms. "Being taxed for his poll for the term of seven years," means seven years in succession.

Henniker v. Weare, 9 N. H. 573.

"To gain a settlement by a residence for the term of seven years" it must be "seven years without interruption."

Royalton v. Bethel, 10 Vt. 22.

Judge Royce, in the latter case, said: "The expressions here used are generally understood to mean an unbroken period of time. This is the general construction in leases, in contracts for service," etc. *Id.* *lized by Google*

To same effect *Monkton v. Panton*, 12 Vt. 250. An interruption of several months is fatal, notwithstanding the intention of returning at some future but indefinite period.

Hartford v. Hartland, 19 Vt. 392.

If a pauper removes from the town while his right of settlement is inchoate, it must be an abandonment of what had been done towards gaining a settlement. A person cannot have two or more inchoate settlements at one and the same time, either of which at his option may be ripened into a perfect settlement.

Lincoln v. Warren, 19 Vt. 172.

See also *Barton v. Irasburgh*, 33 Vt. 159, and *Wilbraham v. Ludlow*, 99 Mass. 587.

Messrs. Applegate & Hope, for defendant.

Magie, J., delivered the opinion of the court:

The writ in this case brings up an order for the removal of a pauper to the Township of Eatontown, upon an adjudication that his legal settlement was in that township. The order was originally made by a justice of the peace and, upon appeal, affirmed by the sessions. That court has sent up a finding of the facts which it adjudged to be established by the evidence before it.

It appears thereby that it was established by the evidence that the pauper had, prior to 1880, become seised of a freehold estate in Eatontown, of the value of \$180. The counsel for prosecutors has properly confined his argument to the first reason. The facts found by the court below limit the discussion to the question raised by that reason, which is—whether the pauper dwelt upon the estate, or in the township in which the estate lay, for one full year and so obtained a legal settlement under the first clause of section 1 of the Poor Act. Rev. 884.

The facts found by the sessions, from which they deduced the conclusion that the pauper had dwelt on said estate or in said township for one full year, are the following, viz: that he built a shanty thereon in 1880, and until 1884 worked out by the day or month in Eatontown and other townships; that while working out he generally ate and slept where employed, but would sometimes provide his meals from and sometimes would sleep at the shanty; that while out of employment, he made his home at the shanty, and it was the only home he had; and that when he left to go out to such work it was always with the intention to return thereto when his employment ceased; that between 1880 and 1884 he worked in Eatontown more than one year, but not for one year continuously, but did not during that time actually dwell in said shanty or the township for any one year continuously.

The contention of prosecutors is that dwelling, in the sense used in this statute, implies actual presence, which to produce a legal settlement must continue without interruption for one full year.

That the words "one full year" will only be satisfied by a dwelling for the full space of one year continuously and without interruption, I have no doubt.

The only question is over the meaning of the word "dwell." In my judgment it is not to be restricted in meaning to actual presence. Such

is not the meaning attributed to it in common parlance or by the lexicographers. To dwell is "to reside; to inhabit; to have a fixed place of residence," etc. Worcester, Dic.

One's dwelling place is his residence, his usual place of abode. It does not cease to be such because of temporary absences, whether for pleasure or for business, provided there exists and continues an intent to return to the abode as a dwelling place.

There have been various English Statutes, giving legal settlement to a pauper after a certain period of continuous residence in a parish, and rendering a pauper irremovable from a parish in which he had resided for a certain period. These Acts completely resemble the Act now before us, in the requirement of a continuity of residence. In construing these Acts it has been always held that the continuity of residence will not be broken by mere temporary absences even for considerable times, if accompanied by an intent to retain the residence and to return to it when the purpose of the absence is accomplished. *Reg. v. St. Leonard*, L. R. 1 Q. B. 21; *Reg. v. Glossop*, L. R. 1 Q. B. 227; *Reg. v. Abingdon*, L. R. 5 Q. B. 406; *Reg. v. St. Ives*, L. R. 7 Q. B. 487; *Reg. v. Worcester*, L. R. 9 Q. B. 340; *Overseers of Manchester v. Guardians of Ormskirk, etc.*, L. R. 16 Q. B. Div. 723.

Under this view of the meaning of our statute, I think we cannot find error in the result reached below. For although the court reports that they found that the pauper did not actually dwell in his shanty or in the Township of Eatontown for any one year continuously, the finding in that respect must be taken to refer to a continuous presence. For the whole finding must be construed together; and since it appears thereby that the pauper had a dwelling place on his own land, that his absence from it was for the purpose of engaging in work, and was entered upon with an intent to return to his dwelling place when his employment ceased, it is entirely clear that it must be inferred that the pauper dwelt there for more than a full year, within the meaning of the Act.

The proceedings below must be affirmed, with costs.

STATE, Amanda T. BROWN et al., Prosecutors,

v.

Village of SOUTH ORANGE.

*1. The report of a reassessment, made after a partial vacation of an assessment for a street improvement in South Orange will not be vacated, merely because on its face it seems to give awards to all owners of land taken or damaged, and to levy assessments upon all lands benefited. The court, looking at all the proceedings, will hold the legal effect to be to make new awards and assessments in lieu only of those previously annulled.

2. The power to make a reassessment not being impugned, objections to the prior assessment are irrelevant.

*Head notes by DIXON, J.

(Decided November 5, 1886.)

CERTIORARI to review proceedings on reassessment for benefits and reawarding of damages to lands on opening of street. *Affirmed.*

The facts and questions raised are set out in the opinion.

Argued before Reed and Dixon, JJ.

Mr. William Talcott, for prosecutors:

By the provisions of the supplement to the Charter of the Village of South Orange (Laws 1875, p. 393, § 5), in cases where assessments are set aside, the board shall cause a new assessment to be made of so much of the former assessment as shall have been set aside.

In this case this should have been done by the board of assessment's determining the amount of damages sustained by the prosecutors, by reason of the taking of the land, and by ascertaining the amount of the peculiar benefits conferred upon them, and then determining the total amount of damages and benefits.

Souther v. South Orange, 17 Vroom, 317.

The object of this provision was not to alter the assessment as to others which the board had no power to do.

Id. See also *Ropes v. Essex Public Road Board*, and *Sutphin v. Elizabeth*, 11 Vroom, 64, 283.

In making the reassessment it was the duty of the commissioners to ascertain what sum should have been assessed to each lot at the date of the first assessment. When they had computed the sum to be charged to the landowner it was to be laid as of the prior date and the land owner was properly chargeable with interest from the date of the first assessment.

Johnson v. Trenton, 14 Vroom, 166, 169.

As the first assessment as a whole is not set aside by this court, but only as to prosecutors, it is presumed that in the judgment of the court the public convenience and interest required that it should stand undisturbed as to those who had not complained.

Winkler v. West Hoboken, 37 N. J. L. 407.

If both reports and both maps in the present case are allowed to stand, there will be two returns as to this one street, which is bad under *State v. Garretson*, 3 Zab. 388.

Mr. J. M. C. Morrow, for defendant.

Dixon, J., delivered the opinion of the court:

An award of damages to and an assessment for benefits upon lands of Amanda T. Brown and Mary B. Souther, resulting from the opening of Rose Avenue in the Village of South Orange, having been set aside by this court on August 8, 1884, the trustees of the Village on November 25, 1884, instituted proceedings in pursuance of which a new assessment and award were made and ratified on July 21, 1885.

The prosecutors complain of these last proceedings because the assessors' report sets out awards to all persons whose lands were taken or damaged and assessments upon all lands benefited, instead of being confined to lands concerning which the awards and assessments had been vacated.

A comparison of the awards mentioned in the present report with those previously made and not annulled, shows that they are identical; and hence we infer that they are stated now merely to indicate the date from which the assessors determined the amount of the expenses which

they were to assess. For this purpose they legitimately appear in the report. The awards to the prosecutors differ from the former ones, because as to them the assessors were to exercise their own judgments concerning the compensation due for the prosecutors' land and damages, the previous judgments in that regard having been reversed.

The assessments embraced in this report all vary from those theretofore made; and on this account the prosecutors object that upon many tracts of land there are two separate assessments which are inconsistent with each other. This objection however arises in part from a misapprehension. The assessors were bound to charge upon the prosecutors such shares of the expenses as were proportionate to their benefits in comparison with those of other landowners. They could do so only by deciding what benefit each parcel of land derived from the improvement, and then distributing the amount of expense among all these parcels in the same ratio. This they had to do upon their own opinion of the benefits, not upon the judgment of their predecessors. The result of this process they have embodied in their report. Its legal effect however is, not to impose a second assessment upon property against which a former assessment still subsists, but only to indicate the proportion of benefits in consonance with which they have fixed the amounts of the prosecutors' burdens imposed in lieu of the vacated assessments. Although this intention is not verbally expressed in the report, yet the court, looking at all the proceedings, readily sees that the new awards and assessments affect the prosecutors only; others stand as they previously stood. There is no substantial error in this procedure. *Souther v. South Orange*, 17 Vroom, 317.

The objection that the assessors erred in determining that no lands lying over 500 feet from the line of the improvement were benefited is unsupported by evidence.

The objections stated against the prior assessments are not relevant to the pending question, since the power to reassess under the supplements to the village charter (P. L. 1875, pp. 396, 609) is not specifically impugned.

The proceedings should be affirmed.

COURT OF ERRORS AND APPEALS.

THE RAILROAD TAX CASES.

STATE BOARD OF ASSESSORS *et al.*,
Plffs. in Err.,

v.

CENTRAL R. R. CO. OF NEW JERSEY
et al., *Defts. in Err.*

1. The "Act for the Taxation of Railroad and Canal Property," approved April 10, 1884 (P. L. 1884, p. 142), providing for the separate taxation, through a "State Board of Assessors," of property used for railroad and canal purposes, at the rate of one half of one per cent on the valuation, for state purposes, and at the local rate (but not exceeding one per cent), on the valuation of the real estate

exclusive of the main-stem and waterway, for local purposes, and providing that the companies shall not be required to pay a greater tax for all purposes under the Act than they would be required to pay at full local rates, **does not contravene** the provision of the **State Constitution** (Amendment of 1875), that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

2. As the Act is framed in general terms, is restricted to no locality, and operates equally upon all of a group of objects (railroad and canal property) which, having regard to the purposes of legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, it is not a special or local law, but is a **general law**. (*Van Riper v. Parsons*, 11 Vroom, 123, followed.)
3. The constitutional provision in question does not deprive the Legislature of the **power of selecting the subjects of taxation**, but it does require that **all members of the class selected shall be included** in the taxing law, and that the **rule applied thereto shall be uniform** as to the whole of the class, and that the assessment shall be made at the **true value** of the property constituting the class.
4. **Railroad and canal property** being **peculiar property** which cannot be valued in the same way as other property of a like nature, the Legislature is bound to provide a peculiar method of valuing it for taxation, and the **machinery provided by the Act** (a State Board of Assessors) is **appropriate** and necessary.
5. **The power of apportionment of the proceeds of taxation is not limited** by the Constitution and the judiciary has no control over it. If the legislative provision for taxation is constitutional it will stand unaffected by the apportionment of the proceeds (here, between state and local purposes).
6. **Franchises** are a proper element of valuation for taxation.
7. The Act does **not contravene** the Fourteenth Amendment to the **Federal Constitution**.
8. The Act is applicable to those **railroad companies** whose **charters** (subject to alteration by the Legislature) provide that the respective companies shall pay a state tax of one half of one per cent upon the cost of the railroad, "provided that no other tax or impost shall be levied or assessed upon said Company." By the **reservation of the power to alter**, the Legislature retained the **power to tax**.

(*Per Runyon, C. Concurring Opinions by Parker, Scudder and Paterson, JJ. Separate Opinions by Dixon and Reed, JJ., holding the Act constitutional as to tax for state purposes, but unconsti-*

tutional as to tax for local purposes; and by Depue, J., holding the Act unconstitutional.)

(Decided May 29, 1886.)

ERROR to the Supreme Court to review a judgment in favor of the Central Railroad Company of New Jersey and other railroad companies, prosecutors, on *certiorari* to review tax assessments. *Reversed*.

The report of the case in the Supreme Court will be found in 2 Central Reporter, 715.

The provisions of the Act in question and the questions presented are set forth in the opinions.

Mr. John P. Stockton, Atty-Gen., for the State.

Mr. Gilbert Collins, for Jersey City and other taxing districts.

Mr. Barker Gummere, for plaintiffs in error.

Mr. Thomas N. McCarter, for Easton & Amboy R. R. Co., Morris Canal & Banking Co., and Lehigh Valley R. R. Co., defendants in error:

I. The Act of the Legislature under which these taxes are imposed is in conflict with paragraph 12 of section 7 of the Constitution of New Jersey as amended, which declares that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

The Act selects the property of a second class of artificial persons, viz.: railroads and canal companies, and natural persons using railroad and canal property; and imposes a special tax of the half of 1 per cent on the whole of such property, when no similar tax is imposed on the property of any other persons in the State, either artificial or natural.

Exch. Bk. of Columbus v. Hines, 3 Ohio St. 15; *Stratton v. Collins*, 14 Vroom, 565; *State v. Runyon*, 12 Vroom, 98, 106; *State v. Newark*, 10 Vroom, 392; *Pine Grove v. Talcott*, 19 Wall. 675 (86 U. S. bk. 22, L. ed. 227); *Gilman v. Sheboygan*, 2 Black, 514 (67 U. S. bk. 17, L. ed. 305); *Knowlton v. Suprs. of Rock Co.* 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 242; *Lumden v. Cross*, 10 Wis. 282; *Atty-Gen. v. Winnebago, etc. R. Co.* 11 Wis. 35; *Zanesville v. Richards*, 5 Ohio St. 589; *Burroughs, Tax*, 62.

The law fails to comply with the requirement of general laws and uniform rules, in that it deprives these corporations of the benefit of the limitation of the rate of taxation allowed to all other persons and property in the general Act concerning taxes, section 2 of the supplement of 1866 (Rev. 1150, § 61).

State, North Ward Nat. Bk. v. Newark, 10 Vroom, 380; 11 Vroom, 358; *Rankin v. Love*, 17 Vroom, 132; *Murphy v. Trenton*, 18 Vroom, 79.

II. This Act is in conflict with the provision of the 14th article of the Amendments to the United States Constitution, which requires that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Railroad Tax Cases, 18 Fed. Rep. 722, 734; *Santa Clara Co. v. Southern Pac. R. Co.* 18 Fed. Rep. 885.

III. Independently of constitutional restriction it has always been held to be a fundamen-

tal condition of legal taxation that there shall be equality and uniformity in the distribution of public burdens.

Boroughs, Tax. chap. 3, § 76, p. 22; Cooley, Tax. 2; *State v. Readington*, 7 Vroom, 86; *Gordon v. Cornes*, 47 N. Y. 611; *Lezington v. Quillan*, 9 Dana, 518; *State, Agents v. Newark*, 8 Vroom, 421.

IV. The assessments in this case are illegal and unconstitutional so far as they include the so-called value of the franchises of the various corporations and impose the tax upon that valuation.

Each. Bk. of Columbus v. Hines, supra.

A franchise is not included in the definition of either real or personal estate in the general law providing for taxation (Laws 1866, Rev. 1150, pl. 2).

The cases commonly referred to in support of the position that a franchise tax may be sustained are *Savings Society v. Coite*, *Provident Inst. v. Mass.* 6 Wall. 594, 611 (73 U. S. bk. 18, L. ed. 897, 907).

In the *State Railroad Tax Case*, 92 U. S. 575 (Bk. 23, L. ed. 663), *Justice* Miller says that the Supreme Court had in these cases sanctioned a tax on the franchise; but an examination of those cases will show that the taxation there attacked was sustained only on the ground that it was a tax on the franchise as a license or excise tax and not as a tax on the property.

In the case of *Black v. Del. & Raritan Can. Co.* 9 C. E. Green, 455, the question was not whether franchises were property, but whether the stock of the corporation could be condemned and taken for public use when its owner refused to consent to the leasing of the railroad property represented by the stock.

V. In American law a franchise in the sense in which the term was originally used is a particular privilege conferred by grant from the government and vested in individuals.

8 Kent, Com. 458.

In Windfield's *Adjudged Words*, p. 273, definitions of the word "franchise" are given and a distinctive feature of each is that it must be a special privilege not enjoyed by citizens in common and depending for its existence and enjoyment on a distinctive legislative grant.

Our constitutional amendments have abolished all such special grants and privileges. The Legislature can no longer grant them specially, but they are bound to provide them freely for the public without grants. If they exist at all their character as special privileges has been abolished; and while their enjoyment may confer a value on property, just as the right to travel on a highway may confer a value on the team or carriage which the traveler uses, the right to the one is as free and independent of special legislative grant as the other.

See *Pa. R. R. Co. v. National R. R. Co.* 8 C. E. Green, 441.

VI. The assessing and levying of taxes is a legislative and not a judicial act. The Legislature cannot confer upon the judiciary the power to do such an act.

Munday v. Rahway, 14 Vroom, 388, *affd.* in 15 Vroom, 395.

Mr. George M. Robeson, for Central R. R. Co., defendant in error.

Mr. B. Williamson, for Philadelphia & Reading R. R. Co., defendant in error.

Mr. Joseph D. Bedle, for Morris & Essex R. R. Co. defendant in error.

Mr. H. A. Drake, for Tuckerton R. R. Co., defendant in error.

Runyon, Chancellor, delivered the following opinion:

The judgments of the Supreme Court which are brought up for review by the proceedings in these cases, set aside and annul as being entirely void the assessment and tax levied upon the respective defendants, under the Act "For the Taxation of Railroad and Canal Property," approved April 10, 1884 (P. L. 1884, p. 142). The ground upon which those judgments are based is that the Act is in contravention of the constitutional requirement adopted in the amendments of 1875, that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

The Act, after providing that all the property of any railroad or canal company not used for railroad or canal purposes, shall be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners in the same municipal division or taxing district, creates a State Board of Assessors to assess all the property of railroad and canal companies used for railroad or canal purposes, including their franchises, and directs that the board shall ascertain the true value of such property, and that in so doing they shall ascertain separately, first, the length and value of the main stem of each railroad and of the water-way of each canal and the length of such main stem and water-way in each taxing district; second, the value of the other real estate used for railroad or canal purposes in each taxing district, including the road-bed (other than main stem), waterways, reservoirs, tracks, buildings, water-tanks, riparian rights, docks, wharves and piers and all other real estate except lands not used for railroad or canal purposes; third, the value of all the tangible personal property of each railroad and of each canal company; and fourth, the value of the franchise. It then declares that the term "main stem" is to be held to include the road-bed not exceeding 100 feet in width, with its rails and sleepers and the passenger depots; and that the term "water-way" is to be held to include the towing path and berme-bank. It defines also the terms "taxing district" and "tangible personal property" as used in the Act. It provides that the State Board of Assessors shall be governed by the valuation of the local assessors if lower than theirs, in ascertaining the value of the real estate used for railroad or canal purposes, not included in the main stem or water-way, and that the local assessors shall certify to the board a description of the property of any railroad or canal company within their taxing district, both that which is not used for railroad or canal purposes, and that used for such purposes, excepting the main stem and water-way as defined by the Act; also their valuation of those properties and the local rate of taxation for county and municipal purposes. If in any taxing district there should be several branch lines of railroads belonging to or controlled by one company, or operated under one manage-

ment, the assessors are to designate one of them as main stem, and the others are to be treated as "other real estate used for railroad purposes." The board are to compute the tax upon the entire assessed valuation of each railroad and canal company as ascertained by them, and the taxation is to be as follows: The company is to pay upon the valuation to the State for state purposes one-half of one per cent annually, and in addition thereto, the local rate for county and municipal purposes, on the valuation of the real estate other than main stem or water-way, that is used for railroad or canal purposes, in the taxing district; but such local rate is not to exceed one per cent of such last-mentioned valuation. The Act provides that the sum of the estimates or computations for each company shall constitute the tax to be paid by it, and that if, upon complaint, the board shall find that the amount of the state tax and local rate, as limited in the Act, combined, exceed the amount which the company would have to pay if assessed at and required to pay full local rates alone, then they shall reduce the whole tax to the amount which the company would be required to pay at the last mentioned rate; and in order to ascertain that amount (but for no other purpose) they may apportion the value of the franchise among the local taxing districts. Of the taxes assessed under the Act, the one-half of one per cent is to be appropriated to state purposes, and the money received for tax upon property separately assessed, in the different taxing districts, is to be allotted to those districts, giving to each the amount derived from the property of each railroad or canal company therein. The foregoing are all the provisions of the Act which it is necessary or important to state for the consideration of the question which is now before the court.

In this connection it will be proper to refer briefly to the history of the legislation, other than such as is contained in special charters, by which taxes have been imposed upon railroad and canal companies in this State. By the Act of 1866 (Rev. p. 1150), it was provided that all real and personal estate within this State, whether owned by individuals or by corporations, except such as was owned by corporations which by their charters were expressly exempted from taxation, should be liable to taxation at the full and actual value thereof. The railroad tax law of 1873 (Rev. p. 1166), after reciting that for the encouragement of railroad enterprise, laws creating and regulating railways in this State usually provide for the payment by them in consideration of their charter privileges of a fixed rate upon their capital stock or the cost of their works in lieu of all other public impositions whatsoever; and that it was nevertheless intended that the property of such corporations being largely acquired for or through the growth and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes; and that it was desirable in order to the avoidance of litigation and future dissatisfaction, that such municipal and county taxation should be authorized and that it should be permanently fixed and regulated, provided that railroad companies occupying and using railroads in this State, whether

as lessees or otherwise, should pay upon the cost, equipment and appendages of their respective railroads, a state tax after such rate of taxation as might have theretofore been fixed by law upon such companies, or in default thereof, after the rate of one-half of one per centum upon such cost; and that they should pay upon all the real property by them occupied, used or owned for the purposes of their roads or otherwise, excepting the main stem or road-bed and track not exceeding 100 feet in width, and excepting also a tract of land not exceeding ten acres at the termini, a county and municipal tax for the benefit of the counties, townships and cities respectively where such real property was situated, after the rate of one per centum upon a valuation thereof, and of all the improvements thereon not by way of repairs, then or thereafter to be made. The Act provided for the voluntary surrender by any railroad company of any privilege which it might claim of exemption from taxation under its charter and for its acceptance in lieu thereof of the taxation provided by the Act. The Act was in force when the amendments to the Constitution were adopted, among which was the before-mentioned provision that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

It will have been seen that under the Act of 1873 the property was assessed for taxes for state purposes, not according to its true value, but according to its cost; and as to taxes for county and municipal purposes, it was assessed upon a valuation. The cost for the assessment of the tax for state purposes was to be ascertained by a return thereof on oath or affirmation by the president of the company to the Comptroller of the State, and the valuation for the assessment of tax for county and municipal purposes was to be fixed by a commissioner appointed by the Governor. The Act gave an action to the State against the corporation for false return in case the Comptroller should be dissatisfied with the return of the president.

By the general railroad law (Rev. p. 925), passed in 1873, it was provided that the companies incorporated thereunder should pay to the State an annual tax of one-half of one per cent upon the cost, equipment and appendages of their road, including the cost of their road-bed, and such other taxes as might be assessed from time to time by a general law applicable to all railroads over which the Legislature should have power for that purpose at the time of passing such law, and that they should be regularly assessed and pay tax for the value of their real estate (except the road-bed 100 feet wide) and the improvements thereon and their personal property as taxed at the time when that Act was approved, in the city or cities, township or townships wherein it lay, at the same time and rate and in the same manner and for the same purposes and by the same person or persons as the other taxes assessed in such cities or townships.

The Act for 1876 (Rev. p. 1168) provided that all railroad corporations and companies occupying or using railroads in this State, whether as lessees or otherwise, liable to be taxed as such by a general law taxing railroads for state

purposes, should pay an annual state tax upon the true value of such railroads and their equipments and appendages, at and after the rate of one-half of one per centum upon such value. The Act contained a declaration (inserted as it says, for greater certainty) that it should not apply to or affect any county, municipal or local taxation whatever. The Act provided for a return of the valuation by the president of the company and for the review of the valuation or for the making of an original one if none should be returned, by a board of railroad commissioners, and it gave to the company an appeal to a justice of the supreme court from the decision of the commissioners.

By the general law (Rev. p. 936) passed in 1877, it was provided that the companies formed under that Act should pay to the State an annual tax of one-half of one per cent upon the cost of their canals, including equipment, appendages and expenses; the amount of the cost in each case to be ascertained by the annual statement of the president of the company under oath or affirmation.

Up to the time of the passage of the Act of 1884, the general Railroad Tax Acts of 1873 and 1876 (the provisions of the latter were expressly confined to the tax for state purposes), were re-organized as valid and were enforced. The question of their constitutionality, however, was never brought to a judicial test. It was held in 1879 that under the Act of 1876 railroad corporations were required to pay a tax for state purposes, upon the value of their railroads and equipment and appendages. *State, N. J. Southern R. R. Co. v. Railroad Comrs.* 12 Vroom, 235. And that they were required to pay county and municipal taxes under the Act of 1873. *State, Central R. R. Co. v. Mutchler*, 12 Vroom, 96, and *State, Penna. R. R. Co. v. Wetherill*, *Id.* 147.

The Act of 1884 covers both railroad and canal property. It fixes the same rate of taxation for state purposes which had previously existed for many years, but assesses it upon the valuation of all the property of the company used for its purposes, including the franchise, and provides for local taxation on part only of such property, as the general Railroad Tax Law of 1873 did; and while that Act fixed a rate of one per cent for local taxation, the Act of 1884 provides that the rate for local taxation shall not exceed one per cent.

It will be seen that the Act of 1884 introduced no novelty in railroad taxation, but that on the contrary the same method substantially of taxing railroad companies had existed from 1873 under the Act of that year, which Act was modified in 1876 merely in order thus to conform it to the constitutional requirement.

The fact that railroad property, when the Act of 1884 was passed, had been separately taxed under similar legislation both for state and local purposes, for so many years, and that the validity of such legislation on the ground of unconstitutionality had not been brought to any judicial test, although immense interests in the hands of vigilant guardians had been annually affected by it, is an important circumstance in the consideration of the question now before the court; because so practical and contemporaneous a construction of the constitutional provision, acquiesced in for so long a

time, under such circumstances, and one so clear and uniform, must have weight with the court in settling judicially the construction of the provision, if the construction were other wise doubtful.

The power of taxation is an essential, inherent attribute of sovereignty. In our state government it is vested in the legislative department. It is unlimited in extent, except as it may be restrained by constitutional provision or irrepealable legislative contract. Of course, to be exercised legitimately it must be exercised within the scope of governmental authority as limited and circumscribed in our polity. To exercise it outside of the sphere of such authority would be usurpation. It is the province of the judiciary to determine whether in any legislation submitted for its decision, the constitutional restraints or limitations have been disregarded or transcended. But unless the legislation is found to be clearly in contravention of some constitutional provision, or to be outside of the limit of governmental authority, the court will not annul it. With the policy or impolicy, justice or injustice of the legislation, irrespective of such constitutional considerations, the courts have nothing whatever to do.

The prosecutors complain and insist that in the Act of 1884 the constitutional restraints and limitations have been ignored and exceeded; that the property of railroad and canal companies has been segregated by arbitrary selection for special and exclusive taxation and made to bear, practically alone, the entire burden of taxation to raise money for state purposes, instead of its due proportion thereof only. And they insist that the legislation thus brought into question is in violation of the before mentioned provision of the State Constitution, that property shall be assessed for taxes under general laws and by uniform rules according to its true value, and of the provision of the Federal Constitution, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the Act under consideration, the Legislature has separated for taxation, not all the property of railroad and canal companies, but only so much of it as is used for the particular purposes of those corporations, and has imposed upon the property so separated a tax for state purposes, and a tax for county and municipal purposes. The property of such companies not used for such special purposes is left to be taxed in the same manner as other like property. The property separated, so far from being taken by mere arbitrary selection, is all of it so circumstanced by reason of the peculiar use to which it is put, as to make it, on that account, a class by itself. To value and tax such property in the same way in which other property is valued would be unjust. To do justice to the companies and in common fairness, not only must the main stem of a railroad and the water-way of a canal be each valued and taxed as a unit, but the other property used in connection therewith and for the same purposes, must also be valued and taxed with reference to such use. To make a just valuation thereof, property used for railroad or canal purposes must be estimated with regard to its value for

such purposes. For example: the true value for purposes of taxation of railroad cuts and embankments and canal locks is not their cost, but what they are worth in connection with the works of which they form part. This subject is well discussed and forcibly illustrated by Mr. Commissioner Hunt in delivering the unanimous opinion of the court in *People v. Barker*, 48 N. Y. 70. See also to the same effect the opinion of the United States Supreme Court in *State Railroad Tax Cases*, 92 U. S. 575, 608 (1875) [Bk. 23, L. ed. 663, 671]. And in *Kentucky Tax Cases*, 115 U. S. 321 (1885) [Bk. 29, L. ed. 414].

This peculiarity of the property in question constitutes it a legitimate class for the purposes of taxation—a class which in order to deal with it fairly in the matter of taxation must be treated separately. In the leading case of *Van Riper v. Parsons*, 11 Vroom, 123, it was held that a law framed in general terms, restricted to no locality and operating equally upon all of a group of objects which, having regard to the purposes of legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. See also *S. C. Id.* 8.

Railroad and canal property has such characteristics, and the Act under consideration extends to and operates equally upon all such property. The law, therefore, is a general law. In *State Railroad Tax Cases*, *ubi supra*, it was said that railroads by themselves constitute a class for the purposes of taxation.

The constitutional provision requires not only that the assessment shall be under general laws, but that it shall be by uniform rules also. It does not require that all property shall be assessed for taxes, but that property when assessed for taxes, or in other words, such property as shall be assessed for taxes—shall be assessed under general laws, etc. Certain property has been exempt from taxation ever since the amendments to the Constitution were adopted, and such exemption has received the judicial sanction. The property is of the same kind as that which is taxed, but the use to which it is devoted, the purposes of religion, education, benevolence, etc., makes it a class and justifies the exemption.

The constitutional provision does not take away from the Legislature the power of selecting the subjects of taxation. *State, Vail's Errs. v. Runyon*, 12 Vroom, 98; *State, Stratton, v. Collins*, 14 Vroom, 562. But it does require that all the members of the class selected shall be included in the taxing law and that the rule applied thereto shall be uniform as to the whole of the class, and that the assessment shall be made at the true value of the property constituting the class; and if these requirements are answered by the law, it is not in conflict with the constitutional provision.

If the Legislature has power to exempt on account of the special use to which they are put certain kinds of property from the taxation to which other property of the same kind, but put to general uses, is subjected, it has the right to provide, in its discretion, that such special property shall be assessed at a different rate and in a different way from the other. Judge Cooley, in his work on Constitutional Limita-

tions, says (p. 497), that constitutional requirements that taxation upon property shall be according to value, do not include every species of taxation, but that all special cases such as those which he specifies, among which are those where corporations are required to pay a certain sum annually in proportion to their capital stock or by some other standard, which methods are regarded by the State as most convenient and suitable for the taxation of such organizations, are by implication excepted. In fact, under our laws various methods which have received express judicial sanction are employed for the taxation of the property of various kinds of corporations in order that such property may be taxed at, and not beyond, its true value.

Railroad and canal property being peculiar property, which cannot in justice to the owner be valued in the same way as other property of a like nature, the Legislature was bound to provide a proper method of valuing it justly for the purposes of taxation. Such method must be a peculiar one. The machinery provided for the purpose by the Act—a State Board of Assessors—is appropriate and such as is necessary in view of the peculiar character of the property. If by the method adopted the companies are required to bear no more than their just share of the public burden of taxation, they surely have no ground of complaint. Whether the tax which they pay is appropriated to state purposes alone or to state and county and municipal purposes, is a matter which does not concern them. All taxes, whether levied for state, county or municipal purposes, are state taxes; they can be imposed by no other authority than that of the State. The State appropriates the proceeds to what purposes it sees fit; but, however the proceeds may be appropriated, every tax is a state tax. *O. and A. R. R. Co. v. Comrs. of Appeals*, 8 Harr. 71; *State, Cam. and Bur. R. R. Co. pros. v. Cook*, 8 Vroom, 338; *State, Freeland, pros. v. Jersey City*, 14 Vroom, 135.

If the legislative provision for the taxation of the property of railroad and canal companies is not in contravention of the Constitution, it will stand; the apportionment of the proceeds of the taxation cannot affect the assessment. The power of apportionment is not limited or affected by the Constitution, and the judiciary has no control whatever over it. The Legislature, in the Act of 1884, takes pains to secure the railroad and canal companies against being required to pay more than their full share of tax. The Act provides that if the State Board of Assessors, upon complaint of any company, shall in any case ascertain that the addition of the state tax of one half of one per cent to the local rate, as limited by the Act, would compel any company to pay more tax than such company would pay if it did not pay that state tax, but did pay full local rates on all its property used for railroad or canal purposes, and its tangible personal property and franchises, without any other exemption than such as would be allowed to an individual citizen on such property, then, and in such case, the board shall make such deduction as will make the tax equal to the amount that the company would pay upon all that property, including the franchises, if assessed at full local rates, without any state tax; and that

for the purpose of ascertaining the amount (but for no other purpose), the Board may apportion the value of the franchise among the taxing districts. Nor can it be successfully contended that under the Act one company may be required to pay a greater proportion of tax for state purposes than another; for, as before stated, the apportionment does not affect the constitutionality of the tax, and each company is to be assessed upon the same kind of property at precisely the same rate and by exactly the same method of valuation. The assessment for tax for state purposes is to be upon the entire assessed valuation of each railroad and each canal company, as ascertained by the State Board of Assessors.

And here it may be observed that if the Legislature may tax the property separately, and by a peculiar rule, the peculiar character of which is made necessary in justice to the owners of the property, as well as to those who own other taxable property, in view and by reason of the use to which the property is applied, the fact that only part of the property is taken into account in one of the methods (*i. e.*, in making up the amount to be paid in respect of county and municipal tax) is of no moment. The tax applied to state purposes and that applied to county and municipal purposes are one tax and are to be so regarded. The Act provides that the sum of the estimates or computations for each company shall constitute the tax to be paid by each company. It may be added that no system of taxation can be devised which will be free from criticism, on the ground that, in some way or other, it works unequally or lacks complete uniformity. Said the court, in *State Railroad Tax Cases*: "Perfect equality and perfect uniformity of taxation, as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect."

The objection is made that, under the Act, only the property mentioned in subdivision II. of section 3 (real estate used for railroad or canal purposes, not including main stem or water-way), is subjected to assessment for taxation for county and municipal purposes, whereby, it is argued, the companies escape their share of county and municipal taxation in respect of the main stems or the water-ways, and the tangible personal property in the taxing districts. But if the taxes be but one tax, and the Legislature has the right to fix the amount of that tax by the means adopted, it follows that the objection is without actual foundation; for the Legislature has the right to say what tax the companies, in view of the peculiar character of their property, shall pay, and in what way it shall be assessed, provided it makes the assessment under general laws and by uniform rules, according to the true value of the property. To hold otherwise would be to hold that the Legislature is bound to tax all property at the same rate and in the same way, without regard to the use to which it is put.

To summarize the views above presented: The power of taxation is in the legislative branch of the government alone. It is un-

bounded except as it may be limited by constitutional restraint. A law which taxes a class of property separately is not unconstitutional if it embraces all property of that class and applies to it uniform rules and taxes it according to its true value. The constitutionality of such a law is to be determined in the same way in which it would be determined if the property taxed were the only property taxed in the State.

It is manifest from the provision that the companies shall not be required to pay more tax for all purposes under the Act than they would be required to pay at full local rates, that the Act is not liable to the criticism that it selects the property of two classes of corporations from the mass of similar property, not to put upon it a proportionate part of a general tax, but to charge it with the whole amount of a separate tax; for, so far from putting upon the property a separate tax, the Legislature has carefully provided that it shall not pay any more than it would pay if taxed at precisely the same local rates as other property without any taxation for state purposes. Moreover it may be remarked, railroad and canal companies are not the only corporations which are required to pay taxes for state purposes. Another Act of 1884, entitled "An Act to Provide for The Imposition of State Taxes upon Certain Corporations and for The Collection Thereof," requires other corporations to pay license tax to the State upon their franchises.

And here it will not be out of place to speak as to the taxability of franchises. They are undoubtedly property, and, as such, are taxable. Burr. Tax. § 85; *Society for Savings v. Crite*, 6 Wall. 594 [73 U. S. bk. 18, L. ed. 897]; *State Railroad Tax Cases*, 92 U. S. 575 [Bk. 23, L. ed. 663]. The Act provides that the State Board of Assessors shall ascertain the value of the franchises separately. They are to ascertain their true value. They have a value which can be estimated. *State Railroad Tax Cases*, *ubi supra*.

There is no substance in the objection that the law in question contravenes the Fourteenth Amendment to the Federal Constitution, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The Act provides that a hearing be given to the companies interested touching the valuation and assessment of the property, and for a review of the assessment by the board upon complaint of any company or person aggrieved, or of the Attorney-General, or of any member of the board in behalf of the State that the property is assessed too low, or that property has been omitted, and for the correction thereof by the board as shall seem just; and that if such complaint be by the Attorney-General or a member of the board, there must be notice to the company or person to be affected by the proceedings. The Act also provides that any company or person assessed, or the Attorney-General in behalf of the State, may contest by *certiorari* the validity or amount of any tax levied under the Act, and that upon the writ relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient as in cases where it is claimed that the principle upon which the assessment is made is erroneous. This present

proceeding is an illustration of the extent to which and the thoroughness with which such matters may be litigated.

Without entering upon the question raised upon the hearing, whether artificial persons are within the scope of the Fourteenth Amendment to the Federal Constitution, it is enough to say that, in the Supreme Court of the United States, it has been held that laws similar to that under consideration are not in violation of the provisions of that amendment. In *Davidson v. New Orleans*, 96 U. S. 97 (1877), [Bk. 24, L. ed. 616], it was held that whenever by the laws of a State, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law.

And the same doctrine was affirmed in the *Kentucky Railroad Tax Cases*, 115 U. S. 821 (1885) [Bk. 29, L. ed. 414]. In that case it was insisted that the law of Kentucky made an unjust and unconstitutional discrimination against railroad companies and their property, because such property, though called real estate in the legislation, was classed by itself as being distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, which methods differed also from those which were applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. And it was urged that such discrimination and difference were in violation of the rights of the railroad company under that clause of the Fourteenth Amendment which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. The court said, on this point, that there was nothing in the Constitution of Kentucky which required that taxes should be levied by uniform method upon all descriptions of property; but the whole matter is left to the discretion of the legislative power, and that there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods; that the rule of equality in respect to the subject only requires that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances, and that there is, therefore, no objection to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained, and that the different nature and uses of their property justify the discrimination in that respect which the Legislature has seen fit to make.

It may be remarked that in what are known as the *San Mateo Case* (8 Am. & Eng. R. R. Cases, 1), and the *Santa Clara Case* (9 Sawy.

165), in the United States Circuit Court for the District of California, the adjudication in reference to the Fourteenth Amendment was upon a provision of the Constitution of California denying to railroad and other quasi public corporations the same right of exemption from the taxable value of their property of the amount of a mortgage debt thereon which was allowed to others. This discrimination was held to be a denial of the equal protection of the laws. Those cases deal with a constitutional discrimination. They have no bearing upon the cases in hand to which the authoritative decisions of the United States Supreme Court, above referred to, are pertinent.

It remains to consider the objection that the Act is inapplicable to those railroad companies whose charters contain a provision that the company shall pay a state tax of one-half of one per centum upon the cost of the railroad, "provided that no other tax or impost shall be levied or assessed upon said company." By the Act "concerning corporations" it is provided that the charter of every company which shall thereafter (that part of the Act was passed in 1846) be granted by or created under any of the Acts of the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature. Every charter granted since the passage of that section is subject to it. A similar provision is contained in most of the railroad charters. It has been held in this court that no irrevocable contract can result from the provisions of a charter which is made in terms subject to alteration, amendment or repeal by the power granting it. *State, M. & E. R. R. Co. v. Miller, Collector*, 2 Vroom, 521; *State, J. C. and B. R. R. Co. pros. v. Jersey City*, Id. 575. The provision in the charter as to tax was merely a declaration that the Legislature at the time of passing the charter intended that the companies should not then be chargeable with any other tax than the one-half of one per centum. *Little v. Bowers*, 17 Vroom, 300. And those charters being subject to alteration, the provision as to tax contained therein presents no obstacle to the application of the Act of 1884 to the property of the companies. By the reservation of the power to alter, the Legislature retained the power to tax.

On the hearing of these cases this court declared that it would not hear argument at that time upon the subject of the liability of companies claiming to have irrevocable contracts protecting them from the operation of the Act. But four of the prosecutors, viz.: The Morris Canal and Banking Company, The Morris and Essex Railroad Company, The Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, claim to have such contracts. The judgments of the supreme court in all the cases, except those in which those companies are prosecutors, should be reversed and the records remitted to the supreme court to be proceeded upon according to law. In those cases the records should be retained for argument upon the question reserved as to whether those companies have such irrevocable contracts.

Parker, J., delivered the following opinion:
On the 10th day of April, 1884, an Act was passed by the Legislature of the State of New

Jersey, entitled "An Act for the Taxation of Railroad and Canal Property." Under that Act the Central Railroad Company of New Jersey and other like companies were taxed on their property used by them for railroad and canal purposes.

The validity of these assessments was contested in the supreme court, and they were by said court adjudged invalid, on the ground of the unconstitutionality of the Act.

An abstract of the Act of 1884 is given in the opinion which has just been read by the Chancellor, and I will not repeat it.

At the opening of the argument in this court, it was announced that counsel would be heard upon two questions, viz.: 1, whether, if the Act of 1884 be invalid, there is any lawful method of assessing taxes upon said Companies in reference to the subjects of taxation mentioned in that Act; and 2, whether the Act of 1884 is constitutional.

In order to answer the first question, the course of legislation in this State on the subject of taxation of corporations of this character should be considered.

In the infancy of this class of corporations, when struggling for existence, the amount of tax they were required to pay into the state treasury was smaller. The State favored them by limiting the annual tax to be paid by such corporations to the one-half of one per cent on the cost of their respective roads. This tax was for state purposes, and they were not assessed for local taxes.

The wise and liberal policy adopted by the State was founded in part on the fact that the enterprises in which such companies were engaged were at that time of doubtful success, and in part on the belief that if successful they would contribute vastly to the public good.

As time progressed, these corporations extended their business operations and acquired additional property, often of great value, until in some sections of the State, especially in the cities, the exemptions from local taxation became so great as to incumber the property of citizens liable to be taxed, with a heavy burden.

To prevent injustice arising from inequality of taxation, and to equalize, as far as possible, the public burdens, the Legislature, on the second day of April, 1873, passed an Act, the avowed object of which was to establish just rules for the taxation of railroad property. This Act made a radical change in the system. It provided not only that railroad companies should pay upon the cost, equipment and appendages of their roads, a state tax at such rate as had before been fixed by law, but also upon all real property of such companies, owned by them (excepting the main stem not exceeding one hundred feet in width), a county and municipal tax for the benefit of the counties, townships and cities of the State, respectively, where the same were situated, after the rate of one per cent, exempting, however, from such tax, land not exceeding ten acres lying in one parcel at the termini of the respective roads.

The Law of 1873 was passed before the adoption of the constitutional amendment in reference to taxation; and, therefore, its validity cannot be wholly tested by the same standard as the Act of 1884. But upon the question now under consideration, viz.: whether, if the Act of 1884

be invalid, there is any lawful method in the Act of 1873 of making the assessments on the subjects of taxation mentioned in the Act of 1884, it is sufficient to remark that, although based on the same general principle as the Act of 1884, yet inasmuch as by the Act of 1873 the assessment was to be made on cost and not on true value, as the constitutional amendment prescribes, the Act of 1873 will not sustain these assessments.

On the same day that the Act of 1873 was approved, the then Governor signed what is termed the General Railroad Law, the nineteenth section of which provides that after any railroad constructed under that Act should be in operation, the corporation owning it should pay to the state treasurer a tax of one-half of one per cent annually on the cost, equipment and appendages of said road bed, and also pay such other taxes as might be assessed from time to time by general law, applicable to all railroads over which the Legislature should have power for that purpose, and that such railroads should be taxed for the value of their real estate (except the road bed of one hundred feet in width), and on personal property, as then taxed in the cities or townships where it should lie.

The Act of 1876, providing for state taxes on railroads, was passed after the adoption of the constitutional amendment. This Act is almost identical with the Act of 1873. The chief object of the Act of 1876 seems to have been to make the system of railroad taxation conform to the constitutional amendment that took effect in 1875, which prescribed that the assessment should be on true value, instead of on cost. Where the Acts of 1873 and 1876 did not conflict, the former stood; and under those two Acts both the state and local taxes on railroad property in this State were assessed and collected, up to the enactment of the Law of 1884. Upon an examination of those Acts, in comparison with that of 1884, it will be seen that they are grounded on the same general principle. If the Act of 1884 be unconstitutional, so is the Act of 1876; and these assessments cannot, therefore, be upheld under the Act of 1876.

Neither can they be supported by the General Law of 1866, because that law has no reference to taxation on railroad and canal property.

If the Act of 1884 be unconstitutional and void, the 16th section of that Act, which authorizes the supreme court to increase or reduce the assessment, will not avail, for the supreme court has no power to adjust or refer back an assessment made under an unconstitutional Act, unless after the original assessment an Act had been passed whereby a legal assessment could be made. Such was the decision of this court in construing the Act of 1881, reported in *Elizabeth v. Meeker*, 16 Vroom, 157.

Where the principle on which the Act rests is in conflict with the Constitution, one part of the assessment should not be set aside and the other part be sustained. In this case there cannot be a separation of the parts without doing violence to the general scheme, and running counter to the intent of the law-making power. If the Act of 1884 is void as to local taxation, it is also a nullity as to state taxes.

Having seen that if the Act of 1884 be unconstitutional and void, there is no lawful method of assessment upon these companies in refer-

ence to the subjects of taxation mentioned in such Act, the vital question now arises, whether the Act of 1884 is constitutional. Upon the answer to this question depends the decision of this cause.

I agree with the supreme court in that part of the opinion which holds the Act of 1884 not invalid because it directs that the valuation and assessment shall be made by a board of assessors especially appointed for the purpose. It matters not what the machinery set in motion by the Legislature to execute a tax law may be, so long as the principle lying at the root of the Act is not antagonistic to the Constitution. Nor would it affect the case, if such machinery be found defective, or if the board made mistakes. The Act gives the supreme court ample power to correct mistakes in the application of the Act.

Nor is the Act of 1884 invalid because in the ascertainment of the value of the property of the companies the franchise is to be taken into account as one element of value. The opinion of the supreme court rightly holds "that this subject is not debatable at the present day, and the doctrine has become already accredited by many decisions, as well of the federal as of the state courts."

One so-called vice of the Act of 1884 is stated in the opinion of the supreme court in the form of an interrogatory. It is asked "Whether by the law and Constitution of the State it is competent for the Legislature, at will, to select the property of two classes of corporations and impose a tax upon such property, at the same time exempting all other property from the burden." If the Act of 1884 was the only tax law on the statute book, the answer should be that it was not competent so to do. But the Act is only one of a series of tax laws under which property in the State is taxed. If by virtue of the various tax laws in force all the property in the State (except that which is devoted to collegiate, academic, religious or charitable purposes) is taxed, how can it be said that the Legislature, at will, selected the property of two classes of corporations and imposed a tax upon such property and at the same time exempted all other property from the burden of taxation. All taxes are, in one sense, state taxes. They are assessed and raised under different laws enacted by the Legislature of the State, all forming one general scheme of taxation, designed to bring all the property in the State (liable to tax) under general laws and uniform rules, according to its true value. Different agencies are employed to assess and collect, and the sums are applied to various public purposes. But this does not vitiate the system of taxation, nor render invalid any one of the Acts which, with others, constitute the system, if the constitutional prohibition be not violated.

While the taxing power is an inherent attribute of state sovereignty, to be exercised only by the legislative branch of the government, yet it is controlled by constitutional limitations which the people have adopted. So long as the legislative branch of the government conforms to the Constitution, it is supreme on the subject of taxation. It has the power and the right to enact that local officers in each taxing district shall assess and collect for their respective districts the county, township and city taxes, and distribute the money without its passing through

the state treasury; or to enact that a state board shall assess and collect all taxes and bring all the money into the treasury, in part to be distributed by the state among the municipalities; or to provide for a State board to assess and collect one portion of the tax and a local board the residue. So long as all property (not exempt by statute) is reached and taxed according to its true value by general laws and uniform rules, it matters not whether the end be accomplished through one statute or through many forming one general system.

The mode of taxation under the Act to establish a system of public instruction, approved March 27, 1874, is pertinent in this connection as an illustration. Under that Act a state school tax was directed to be raised (in lieu of township school taxes), to be levied and collected by the local officers, to be paid through the several county collectors into the state treasury, and be redistributed by the State so as finally to reach the several school districts. This Act is an instance of direction by the Legislature of the specific channel into which a tax raised for a specific purpose may be made to go before it will reach the contemplated object. It shows the power of the Legislature over the subject of taxation, restrained only by constitutional provisions.

Another somewhat similar instance is the Act in reference to insurance companies of the State, the 89th section of which requires that every company organized under the Act shall pay (not as a license fee, but as tax) into the state treasury one-quarter of one per cent per annum on its capital stock for the school fund. Foreign insurance companies are required not only to pay a license fee for the privilege of transacting business within the State, but also a tax of two per cent on all premiums received in the State, to be distributed among organized fire departments, for the use of disabled firemen.

Enough has been stated to show the power of the Legislature over the subject of taxation and to demonstrate that in forming a judgment as to the validity of a specified Act, it must be taken in connection with all other laws operative on the same subject.

When the state government desires to raise a tax for state purposes, through the local officers in the several taxing districts, it becomes necessary to fix the amount to be raised and apportion it among the counties on the basis of ratables; but when the State chooses to levy a state tax direct, through the machinery of its own officers selected for the purpose, an apportionment is not needed; and it is only required to ascertain the true value of the property to be assessed and to fix the rate.

It is alleged that the Act of 1884 is unconstitutional and void because it violates the clause of the amended Constitution, which requires property to be taxed "under general laws and by uniform rules according to its true value." In the arguments addressed to the court by the several counsel of the defendants in error, this objection to the Act was elaborated and enforced, and the court is called upon to consider this branch of the case very fully.

In the first place, it will be observed that the word "all" is omitted from the sentence which contains the constitutional restriction on the power of taxation. This omission by the com-

mission that prepared the amendment and by the Legislature that submitted it to the people was not accidental. It was intended that some property should be exempt, and that upon the classes of property which the Legislature saw fit to tax, the assessment should be according to the true value and by uniform rules, affecting alike all property of a class.

In the opinion of the supreme court in this case, it is conceded that the Legislature has the power to classify property for the purpose of taxation; but it is maintained that a class must not be declared arbitrarily, and that it must arise out of the nature of the things classed. This is true, but is not property used by railroad and canal companies for the purposes of their business, a class of property arising out of its nature? It is a class universally recognized as different from any other class in many respects. It is not the abstract value of the rails and ties as so much steel and wood, or of the land on which they rest as farm land or building lots, or of the tangible personal property in itself considered, which are alone to be taken into account in ascertaining the true value of property used for railroad purposes, but the franchise also, which puts life into what otherwise would be comparatively dead property, of little value. The true value of property used for railroad or canal purposes cannot be arrived at except in treating it as a class by itself.

This view is sustained, not only by our common knowledge, gained by observation, but is held by numerous decisions of the courts.

In 99 U. S. 722 [Bk. 25, L. ed. 502], *Chief Justice Waite* says: "Railroads are a peculiar species of property; and railroad corporations are in some respects peculiar corporations."

In the case of the *Louisville and Nashville Railroad Company v. Kentucky*, 115 U. S. 321 [Bk. 29, L. ed. 414], *Justice Matthews* said: "The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property."

As has been seen already, the Acts of 1873 and 1876 were grounded on the same general principle as the Act of 1884, and it becomes important in this connection to inquire how the courts have practically regarded those former Acts. In case of *State, Central R. R. Co. of New Jersey, pro. v. Mutchler, Collector of Town of Phillipsburg*, reported in 12 Vroom, 96, a bridge within the main stem (100 feet wide) of the railroad of said company was assessed for local taxes, and the company claimed exemption from such assessment, under the laws then existing on the subject of railroad taxation. Those laws were the Acts of 1873 and 1876 before mentioned. On page 97 the court, in its opinion delivered in 1879, said: "The first section of the Act for the taxation of railroad corporations of April 2, 1873, exempts from county, township and municipal taxation the main stem or road bed and track of such corporation, not exceeding 100 feet in width. The last-mentioned Act was modified by the Act of April 13, 1876, but the Act of 1873 was not repealed. Its provisions, except so far as altered by Act of 1876, are still in force. In the respects mentioned it is in force, and lands held by such corporations within the prescribed limits are exempt from taxation for county, township and municipal purposes, if used exclusively for railroad pur-

poses. It purports to establish a uniform rule of taxation on this subject. A uniform rule must necessarily be the only rule applicable to the entire class of subjects embraced within the provisions of the statute, and by implication supersedes and excludes all other rules on the subject. The Act of 1873 is expressly made applicable to all railroad corporations occupying or using railroads in this State, whether as lessees or otherwise." The local assessment on the bridge was set aside. It does not appear that the question of the validity of the Acts of 1873 and 1876 was raised, or that it suggested itself to court or counsel on that occasion. The validity of the Acts was taken for granted and the result was that the company had the benefit of those Acts of being declared exempt from the tax on the bridge. Had those Acts been unconstitutional and void, the assessment for local tax on the bridge was lawful.

In *Van Riper v. Parsons*, 11 Vroom, 8, the supreme court uses the following language, viz.: "A law settling the methods by which all railroads should become incorporated, would be special in the sense that it would be confined in its operation to but a single kind of corporations; and so a law would be local, by this same test, that should provide for the organization, under one system, of all the municipal governments in the State, as such a law would manifestly have a restricted effect with respect to locality. But who, conversant with the usage touching these terms, would venture the assertion that such statutes as these would not be general laws? All legislation is based, of necessity, on a classification of its subjects; and when such classification is fairly made, and the legislation founded upon it is appropriate to such classification, such legislation is as legitimate now as it would have been prior to the recent amendments to the Constitution. * * * If a set of objects be fairly classified, a law embracing them will be a general one and in all respects unobjectionable."

The case of *Van Riper v. Parsons* came before the supreme court again, and on page 123 of 11th Vroom, the syllabus of the decision is tersely stated thus, viz.: "A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law but a general law." If property used for railroad and canal purposes be not distinguished from all other property by marked and important characteristics, it would be difficult to find any property which could be classified.

It should be observed that at the time the constitutional amendment was adopted, the Act of 1873, which treated property used for railroad purposes as a separate class, was in force; and that feature of the Act has never been changed.

The case of the *New Jersey Southern Railroad Company v. Board of Railroad Comrs.* reported in 12 Vroom, page 235, was decided more than three years after the amendment to the Constitution took effect. That opinion is founded on the assumption that the Acts of 1873 and 1876, for the taxation of property used for railroad purposes, were constitutional and valid laws. The question of constitutionality was not, in

that case, distinctly raised, but the validity of those Acts was taken for granted and acted upon, as has been repeatedly done by the courts during a period of ten years after the adoption of the constitutional amendment in reference to taxation. In the case to which reference is last made, the justice who delivered the opinion said: "In 1877 a state tax was laid on each of these corporations by the board of railroad commissioners, pursuant to the provisions of the Act entitled 'An Act Providing for State Taxes on Railroads and a More Efficient Collection Thereof,' approved April 13, 1876. These writs of *certiorari* were sued out to review the legality of such assessments." The court held the assessments legal and properly made.

Although no case is reported wherein the constitutional objection to the Act of 1876 or 1873 was expressly made, yet it appears by the files and records in the office of the clerk of the supreme court that each of the then justices had before him for review assessments on railroad property under the fourth section of the Act of 1876, on claim of reduction, and that each justice proceeded to act under that section as if the law was constitutional. In one case the validity of the Act was attacked, but the justice disregarded the objection and fixed the amount of the tax. A *certiorari* was taken, and to the return was attached by counsel of the company the following, viz.: "The Constitution of the State of New Jersey provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value. It is submitted that the statute under which the taxes in question have been assessed is not a general but a special law, applicable to corporate property in railroads only, and that the Act is unconstitutional and void." The *certiorari* in that case was dismissed for want of prosecution, but was reinstated by consent. The writ was again dismissed and a writ of error taken, but the case was never brought to a hearing.

Under the Act of 1876 large sums of money were each year collected as taxes on property used for railroad purposes and paid into the state treasury. After such action on the part of the State, and acquiescence on the part of the Companies for so long a period of time under the Acts of 1876 and 1873, the question of the constitutionality of a similar Act is now raised. Such acquiescence on the part of the companies affected may not be decisive upon the question of constitutionality now distinctly raised, yet the practical construction given by the courts and acted upon by the companies may be taken as some evidence of contemporaneous opinion. As was said by the supreme court in the case of *State v. Kelsey*, 15 Vroom, 1, "Such a course of practice may amount to a practical exposition."

The uniformity of rules in taxation which the Constitution requires is that uniformity which operates on the whole of a class. A tax upon property of railway corporations should be governed by uniform rules as to the property of all such companies used for railroad purposes. The Act of 1884, now under examination, is within this rule. It operates uniformly upon the property of all railroad corporations used for railroad purposes, being, as has been already demonstrated, a distinctive class, by

reason of inherent qualities, and, therefore, not antagonistic to the constitutional requirement of uniformity.

Still another question has arisen which should here be disposed of. It is whether these Companies are exempt from the assessments made under the Act of 1884, by reason of the clause inserted in their respective charters, that the tax of one-half of one per cent is in lieu of all other taxes or imposts. This is accompanied by a subsequent clause in the same connection, which provides that the charter may be altered, modified or repealed. This provision is also expressed in the sixth section of the General Corporation Act. Charters of this nature have received construction repeatedly in the New Jersey Courts.

In *State, Jersey City and Bergen R. R. Co. v. Jersey City*, 2 Vroom, 577, the justice who delivered the opinion of the court of errors, after quoting the clause in the charter of the company providing for the payment to the treasurer of the State annually by the company of one-half of one per cent on the cost of the road, and that no other tax or impost should be assessed or levied upon said company, and that the Legislature might at any time alter, modify or repeal the same, said: "The contract which is set up is the proviso in the fourteenth section of their charter before cited, which, following the provision fixing the annual sum they are to pay, declares that no other tax or impost shall be levied or assessed upon them. This designation of what they are to pay, connected with the proviso excluding all other burdens in the form of taxation, they contend, forms a contract between them and the State. These statutory provisions form, in my opinion, a contract neither in letter nor spirit. They are to be read in connection with the other provisions in the charter which reserves to the Legislature the right to alter, modify or repeal."

In 1 Vroom, 368, it is decided, in referring to the latter clause, that "The language extends to all the provisions of the charter."

In *State, Little, v. Powers*, 17 Vroom, 300, it was adjudged in effect that such provision in a railroad charter was not a contract, and that a railroad corporation having a repealable charter was subject to additional taxation.

In *Tomlinson v. Jessup*, reported in 15 Wallace, 454 [82 U. S. bk. 21, L. ed. 204], the Supreme Court of the United States held that "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

Having considered the question of the constitutionality of the Act of 1884, in all its bearings, after a careful examination of the organic law and all the statutes relating to the assessment of taxes on railroad and canal property, and the authorities on the subject, I have reached the conclusion that the said Act does not in any particular violate the Constitution of the State of New Jersey and that it is a valid law.

The Act in question is not only constitutional but is founded on a just basis. While it requires of the Companies the payment of one-half of one per cent for state purposes, it so guards against imposition, in the assessment of local taxes, that in no case can a company be

forced to pay more than the local rate, but may pay much less. If there be any inequality, it is favorable to the companies, and of this they have no legal right to complain. It is the injured party who has the right to move for the correction of errors.

But it is contended that the Act of 1884 is in violation of the Fourteenth Amendment of the Federal Constitution, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. To sustain this contention the case of *County of San Mateo v. Southern Pacific R. R. Co.* is cited. A critical examination of that case leads to the conclusion that it does not have the slightest application to the question now before the court.

The County of San Mateo brought suit against the company to recover state and county taxes claimed to be due from that corporation. The company had expended a large sum of money in the construction of its road, and, to secure a portion of the indebtedness, had executed a mortgage upon its railroad, rolling stock, appurtenances and franchises, and also upon some land not used for railroad purposes. The board of equalization of the State of California assessed against the company taxes on the whole of its property, without any deduction from its value on account of the mortgage given upon it to secure its indebtedness. Under the Constitution of that State, persons operating a railroad only in one county had the right to deduct from the valuation for mortgage debts, while those operating a railroad in more counties than one could not claim deduction therefor.

There was also another distinction made in the Constitution of California between railroad property held by individuals and that held by corporations, which worked inequality. In the opinion delivered by Justice Field, in the United States Circuit Court, in the *San Mateo Case*, he said: "If we look at the scheme of taxation prescribed by the Constitution of California, for the property of railroad companies, we will perceive a flagrant departure from the rule of equality and uniformity, so essential in the distribution of the burdens of government. Wherever an individual holds property incumbered with a mortgage, he is assessed at its value, after deducting from it the amount of the mortgage; if a railroad corporation holds property subject to a mortgage, it is assessed at its full value without any deduction for the mortgage, and as if the property was unincumbered."

It will at once be seen that the facts in the *San Mateo Case* are entirely different from those developed by an examination of the Act of 1884; and how the decision in that case can be tortured into an authority to show that the Act of 1884 violated in any respect the Fourteenth Amendment to the Constitution of the United States is beyond my comprehension.

The Act of 1884 makes no such discrimination in the valuation of railroad property, incumbered by mortgage, as is made by the Constitution of California. On the contrary, the Act of 1884, in the 10th section, expressly provides, that in case any railroad or canal company shall claim a deduction, on account of mortgage, or debt secured thereby, the state board of assessors shall allow the same, in the cases in which and to the extent to which

the local assessors are authorized by law to allow a deduction in the case of any other owner of mortgaged lands.

Upon the whole case, I am clear in the opinion that the Act "for the taxation of railroad and canal property," approved April 10, 1884, is not unconstitutional and void, but is constitutional and valid, in all its parts.

The judgment of the Supreme Court should be reversed.

Scudder, J., delivered the following opinion:

I have prepared an opinion stating my conclusions, without discussing the whole subject in controversy. The questions raised and discussed on the writs of error to this court relate to the validity of the Act entitled "An Act for the Taxation of Railroad and Canal Property," approved April 10, 1884, and whether, if said law be invalid, there is any other statute under which this court may make or direct a legal assessment. It is not necessary to add anything to what has been already said by other members of the court on the latter part of this proposition; and I entirely agree with the conclusion that no prior statute exists by which these disputed assessments against railroad corporations can be amended or sustained, if this law be invalid, or by which any new assessment can be substituted in the place of these by any action of this court. The former part of the proposition is more difficult to determine. Is this law invalid, so that it cannot be executed without violating the fundamental law of our State? If it be not thus controlled and annulled, it is the duty of this court to give it effect. It is not our province to say whether the law is impolitic, or even oppressive, or unjust in its provisions, so long as it does not violate the constitutional rights of these corporations in the enforcement of what is designed to be strictly a tax law. The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the State. *Cooley, Taxation* 34. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people, by whom its members are elected. So, if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution. *Veazie Bank v. Fenno*, 8 Wall. 548 [75 U. S. bk. 19, L. ed. 487].

A mere suggestion of these familiar principles of law, giving the well defined duties and powers of the co-ordinate branches of our government will dispose of many points in the arguments of counsel and bring us to the real issue which we have the power at this time to decide under the assignment of errors before us. Is this tax law of which these railroad corporations complain unconstitutional? If so, this case is ended. If not, further proceedings may correct its alleged defective execution. That part of the Constitution which is said to be violated by its enactments is article 4, sec. 7, par. 12: "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

There can be no question that this law imposes a tax on property, and it is not a fran-

chise tax. By subdivision 4 of section 3 of the Act, the value of the franchise is to be estimated and included in ascertaining the true value of all property used for railroad and canal purposes, and the tax is imposed on this total valuation. All is designated in the Act as property, and is within the scope of this paragraph of the Constitution. That the franchise of a railroad or canal company may be thus valued and assessed for general taxes is abundantly settled both by authority and precedent in legislative Acts and in the decisions of courts. It has an appreciable market value not in all cases easy to measure and not always determinable by the same rule or estimate. Corporate rights and privileges by grant from the government are not mere abstractions, or so involved with the other property of the corporation that they cannot be valued. The land, road bed, rails, buildings and materials of which a railroad are composed have a value; and the added worth given to them by the uses to which they may be applied by the public grant of a franchise for such uses may be approximately if not exactly estimated. It has often been done and sanctioned by courts. How this may best be done must be left largely to legislative discretion and judgment. The whole aggregate property of the railroad is thus to be valued and brought together for taxation; and the assessment is laid upon it to supply a revenue for the government of the State. This is an assessment of property for taxation within the above cited paragraph of the Constitution, and, by its terms, must be made under general laws. This I hold is a general law, applicable to all the railroads and canal companies in the State, unless they are protected by express limitations of taxation in their charter, and by what are called, in some cases, irrevocable contracts beyond legislative control. Railroad corporations have peculiar qualities which distinguish them from mere private corporations, or other public or quasi public corporations, in the right of eminent domain to condemn lands, conferred on them by charter; in the uses to which their railroads may be applied by them as carriers of passengers and freight, receiving tolls or fares for the same; in the employment of steam power—a dangerous agency—in passing through the State, and their protection in the careful use of such agency; in the structure of the road, with its rails, cuts, embankments, often built and maintained at a great detriment to other property; in the extent of the road, often through several counties, or across the State; in the depots, freight houses, wharves, and the great accumulation of property at the termini and other points on the line of the railway. Canals have some of the same peculiarities in the construction and maintenance of their water ways. These characteristics, which so clearly distinguish them from other corporations, make it almost a necessity that they should form a class by themselves; and the right to do this for taxation has been recognized in the charters of companies in our General Railroad Act, the General Canal Act, and laws passed prior to and since the amendments to the Constitution in 1875, notably the tax laws of 1878 and 1876, all of which have been enforced and acquiesced in. In the *Kentucky Railroad Tax Cases*, 115 U. S. 821 [Bk. 29, L. ed. 414], the classification of the

property of railroads for taxation is recognized, and in the opinion of the court, *Justice Matthews* says: "The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vested by the Constitution of the State in its Legislature, and necessarily involves the right on its part to devise and carry into effect a distinct scheme with different tribunals in the proceeding to value it."

We have no right to assume that this discretion will be abused and railroads taxed out of existence, as has been said, and to strain the power of the court to protect them in anticipation of such attempt at destruction. If the property of railroad and canal companies admits of this distinctive classification, founded on real differences and not on mere devices for the manifest purpose to oppress and harass them by unequal taxation, then the law which classifies them for taxation is general, within the description of such a law in the well known and oft quoted decisions of our own courts.

The word "all" does not precede the word "property" in the paragraph referred to, and property may, therefore, be classified, and even exempted from taxation, as is sometimes done, without violating the express words of the Constitution.

Besides the requirement that property shall be assessed for taxes under general laws it must also be assessed "by uniform rules." The word "uniform" is defined as "not variable," "not different," "having the same form or manner." As it stands in this paragraph of the Constitution it means that rules must not be variable in their application to the subject of taxation included in the classification of property. In the *Head Money Cases*, 112 U. S. 580-594 [Bk. 28, L. ed. 798, 802], in construing the clause of the Constitution of the United States that "All duties, imposts and excises shall be uniform throughout the United States," the court said: "The tax is uniform when it operates with the same force and effect in every place where the subject is found," but that "perfect uniformity and perfect equality of taxation in all aspects in which the human mind can view it, is a baseless dream, as this court has said more than once;" citing *State Railroad Tax Cases*, 92 U. S. 575, 612 [Bk. 23, L. ed. 663, 673]. The rules for taxation must be uniform as to the property in the class on which it operates. As to railroad property, all property in that class must be assessed for taxes by the same rules. But suppose the law by its uniformity does produce unequal and unjust results in some cases, is it therefore to be annulled? Suppose, as in this case, that the main stem, which includes the road bed not exceeding 100 feet in width, with its rails, sleepers and depot buildings used for passengers, connected therewith, is assessed at one rate, and the other real estate used for railroad purposes in each taxing district is assessed at another rate, and no good reason is assigned for such difference; or suppose, as in section 6 of this Act of 1884, it is enacted "That whenever in any taxing district there shall be several branch lines of railroad belonging to or controlled by one company, or operated under one management, the assessors shall designate one of said lines as the main stem and the value of

the others shall be included in the separate valuation provided for in the second subdivision, section 3, in this bill (that is, the value of the real estate used for railroad purposes in each taxing district in this State, other than the main stem), and that this rule applied to some of the railroads produces unequal and unjust results, will these invalidate the law in whole or in part? These inequalities arise mainly from the fact that some railroad corporations have acquired more of a certain kind of property than others, and they have extended their holding, in many cases, far beyond the width of 100 feet for the main stem of the road as originally intended and provided for in their charters. If all are taxed alike for such excess, the rule of uniformity is not thereby violated. Has not the Legislature the legal right to say that for the main stem of the road 100 feet in width, which the original charter contemplated the railroad companies should hold and use, they will tax at the rate of one half of one per cent for state purposes, which was the amount originally fixed in most if not all of the charters; but for all acquired beyond 100 feet in width a greater tax shall be paid, not to exceed in the aggregate of both taxes the local rate as fixed and assessed for county and municipal purposes? The same rule is applied, by this separation, to all in the class, and they are by this law carefully guarded, not only against assessment at a higher rate than others of the class, but also against a higher rate than is imposed on other property holders in the several taxing districts where their property is located.

The objection that the property of railroads by this law is not assessed by taxes according to its true value because it can only be truly valued as an entirety, and not in parcels, as provided for in the Act, is not well taken. The method of determining the true value of property must be left to the discretion of the Legislature. If this value is fixed as the basis of taxation, the method and the agencies to be used to ascertain it belong to the legislative and not to the judicial province.

Nothing is said in the Constitution as to the apportionment of taxes after they are assessed and collected. If, as in this case, one half of one per cent is reserved for state purposes, and one per cent be distributed for local expenses for which general taxes may be assessed, this court cannot interfere with such apportionment, for the reason that there is no restriction in the Constitution of the power of the Legislature to make such apportionment. This is but a convenient form of collection and distribution of taxes when collected, without increasing the general rate of either the individual taxpayer or the railroad and canal company.

It is argued that "the equal protection of the law" under the Fourteenth Amendment of the Constitution of the United States, exempts from any greater burden or charges than such as are equally imposed upon all others under like circumstances, and that this equal protection forbids unequal exactions of every kind, and among them that of unequal taxation. Admitting this to be so, and I am not disposed to deny it, the limitation to all persons and property in like circumstances restricts the comparison to all those within the same classification for taxation. This law does not stand alone in the classifica-

tion of property for taxation, but it is part of a system of tax laws by which this burden is distributed among all classes of persons and upon all taxable property, with slight exemptions, within the State, and taxes are thereby raised for the expenses of the state, county and municipal governments in their different departments, and according to their several requirements. Thus far, as it appears to me, there has been a fair effort throughout the whole system to place all persons and property, so far as may be practicable, within the equal protection of the laws, both constitutional and legislative. That there are errors in details and in some of the methods of assessment, all will probably admit; and doubtless when these are made plain by the practical working of the law they will be corrected. But substantial and not exact equality is all that can be required under any system of legislation for taxes. Unless this law is manifestly wrong, it should be sustained. In my opinion, it is not, and the judgment should be reversed.

Paterson, J., delivered the following opinion:

I have reached a conclusion in harmony with the opinion of the court, and therefore shall set forth the reasons for so doing but briefly on the record. Nor would I consider it at all necessary, if such reasons were similar precisely to those formulated in the judgment to be rendered. I think, besides, from the gravity of the matters involved in the determination of the case, that these views should be expressed by more than a mere signification of assent. This is why I propose to add something to what has been said, though not required to sustain or strengthen the decision about to be given.

Until thirty-five years ago, state revenue was raised in New Jersey by assessments imposed on land and certainties, so-called, that is gold and silver coin, and other property of a visible and tangible nature. This system had the merit of simplicity; but public sentiment, after a century and a half of practice, demanded a change because the burden of taxation was distributed unequally and unjustly. So, to remedy this, another species of property, invisible, incorporeal and intangible was brought under the reach of the assessor. But under the new departure, though intended to remove the dissatisfaction existing previously, complaints of injustice were none the less frequent than before, and while the essential features were preserved, the plan was subject to constant modification. Equal taxation, like other abstract propositions, was easy to lay down in words; but to carry out in practice, *hic labor, hoc opus erat*. Finally, after a quarter of a century of experimental economy, constitutional restriction, to which the legislative authority had not been subjected previously, interposed, and declared that property should be assessed for taxes under general laws and by uniform rules, according to its true value. The words are imposing and equitable in sound but, like all similar declarations of a general nature, when submitted to the touchstone of human ingenuity, sharpened by legal acumen, are capable of various interpretations when sought to be applied to a practical result. The case now

under consideration is an illustration in point. Difficulties arise at once in establishing any principle of impost on property for purposes of state revenue. Note here how learned legal critics differ as to the meaning of state tax. While that phraseology may be, and for ordinary and distinctive purposes is, distinguished from what, for similar convenience, are recognized as local or municipal assessments, still when considered as a system or science, no tax can be regarded as other than an impost of the State, because no other authority can lay a custom levy. It is in such a character and connection only that a judicial tribunal can contemplate the word "taxes" in a constitutional aspect. As matter of fact, any ordinary state tax, whenever laid, is collected through municipal instrumentality. Any argument drawn from a specious distinction between state and local taxation must be outside of constitutional intent, and therefore fallacious, and should be disregarded in arriving at a final determination of this controversy.

Then, too, the single and simple word "property," the very first in the amendment restricting legislative power in this particular, has elicited vigorous judicial criticism as well as sharp and spicy legal sparring. Who would suppose so little a phrase would involve such a wide variation as shown in the argument? That so much could have been said, so many learned words uttered in attempting to prove the meaning of the classical little *logos* as used in the constitutional sentence? Property was to be assessed for taxes, nothing else could be. There is a popular definition of the word, in which those who have none are not concerned, and those who have, generally try to keep but little on hand during the summer months. The word would seem to have but one signification for practical purposes. It is something seen and handled, touched, of which there is a visible fixed sign. All agree to that. But it is said property as used in the amendment implies totality; and, if it does not, then some only and not all is assessed. In opposition to this, it is claimed that whatever property is assessed is a totality, is all that is required by the Constitution. Here a difficulty is started that must be settled by a judicial tribunal. What meaning is contemplated by the use of the word? Property is the single *logos*. It is in the beginning of the sentence, single and simple, not qualified by any limitations. It must signify all or only some. The Constitution does not declare that the whole or part only of property should be assessed for taxes. What is the natural construction of the word in connection with practice and contemporary exposition? Legislative power had been the sole arbiter in matters of financial economy for nearly two centuries in the history of the Commonwealth prior to the restrictions of 1875, and the latter in this respect did not limit the discretion of that power. The same rule has obtained since as was followed before the amendment was adopted. There have been ten years of practice under the new dispensation, and that should go far toward determining the construction of the term. "Property" here is a totality, and "all property" could be no more, for the reason that both would mean whatever property was assessed in the exercise of legislative discretion. The con-

N. J.

struction that seems to me to be natural and proper is that whatever property the Legislature should determine to assess, whether all or a part, must be taxed after certain mode and manner. That body, untrammelled and sovereign as to this, might select whatever it chose to bear the burden of custom, tithe and tribute; and that would be a totality because it would be all the property made subject to taxation. In my judgment, there was error in the opinion of the supreme court in this respect.

This leads to the consideration of the constitutionality of the law, which is the only action a judicial tribunal can take. The taxing power is a legislative function exclusively, and is the life of a state government. Taxation is a prominent factor in state sovereignty. The power that exercises a prerogative of that high character cannot be stigmatized as a heresy. The exalted nature of the power is dwarfed because the use is so common. That other prerogative, the authority to declare war, is regarded generally as the *ultima thule*, the limit beyond which a State cannot go, but that must be furnished with the means of existence, or it becomes unavailing as an engine of destruction. It is wondrous because comparatively so uncommon. The light of the sun exceeds in intensity any product of human ingenuity, but is matter of everyday occurrence, and the radiance of his lustre excites no astonishment among men because so common to the eye. State taxation is before the people continually, and so the transcendent nature of the power it wields, the innate, inherent sovereign attributes it possesses are not recognized as if exercised less frequently. Taxation is always with us. Such a power, of necessity, must be arbitrary, more or less, in the execution of its details and destructions. Judicial decision can only restrain the exercise of this power within the limits of the Constitution; all other relief is legislative. In New Jersey this prerogative of the Legislature can be restricted by the interposition of a legal or equitable tribunal, simply and solely because it has run beyond the bounds imposed on it. In that case, it is within the province of a court to grant relief. A township assessor is as much an autocrat in his homœopathic domain as the quadrilateral created by the Act under review is within the limits of its more imperial sway. The acts of each may be supervised by legal authority, but such supervision does not touch or question the right of the Legislature in the premises.

The issue, then, to be determined here is whether this Act does or does not conflict with the Constitution. Had the Legislature authority, under the restrictive amendments of 1875, to pass this particular law for the taxation of railroad and canal property?

Three essential requirements are prescribed. Property taxed is to be assessed under general laws, by uniform rules and according to its true value. My reflections have led me to the conclusion that the last two elements will follow the determination of the first, or that this case turns on the question whether the statute is a general law of the kind contemplated by the Constitution. I shall consider them in the reverse order.

Property is to be assessed according to its true value. The Act requires the assessors to

do this, and the opinion admits that such valuation has been made under the law. This is just what the local assessor is required to do, and if he is governed exclusively by municipal interests is rather apt not to do. The state assessors were appointed to perform this work; they report that in the exercise of the discretion intrusted and the powers vested in them, they have determined what they consider to be a true value of the property to be assessed. They have taken all elements into consideration, and have fulfilled the purpose for which they were commissioned. The properties in question, therefore, have been assessed according to the intent of the Constitution; that is, at a true value through agents appointed by law.

Property, when taxed, is to be assessed by uniform rules. If it be found that the Act sought to be overthrown is a general law within the limits of the Constitution, then I fail to see in what way the assessors have done otherwise than cause the property they were required to tax to be so taxed by a uniform rule. The records show that just the same plan was adopted in each case. No discrimination in this respect is manifest. If there was, and it appeared that one road was assessed by one rule, and one by another, and a third by a mode different from either, a multiplicity of rules must have been shown in the result of the work of the commission. After a thorough and careful examination of the records, I find no evidence of this. Should the law stand the constitutional test, I think it clear that all the requisite essentials of uniform rules are preserved in its enactment. Let us see how this may be.

A general law, in the abstract, must be defined in some way before it can be carried out practically. It is by no means difficult to declare that property must be assessed under general laws. This, laid down as a general principle, would seem to command universal assent. Who will venture to disagree with the proposition? No better illustration, however, of the difficulties and differences attending on its execution can be found than is shown in the history of this Statute of 1884. Take a specimen. The appellants insist that the law is general in operation, and the framers designed to adhere to the letter and spirit of the Constitution. No legislator proposed to set up law in contravention of that. Oh, no, say the respondents, that is a mighty mistake; the law is special and not general. I quote directly from the record. Both are satisfied with the sound of the abstract declaration. But when a departure is attempted from that, a variation appears that is as divergent as many minds. Other instances of this divergence could be adduced from the books of the case, of all which it may be said that, like two parallel lines when extended, they run on but never meet, though, unlike those lines in this aspect, they become wider and still more wide apart upon their onward way. I can only say farther, in this connection, that it is the province of the court, under such circumstances, to settle and determine the matters in litigation; and, in my view, this must be decided ultimately by ascertaining whether the statute in question is or is not a general law in the intent of the Con-

stitution. If not, the whole superstructure of the law must fall.

Property in the State is to be taxed in that way only. Then, to be so taxed, a law must run or be coextensive with the jurisdiction of the Commonwealth and not affect simply a portion of the territorial limits. This includes all state territory, for the application of its prescription is not confined to any portion or portions, county or counties, city or cities; not even so much as a township is excepted from its operation. In this view it must be regarded as general. But the purport of the statute is to tax the property of railroads and canals, and no other kind. Is that within the meaning of the restriction? I think so, for the reason that if the word "general" is to have a signification broader or more extended than this, then taxation could be accomplished only under one single law, sweeping in all classes of individuals and property. This would be absurd manifestly, and next to impossible almost, to execute. A strict construction would require a repetition of this process, whenever an alteration or amendment was necessary. The true intent must be that the law-making power could not select certain property, say, for instance, that of the West End Railroad Company, or a pottery in Trenton, or an oyster fishery in Perth Amboy, and take those properties by one method and under one law, and another railroad company, pottery or oyster fishery by another method and under another law. But it does seem to me that it can take "a homogeneous mass of property" throughout the State and now to be found in every county, without such being arbitrary in any sense other than what is justified by the necessity always existing under any system of taxation. Selection in this way is the same as classification. I do not understand that there is any controversy but what a general law permits classification of property, and as that of railroads and canals all over the State is included in the Act, I fail to see by what reasoning it can be part and not the whole of a class. All is brought in alike and taxed; that is, all of this particular property. It is a class by itself, and but one part of a whole system. Acts for this purpose have been passed before, and no court has declared them to be contrary to the meaning of the Constitution. Even corporations created by special laws have been regarded under the state system as a separate class, and to be assessed by a separate method from other corporations and railroads and canals would as certainly be a proper classification. Without extending these remarks, it is clear to me that the Act must be regarded as a general law, within the pale of the Constitution, and I shall vote to reverse the judgment below.

No reference has been made to authorities, as those appear in the opinions already given to sustain the law, nor shall I review or criticise any of those which are adduced to maintain the contrary, farther than to say that I have not been able to discover any analogy between the principle involved in the *San Mateo Case* and this.

Dixon, J., delivered the following opinion: Under "an Act for the taxation of railroad

and canal property," approved April 10, 1884, taxes were levied in that year upon all property used for railroad or canal purposes under a franchise in this State. The Central Railroad Company of New Jersey, and thirty-three other railroad and canal corporations sued out writs of *certiorari* to review the assessments thus made, and thereupon the supreme court held the Act to be unconstitutional, and for that reason set aside the taxes. Writs of error were then brought on behalf of the State, and the records are now before us. Although it is within the province of this court, on writ of error, not only to reverse or affirm the judgment brought up, but also in case of reversal to render such judgment as should have been entered below, if the necessary facts have been settled, yet upon the argument the court confined the present inquiry to the question in substance whether the judgments of the supreme court should stand.

The defendants in error insist that the statute is invalid, because it violates fundamental principles which must be observed in every exercise of the taxing power, because it does not conform to paragraph 12, section VII, article IV of the State Constitution, and because it infringes the Fourteenth Amendment of the Constitution of the United States.

The general principles of taxation need but slight notice. It is laid down that the power to tax belongs to the Legislature and its agents exclusively, and that the courts, in the absence of constitutional restriction, have no control over its exercise, beyond seeing that the will of the Legislature is enforced. By this is meant, not that the power of taxation is a limitless power, but only that the legislative authority over the subject, taxation, is absolute. Taxation is a thing capable of definition, the boundaries of which in our system of government are to be ascertained from the history of the English and American peoples; but over the area thus determined the will of the Legislature is the supreme law. No doubt impolitic or unjust taxes may be levied, but the only remedy for such impositions is by appeal to the Legislature. The courts may decide whether any particular exaction is a tax or not, but if found to be a tax such as they whose institutions we inherit recognized as coming within the range of the taxing power, it is the duty of the judiciary to uphold the levy, regardless of their own views of its wisdom or equity. The struggle for fairness of taxation must remain in the parliamentary arena, except as it may be removed to some other sphere by constitutional provision.

With regard to the present law, nothing has been urged against it on the general principles of taxation, which may not, with equal force, be urged against it on the words of our Constitution, except the assertion that the Legislature cannot authorize a levy to be made without first determining how much is needed for governmental purposes and confining the levy to that sum. I know of nothing in the history of taxation which gives countenance to this claim, and therefore pass on to consider the constitutional restrictions.

The State Constitution declares that "Property shall be assessed for taxes under general

laws, and by uniform rules, according to its true value."

It is clear that the case in hand is subject to this provision, that it is one wherein property is assessed for taxes. This is manifest both from the title of the statute, "*An Act for the Taxation of Railroad and Canal Property*," and from the body of the law, by which the ownership or possession of property is made the sole ground for and measure of assessment. It is necessary, therefore, to ascertain the meaning of this constitutional clause.

The sentence does not import that all the property within the jurisdiction of the taxing body must be assessed. Such an aim has never been deemed attainable by theorists, such an object has never been sought after by the Legislature of this State, such an interpretation has never, by any branch of the government, been put upon the provision, and its language does not fairly support such a meaning. This clause was engrafted upon our organic law by amendment adopted September 7, 1875, when it was still, as it long has been and yet is, an open question among political economists, how taxes should be distributed over property so that their burdens may be borne by those best fitted to sustain them; and it is reasonable to suppose that, if there had been entertained a design to settle this question by constitutional edict, the design would have been plainly declared. But such an intention cannot be made apparent on the face of this amendment without adding to it a word the importance of which the framers could not have overlooked. "Property" and "all property" are not interchangeable terms, and we are not warranted in substituting one for the other. The whole purpose of the sentence appears to be to define the mode in which property shall be dealt with when it is assessed for taxes. It requires three things in such assessments: first, that they shall be made under general laws; secondly, that they shall be made by uniform rules; thirdly, that they shall be made according to the true value of the property assessed. The signification of these three clauses will afford us the proper tests of the validity of the statute under review.

First. What are general laws?

Since the expression "general laws" became prominent in our theories of constitutional construction, it has been on all hands agreed that a law operating equally throughout the State, and embracing all of a group of objects which naturally form a class by themselves, or which are fairly classified by the Legislature for legislation touching the basis of classification, is a general law. This principle was enunciated by the Chief Justice in *Van Riper v. Parsons*, 11 Vroom, 1, and is now firmly imbedded in our jurisprudence. For present purposes, the phrase "general laws" needs no further definition.

Secondly. What are uniform rules for the assessment of property?

In *Stratton v. Collins*, 14 Vroom, 562, it was said that this clause requires that the same imposition should be made upon all the taxable property in the township for township purposes, in the county for county purposes, and in the State for state purposes. This statement, although sufficiently exact for the case then before the court, is broader than the Constitution

seems, on reflection, to demand. The expression "uniform rules" is not of wider import than the expression "general laws;" and if the latter may be confined to a class, with equal propriety may the former. Indeed, strictly speaking, a prescript may be a uniform rule, without prevailing over even a class; for it would be a rule, if designed for the government of a single individual, and, if designed for the government of more than one, could be called a uniform rule. But such an interpretation would be too narrow for this constitutional phrase. Its collocation with the words "general laws" indicates that it was to have a corresponding meaning, and the whole sentence becomes harmonious by holding that it requires the same regulations to be applied to every member of each class which the general laws recognize or establish. This signification of the word "uniform" is common. Thus the laws of nature are uniform, although none of them is universal, and many operate in single classes only. The same idea is well illustrated in the practice of the United States Government. The Federal Constitution provides that all duties, imports and excises shall be uniform throughout the United States; yet these taxes have always been levied in divers methods and amounts upon the different classes of property and business. So it empowers Congress "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." But various rules of naturalization have been prescribed and maintained without question, for distinct classes of aliens, as widows, minors, soldiers, seamen, and those residing here before specified dates; and the laws for the bankruptcy of bankers and traders have differed from those concerning other persons. This diversity in uniformity can rest only on the right to classify. The same import is expressly affixed to the word in the Constitutions of Pennsylvania and Illinois, which enjoin uniformity in each class only; but it is held to be implied with equal force in the Constitution of Wisconsin under the provision that "the rule of taxation shall be uniform." *Wisconsin Central R. R. Co. v. Taylor County*, 52 Wis. 37. Similar views of the meaning of the term are expressed in *Youngblood v. Sexton*, 32 Mich. 406.

The third clause of the provision: that property shall be assessed for taxes according to its true value, excludes an assessment according to cost, number, weight, measures, fineness, or any other standard except true value, that is, the value which it has in exchange for money, and requires that the tax exacted from each person owning or possessing property of the class assessed shall bear the same proportion to the whole amount of taxes exacted from all persons having property of that class, as the true value of each one's classified property bears to the true value of all the property. With these explanations of the constitutional provision, we come to examine the statute in question.

This enactment is susceptible of two interpretations: one, as being designed to authorize a single annual tax, levied upon all property in the State used for railroad or canal purposes under a franchise; the other as being designed to authorize such a tax, for the direct use of the State, and also an annual tax for each taxing district, to be levied upon so much of the real

estate used for railroad or canal purposes in each district, as is described in subdivision II, of section 3 of the statute. A perusal of section 12 shows that while the whole sum chargeable in each year against any company is made a unit for the purpose of collection, constituting a single lien, a single debt, recoverable by a single action, yet up to the point of ascertaining what each company shall pay for the use of the State, and what for the use of each taxing district in which its property lies, the processes of assessment are distinct, or at least quite distinguishable. The court is, therefore, at liberty to adopt whichever view of the Act will most accord with the Constitution and effectuate the legislative purpose to tax.

Let us first consider the law as one to impose a tax for the State and a separate tax for each district.

With regard to the state tax, the law provides for a board of assessors, and directs these officers to ascertain the true value of all property, used for railroad or canal purposes, of each railroad and of each canal company in this State, including its franchises, and embracing in the term "company" not only corporations, but also individuals and associations owning or operating railroads or canals under a franchise; and it imposes an annual tax of one-half of one per centum of such value upon each company. These are the essential features of the assessment. The action contains, besides, some instructions as to the mode of ascertaining true value and of claiming and allowing deductions for debts, etc.; but these are only subsidiary to the main design, and if in themselves misleading or unconstitutional, can be rectified or disregarded, under that provision of the Act which requires the supreme court to correct assessments appearing to have been made upon erroneous principles or for improper amounts. If, therefore, these essential features of the law are consistent with the Constitution, the law is valid, and this tax can be maintained, either as it was levied by the assessors or as it may be modified by the supreme court. Is the law, then, with reference to these features, constitutional?

The property to be assessed is all property used for railroad purposes and all property used for canal purposes. This is, in my judgment, legitimate classification. It is true that things used for railroad and canal purposes are not in essence different from such things when put to other uses. But classification of property need not rest upon the essence of things. The use made of them forms as just and as common a basis of classification as does their essence. So prominent in the very conception of property is the use of things, that it would be singular if property as such had not been often classed upon that basis. Accordingly we find in our Crimes Acts, Execution Acts, Tax Acts and other statutes, that the use for which property is held is constantly made the ground for legislation concerning it. It would be a waste of time to particularize the instances. As long as railroad and canal corporations have existed in this State, the property employed by them under their franchises has been placed apart from other property for both the method and the amount of taxation. The same custom has prevailed elsewhere, and has received the ap-

proval of the highest judicial authority. Said the court in *Kentucky Railroad Tax Cases*, 115 U. S. 321 [Bk. 29, L. ed. 414]: "The right to classify railroad property as a separate class for purposes of taxation, grows out of the inherent nature of the property and the discretion vested by the Constitution of the State in the Legislature." Inasmuch, therefore, as the law is to prevail everywhere in the State, and also relates to entire classes of property, it meets the requirement that laws for the assessment of property shall be general.

The law also directs that the assessments upon these classes of property shall be made by uniform rules, according to the true value of the property. Its simple mandate is that each company shall pay an annual tax equal to one-half of one per centum of the true value of its property used for railroad or canal purposes, including its franchises. Some objection has been interposed to the inclusion of railroad franchises, to the effect that they are not property, and that they have no exchange value, since similar franchises may be acquired by any persons organizing under the general railroad law. It suffices to say, that this Act imposes no tax upon franchises, but merely requires that they shall be considered in ascertaining the value of the property assessed. The franchises intended are but the legal privileges which the company enjoys in the use of its property, and of course therefore should not be disregarded in determining what that property is worth to its present possessor, and would be worth to any other possessor having the same privileges; and their importance is by no means destroyed because any other person who can obtain the same kind of property may use it in the same manner.

The imposition of the tax of one-half of one per cent is in compliance with the Constitution. Let us turn now to the local tax:

Concerning this, the law directs (section 8) that the Board of Assessors shall ascertain separately:

I. The length and value of the main stem of each railroad, and of the water way of each canal; the term "main stem" to include the road bed not exceeding 100 feet in width, with its rails and sleepers and depot buildings used for passengers connected therewith; the term "water way" to include the towing path and berme bank.

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this State.

III. The value of all the tangible personal property of each railroad and of each canal company.

IV. The value of the franchise.

It further provides (section 6) that whenever in any taxing district there shall be several branch lines of railroad belonging to or controlled by one company, the assessors shall designate one of said lines as the main stem, and the value of the others shall be included in the separate valuation provided for in subdivision II of section 8.

It then enacts (section 12) that each company shall pay, in addition to said tax of one-half of one per cent, a tax at the local rate, as fixed and assessed for county and municipal purposes upon other property in each taxing district,

upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision II in section 3 of the Act, which tax shall also be computed by the State Board of Assessors; but the last mentioned rate shall in no case exceed one per cent of the valuation of the property valued under the provisions of subdivision II of section 3. This tax, when collected by the State, is to be transmitted to the several taxing districts for their local uses.

The first question here again arising is whether the law for the imposition of this tax is general, whether it embraces entire classes of property. In making the assessment, the property to be valued and upon the valuation of which the tax is to be computed is that described in subdivision II, exclusive of the property mentioned in the other subdivisions. Is such property capable of being regarded as a class or classes of property?

There must be conceded to the Legislature a large discretion on the subject of classification, and the judiciary has no right to thwart its reasonable exercise. But with this in mind, I have not been able to find any fair basis on which the property, thus submitted to special taxation for local uses, can stand as a class by itself. How does the main stem of a railroad to the width of one hundred feet differ, as a class of property, from the main stem lying beyond that width? On what principle are passenger depots ranked with the main stem, and freight depots, water tanks and all the other necessary adjuncts of a railroad excluded? What stamps the locks and berme bank of a canal with one character, and its planes and feeders with another? Or how can the mere designation of one branch line of railroad as a main stem cause it to differ from other branch lines controlled by the same company in the same district? How will you describe or conceive of, as classes of property, groups so segregated? The divisions thus constituted by the Legislature seem to me to be defined by no substantial distinctions, but to be purely arbitrary or fanciful; and a law which deals with them exclusively is special and not general.

That feature of the statute which limits the tax for local uses to one per cent when the local tax on other property exceeds one per cent has also been assailed. But in my judgment such a limitation is permissible, provided the property so favored forms a class by itself. As before stated, the Constitution is satisfied, if, in each taxing district, the same rules of assessment are applied to all members of the same class.

It is not plain, however, that this local tax can, under the Act, be assessed according to the true value of the property on account of which it is levied. The intention expressed in the statute is that the property described in subdivision II shall be valued separately from that mentioned in the other subdivisions. For the purposes of the state tax, this direction is only a means to an end, the end being the valuation of the whole railroad and canal property; and the courts may, and in obedience to the Act itself must, if necessary, renounce the designated means for the sake of the more important end. But for the purpose of local taxes, the valuation of this segregated property is the end itself, the very basis on which the tax is to

be computed, and it cannot be disregarded without overthrowing the tax. Now the question arises whether the true value of this property can be ascertained by any process of estimation which leaves out of view the main stem of the railroad, the water way of the canal, and the franchises under which alone the property can be utilized. This question appears to be a serious one; but it is unnecessary to pursue the matter, because, for the reason already stated, the law, so far as it provides for the local tax, is deemed not general, and therefore unconstitutional. If the Act had directed the assessors to ascertain the true value of all the real property used for railroad or canal purposes in each taxing district, and had authorized taxes to be levied thereon by uniform rules for local uses according to that value, the difficulties here stated would have been avoided. The property designated would have composed a class, and its true value could have been determined with reference to the value of the system to which it pertains.

Recurring then to the view of the statute thus far considered, it appears that the law, so far as it directs a tax of one-half of one per cent for state uses, is valid, and so far as it directs a tax for local uses is invalid. There are no insuperable obstacles in the way of upholding the one tax without the other; and the chief perplexities pointed out in argument as attending upon the practical enforcement of the law, will disappear if the local tax fails.

But it was said that the Act might be interpreted as being designed to authorize a single tax to be levied annually upon all property in the State used for railroad or canal purposes; which tax, when collected by the State, would be retained in part for state uses, and in part be distributed among local taxing districts for local uses. If the law can be maintained for the accomplishment of this design, it is our duty to support it.

Under this interpretation the legislative scheme would be that the assessors should ascertain the true value of all property used for railroad or canal purposes; that they should also ascertain the true value of the property included in subdivision II of section 8; that they should then determine how much money would enable the State to retain for itself one-half of one per cent of the value of all the property, and to pay over to each taxing district an ascertainable percentage of the value of such part of that property situated in the district as is described in subdivision II.

So far the steps of the law would not transgress the Constitution. Considering the property to be assessed as the whole property used for railroad or canal purposes, the valuation of the designated portions of this property might be regarded as made only in order to aid in ascertaining the gross sum to be raised and in distributing it when collected. And if the law had then directed or permitted the assessment of this gross sum upon the property assessed, by uniform rules, according to the true value of the property, it might have been upheld. But it does not permit such an assessment. It requires the tax to be apportioned among the several companies, not according to the value of each company's property as classified and assessed, but only in part according to that value,

and in part according to the value of a portion arbitrarily selected from that property; and the inevitable result is that the tax exacted from each company does not bear the same proportion to the whole tax as the value of its classified property bears to the value of all the property in the class.

To illustrate this conclusion:

The total valuation of all the property in the State used for railroad and canal purposes is	\$190,437,908
The total tax levied is	1,273,670
Which is equal to \$6.68 on each \$1,000.	
The valuation of all the property of the Central Railroad Company used for railroad or canal purposes is	\$38,756,838
Its whole tax under the Act is	271,840
Which is equal to \$7.01 on each \$1,000.	
The valuation of all the property of the Easton and Amboy Railroad Company used for railroad or canal purposes is	\$8,678,062
Its whole tax under the Act is	53,115
Which is equal to \$6.15 on each \$1,000.	
The valuation of all the property of the New York, Susquehanna and Western Railroad Company used for railroad or canal purposes is	\$4,892,428
Its whole tax under the Act is	25,195
Which is equal to \$5.15 on each \$1,000.	

These discrepancies in the rates of taxation do not spring from any errors of the assessors, but are necessitated by the statute itself; and no process of rational construction can conform the Act to any rule of assessment which will obviate them, if the whole sum chargeable against each company is treated as an entire, indivisible tax. If, therefore, the court were shut up to this interpretation, I should be constrained to hold the whole tax invalid, because assessed in violation of the Constitution.

Hence the construction first indicated should be adopted, under which the tax of one-half of one per cent can be sustained.

It remains to consider whether this state tax is opposed to the Fourteenth Amendment of the Federal Constitution, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws.

The general object of this provision, as declared by the Supreme Court of the United States, was to prevent unjust discriminations among persons, based upon differences of race or social condition. *Slaughter House Cases*, 16 Wall. 36 [83 U. S. bk. 21, L. ed. 394]. No such discrimination is observable in the imposition of this tax. The same court has also expressly adjudged that a state law which designates railroad property as a class by itself, and provides a distinct mode of taxation for that class, but which requires the application of the same methods to all constituents of the class, so that the law will operate equally and uniformly upon all persons in similar circumstances, denies to no person the equal protection of the laws, within the meaning of the Constitution of the United States. *Kentucky Railroad Tax Cases*, 115 U. S. 321 [Bk. 29, L. ed. 414].

The state tax is in all respects constitutional.

One other suggestion deserves notice. It is, that the court may look behind the statute for other enactments to support state and local taxes against these companies. If this Act had failed to impose any tax, I should have thought the court at liberty to seek elsewhere for legal taxation of railroad and canal property; but the first section of the Act declares that the tax imposed by it shall be in lieu of all other tax

ation upon the property subject to taxation under the provisions of the Act; and having concluded that this Act does impose a tax upon all the property used for railroad and canal purposes in the State, no other tax on that property can be maintained consistently with the legislative will.

The judgment of the Supreme Court, so far as it annuls the tax of one-half of one per cent, should be reversed.

Reed, J., delivered the following opinion:

First. The Constitution does not require all property to be subjected to the imposition of a tax levy.

At the time of framing the twelfth paragraph, there were in existence several State Constitutions in which, in variant shapes, was the provision that all property should be taxed. The commission which drafted our amendment deliberately refrained from employing the word "all." Nor do I understand that the assertion in the opinion of the supreme court, that the requirement was that all and not some property should be taxed, meant that a law to conform to the constitutional standard must impose a tax levy upon every kind of property. I think it could only have been intended to signify that all property must be subjected to the operation of tax statutes, but that the law may operate as well by the way of exemption as by imposition. This seems apparent from the admission that it is within the scope of legislative ability to provide that certain kinds of property may be relieved from the burden of taxation, and from the recognition of property used for church, school, college and the like purposes as a kind that may be exempted.

This power of exemption was exercised in the General Tax Act of 1866, which statute was recognized in the case of *The North Ward Bank v. Newark*, 10 Vroom, 380; *S. C.* 11 Vroom, 558, as a general law. Since then, in no case, in no argument, in no expression of judicial opinion has the exercise of this power in the Act of 1866 been challenged as opposed to the Constitution.

Second. If, then, the Legislature can impose upon some and relieve other property from the tax rate, upon what rule must the separation of property for these purposes be made? I think it may be assumed that this cannot be done capriciously. Whether the Legislature could so act, even if unfettered by a constitutional limitation, is not a question needing an answer now. That it cannot so act in view of the twelfth paragraph of the constitutional amendment is clear. The degree of the limitation is that both imposition and exemption must operate generally. Generality of operation has by a long line of cases been definitely settled to mean operation upon all of a class. Property must be taxed by general laws, namely: laws each of which includes all property included within its class; so, conversely, property must of necessity be exempted by a class or classes. The line which separates taxed from exempt property must be a line which divides classes.

Third. If taxation must be by laws each of which includes a class, does property used for railroad purposes include a class by itself? Property may be classed by reason of its inher-

ent qualities. Real estate and personalty, tangible and intangible property, are obvious instances of differences which might be the basis of segregation for taxation by reason of inherent qualities. But I think differences may be impressed upon property by reason of the purpose for which it is used, which differences may also be the foundation of classification. A college owns lands and buildings; so does the owner of a hotel. The former may own scientific apparatus and books; so does the dealer in books and telescopes. The property of the college is, by the Tax Act of 1866, exempt, but the same kind of property belonging to the owner of a hotel or a dealer in scientific instruments is subjected to taxation.

If the Tax Act of 1866 is a general law, and the exemption clause in that Act is to be regarded as based upon a proper classification, then the exemption of the property of colleges, seminaries and cemeteries, grounded entirely upon a classification arising by reason of use, must be considered as establishing the right to select property for taxation in accordance with the same rule. I think, also, that the use of property for railroad purposes is in a degree distinctive as compared with all other uses of property. In the opinions of distinguished judges such property has been noticed as *sui generis*. It is impossible to think of this property in respect to its character for the purposes of taxation without connecting the tangible things themselves with the franchise by which they are utilized. By reason of the manner of its use under a railroad charter, a belt of land which stretches through a hundred taxing districts is welded into something which, for the purposes of valuation, becomes a unit. Its property, both real and personal, is shaped and constructed for the attainment of a purpose which, without a franchise peculiar to railway companies, would be impracticable. The property stripped of the peculiar power of utilization conferred by such a franchise would be comparatively valueless. The graded road bed, the track, the depots, the engines, the cars, for other uses than railroading, would be of little worth; and railroading without the State's charter of power and privileges could be hardly considered a practicable undertaking. The public character of the functions which a railroad company performs; its right to demand fares and freight charges, and to invoke the State's prerogative to condemn lands; its power to run trains across highways and through cities at a high degree of speed; its power to carry an element which, with all practicable guards, is still a menace to adjoining property—these and other powers, while in some respects they may be common to other corporations, are, in the aggregate, peculiar to railroad charters. Certainly the purpose for which property is used under such a charter impresses it with a distinct character, if we once admit that use can be the basis of classification. I conclude, therefore, that a law which includes in its operation all property used for railroad purposes is general.

Fourth. Must property be taxed at a uniform rate by reason of the requirement that property shall be taxed by uniform rules as well as by general laws? The Constitution does not require that property shall be taxed by a single

rule, but by uniform rules. If we assent to the proposition that property may be ranged into classes for any purpose of taxation, and also to the proposition that a law which includes all of a class is a general law, I am unable to perceive how a rule that also applies to a class lacks uniformity of operation. Judicial sentiment has been in favor of the view that the constitutional amendment was not intended to affect mere methods of procedure in levying or collecting taxes, but was designed to fix the rules by which the burden of taxation was to be distributed. Inasmuch as all property taxed is to be taxed at its true value by the express terms of the amendment, if it is also held that all property must be taxed at a uniform rate, then the power of classification is a barren privilege. Besides, I think it would follow from this construction that there is no power in the Legislature to exempt property from taxation. And, conversely, if the admitted power to relieve a class or classes of property from taxation exists, how can it be said that uniformity of rule requires uniformity of rate to be imposed upon all property? And if there exists the power to deal with property so as to exempt a class entirely, there must exist the power to relieve a class partially as to rate, and so the right to legislate for classes as to rate of taxation must be recognized.

Fifth. If the statute under consideration be valid, as tested by the views above expressed in regard to the requirements of the Constitution, so far as it provides for the imposition of a tax at the rate of one-half of one per cent upon railroad property used for railroad purposes, I regard it as sound. It includes in its operation an entire class of property, and the imposition of a tax of one-half of one per cent upon all property within this class is within the constitutional authority of the Legislature. Nor do I think there is any doubt concerning the validity of the provision not now involved, however, which taxes all property owned by railroad companies, but not used for railway purposes, in the same manner as other property of the same kind is taxed for local purposes. This property is segregated from other property of such companies by the fact that it is used differently or is unused; and so it is with propriety thrown into the mass of taxable property in the several local taxing districts where it happens to be situate, and is taxed at the local rates.

But there is a further provision in the Act for the taxation of a part of the property owned by these companies and used by them for the purposes of their business for local purposes. The provision selects all the property so used, excepting a main stem one hundred feet in width and the passenger depots, and imposes upon the part of such property which may be considered as belonging to each taxing district a tax at the local rate of not exceeding one per cent. The Act provides that where there shall be several branch lines belonging to one corporation or operated under one management, one of the said lines shall be designated as the main stem, and the others be taxed. These features of the Act I am unable to regard as either general or uniform in their operation upon a class. It exempts from local taxation a strip of land one hundred feet in width, with its tracks, and it also exempts passenger depots, whether with-

in or outside the strip; but at the same time, taxes other property similar in kind and devoted to similar purposes.

The commissioners are empowered to select one of two or more lines owned or managed by one company, for exemption. The one selected is in no respect different from the others which are left for taxation. And upon what ground can a passenger depot be put in one class and a freight depot in another? No ingenuity can discover here a ground for a classification which is not entirely illusive. It must be remembered that this exemption is not an accidental failure to include something within the words of the Act which might properly belong to the class, but it is a well matured design to exempt an important, in some instances the most important, part of the class from the burdens imposed upon the remainder of the class. I am compelled to view it as an arbitrary selection of property for taxation and also for exemption, and so opposed to the text of the twelfth paragraph.

It may be further observed that this lack of generality is accompanied in this, as I think in all cases, by want of uniformity in the operation of this part of the statute.

Uniformity requires an equality of operation upon all property of the same class. It means that each owner of property of the class shall bear his proportion of the tax levied upon all the property comprising the class. If the value of the main stem and passenger depots of each one of all the companies in the State bear a like proportion to the value of its other property of the same class, then the practical operation of this part of the law would be uniform.

But no such condition of affairs as this is conceivable as an existing fact. In truth, the proportions which the two sections of property bear to each other among the different owners vary greatly. The result is that the company having a large amount of outlying property is heavily taxed, while the company whose property consists almost entirely of main stem and passenger depots pays in comparison next to nothing.

It is because laws of this kind operate in the way of discrimination in favor of some and adversely to other owners of the same class, that they are prescribed by the constitutional requirement of generality and uniformity of operation. This part of the statute is, in my judgment, void for these reasons, and the local taxes levied under it should be set aside.

This part of the Act is severable from those portions which provide for the levy of the tax for state purposes, and the record should be remitted to the supreme court for its consideration of those objections to the latter tax other than constitutional, which were reserved.

Depue, J., delivered the following opinion:

The writs of *certiorari* in these cases brought to the supreme court for review the valuation and assessment of the property of the several prosecutors, consisting of real estate used for railroad purposes, tangible personal property and franchises, made by the State Board of Assessors, and the taxes assessed thereon by the said Board for the year 1884, pursuant to the provisions of an Act of the Legislature approved April 10, 1884, entitled "An Act for

the Taxation of Railroad and Canal Property." P. L. 1884, p.

Some of the prosecutors have irrevocable charters. The court directed the argument as to the effect of the Act of 1884 upon charters having an irrevocable quality to stand over until the next term. The charters of the greater part of the prosecutors are such as contain a provision for the payment to the State annually of a certain sum—as, for instance, a *per centum* on cost or capital stock—with proviso that no other tax or impost should be laid or levied on them, and a clause reserving to the Legislature the power of altering or repealing the charter. These corporations have no contract with the State on the subject of taxation. The only semblance of a contract there is under such a charter is on the part of the company to pay the sum named in its charter as a condition on which its corporate franchise was granted. The proviso that other taxes shall not be imposed is a mere legislative concession, revocable at the will of the Legislature, and rescinded whenever the Legislature, in the exercise of its power of taxation, subjects such corporations to other or additional taxation. *State, Morris & E. R. R. Co. v. Comr.* 8 Vroom, 228, 9 Vroom, 472; *Little v. Bowers*, 17 Vroom, 800. These corporations, in virtue of the reserved power of alteration, or repeal, are liable to taxation the same as private persons, and are equally entitled to dispute the validity of the law by which taxes are imposed, as not being a constitutional exercise of the power of taxation.

The tax laid by the Act of 1884 is a tax upon property. The Act is entitled "An Act for the Taxation of Railroad and Canal Property," and the provisions in it which designate the subjects of taxation, the mode of assessment and valuation thereof, and the computation of the taxes thereon, indicate taxation on property as the purpose of the Act. The tax to be assessed and levied has none of the qualities of a tax *in personam*—none of the characteristics of indirect taxation of franchises. The franchises of the corporations comprised in this Act are made taxable on the true value thereof as property, and as part of the property of such corporations. The counsel on both sides discussed the case on the assumption that taxation by the Act of 1884 was taxation upon property, and in that view I concur. The inquiry which arises, therefore, is whether the taxation provided for by the Act of 1884 is in compliance with the provision introduced by the amendments of 1875, that "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value." Const. art. IV, section 17, p. 12.

The theory of our government is that the sovereign power of taxation is unlimited, except as qualified or restrained by constitutional limitations; that this power of taxation consists primarily in the power to select and classify the persons or property which shall be made the subjects of taxation, and when the classes of persons or kind of property set apart for taxation have been designated, then to apportion the tax among those of the class which is to bear the burden, upon the principle of uniformity; that where the burden is common there shall be a common contribution to discharge it. *State v. Parker*, 8 Vroom, 426; *State*,

Trustees, etc. v. Township Committee of Readington, 7 Vroom, 86. The problem for consideration is how far the constitutional prescription that "property shall be assessed for taxes under general laws and uniform rules, according to its true value," has restrained the power of the Legislature in the selection and classification of property for the purpose of taxation.

In the distribution of the powers of government the power of taxation is lodged in the legislative branch. For an unwise, unjust, oppressive or unnecessary exercise of that power by the Legislature, there is no redress except by an appeal to the people. So long as constitutional limitations are not exceeded, or the constitutional rights of the citizen are not violated, the Legislature is the supreme authority which the courts, as well as others, must obey. *Cooley on Taxation*, 2d ed. pp. 48-45.

But the same plan of government which lodges the power of taxation in the legislative department of the government has conferred upon the judiciary the power, and has imposed upon that branch of the government the duty to determine whether the Legislature, in the method of taxation adopted by it, has exceeded constitutional limitations, or invaded the constitutional rights of citizens. Every intendment will be made in favor of the legislative Act that is permissible; and any construction which is within rational bounds will be resorted to in the endeavor to harmonize the legislative plan with constitutional limitations. But if, on an investigation conducted in this spirit, it be found that the legislative Act is in violation of constitutional limitations, or an infringement upon the constitutional rights of those who are made the subjects of taxation, the duty of the judiciary in the premises can neither be cast off nor evaded.

The constitutional provision invoked relates only to taxation upon property. It leaves unimpaired that branch of the taxing power which consists of the imposition of indirect taxes for the exercise of franchises or the pursuit of business, trades or occupations. Over this subject the discretion of the Legislature is unrestrained, save only by the need of conforming to that essential quality of taxation, that when a class of persons or things is selected for taxation, the tax must be imposed upon individuals of the class under a rule of uniformity.

Nor does this constitutional provision require the taxation of all property which is legitimately the subject of taxation. On that construction, the argument of Mr. Collins, who appeared in this suit for the several municipalities, and contended in their behalf that by force of this constitutional provision the property of these companies became subject to taxation in the several taxing districts of the State in common with other property in those districts, would be irresistible. The second section of the General Tax Act of 1866 (Rev. 1150), and the enacting clause of the Act of 1878 (P. L. 1878, p. 61), in designating the property to be taxed, were comprehensive enough to embrace the real and personal property of all railroads and canals. The taxation of such property was taken out of the provisions of these Acts by section 5 of the Act of 1866, and the proviso in the Act of 1878. The constitutional provision being self-execut-

ing, and, *propria vigore*, abrogating all special legislation on the subject (*State, North Ward Bank, v. Newark*, 10 Vroom, 380; 11 Vroom, 558), and making void all such legislation in the future, it is difficult to see how, in the light of the decisions of our courts, the exemption in the fifth section of the Act of 1866, of corporations having repealable charters from taxation on real and personal property, or that contained in the proviso in the Act of 1878, could stand consistently with a constitutional requirement of such import. If special charters may be repealed by a general law, as was held by this court and the supreme court in *State, Morris & E. R. R. Co. v. Commissioner of Taxation*, 8 Vroom, 228, 9 Vroom, 472, much more clearly would the same result be effected by a self-executing constitutional provision, which, as the supreme law of the land, must operate to efface from the statute book every legislative Act repugnant to its provisions.

But I do not assent to this interpretation of the constitutional provision. The power of taxation is not derived from a constitutional grant. Immediately upon the organization of the colony as a free and independent government, and the establishment of a legislative department of the government, the Legislature was, *ipso facto*, invested with the power of taxation by a fundamental principle of government derived from the mother country, that taxation is a legislative Act, and is necessarily inherent in the legislative branch of the government. Neither of our State Constitutions nor the amendments of 1875 contain any grant of the power to tax. The only provision on that subject is the amendment under discussion, and that is a restriction on the power of taxation which the Legislature possessed from the organization of the government. And it is a fundamental doctrine in the interpretation of constitutional limitations derogatory to the powers of a co-ordinate branch of the government that construction should not be pushed beyond a fair and reasonable interpretation of the letter of limitation.

The framers of the constitutional amendments, recognizing the reasonableness of exempting churches, charitable institutions, and institutions of learning from taxation, and the wisdom and justice, in some instances, of indirect taxation, as by taxes on franchises, trades or occupations, with the General Tax Act of 1866, which did exempt religious, charitable and educational institutions and corporations from taxation upon property, and the Railroad Taxation Act of 1878, which laid a tax upon franchises, before them, seemed to have avoided that expression in the constitutional amendment which would readily have occurred to them if they designed a constitutional provision which would require all property to be taxed. The provision adopted and recommended to the Legislature, and approved by the Legislature and the people, does not require that construction. It interdicted taxation on property unless under general laws and by uniform rules, and according to true values, but left unimpaired the power of the Legislature, by proper classifications, to designate the property which should be brought under a property tax. The supreme court so held in *State, Trenton Iron Co. v. Yard*, 13 Vroom, 357, and in *Stratton v. Collins*, 14 Vroom, 562, and in that construction of the constitu-

tional provision I concur. But with the selection of the property to be taxed the power of the Legislature to discriminate ends. The rule of uniformity prescribed for taxation prevents property from being classified and taxed as classed by different rules. *Township of Pine Grove v. Talcott*, 19 Wall. 666, 675 [86 U. S. bk. 22, L. ed. 227, 232]; *Gilman v. City of Shelby*, 2 Black, 510, 518 [87 U. S. bk. 17, L. ed. 305, 309].

In the next place, the constitutional provision does not touch the machinery by which taxes shall be assessed or collected. Every system of taxation consists of two parts: the one relating to the assessment (the designation of the persons or things which shall be the subjects of taxation and the apportionment of taxation among such persons or things in the ratio prescribed by law), the other the collection of taxes by the enforced payment thereof. The constitutional provision in question relates only to the assessment of taxes, and in that respect concerns only such equalization of the burden of taxation as would result from the designation of the property which shall be the subjects of taxation and the apportionment of the taxes thereon under general laws and by uniform rules, according to its true value. The mere machinery by which taxes shall be assessed or collected is left in legislative discretion. *Trustees of Public Schools v. City of Trenton*, 2 Stew. 668. A railroad or canal is a peculiar kind of property, and the appraisal and valuation of such property, including the rolling stock, property used in transportation, and franchises as a unit, by a state board of assessors instead of an appraisal of it by local assessors in detached parts, would be indispensable in estimating such property at true value, which is the basis of taxation under the constitutional provision. A law providing for such an appraisal and valuation of all railroads and canals, and the apportionment of the valuation thereof among the proper taxing districts to be taxed by local assessors in common with other taxable property, or providing for the entire process of laying the taxes and the collection thereof by state officers by a sale in its entirety of the property assessed, would be a general law in compliance with the constitutional requirement that property should be assessed for taxes under general laws.

But the constitutional provision does not stop with the requirement that property should be assessed for taxes under general laws. It adds the further prescription that the assessment should be by uniform rules and at true values. The object of this constitutional provision was twofold: the equalization of the burden of taxation in the apportionment of taxes for state purposes among the several counties, and of taxes for state and county purposes among the minor taxation districts in which all taxes are in fact levied and collected, and also the equalization of the burden upon all those who are subject to taxation in the political division for the use of which taxes are laid: in the State if for state purposes; in the county if for county purposes, and in the minor political divisions—townships, cities or wards—if for municipal or local purposes. By uniform rules is meant uniformity in the standard of valuation and rate of taxation. How that uniformity shall be at-

tained will depend upon the purpose for which the particular tax is laid. If it be for state purposes, it must be at the rates of taxation uniformly applied in the State in taxation for state purposes; if for county or municipal purposes, at the same rate at which property is taxed for such purposes. *State, Vail's Exrs. v. Runyon*, 12 Vroom, 99. As was said by Mr. Justice Dixon, the constitutional provision requires and is satisfied by such regulations as would impose the same percentage of its actual value upon all taxable property in the township for township purposes, in the county for county purposes, and in the State for state purposes. *Stratton v. Collins*, 14 Vroom, 563.

That part of the Act of 1884 which provides for taxation on the property of railroad and canal companies not used for railroad or canal purposes is not in dispute. The controversy relates solely to the taxation of property used for those purposes. The Act provides in section 3 that property of that description shall be assessed by a state board of assessors, and at true value, and that the board should, in such ascertainment, ascertain separately:

I. The length and value of the main stem of each railroad, and of the water way of each canal, and the length of such main stem and water way in each taxing district;

II. The value of the other real estate used for railroad or canal purposes, in each taxing district in this State, including the road bed (other than main stem), water ways, reservoirs, tracks, buildings, water tanks, water works, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and of each canal company;

IV. The value of the franchise.

Upon the entire assessed valuations of the property in these subdivisions an annual state tax is laid at the rate of one-half of one per cent. Besides the state tax an additional tax is laid upon the property named in subdivision II, for the benefit of the several taxing districts at the local rates at which other property is assessed in such taxing districts for county and municipal purposes; but it is provided that in no case should the last mentioned rate exceed one per cent., and it is further provided that, in case the state tax of one-half of one per cent. and the local tax as limited in the Act would compel any company to pay more tax than the tax such company would pay if it did not pay the state tax, but did pay full local rates on all the property and franchises mentioned in section 3, without any other exemptions than would be allowed to an individual citizen on such property, such deductions should then be made as would make the tax equal to the amount such company would pay on all the property and franchises mentioned in section 3 if assessed at full local rates, without any state tax.

The rate fixed by the Act for local taxation upon that part of the companies' property used for railroad and canal purposes made liable to such taxation is manifestly a departure from the constitutional rule. In taxing districts where the rate of taxation for county and municipal purposes exceeds one per cent, the

limitation of the tax on these companies to one per cent produces a discrimination in assessing taxes prejudicial to other taxpayers in such districts, and is in violation of the constitutional rule of uniformity. It is said that the discrimination being in favor of the prosecutors, they cannot avail themselves of that fact to annul the tax assessed against them. If the legislative power to lay the tax was not in controversy, and the objection was simply for inequalities in the execution of the law, the objection would not be heeded. But that presentation of the case does not correctly represent the position in which the matter is placed before the court. Taxes have been assessed against the prosecutors, the collection of which is about to be enforced. They dispute the validity of the law under which the taxes were laid, and if they present legal grounds for sustaining their contention, the court cannot refuse relief on any notion of the propriety or reasonableness of the conduct of parties. The prosecutors say that under their charters and the laws antecedent to the Act of 1884, they were exempt from local taxation on this part of their property; and they insist that that exemption has not been taken away by the Act of 1884, because of the nonconformity of that law to constitutional requirements. It is the prerogative of every citizen and taxpayer to say to the government: tax me according to law, or not at all; and it would be no response to the assertion of that prerogative to reply: if you had been taxed according to law you would have fared worse.

To avoid recurring to this subject again, I may say here, in response to the argument so freely used (that these companies are still a favored class in the matter of taxation), that that fact would be a substantial objection to this law on constitutional grounds; for, as it seems to me, it would be impossible to sustain the law as being constitutional as applied to these prosecutors, and pronounce it to be unconstitutional when other persons upon whose property taxes have been assessed make resistance, on the ground that the taxes assessed upon their property have not been laid upon all property liable to be assessed for taxes by a uniform rule. In *State v. Yard*, 18 Vroom, 357, and in *Stratton v. Collins*, the constitutional question was raised by persons whose property had been assessed, on the ground that other property not assessed should have been brought in and subjected to taxation in common with their property and at an equal rate.

The tax levied on the prosecutors for state purposes is a state tax, and is laid exclusively on the property of the prosecutors. The rate of tax fixed by the Act is one half of one per cent, subject to a certain adjustment which I will refer to presently.

I have already said that uniformity in the rate of taxation is determined by the territory or political division for the use of which the tax is laid: that the Constitution requires the same percentage of actual value upon all taxable property in the township if for township purposes, in the county if for county purposes, and in the State if for state purposes. That is the principle enunciated in *Stratton v. Collins*, and sustained by an unvarying line of judicial decisions. The method

of laying state taxes in this State is by an equal percentage upon all the taxable valuations in the State, and the apportionment of the amount to be raised among the several counties in the ratio of taxable valuations in each, for assessment and collection as other taxes are assessed and collected.

At the time the Act of 1884 was passed the Act of 1881, laying a state tax for the support of schools, was in force. The tax laid by that Act was laid, as I have mentioned, by an apportionment among the several counties in proportion to amount of taxable real and personal property in each, to be assessed and collected in the manner in which other taxes were assessed, levied and collected. Acts 1881, p. 120. By these two Acts, the Act of 1881 and the Act of 1884, we have this situation of affairs: two state taxes, the one levied exclusively on the taxable valuations of the property of railroad and canal companies, the other exclusively upon the other taxable valuations in the State. These two systems of taxation cannot stand together or be brought into harmony with uniformity in the rules of taxation. That they will inevitably produce inequality of rates in taxation is apparent. That in fact they bring about that result is demonstrated by a few figures taken from the report of the state comptroller for 1885. The total valuation of real and personal property in the State (other than railroad and canal property) on which the state school tax was laid was \$554,828,114.84. The state tax raised thereon was \$1,424,244, and the rate of taxation to raise that sum was a small fraction over two and a half mills on each dollar. The valuation of the real and personal property of railroad and canal companies as assessed under the Act of 1884 was \$140,236,605.43. The tax for state purposes on that property was \$701,182.05, and the rate of taxation was five mills on each dollar. The gross amount of taxable valuations of real and personal property in the State, including the real and personal property of railroad and canal companies, was \$695,064,719.76. The state school tax and the tax on the real and personal property of these companies aggregated \$2,125,426.05, and, laid on the gross valuation of property in the State, would require a tax a small fraction over three mills (3 6-100 mills) on each dollar.

But it is said that the rate of taxation named in the Act of 1884 was so adjusted by the twelfth section as to secure equality in the rates of taxation both for state and local purposes. The plan adopted by that section is that in cases where the state tax and the local tax exceed the tax the companies would pay if taxed at local rates upon all their property, used for railroad or canal purposes, such deductions should be made as would make the tax equal to the amount such company would pay on all its property and franchises if assessed at full local rates without the state tax.

This plan of adjustment is plainly inefficient to secure equality and uniformity in the rate of state taxes. Local rates are determined by that percentage on taxable valuations in the locality which is necessary for all the local purposes for which such tax is required to be laid: the expenses of local government, the supply of water, the expenses of police and fire departments, the cost of erecting school-

houses, the cost of public improvements above assessments for benefits, the interest or principal of municipal indebtedness, and the like, and vary with the extravagances or misfortunes in conducting local governments. The state school tax for 1884 was raised by a rate of two and a half mills, one quarter of one per cent. The local tax rate for the same year in Newark was 2.08 per cent; in Orange, 2.62, and in Jersey City, 2.98. A uniform rate of taxation for state purposes can be obtained only on a ratio of the tax to be raised to the taxable valuations in the State.

But I need not pursue this matter further. As I understand the views of the majority of the court, it is not claimed that the Act of 1884 provides for taxation either for state or local purposes on a rule uniform with that on which taxes, state or local, are laid under the General Tax Act of 1886. The position taken is this: that the constitutional provision allows a classification of property for taxation under general laws, and that upon such a classification the rule of uniformity prescribed by the Constitution is complied with if the tax be laid upon property within the classification of an equal percentage without regard to the rate of taxation upon other taxable property in the State; that local taxes may be laid on property in the classification at one rate and upon other property at a different rate, and state taxes be levied with the same diversity in rates, provided only that a uniform rate be observed in the tax upon property within each class; and that property used for railroad and canal purposes may be segregated into a class and subjected to taxation at any rate that may be prescribed by the Legislature.

The power of discrimination asserted in this proposition may well challenge the closest scrutiny. The classification made by the Act of 1884 is either upon the use which is made of property, or upon the ownership of it. On the principle adopted, lands used for agricultural purposes, city lots, lands improved or unimproved, timber, mining or mineral lands, mills and lands used for manufacturing purposes, and the implements used in agriculture or in the various branches of mechanical pursuits, may be set apart into classes and taxed at any variety of discordant rates, provided uniformity of rate be observed within each particular class. Indeed, the capacity which lies within the doctrine of classification is aptly illustrated in this case. A classification which sets apart indispensable parts of the structure of a railroad, as cuts, embankments, switches, turnouts, engine houses and freight depots from the main stem, if beyond the one hundred feet prescribed as the width of the main stem, and puts those parts into a class to be taxed separately for local uses, is regarded as a legitimate classification.

The authority pressed upon the attention of the court with the most confidence, as justifying this construction of our constitutional provision, is the decision of the Supreme Court of the United States in the *State Railroad Tax Cases* reported in 92 U. S. 575 [Bk. 2423 L. ed. 663]. The tax in that case had been laid under a statute of Illinois which provided that the entire taxable property of railroad companies should be ascertained by the state

board of equalization, and that the state, county and city taxes should be collected within each municipality on this assessment in the proportion the length of the road in such municipality bears to the whole length of the road within the State. The rule for the apportionment and assessment adopted was uniform in its action on all railroad companies, but was not uniform with the method by which other property was taxed under the general tax laws. The question before the court was whether this mode of taxing railroad companies was consistent with section 1 of article 9 of the Constitution of Illinois, which is in these words:

"Section 1. The General Assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

The court sustained the tax upon the peculiar features of the State Constitution, which expressly excepted certain classes of persons and things, among which were persons or corporations owning or using franchises and privileges out of the general equality clause, and adopted a special equality clause for taxing such persons or things by providing that they should be taxed in such a manner as the Legislature should from time to time direct by general law, uniform as to the class upon which it operated. Mr. Justice Miller, in delivering the opinion of the court, placed the decision distinctly on that discrimination in the constitutional provision, "because," as he says, "the latter part of the section in express terms authorizes the Legislature to tax persons and corporations owning or using franchises in such manner as it shall from time to time direct by general law;" and the only restriction on the power, as applied to this class, is that it shall be "uniform as to the class upon which it operates." He then adds: "There can be no doubt that all the classes named in this clause * * * are taken out of the general rule of uniformity prescribed by the first clause; and the only limitation as to them is that of uniformity as to the class upon which the law shall operate."

In this respect the Constitution of Illinois and the Constitution of this State are totally dissimilar. Our Constitution makes no discrimination in the property which the Legislature has subjected to taxation, with respect to the rules by which it shall be taxed. The rules must be uniform, whatever method may be adopted in making the assessment, and in the machinery by which the tax is assessed, laid or collected. The case cited is no precedent for the construction of our constitutional provision.

N. J.

Another precedent cited with a great deal of confidence is the case known as the *Kentucky Railroad Tax Cases*, reported 115 U. S. 321 [Bk. 29, L. ed. 414]. The complaint in that case was of a statute which discriminated against railroad companies in the fact that railroad property, though called real estate, was classified by itself, distinct from other real estate, and different means were provided for ascertaining its value for the purpose of taxation; and the protection of the Fourteenth Amendment of the Constitution of the United States was appealed to for relief. The court denied relief, on the ground that no constitutional provision of the State of Kentucky had been violated. Mr. Justice Matthews, who read the opinion of the court, puts the decision on the ground (to quote his own language) that "There is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." This case is simply an elucidation of the general doctrine that where the power of the Legislature is not restrained by express constitutional limitations, the designation of property to be taxed and the manner of taxation are matters within the discretion of the Legislature. It is a precedent irrelevant to the construction of express constitutional limitations upon the legislative power of taxation.

Union Pacific R. Co. v. Cheyenne, 118 U. S. 517 [Bk. 28, L. ed. 1099], is a case of the same import. The court held that a statute for assessing and taxing the property of railroad and telegraph companies as a whole, and distributing it ratably among the different counties and the several taxing districts in proportion to the number of miles in each, was valid. The tax was laid in the Territory of Wyoming, and there was not there any express constitutional restraint upon the power of taxation.

Another class of cases cited from federal and state courts is also inapplicable to this subject. I refer to decisions on the legislative power of indirect taxation by taxes on privileges, franchises, trades and occupations and excise duties, of which *Society for Savings v. Coite*, 6 Wall. 594 [73 U. S. bk. 18, L. ed. 897]; *Head Money Cases*, 112 U. S. 580-594 [Bk. 28, L. ed. 798, 802]; *Commonwealth v. Cary Improvement Co.* 98 Mass. 19; *Youngblood v. Sexton*, 32 Mich. 406; *New Orleans v. Kauffman*, 29 La. Ann. 288; *Kittanning Coal Co. v. Commonwealth*, 79 Pa. 109, are types. This branch of the legislative power of taxation is universally admitted not to come within the equality clauses in constitutional provisions relative to taxation upon property; and in constitutions which simply provide that all taxation shall be equal, a distinction is made between taxes on property and taxes on franchises, occupations and pursuits, for the reason that in property there is always present the element of market value as the basis on which equality in taxation can be attained by the ap-

plication of a uniform rate on such values. But in franchises, trades or occupations there is no element of value in common, and hence the rule of equality is not violated by taxation on these subjects by a rule which is uniform as to each class. The cases on this subject are cited by Mr. Justice Cooley in discussing the constitutional provisions of the several States. Cooley on Taxation, 2d ed. pp. 176-200, and on page 379.

It may also be remarked that in *State, N. J. Southern R. R. Co. v. Board of R. R. Comrs.* 12 Vroom, 285, and *State, Central R. R. Co. of N. N. v. Mutchler*, Id. 96, no constitutional question was raised or considered. The first case was submitted on briefs, which appear in the printed report of the case, and neither in the reasons filed nor in the argument of counsel was any constitutional question presented. Nor was any question of that character raised by counsel or considered by the court in the other case, and in that case the company was exempt from taxation such as that from which it was relieved by its charter and by the General Tax Act of 1866, irrespective of the Act of 1873. *The State v. Township Committee of Redington*, 7 Vroom, 66, was decided before the constitutional amendments were adopted or framed.

With the exception of the decisions upon the peculiar language of the Constitution of Illinois, the precedents in state and federal courts on express constitutional limitations upon the powers of taxation designed to secure equality in taxation are uniformly against any discrimination in taxation upon property. In Ohio the constitutional provision is that "Laws shall be framed taxing by a uniform rule all moneys, credits, investments," etc., "and all real and personal property according to its true value in money." The Supreme Court of Ohio, in a case so often quoted, in construing the language "taxing by a uniform rule," said: "Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. * * * But this is not all. The uniformity must be coextensive with the territory to which it applies. If a state tax, it must be uniform all over the state; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to all property subject to taxation, so that all property must be taxed alike—equally—which is taxing by uniform rules." *Exchange Bank of Columbus v. Hines*, Ohio St. R. 1.

The constitutional provision in Wisconsin is "that the rule of taxation shall be uniform and taxes shall be levied upon such property as the Legislature shall direct." The charter of the City of Janesville provided for an annual tax upon all the property in the city subject to taxation, not exceeding one per cent for current expenses, and such additional taxes for roads, bridges and the support of the poor as the common council might deem necessary. Within the corporate limits of the city, but outside of the recorded plot of the original Village of Janesville, was a large quantity of farming or agricultural lands. By a subsequent Act the Legislature provided that lands used, occupied or reserved for agricultural or horticultural

purposes should not be taxed for city purposes beyond one-half of one per cent., nor for roads, bridges and support of poor more than one-half as much per dollar as should be levied for such purposes on property within the recorded village plot. This latter Act was held to be unconstitutional, as being in violation of the constitutional rule of uniformity. *Knowlton v. Board Supervisors of Rock. Co.* 9 Wis. 410.

In a later case in the same court a city charter provided for taxation upon real and personal property, and in one section gave the common council power to lay and collect a tax on all the lots and land in the city, not including any improvements thereon, to pay the city's bonded debt. This section was held to be in violation of the constitutional rule of uniformity. *Mr. Justice Lyon*, in the opinion of the court, said: "The true doctrine unquestionably is that while the Legislature may by law exempt certain specific property or classes of property from taxation, such exemption, to be valid and operative, must be absolute and total. The Legislature has no power to exempt property from one tax, or from taxation for one purpose, and hold it liable to taxation for other purposes; and this for the reason already indicated, that it is impossible to do so without violating the rule of uniformity which the Constitution requires the Legislature to observe." *Hale v. City of Kenosha*, 29 Wis. 599-604.

The Supreme Court of the United States, dealing with a statute of the same State empowering a city to lay a tax for a particular purpose on real estate exclusively (real and personal estate being taxed for other purposes) held it to be unconstitutional, and *Mr. Justice Swayne*, in the opinion of the court, said that "It was beyond the constitutional power of the Legislature to make any discrimination. Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property." *Gilman v. City of Sheboygan*, 2 Black. 518 [67 U. S. bk. 17, L. ed. 809].

In a later case the same learned judge, speaking of the constitutional provision of the State of Michigan, that the Legislature shall provide a uniform rule of taxation except as to property paying specific taxes, said: "The object of this provision was to prevent unjust discriminations. It prevents property from being classed, and taxed as classed, by different rules. All kinds of property must be taxed uniformly or be entirely exempt." *Township of Pine Grove v. Talcott*, 19 Wall. 666-675 [36 U. S. bk. 23, L. ed. 227-232]. The decision of the court in *Cummings v. National Bank*, 101 U. S. 154 [Bk. 25, L. ed. 908], though directed against systems of valuation intended to operate unequally, has a direct application to laws which are so framed as to produce that inequality.

These decisions establish the principle by which constitutional provisions designed for the protection of property from unequal taxation must be construed.

The endeavor in this case is to take the constitutional limitation out of this rule upon the words "under general laws."

The words "general laws" were brought into

prominence by the peculiar provisions of paragraph 11 of section 7 of article IV of the amended Constitution which provides that the Legislature shall not pass private, local or special laws in certain enumerated cases, as, for instance, regulating the internal affairs of towns and counties, but shall provide therefor by general laws. The place this expression has in this paragraph is totally unlike that which it occupies in the paragraph on the subject of taxation. In paragraph 11 the only restriction on the legislative power is that it shall legislate by general laws, and when a classification by a general law is once made, the power of the Legislature to legislate over that class is unlimited. In paragraph 12, relating to taxation, an additional restriction is added. The mandate is that property shall be assessed for taxes under general laws and by uniform rules at its true value. A construction which gives a controlling effect to the words "general law" practically excises the other member of the sentence; for, independent of the constitutional prescription, it was an essential quality of taxation that, when a class of persons or things is selected for taxation, the burden must be distributed among the members of the class on the rule of uniformity.

In the construction of constitutions as well as of statutes, it is a cardinal principle that words are to be taken in their natural and ordinary sense, and that every word shall have a part, if possible, in declaring the intention of the maker. The words "under general laws" in this paragraph can have full scope and operation without detracting from the effect of the other words in it. I have already said that, for the purpose of assessment and valuation, and even the completion of the whole process of taxation upon railroad and canal property, the Act of 1884 is for that purpose a general law. It accomplishes the purpose contemplated by the Constitution by securing the true value of property which otherwise would be valued inadequately. It fulfills the purpose of the Constitution in requiring the assessment of taxes under general laws, in order that special modes of assessment and valuation which might produce inequalities in taxation should not be resorted to. But the words "under general laws" cannot be permitted to control the whole sentence of which they are only a part without overriding a fundamental rule of construction.

A construction which conforms to proper rules, at the same time will secure the object such constitutional restrictions are presumed to have been adopted to promote: equality in taxation, which can be secured only by the application of uniform rates of taxation to property at its true value. The language of this constitutional provision, giving words their natural meaning and the sentence a grammatical construction, can be made to signify nothing else. If the language had been that "property shall be assessed for taxes under general laws by uniform rules according to its true value," it would be possible, by a refinement of construction, to impute to it the meaning that all that was required was that property should be classified for taxation, and then taxed by rules uniform as between members of the same class. But the paragraph as inserted in the Constitution is given a complex form by the conjunction

of the two members of the sentence in the use of the word "and," which lexicographers define to signify "that a word or part of a sentence is to be added to what precedes." Webster, Dic., "and." Property is to be taxed "under general laws," and "by uniform rules according to its true value." Both the constituent parts of the sentence "general laws" and "uniform rules" are made essential to a valid act of taxation. A simple reading of the sentence carries with it at once that meaning. Contrasting the language of this paragraph with the proviso in the Constitution of Illinois, or even with the language used in opinions read this morning to express a different construction, will indicate the difference in language and expression necessary to effect that purpose. A constitutional provision expressed in that language, placed alongside of this constitutional provision, would appear to be another and a different instrument.

Under an organic law for taxing property at its true value, there can be no classification except as a means of ascertaining true values. Different kinds of property have different grades of value, but true value is a characteristic of all kinds of property, and peculiar to no one species so as to make it a class by itself. The classification adopted in this Act is upon the use to which the property is devoted; but the use to which property is applied does not alter its true value. An engine is of the same market value in the shop of a manufacturer as when placed upon a railroad track. A locomotive moving a train of cars on the track of a railroad has no characteristics distinguishing it from an engine moving the machinery in a factory, except that one is movable and the other stationary. Passenger cars on a steam railroad track have no characteristics distinguishing them from passenger cars on a horse railroad track, except that the former are more costly and of greater true value. Horses drawing boats for a canal company have no characteristics distinguishing them from horses drawing drays upon the streets of a city. Boats used in transportation upon canals have no peculiarities distinguishing them from boats of the same kind used in the carrying business upon the Passaic and the Hudson. The docks along the Hudson, from which ocean steamers and vessels employed in freighting or carrying passengers to domestic ports sail, have no characteristics distinguishing them from the adjacent slips from which the ferryboats of railroad companies run. The miles of wharves along the Passaic used for the shipping and discharge of freight by private owners or navigation companies are not characterized by any peculiarities distinguishing them from the wharves owned by the canal company which would put them in one group for one rate of taxation and the canal company's wharves into another group for taxation at another rate.

The Supreme Court of Pennsylvania, under a constitutional provision of that State that "all taxes shall be uniform upon the same class of subjects," held that the Legislature might select its subjects of taxation, but that the tax, upon whatever laid, must be uniform, and that in the taxation of property there was no distinction between natural persons and corporations. *Fox's Appeal*, 8 Cent. Rep. 561, 566. In the *Railroad Tax Cases*, 92 U. S. 575 [Bk. 24, L.

ed. 668], the tax in question was not laid upon railroad property exclusively, nor was the rate of taxation different from the rate upon other property. The property of railroad companies was included in the taxable valuations in common with other property, and the rate of taxation thereon was the same. The objection was with respect to the mode in which such property was valued and its value apportioned among the several taxing districts. The court sustained the rule adopted for the valuation and apportionment under the peculiar provision of the Illinois Constitution, and, as appears by the opinion of the court on page 611, held that taxes assessed upon such property by that rule were uniform when the rate of taxation was the same on the assessment thus ascertained as it was upon other property. The Constitutions of these States recognize classification in the assessment of taxes, but, as construed by judicial decisions, afford no warrant for the classification of property for the purpose of laying a particular tax on one class exclusively, or of taxing it at a different rate.

But it is said that the property of these Companies possesses peculiar qualities distinguishing it from the property of private individuals or of other corporations, in the fact that it is associated with and is necessary for the exercise of corporate franchises or the business of operating railroads or canals, and therefore may be disassociated from other property intrinsically of the same nature, for a different sort of taxation, or for taxation at a different rate. Such a mode of taxation is not taxation on property at its true value. It is that method of taxation which can lawfully be resorted to only in the exercise of the power of indirect taxation, by taxation upon franchises, trades or occupations; and this Act has none of the features of such a mode of taxation. It is what its title imports: taxation of property. As such, I think the mode in which it is exercised is not in conformity with the constitutional provision.

Mindful of the great importance of this case, and of the public interest in the question involved, I have given the subject a careful and thoughtful consideration. If my investigation had left my mind in doubt, I would defer to the opinions of my associates. But investigation has produced in my mind a conviction that the law is in violation of constitutional restrictions, so strong that I cannot yield my judgment to the opinions of others. The taxation imposed is said to be an equitable and fair

512

method of taxing these companies. It probably is, and the law has been executed by the Board of Assessors with a commendable regard to fairness. But it is not the equity or fairness of the system, but the legislative power to tax by this method, that is brought before the court for decision.

A faulty construction of a statute does a wrong, but the injury is temporary. The statute may be altered or repealed. The construction of constitutional law is not for a day or an occasion, and the introduction of an erroneous principle of construction is an abiding wrong that will work incalculable mischief. Every citizen holds his rights and his property under the protection of the Constitution, and is interested that at all times and upon every occasion, sound rules of constitutional construction shall be laid down and adhered to. In the construction of this constitutional provision every citizen having property has a direct interest. It is a part of the organic law adapted to be a barrier against injustice by unequal taxation. The construction proposed to be put upon it in effect eradicates it from the Constitution, and puts the power of taxation where it was before the amendment was adopted, and even enlarges the power of selection and classification beyond the limits imposed by settled principles of taxation. The right to classify, and to subject property to taxation in classes at such rates and for such purposes as the Legislature may will, affects property of every description and ownership in the State. By this Act it is applied to the property of the prosecutors, but who can foretell to what purposes or to what property this doctrine of classification may be extended in the future?

For these reasons, I shall vote to affirm the decision below.

On the question: Shall the judgment of the Supreme Court be reversed as to the tax for State purposes?

For affirmance: Depue, 1.

For reversal: The Chancellor, Dixon, Parker, Reed, Scudder, Brown, Clement, Cole, McGregor, Paterson, Whitaker, 11.

On the question: Shall the judgment of the Supreme Court be reversed as to the tax for county and municipal purposes?

For affirmance: Depue, Dixon, Reed, 3.

For reversal: The Chancellor, Parker, Scudder, Brown, Clement, Cole, McGregor, Paterson, Whitaker, 9.

PENNSYLVANIA.

SUPREME COURT.

Michael HAYES, *Appt.*,

v.

BALD EAGLE VALLEY R. R. CO. *et al.*

1. The lien of contractors and laborers for work done in the construction of a railroad, although of indefinite duration, is subject to the common-law presumption of payment arising from the lapse of twenty years.
2. A bill in equity for the enforcement of the lien so framed that it disclosed the presumption of payment, and containing no allegation of facts in rebuttal of the presumption, will be dismissed on demurrer.

(Decided October 4, 1886.)

CERTIORARI *sur* appeal from a decree of Common Pleas No. 1 of Philadelphia County, sustaining the appellees' demurrer and dismissing the appellant's bill. *Affirmed.*

This was a bill in equity filed September 8, 1884, by Michael Hayes, the appellant, against the Bald Eagle Valley Railroad Company, the Pennsylvania Railroad Company, lessee, and the Fidelity Insurance Trust and Safe Deposit Company, mortgagee, the appellees.

The bill alleged that in the years 1857, 1858 and 1859 the plaintiff, as a contractor, did grading, bridging and mason work for the Tyrone & Lock Haven Railroad Company, a corporation of the State of Pennsylvania, on its line of road between Tyrone and Lock Haven, to the amount of about \$20,000; that the plaintiff was unable to state the exact amount because he never received final estimates and never had access to the books of the company; that the said Tyrone & Lock Haven Railroad Company, while indebted to plaintiff for said work, without his consent, executed a mortgage upon all its road bed, franchises and property of every description for \$500,000; that on June 6, 1860, proceedings in foreclosure were instituted in this court, and on December 7, 1860, this court decreed that said premises should be sold; that on January 29, 1861, the said railroad and its franchises, pursuant to said order and decree, were sold to Philip M. Price for \$21,000, which was a grossly inadequate price; that the sale was fraudulently conducted, and bidders were intimidated, in order that said Price and his confederates might become the owners of said railroad for the smallest possible sum, and thus defraud the plaintiff and the other contractors and laborers of the money justly due them for work and labor done; that by Act of Assembly, on March 25, 1861, the said Philip Price and his associates were created a body politic and corporate, under the name of the Bald Eagle Valley Railroad Company, one of the defendants herein; that upon the sale of said railroad and franchises, as aforesaid, the Tyrone & Lock Haven Railroad Company suspended business and ceased from the ordinary business for which it was created, and ceased to have an existence as a corporation; that by the said Act of Assembly,

all the rights, franchises and privileges, together with the property of the said Tyrone & Lock Haven Railroad Company, were transferred to and became vested in the said Bald Eagle Valley Railroad Company, and it became the successor of said Tyrone & Lock Haven Railroad Company, and as such successor it took possession of said railroad, franchises and property, including the work and labor done by the plaintiff, and proceeded to equip and use said railroad without paying the plaintiff any part of the money due him as contractor, laborer and workman; that on December 7, 1864, the Bald Eagle Valley Railroad Company leased its railroad franchises and property to the Pennsylvania Railroad Company for the term of ninety-nine years; that on January 1, 1880, the Bald Eagle Valley Railroad Company, without the consent of the plaintiff having been previously obtained, mortgaged all its railroad property and franchises to the Fidelity Insurance, Trust and Safe Deposit Company for \$400,000.

The bill alleged further that the plaintiff was legally and equitably entitled to receive from the Bald Eagle Valley Railroad Company and the Pennsylvania Railroad Company the aforesaid balance or sum of \$20,000, with interest from March 8, 1859, or whatever sum may be found due the plaintiff upon a full settlement for said work and labor done upon said railroad as contractor, laborer and workman, as aforesaid; and because the said Tyrone & Lock Haven Railroad Company had ceased to exist and the plaintiff had no remedy in law.

The bill prayed discovery; that an account be stated between the plaintiff and the Tyrone & Lock Haven Railroad Company, and that the amount of the liability of the defendants be definitely ascertained; that the court direct the defendants to pay the plaintiff such sum as might be due him; and for further relief.

The defendants filed a general demurrer which was sustained by the court and the bill dismissed.

The assignment of error specified the action of the court in sustaining the demurrer and dismissing the bill.

Mr. Bertram Hughes, for appellant:

The assets of an insolvent corporation are a fund for the payment of its debts. The holders of the property take it, charged with a trust in favor of creditors, which a court of equity will enforce.

Curran v. Ark. 15 How. 307 (56 U. S. bk. 14, L. ed. 707).

The parties have been joined as defendants, in the manner approved by this court.

Shamokin, etc. R. R. Co. v. Malone, 85 Pa. 25-36.

The plaintiff, being a contractor, has an absolute, indefinite lien upon the railroad and franchises of the Tyrone & Lock Haven Railroad, in the possession of the Bald Eagle Valley Railroad Company and the Pennsylvania Railroad Company. As to the plaintiff, the mortgages and the proceedings thereon are null and void.

Act of Jan. 21, 1843, P. L. 367; *Shamokin Valley etc., R. R. Co. v. Malone*, 85 Pa. 35; *Tyrone & C. R. R. Co. v. Jones*, 79 Pa. 64.

The plaintiff's claim is not barred by the Statute of Limitations.

The seventh section of the Act of April 25, 1850; P. L. 570, provides that:

"The provisions of the Act of the 27th of March, 1713, entitled 'An Act for the Limitations of Actions,' shall not hereafter extend to any suit against any corporation or body politic which may have suspended business or made any transfer or assignment in trust for creditors, or who may have, at the time or after the accruing of the cause of action, suspended the ordinary business for which said corporation was created."

When the corporation became extinct and ceased "from the ordinary business for which it was created," the statute then stopped running, and the legal bar is not in the plaintiff's way.

Shamokin etc. R. R. Co. v. Malone, 85 Pa. 34.

The claim is not stale. We are suing to enforce a strictly legal cause of action, but are compelled to resort to an equitable form, because the Act has not provided us with means to enforce it at law. We cannot obtain a judgment against the Tyrone & Lock Haven Railroad, because it is an extinct corporation.

Id.

The decisions upon suits of this kind hold that a claim of this description does not become stale.

Hox v. Seal, 22 Wall. 424 (89 U. S. bk. 22, L. ed. 774).

A presumption of payment may arise from lapse of time. That is not conclusive, but casts upon us the burden of rebutting it:

Reed v. Reed, 12 Pa. 121.

Equity, by analogy, follows the Statute of Limitations. In this case there is no limitation. Act of April 25, 1850.

Mr. David W. Sellers, for appellees:

Equity follows the law in stale claims.

Hamilton v. Hamilton, 18 Pa. 20; *Irrin v. Cooper*, 92 Pa. 304; *Wagner v. Baird*, 7 How. 284 (48 U. S. bk. 12, L. ed. 681); 2 Story, Eq. § 1520.

Where the obligation is liquidated, either by a bond or a judgment, after the lapse of twenty-one years by all the cases payment is presumed, and a *fortiori* is an unasserted claim barred.

Cope v. Humphreys, 14 Serg. & R. 15; *Foulk v. Brown*, 2 Watts, 214; *Diemer v. Sechrist*, 1 Pen. & W. 419; *Ankeny v. Penrose*, 18 Pa. 192; *Pryor v. Wood*, 31 Pa. 145, 148; *Baily v. Vehmeyer*, 7 W. N. C. 195; *Potter & Page's Est.* 54 Pa. 465; *Reed v. Reed*, 46 Pa. 239; *Bentley's App.* 11 W. N. C. 422; *Commonwealth v. Snyder*, 62 Pa. 157; *Seibert's App.* 2 W. N. C. 53, 557; *Eckert's App.* 6 W. N. C. 21; *Bentley's App.* 11 W. N. C. 422; *Davis v. McHenry*, 11 W. N. C. 305.

It does not follow because the Act of April 15, 1850 (P. L. 570), as to debts and liabilities incurred to contractors, laborers and workmen, under the resolution of 1848, excludes the provisions of the Act for the limitation of actions, that the presumptions of payment and in bar of stale claims do not arise.

The presumption, where the time elapsed is sufficient, is absolute and is nowhere qualified by any circumstance except such as rebuts it. Before the Act of 1798 the lien of a judgment on land had no limitation; yet (*Cope v. Humphreys*, 14 Serg. & R. 15) the presumption is said to be derived from analogy to a Statute of

James. It must therefore have existed before the Act of 1798.

No statutory law limits the lien of a recognizance; but it is subject to the legal presumption of payment.

Ankeny v. Penrose, 18 Pa. 193.

A case somewhat in point is *Slaymaker v. Wilson*, 1 Penr. & W. 219, which was an action by a pledgee against a pledger on the contract which was secured by the pledge. It was a simple contract, and twenty-three years had elapsed before suit. But the court below decided that the continued holding of the pledge prevented the operation of the Statute of Limitations.

Indeed these views have been emphasized by this court in its opinion in *Biddle v. Girard Bank*, 16 Weekly Notes, 397 (1885), wherein—although the claim had passed into judgment—the garnishees were released from the effect of an attachment not prosecuted.

In *Shamokin etc. R. R. Co. v. Malone*, 85 Pa. 35, the claim was not stale nor was the contractor chargeable with laches nor had any presumption arisen from lapse of time.

Mr. Justice Trunkey delivered the opinion of the court:

That the plaintiff had a lien of indefinite duration, prior to all other liens on the property, for the sum due him by the Tyrone and Lock Haven Railroad Company, as contractor for the construction of the road, is incontrovertible. The lien remained, notwithstanding the judicial sale in the proceeding on the mortgage. *Tyrone etc. R. Co. v. Jones*, 79 Pa. 60; *Shamokin etc. R. R. Co. v. Malone*, 85 Pa. 25.

To that debt the Statute of Limitations does not apply.

Although the debt is an indefinite lien, there is nothing in the statutes to save it from the presumption of payment arising from the lapse of time. This presumption arises upon every species of security for the payment of money. The lien of a recognizance is indefinite, yet it lasts not forever; it is subject to the legal presumption of payment, after twenty years from the time of payment. *Ankeny v. Penrose*, 18 Pa. 190.

The rule is in the nature of the Statute of Limitations, furnishing indeed not a legal bar, but a presumption of fact, not subject to the discretion of the jury; they are bound to adopt it as satisfactory proof until the contrary appears. *Cope v. Humphreys*, 14 Serg. & R. 15.

After the lapse of twenty years all evidences of debt excepted out of the Statute of Limitations are presumed to be paid. This is a rule of convenience and policy; the result of a necessary regard to the peace and security of society. Transactions cannot be fairly investigated and justly determined after a long time has involved them in uncertainty and obscurity. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life. *Foulk v. Brown*, 2 Watts, 209.

The plaintiff's bill sets forth that the debt was due on March 8, 1859, from which date he claims that it bears interest; that on January 29, 1861, pursuant to an order and decree of

the supreme court, in a proceeding to foreclose a mortgage, the road bed, franchises and property of the Tyrone & Lock Haven Railroad Company were sold to Philip M. Price, for a grossly inadequate consideration; that on March 25, 1881, said Price and others were created a corporation under the name of the Bald Eagle Railroad Company, which Company was invested with all the franchises and property of the Tyrone & Lock Haven Railroad Company; and that the sum due to the plaintiff is still unpaid.

This bill was filed on September 8, 1884, twenty-five years after the debt became due and payable, and twenty-three years after the judicial sale of the property of the debtor, and the organization of the Bald Eagle Railroad Company, one of the defendants. What has been the cause of delay in bringing suit nowhere appears in the bill. Not a circumstance is stated showing that the debt is unpaid. Hence, on the face of the bill, the presumption is that the debt has been paid; and the action fails unless it is unnecessary to show facts repelling the presumption of payment.

Where a bill is so framed as to present the objection that from lapse of time there is a legal presumption of fact that the debt has been paid, without any attendant circumstances to obviate it, courts of equity act on the analogy of the law as to the Statute of Limitations and will not entertain a suit for relief, if it would be barred at law. And this objection may be taken advantage of by demurrer; but if it does not appear on the face of the bill it must be taken by way of plea or answer. Story, Eq. Pl. § 503; see §§ 751, 813.

In *Piatt v. Vattier*, 9 Pet. 405 [34 U. S. bk. 9, L. ed. 173], a bill for conveyance of the legal title to real estate was dismissed, aside from the Statute of Limitations, because lapse of time was a bar, there being no circumstances stated in the bill or shown in the evidence to overcome the adverse possession; and courts of equity will not entertain stale demands. The remark of Lord Camden was approvingly quoted: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation of suits in this court." See *Wagner v. Baird*, 7 How. 234 [48 U. S. bk. 12, L. ed. 681]; Story, Eq. Jur. § 1520 and note.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Leah GABLE *et al.*, *Appts.*,

v.

George W. BRIETSCH.

1. A certificate of the separate acknowledgment of a married woman, although omitting to state that she de-

livered as well as signed and sealed the deed without compulsion, etc., is not invalid, if otherwise in the usual form; it is a substantial compliance with the statute, and therefore sufficient.

2. The evidence in this case held sufficient to warrant the finding that the mortgage was not given as collateral security.

(Decided October 4, 1886.)

CERTIORARI *sur* appeal from a decree of the Common Pleas of Franklin County, dismissing exceptions and confirming the report of the auditor to make distribution of the proceeds of a sheriff's sale. *Affirmed.*

In proceedings by *scire facias* to foreclose a mortgage the real estate covered by the mortgage was sold by the sheriff for \$2,250, and O. C. Bowers, Esq., was appointed auditor to make distribution.

The auditor found as a fact that the mortgage was given in 1881 by Michael Gable and Leah, his wife, upon real estate belonging to the wife, under the following circumstances:

Michael Gable having served a term as sheriff of the county, employed H. Gehr to collect the fees due him. Gable was indebted to George Brietsch, the appellee, for bread furnished to the county jail; and Gehr, having also in his hands Brietsch's claim for collection, proposed that if Gable and wife would give this mortgage of the wife's real estate to secure the debt he (Gehr) would advance the money upon it and pay off Brietsch. This was done; but when Gehr offered to pay Brietsch the money, Brietsch preferred to take the mortgage instead, and accordingly Gehr assigned it to him. The certificate of the wife's separate acknowledgment stated that "she did voluntarily, and of her own free will and accord, sign and seal" the mortgage, but omitted to state in the separate acknowledgment that she also delivered it, although the certificate stated in the usual form that they acknowledged that they delivered it, etc.

There was at the time the mortgage was given money enough due Gable upon his book accounts, over and above exempt property, to pay Brietsch's claim, but Gable afterwards used nearly all the money as fast as it was collected, and at the time of the sale was insolvent.

The auditor found as facts, *inter alia*, that it was no part of the arrangement that Gehr was to hold the mortgage as a security, and that he should repay himself out of Gable's costs as he should collect them, and that it was not a condition of the giving of the mortgage that it was to be paid out of money to be collected from his books. The testimony is reviewed in the opinion of the court below.

The auditor also found as matter of law that the acknowledgment was sufficient, and that the mortgage was entitled to be paid out of the fund. He reported a schedule of distribution in accordance with these conclusions. To this report exceptions were filed by Leah Gable. The exceptions related both to the findings of fact and the conclusions of law.

Rowe, P. J., overruling the exceptions, said, *inter alia*:

"An objection has been made, but not much

insisted upon, as to the form of the acknowledgment. No doubt the acknowledgment is a substantial compliance with the Act of 1770. That the wife is of full age need not be certified. Michael Gable is referred to as 'her said husband.' Both acknowledged that they signed, sealed and delivered the same as their voluntary act and deed.

"The magistrate, in taking an acknowledgment, is required to do two things: 1, to examine the wife separate and apart from her husband; 2, to make known to the wife the full contents of the deed. The contents may not be made known upon the separate examination. It is required, however, that upon the separate examination she shall, in substance, declare that she did voluntarily and of her own free will and assent seal and, as her act and deed, deliver the deed, without any coercion or compulsion of her husband. Now the certificate states that she did declare that she did voluntarily, and of her own free will and accord, sign and seal the written indenture, without any compulsion on the part of her said husband, to the end the same might be recorded as such as her act and deed.' This is equivalent to saying that as her act and deed she delivered the same. And the whole is to be understood as declared upon her separate examination. *Hornbeck v. Mut. Build. & Loan Assn.* 88 Pa. 64; *Jamison v. Jamison*, 8 Whart. 457; *Shaller v. Brand*, 6 Binn. 435.

"Coming to the main question, I think that the right of Mr. Brietsch to participate in the fund for distribution, depends on this: whether Mrs. Gable executed the Gehr mortgage upon the faith of his agreement to repay his advance out of the moneys collected by him for Michael Gable; in other words, whether the mortgage was given as collateral security.

"Mr. Gehr was collecting costs for Sheriff Gable. George Brietsch had a claim for bread furnished to Gable amounting to \$600, which he put in Mr. Gehr's hands for collection. The costs due Gehr would more than pay Brietsch, if applied to his claim after collection, and were liable to Brietsch's attachment. Gehr offered to furnish the money necessary to satisfy Brietsch, upon the security of Leah Gable's mortgage. The mortgage was executed. Gehr offered Brietsch the \$600, but the latter preferred to take an assignment of the mortgage, which was transferred to him. Mr. Brietsch had nothing else to do with the transaction. Mr. Gehr never spoke to Mrs. Gable herself about the business. She knew that the object of the mortgage was the satisfaction of the Brietsch claim against her husband. She was told by her husband of the costs in Gehr's hands for collection, to an amount greater than the sum secured by the mortgage; and was assured that they would be applied to the mortgage debt and that there would be no trouble.

"There was, so far, no fraud, misrepresentation or concealment in procuring the mortgage, nor was there a fraudulent or even harmful use made of it in transferring it to Mr. Brietsch; for what difference whether Gehr satisfied Brietsch with money or the mortgage, seeing that it was simply held until her land was sold upon another lien?

"But Mrs. Gable testifies that her husband told her that Mr. Gehr was to repay himself out of the costs collected, and that it was on the

faith of this that she gave the mortgage. The auditor has not accepted her testimony, because in this and some other material particulars she differs from her husband and Esquire Seiders, whose evidence is to be preferred.

"First, as to what took place between Mr. Gehr and Sheriff Gable; the former testifies, 'When I took this Brietsch mortgage to myself, I had no agreement or understanding with Mr. Gable, or anyone else, that it was to be paid out of his costs. Mr. Gable was after me time after time for his costs, and I paid them to him as fast as I collected them.'

"Michael Gable testifies that Mr. Gehr said, 'he would make it out of the books * * * he would make up the money for Brietsch, and that would give Mr. Gehr time to collect the money from the books, and save me from being harassed or sued by Brietsch.' * * * The witness, being asked to state fully what transpired between him and Mr. Gehr, said: 'Mr. Gehr said we should give him the mortgage and he would advance the money and keep Brietsch from harassing me, and would make the collections out of the books and pay Brietsch off.'

"Now, I do not think that it can be collected, from a view of the evidence of these two as to what was said between them, that Mr. Gehr agreed or undertook to apply the moneys he should collect for costs to this debt; but only (if so much) that the costs were mentioned as a fund out of which the debt could be paid. The action of Mr. Gehr in paying out the money as fast as collected to Sheriff Gable, or upon his order, shows clearly how he understood the arrangement, for it is not supposable he would have paid out the money to others, without hesitation or question, which he knew were to be appropriated to the Brietsch debt.

"Second, as to what Sheriff Gable told his wife about the arrangement. Esquire Seiders testifies, 'Mr. Gable told her his books were in the hands of Brewer & Gehr, and that there was money enough coming on them to more than pay off this mortgage; that as fast as the money came in it was to be applied to that purpose.' Here it is to be noticed that he did not say that Mr. Gehr had so promised or agreed.

"Michael Gable puts it in different ways: 'I told my wife there would be no trouble about that, as Mr. Gehr would make the money out of the collections within a year.' Again: 'She said, What does this mean? I told her I owed Mr. Brietsch and Mr. Gehr; said by doing this it would keep Brietsch from harassing me, and give him time to collect the money from the books. I told her Mr. Gehr would hold this mortgage and there would be no trouble about it.' Subsequently, in answer to the question: How were her objections removed? he said: 'I just told her there would be no trouble about it; that Mr. Gehr would make the money very easily; that there was plenty of money there to do it with.'

"Now upon the evidence of these two witnesses, Seiders and Sheriff Gable, I do not think that the auditor could safely find that Mrs. Gable was told that Mr. Gehr had agreed to apply the costs to the Brietsch claim; nor could Mrs. Gable fairly infer, and therefore she was not at liberty to infer, that it was to be paid out of the costs, and that her mortgage was only to be a collateral security. They show this only:

that she had the promise and assurance of her husband, whose debt she was about to secure, that he had the means in the costs due to him to meet the debt, and that they should be so applied. But every surety receives the same promise and assurance that he will not be troubled. If she had shown that she was told that Mr. Gehr had so agreed (that is, that he would look to the costs for repayment in the first instance), then, on the authority of *Cridge v. Hare*, 98 Pa. 561, she might perhaps successfully dispute the right of the Gehr mortgage to participate in the fund, because costs enough were, in fact, collected to pay the Brietsch claim. "The exceptions are overruled, the report and distribution of the auditor is confirmed."

The assignments of error specified the action of the court in overruling the exceptions.

Messrs. Thad. M. Mahon and W. N. Brewer, for appellants:

The giving of the mortgage to Brietsch, without the consent of Mrs. Gable, was such an alteration of the original arrangement as in law discharged the surety.

Misrepresentation committed prior to the execution of a guaranty, destroys its operation, and may be either verbal or in writing.

De Colyar, Guar. p. 374; *Blest v. Brown*, 8 Jur. N. S. 603; 3 Giff. 450.

The surety is discharged by a variation which is not in itself material, where the surety has contracted on the faith of the original or has expressly made the terms of it part of his contract. The surety is held to become surety on the faith of the original agreement, if notice was given to him of the terms of the contract between the creditor and the principal debtor, and if after such notice he executed the guaranty.

Garrett v. Handley, 4 Barn. & C. 664; *Glynn v. Hertel*, 8 Taunt. 208; *Bacon v. Chesney*, 1 Stark. 192; *Cridge v. Hare*, 98 Pa. 561.

The Act of Assembly provides that a married woman must acknowledge not only that she signed and sealed, etc., but that she delivered the indenture without any coercion of her husband.

Messrs. H. Gehr and Jno. Stewart, for appellee:

The report of an auditor upon the facts, approved by a judge, must stand until plain error is pointed out.

Liggett Spring & Axle Cos.' App. 2 Cent. Rep. 318; *Messinger's App.* 1 Cent. Rep. 126.

Not every misrepresentation or variation from the original understanding necessarily operates as a discharge of a surety. It must be a material misrepresentation, or a variance that results prejudicially to the surety.

Kerr, Fraud, 74; *De Colyar*, Guar. 391.

A substantial compliance with the form of certificate of acknowledgment prescribed by the Act of Assembly is sufficient.

Hornbeck v. Mutual Build. & Loan Asso. 88 Pa. 64.

In *Jamison v. Jamison*, 3 Whart. 457, the omission was the same as here. It was said by the court that although there were literal deviations from the Act of Assembly, yet the certificate was substantially in compliance with it, and therefore sufficient, according to the decisions in *McIntire v. Ward*, 5 Binn. 301, and *Shaller v. Brand*, 6 Binn. 435.

Per Curiam:

An examination of the whole evidence fails to convict the auditor of error in his finding of facts. The finding was approved and confirmed by the court. The facts thus found clearly sustain the decree of distribution. The certificate of acknowledgment is a substantial compliance with the requirements of the statute.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Henry SWANK, *Plff. in Err.*,

v.

Alfred PHILLIPS *et al.*

1. In an action of ejectment by a plaintiff, claiming as an innocent purchaser for value, without notice, the record of an agreement for the sale of the land in dispute, to the plaintiff, recorded after the commencement of the action, is admissible as evidence; but its rejection is not ground for reversal if the original agreement was admitted.
2. A point presented to the court for consideration should be so answered that the jury will clearly understand whether it is affirmed or denied.
3. That the plaintiff in an action of ejectment has been permitted to testify to matters occurring in the lifetime of the deceased ancestor of defendants, either with or without objection, does not render the widow and son of the ancestor competent to testify to such matters for the purpose of sustaining the defendants' title.
4. The widow and son, being tenants in common with the defendants, in whom an outstanding title is alleged to exist, are not competent witnesses for the defendants, alleging their title.
5. The record of a deed by the executors of a deceased vendor, in a written agreement for the sale of land in this State, to the vendee thereof, executed by direction of a court in another State, is not admissible in an action of ejectment for the land attempted to be conveyed by the deed.
6. A vendee with notice of a former conveyance, or who, with such notice as should have put him on inquiry whether his grantor's title was disputed, neglected to inquire concerning it, is not an innocent purchaser and takes no title.
7. In an action of ejectment, declarations of a deceased grantor, under whom plaintiff claims title, that he had sold the land to the ancestor of the defendants, are admissible.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Sullivan County, to review a judgment in favor of defendants, in an action of ejectment. *Reversed.* At the trial before *Judge P. J.*, the following facts appeared:

David Phillips, being the owner of the land in dispute in 1849, leased it as alleged, by a written lease to continue for seven years, to his son Jonathan Phillips, who took possession. On August 20, 1850, David Phillips executed the following paper:

August the 20, 1850. I do hereby agree that Jonathan Phillips shall have the land which he is posetion of now for the labor he done for me over age and this shall be his receipt for all my "writes" and claims against the land.

David Phillips.

This paper was never recorded.

Jonathan Phillips remained in possession of the land until his death in 1860; and after his death, his widow and children remained, without further writings, until April 1, 1862, when David Phillips, who was administrator of Jonathan Phillips, leased the land to the widow by a written lease for one year.

At the expiration of the lease the widow, at the request of David Phillips, quit the premises. The plaintiff then took possession as tenant of David Phillips, and on October 17, 1863, in a written agreement, contracted to buy the land of him, paying a part of the purchase money.

David Phillips having moved to Michigan and died, without having executed a deed to the plaintiff for the land, his executors (having been paid by plaintiff the balance of the purchase money, in accordance with a decree of the court in Michigan) executed and delivered to plaintiff a deed in 1875, which was placed on record in Sullivan County.

On April 7, 1881, the defendants, being sons of Jonathan Phillips, took possession of the premises by breaking into the house thereon, the plaintiff residing on an adjoining farm. They refused to leave; hence this action was brought.

After the commencement of the action, the agreement between David Phillips and the plaintiff, dated October 17, 1863, for the sale of the land to the latter, was put on record. The record was offered in evidence and refused. *First assignment of error.*

The original agreement was afterwards offered and admitted. The record of the deed by the executors of David Phillips to the plaintiff, executed under direction of the court in Michigan, was offered in evidence and refused. *Second assignment of error.*

The widow of Jonathan Phillips was called as a witness for the defendants, to testify to transactions in the lifetime of David Phillips. The testimony was admitted under objection. *Sixth and tenth assignments of error.*

John Phillips, a son of Jonathan Phillips, and a brother of the defendants, was offered for the same purpose. Objected to because the witness was a party in interest.

THE COURT. Inasmuch as Henry Swank has testified to matters in the lifetime of David Phillips, it being a part of the record, we will not exclude the witnesses on that ground. *Ninth assignment of error.*

Defendants also called witnesses to testify to declarations of David Phillips, made against his interest. They were objected to by the plaintiff, but permitted to testify. *Seventh and eighth assignments of error.*

Griffith Phillips was called by the defendants and testified without objection, as to conversa-

tions with the plaintiff prior to October 17, 1863, as to the title of Jonathan Phillips to the land in dispute.

Two of the points presented by the defendants with the answers of the court thereon were as follows:

Fourth: That the plaintiff, claiming the land under an unrecorded conveyance, cannot recover the land in dispute from the defendants, who are in possession of the land claiming under a prior unrecorded conveyance from the same grantor.

Answer: In this case neither party has a deed, and neither party has a conveyance upon record. The actual possession at the time of bringing suit is not the only criterion of equitable title. If the plaintiff purchased with notice that Jonathan Phillips died seised of that land, claiming to be owner, it was enough to put him upon inquiry; and notice of the equitable title to Jonathan Phillips may be inferred from evidence that he had such notice. *Third assignment of error.*

Fifth: That if the jury believe that Henry Swank had notice of the fact that Jonathan Phillips was the owner of the land or was in possession of the land under a claim of ownership, the verdict of the jury must be for the defendants, and if from the evidence they believe that Henry Swank knew that Jonathan Phillips was in possession of the land for a number of years, that fact should be taken into consideration by the jury in determining the question of notice.

Answer: If the jury believe that Henry Swank had notice that Jonathan Phillips was the owner of the land or in possession of the land under claim of ownership at the time he died, he cannot recover in this action.

The court charged, *inter alia*, as follows:

"In this case it appears that Jonathan Phillips did not put this conveyance to him upon record, neither did Swank put the agreement which he obtained upon record. Therefore we have these cases: two parties, neither of them having what is called a legal title to the land; each of them having an agreement by which he claimed the land, yet neither complying with the law respecting the recording of deeds. These two parties therefore stand upon an equal footing so far as the recording Act is concerned." *Fourth assignment of error.*

"But if he (Swank) had the means of knowing (and such notice as should have put him upon inquiry to find out) by what title this land was held, then he would no longer be an innocent purchaser; for however innocent his intentions might be, that notice is a notice which should have put him upon inquiry and he might find the facts if he wanted to do so." *Fifth assignment of error.*

Verdict for defendants and judgment thereon; whereupon, plaintiff took this writ.

The assignments of error specified the ruling of the court on the testimony as above stated, the answer of the court to defendant's fourth point, and that part of the charge of the court above cited.

Messrs. E. M. Dunham and R. J. Thomson, for plaintiff in error:

"All bargains and sales, deeds and conveyances of lands and tenement and hereditaments in this province, may be recorded in said office."

Bright. Purd. p. 567, pl. 19.

The next section of the Act of 1715 provides the manner of proof of the execution of deeds, etc., by the subscribing witnesses.

The fact that the article of agreement was recorded after suit brought can make no difference; as the Act of 1834, section 1, provides, that "Whenever provision has been made or hereafter shall be made by law for the recording in the proper office any paper or papers, the record and records thereof made, and exemplifications of the same, lawfully certified, shall be legal evidence in all cases in which the same would be competent testimony.

Brightly, Purd. p. 729, pl. 36.

An exemplification of a record is not evidence of a secondary quality, but stands upon an equality with the original.

Curry v. Raymond, 28 Pa. 144.

The deed is executed by the executors, acknowledged before a judge of probate, and certified under his hand and the seal of said court, as required by Act of 1849.

P. L. p. 620, § 8; Brightly, Purd. 571, pl. 30.

By the act of recording, the title relates back to the date of the instrument and makes the one first on record prior in right.

Poth v. Anstatt, 4 Watts & S. 307; *Pa. Salt Mfg. Co. v. Neel*, 54 Pa. 9.

Every presumption is in favor of the subsequent purchaser, when the former owner is guilty of neglect; nothing short of evidence that taints his conduct with fraud can postpone the subsequent purchaser's title.

Boggs v. Varner, 6 Watts & S. 469.

As to notice, see *Miller v. Cresson*, 5 Watts & S. 285.

In *Hetherington v. Clark*, 30 Pa. 393, it is held that an unrecorded deed is void; and nothing short of recording it before the second purchaser does his can save the interest of the first vendee.

In *Meehan v. Williams*, 48 Pa. 238, it is held that "Possession or occupancy, to be equivalent to constructive notice, must be clear, open, notorious and unequivocal at the time of the purchase."

The widow of Jonathan Phillips, and John Phillips a son, were not competent witnesses. Act of April 15, 1869.

Karns v. Tanner, 66 Pa. 297.

Messrs. W. E. Crawford and Ellery P. Ingham, for defendants in error:

A subsequent purchaser, for a valuable consideration, with notice (actual or constructive) of prior rights takes subject to those rights.

Le Neve v. Le Neve, 2 White & T. L. Cas. in Eq. *35.

"The plaintiff in ejectment must show in himself a right to the possession of the land at the time he commenced the action."

Gabraith v. Elder, 8 Watts, 101.

He cannot recover upon a title acquired after suit brought.

McCulloch v. Cowher, 5 Watts & S. 423; *Alden v. Groce*, 18 Pa. 385.

The plaintiff must have the entire right at the time suit is brought; he cannot afterwards strengthen it.

Schrack v. Zubler, 34 Pa. 41.

The Act of 1849 P. L. p. 620, § 8, simply provides a plan by which instruments of writing

made out of this State may be made eligible for record within it. It does not cure the defects in the instrument to be recorded. It is true that the Act of May 27, 1878, P. L. p. 98, does declare that certain deeds made by executors without the State and recorded within it shall be good deeds. But they are deeds made under the authority of any last will and testament.

If there was no authority in the will of David Phillips for his executors to make a deed to Henry Swank, and it does not appear that there was, then it required the decree of a court having jurisdiction authorizing specific performance of this contract. This jurisdiction is vested in the orphans' court in this State; and this jurisdiction is exclusive.

Musselman's App. 65 Pa. 488.

In *Poth v. Anstatt*, 4 Watts & S. 307, and *Pa. Salt Mfg. Co. v. Neel*, 54 Pa. 9, the deeds were recorded before suit brought.

"Whatever is sufficient to put a purchaser upon an inquiry which would have necessarily led him to a discovery of an adverse claim to the land, affects him with notice thereof."

Epley v. Witherow, 7 Watts, 168. See also *Jacques v. Weeks*, 7 Watts, 261; *Hill v. Epley*, 81 Pa. 331.

The notoriety of an adverse claim is evidence to prove notice.

Davis v. Butterbach, 2 Yeates, 211.

Possession, if distinct and unequivocal, is constructive notice of an unrecorded deed.

Sailor v. Hertzog, 4 Whart. 259.

Notice is a question of fact for the jury.

Jamieson v. Pomeroy, 9 Pa. 230.

The widow and son were not parties to any agreement involved in this case and they were not parties in the case.

The interest of a witness must be affirmatively shown.

Plank Road Co. v. Thomas, 20 Pa. 91.

If incompetent evidence has been admitted on the one side it may be rebutted by the same kind of evidence on the other.

Morris v. Travis, 7 Serg. & R. 220.

The admission of incompetent evidence cannot be assigned for error, if the facts were subsequently established by other conclusive evidence.

Wolverton v. Commonwealth, 7 Serg. & R. 273; *Kemmerer v. Edeleman*, 28 Pa. 143.

The acts of a deceased person, done against his interest, are evidence in favor of those claiming under him.

Allegheny v. Nelson, 25 Pa. 332.

Where one has sold the same land to different persons, his declarations before the second sale are evidence against his second vendee.

Steward v. Richardson, 2 Yeates, 89.

Parol declarations made by the parties, after a sale of land by written agreement, are admissible in corroboration of the agreement.

Rearick v. Rearick, and *Wager v. Chev*, 15 Pa. 66, 323.

Mr. Justice Trunkey delivered the opinion of the court:

That it was error to exclude the record of the agreement is too plain for question. It was legal evidence under the Act of February, 21, 1834, P. L. 63; *Curry v. Raymond*, 28 Pa. 144. But its rejection is not ~~error~~ for reversal, for

afterwards the original agreement was offered by the plaintiff, and admitted; otherwise the first assignment would have to be sustained.

When the plaintiff had the agreement recorded, the defendants were already in possession, and this action was pending. At the trial he did not claim to recover because his agreement was recorded; he claimed to be an innocent purchaser without notice; nor is there anything in the statutes relative to recording of deeds to aid him. If he had notice of the outstanding title, it bars his recovery as effectually as if it had been recorded.

The defendants' fourth point, namely: "That the plaintiff claiming the land under an unrecorded conveyance, cannot recover the land in dispute from the defendants who are in possession of the land, claiming under a prior unrecorded conveyance from the same grantor," should have been unqualifiedly refused. Its mere refusal could not have been misunderstood. The answer was very nearly the substance of the defendants' fifth point, and also of the answer to that point, and also of what the court had said respecting notice in the charge.

It is but fair to the parties when one puts a well constructed and definite point, that it be either affirmed or denied. To do neither in express terms, and take occasion to repeat the substance of another point by the same party is likely to be unsatisfactory to the other, if not ground for a reversal. Although a lawyer would understand the point was refused because it was not affirmed, it is uncertain whether the jury would so understand.

The defendants are two of the children of Jonathan Phillips, deceased, and claim under him as heirs. Against the plaintiff's objection, the widow and a son of said decedent were permitted to testify, respecting matters which occurred in the lifetime of said Phillips. The court gave no reason for so permitting the widow to testify, but remarked that the son would not be excluded, inasmuch as the plaintiff had testified to such matters.

In *Morris v. Travis*, 7 Serg. & R. 220, an action arising from a dispute about lines, the defendant was allowed to show the extent of his improvements on the land he had in possession, and this court held that it was competent for him to do so (if for no other reason), to rebut the evidence the plaintiff had given on the same subject. That is the sole authority cited to support the ruling that when an incompetent witness has testified on one side, no matter whether with or without objection, an incompetent witness must be admitted if offered by the other side to testify on the same matter. And we think the case has no application to the ruling. Had objection been made to Swank, and error committed in permitting him to testify, that error could not be corrected by committing another.

Was the brother of the defendants interested? If so, it is not pretended that the statute qualifies him. One of several tenants in common in whom an outstanding title is alleged to exist is not a competent witness for the defendant alleging his title. In such case the witness comes to maintain his own title, and to keep those in possession who recognize it. If the defendants succeed, the title of the witness

is found by the verdict, and he can call on the defendants to attorn to him or commence an action to recover possession. *Lodge v. Patterson*, 3 Watts, 74.

A tenant in common is a competent witness for his cotenant in an ejectment brought by the latter; in that case the cotenant is interested in the question, not in the event of the suit. *Bennett v. Hethington*, 16 Serg. & R. 193.

It was there said "that a tenant in common is not competent to support the possession of his cotenant when the latter is defendant in an ejectment, founded on a title adverse to the title of both." And the reasons were pointed out why a cotenant is competent to testify when called by the plaintiff in an ejectment, and cannot be a witness for the defendant in an ejectment for the land.

Not only was the brother of the defendants (he being their cotenant) incompetent, but so also was their mother. The moment their title is established, her right to the widow's interest under the intestate laws is established. Her interest in the event of the suit is certain. The sixth, ninth and tenth assignments of error are sustained.

In the court below no point was made that the evidence was insufficient to warrant the jury in finding that the plaintiff, prior to his purchase, had notice of the title of Jonathan Phillips. On the contrary, the plaintiff's points indicate that he believed the evidence was sufficient to submit, for he prayed instruction that the plaintiff was entitled to recover if the jury found that he purchased in good faith, without notice of the title which the defendants claimed. Unless there was evidence of notice there was no question about it for the jury.

At present nothing will be said of the sufficiency of the evidence. It may not be precisely the same at the next trial. Then it may appear whether Griffith Phillips is a near relative of the children of Jonathan Phillips, or a stranger. At the argument it was not contended the instructions on the question of notice were erroneous, in case there was evidence to submit.

No error is in the rulings complained of in the second, fourth, seventh and eighth assignments, and there is no occasion to note them specially.

Judgment reversed and venire facias de novo awarded.

James E. DEFFENBAUGH *et al.*, *Pliffs.*
in Err.,
v.

Joseph S. P. HARRIS *et al.*

1. A devise of land, without words of limitation, to a married daughter, followed by the words "and I hereby authorize and empower her to sell and dispose of the same as she may think proper, but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided among her children share and share alike as they arrive at the age of twenty-one," and in the light of other clauses in the will, gives to the daughter a life estate in the land and a power

to appoint, by way of sale or otherwise, to other uses than those specified by the will.

2. A deed of conveyance of the land in fee simple, without the joinder of the husband, is a valid execution of the power.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Blair County, to review a judgment for the plaintiffs in an action of ejectment. *Reversed.*

At the trial before Bucher, P. J., the plaintiffs proved that Aaron Burns died in 1842, seised of the land in controversy and leaving the following will:

"First, it is my will, and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

"Item. I give and bequeath to my daughter Sarah Anne my secretary, two of my best beds and bedding at her choice, and one hundred dollars' worth of household and kitchen furniture, which she may keep at the appraisal if she chooses so to do; also the four acre out lot including the house and garden at the upper end of the Town of Williamsburg (house and garden now occupied by David Stephens); and after she arrives at the age of twenty-one years, do hereby authorize and empower to sell and dispose of the same, or otherwise hold it as she may think proper. I also give and bequeath to my said daughter in addition to the foregoing two thousand dollars in money, as follows: five hundred dollars when she arrives at the age of twenty-one years, five hundred dollars one year thereafter, and the balance, one thousand dollars, to be paid one year after the last five hundred dollars are paid.

"Item. I give and bequeath to my daughter Mary, intermarried with Jos. S. P. Harris [the land in controversy]; and I do hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper; but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided amongst her children, share and share alike, as they arrive at the age of twenty-one. I also give and bequeath to my said daughter Mary two thousand dollars in money, to be paid to her as follows: one thousand dollars one year after my death, and one thousand dollars two years after my death; and no voucher or receipt for the payment of the money as aforesaid shall be of any value except her own, unless in case of her death; then the same to be equally divided amongst her lawful heirs as they arrive at the age of twenty-one years. I will and bequeath to my daughter Mary the balance (if any) due me on a final settlement of the debts and credits of the late firm of A. Patterson & Co. after first deducting the balance from me on my private account remaining on the books of said firm.

"Item. I give and bequeath to my daughter Rachael Rebecca, intermarried with Dr. Alex. McKamey, the house I now occupy [and certain other lands] for her entire use and benefit, to sell the same or hold it as she may think proper; and I do hereby authorize and em-

power my said daughter Rachael Rebecca to sign, seal, execute and acknowledge all such deed or deeds of conveyance as may be requisite and necessary for the granting and issuing the same to the purchaser or purchasers thereof. I also give and bequeath to my said daughter Rachael Rebecca three thousand dollars to be paid to her in money, as follows: five hundred dollars one year after my decease, one thousand dollars three years after my decease, and one thousand dollars four years after my decease; but in the event of her death the money as aforesaid remaining unpaid to be put out on interest for the use of her lawful heirs, to be paid to them share and share alike, as they arrive at the age of twenty-one years, and the house and lots given and bequeathed to my said daughter Rachael Rebecca as aforesaid in the event of her death, and the same remaining unsold is to be distributed amongst her lawful heirs, in the same manner and form as the money.

"Item. I will and bequeath to my son Joseph [a certain house and lot], one good bed and bedding and three thousand dollars in money, to be paid to him as follows: five hundred dollars to be paid to him one year after he becomes of age; five hundred dollars one year after that; one thousand dollars when he arrives at the age of twenty-four years, and one thousand dollars when he arrives at the age of twenty-five years; but in the event of the decease of my said son Joseph without any lawful issue, and the money as aforesaid remaining in part or in whole, or not all due, then and in that case to be divided among my other children then living and my children that may have died and left lawful heirs, share and share alike.

"Item. I give and bequeath to my grandchildren Mary Ann Rhule and Jonathan Albert Rhule, each, eight hundred dollars in money, to be put out on interest until they arrive at the age of twenty-one years; and in the event of the decease of either of them before they arrive at the age of twenty-one, then and in that case the survivor is to receive the whole sum of sixteen hundred dollars; but in the event of the decease of both of my aforesaid grandchildren before they arrive at the age of twenty-one, then and in that case the said sixteen hundred dollars is to fall back to my estate and to be divided amongst my children then living and my children that may have deceased and left lawful heirs, share and share alike.

"It is my will and desire and I hereby order and direct my representatives to sell at public sale three shares I hold in a tract of land in Allegheny Township, bought of Jacob and John Kinsel and Jacob Burkett, who is married to one of the heirs of said estate, containing one hundred and ninety acres, sale to be made in one or two years, as may be thought best and advisable; and I hereby authorize and empower my said representatives to transfer my title to the purchaser and purchasers.

"And as touching all the rest, residue and remainder of my personal estate which will amount to from four to five thousand dollars, which is not disposed of, that when all is settled up, the balance or remainder of my estate, I will and bequeath to my children share and share alike, and my two grandchildren Mary

Ann and Jonathan Albert Rhule to have what would be coming to their mother if living.

"All the houses, lots, etc., given to any of my children in this my last will and testament, are to be taken charge of by them immediately after my decease, and to receive the income and profits arising out of the same; the said houses and lots are all leased for the present year except the one I now occupy. And whereas, I have made sundry deeds of trust of real estate to my children, which are my lawful acts and deeds, and desire that the same may be carried into full effect as intended so to be by the said deeds of trust for the benefit and interest of each of my children named therein; and if any one of my children are dissatisfied with the said deed of trust or this my last will and testament, and commences a suit at law or occasions any disturbances promoting any suit or suits at law, that child or children, son-in-law or sons-in-law, so misbehaving to have no part of my estate, and his or their share or shares to be equally divided amongst the rest of my children share and share alike.

"All promissory notes and receipts for money lent or advanced or for any other purpose including all accounts which I might have held against any of my children or sons-in-law are considered fully settled and discharged, except a balance of rent which Jos. S. P. Harris is to pay after making certain improvements on the farm he now occupies, amounting to one hundred and fifty dollars, due April 1, 1848.

"It is my will and desire that Jos. S. P. Harris and Dr. Alexander McKamey may settle my estate by entering such bail as the orphans' court will require; and if they cannot obtain such bail, then my request is that Adolphus Patterson, Jno. K. Neff and Jos. S. P. Harris become my administrators; and if said Harris cannot find bail, he is to assist the others, as he knows more than anyone else concerning my business; and the administrators as aforesaid are to allow said Harris for his time and trouble, to be paid out of my estate."

The plaintiffs proved also the death of Mary, wife of Jos. S. P. Harris in 1860, leaving four children, three of whom, with their father Jos. S. P. Harris, who had acquired the share of the fourth child, now deceased, were the plaintiffs, and rested.

The defendants offered in evidence the deed of Mary Harris, formerly Mary Burns, to James Stevens, dated March 25, 1851, for the land in controversy, to be followed by proof that James Stevens and the defendants claiming under him had been in possession since 1851 under the deed.

Upon the objection of the plaintiffs the court rejected the defendants' offer, upon the ground that the will gave Mary an estate in fee, "with the right to sell, if she saw proper; but that this did not give her power to sell and convey without her husband joining her."

The court directed a verdict for the plaintiffs; whereupon the defendants took this writ.

The assignments of error specified the action of the court in rejecting their evidence and in instructing the jury to find for the plaintiffs.

Mr. Samuel S. Blair, for plaintiffs in error:

A power has no effect on the limitation over until it is executed. Until then it is as if 256

it had no existence; but if it carries the fee, when executed, it will operate as a divestiture. *Fearne, Contingent Remainders, 226; Phyllis's Estate, 2 Brewst. 179.*

Whether the limitation precedes or follows the power makes no difference.

Fearne, Contingent Remainders, 227.

Sometimes the testator gives in his will a power of disposition and then devises over the estate to take effect if and in case the power shall not be exercised. Limitations of the latter kind are regarded as remainders, and as vested, although liable to be defeated if the appointment shall be made to another.

2 Washb. Real Prop. 586.

No inference in this case of an intention to give a fee can be drawn from the devise being general or indefinite, as the Act of 1833 provides that "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there are no words of inheritance or perpetuity, unless it appear by a devise over, or by words of limitation or otherwise, in the will, that the testator intended to devise a less estate."

A devise of an estate generally or indefinitely with a power of disposition over it carries the fee; but where the estate is given for life only the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed.

Morris v. Phaler, 1 Watts, 390; 4 Kent, Com. 819; Fisher v. Herbell, 7 Watts & S. 78; Second Ref. Pres. Church v. Diabrov, 52 Pa. 223.

A devise for life with a power to dispose of the thing at his death is but an estate for life; and if the devisee or legatee does not dispose of it, it goes (when there is no devise over) to the heir or next of kin of the testator, according to the nature of the property.

Flintham's App. 11 Serg. & R. 16.

A *feme covert* may execute any kind of power whether simply collateral, appendant or in gross; and it is immaterial whether it was given to her when sole or married. The concurrence of the husband is in no case necessary.

4 Kent, Com. 324; Sugden, Powers, 148.

The mode of executing the power of sale given to Mrs. Harris is not specified in the will. It was a power to sell. She did sell and received the purchase money. The power would have been well executed by a parol sale.

Silberthorn v. McKinstler, 12 Pa. 67.

If the power is required to be executed by deed, nothing less will satisfy the words; and it must be sealed and delivered as a proper deed without reference to the power of the donee to make a proper deed; therefore a married woman must seal and deliver the deed as if she were *sui juris*.

2 Sugden, Powers, 308.

Ordinarily a power of disposal annexed to a fee is merged in the estate; but where a married woman is the devisee in fee and the donee of a disposing power, the power, the execution of which may be necessary to pass her estate, should not be regarded as merged.

2 Sugden, Powers, 107; *Abbott v. Burton, 11 Mod. 181; Downs v. Tippetton, 4 Russ. 334.*

Mr. Aug. S. Landis, for defendants in error:

Under the ninth section of the Act of April 8, 1833, Mrs. Harris took an estate in fee sim-

ple. The Act says: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or perpetuity, unless it appears (by a devise over or by words of limitation or otherwise in the will) that the testator intended to devise a less estate." The superadded words of the testator, whereby he authorized her to dispose of the land as she thought proper, will in nowise diminish the estate; but emphasizes the full and perfect measure of the estate, as there is no stronger evidence of the absolute dominion over property than the power to sell it in any way or upon any terms preferred by the seller.

The gift of the proceeds of a thing is the gift of the thing itself; and it is the settled law of this State that a devise with the power to sell vests in the devisee an estate in fee simple.

Morris v. Phaler, 1 Watts, 389; *Culbertson v. Duly*, 7 Watts & S. 195; 4 Kent, Com. 819; *Caldwell v. Fulton*, 81 Pa. 479; *Church v. Disbrow*, 52 Pa. 219.

As there was no life estate, there was no remainder. When the testator directed that in case she died without having sold the land it was to be divided among her children, share and share alike, as they came of age, it was the grant to them of a fee after her fee, by executory devise.

Pells v. Brown, Cro. Jac. 590; *Hinde v. Lyons*, Leon. pt. 2, p. 11; 2 Bl. Com. 178, 174; *Hauer v. Shitz*, 3 Yeates, 221; *Langley v. Heald*, 7 Watts & S. 96; *Evans v. Evans*, 9 Pa. 192.

A power is technically an authority given to some one to do an act in relation to lands which the owner might himself lawfully perform. It is said to be collateral when conferred upon a stranger without interest; appendant when the person along with his interest and within its compass has the power of revocation or appointment; in gross when the life tenant has the power of appointment out of the compass of his estate.

Sugden, Powers, 82; 2 Washb. Real Prop. 802-806.

Until the Statute of 3d and 4th William IV., a married woman could only convey by the fictitious method of fine and recovery. That Act authorized her "to release or extinguish any power vested in or reserved to her in regard to lands of any tenure, as effectually as if she were a *feme sole*; but her husband must concur in the deed, and the deed must be acknowledged as required by the Act."

2 Sug. Vend. 90.

The only modification of this was in 1874, by the Act of 87 and 88 Vict. 78, when she was authorized to execute a deed as a *feme sole* when she was a mere trustee. There are no statutes on this subject in Pennsylvania.

Even if Mrs. Harris had a power to sell, she was not empowered to convey. It is a rule in regard to powers that a strict compliance with the language of the grant is absolutely necessary. What is not there cannot be supplied.

2 Washb. Real Prop. 316.

Here nothing was said as to how she should convey; and with that omitted, the law would supply the usual method, with her husband. In the devise to Rebecca, the testator authorizes her "to sign, seal, execute and acknowledge all such deeds of conveyance as may be

requisite and necessary." Whatever that may avail with her, he studiously avoids going so far with Mrs. Harris.

Mrs. Harris had an estate in this land, and unless she conveyed it as the law required, her conveyance was void. The second section of the Act of February 24, 1770, 1 Purd. Dig. p. 460, requires the husband to join in the deed. The Act of April 11, 1848, made no change in this respect.

Peck v. Ward, 18 Pa. 506; *Thorndell v. Morrison*, 25 Pa. 326; *Glidden v. Strupler*, 52 Pa. 400; *Ulp v. Campbell*, 19 Pa. 361; *Richards v. McClelland*, 29 Pa. 835; *Buchanan v. Hazzard*, 95 Pa. 240.

Mr. Justice Sterrett delivered the opinion of the court:

In 1842 Aaron Burns died seized of the lots in controversy, having first devised the same, *inter alia*, as follows: "I give and bequeath to my daughter Mary, intermarried with Joseph S. P. Harris, the house and lot," etc., describing the property; "and I hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper; but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided among her children, share and share alike as they may arrive at the age of twenty-one."

In 1860 the devisee Mrs. Harris died, leaving her husband and four children surviving her. In 1873 this action of ejectment was brought by three of the children and the husband who had acquired the interest of the fourth child then deceased. They contended that the property had not been sold or disposed of by Mrs. Harris in her lifetime; and hence, according to the terms of the will, the title in remainder was vested in her children.

The defendants, on the other hand, claiming under the deed of Mrs. Harris, of March 25, 1851, to Rev. James Stevens, contended that the lots in controversy were conveyed to him in fee for the consideration of \$1,400; that this was done in execution of the power of sale contained in the will. In support of this position the deed was offered in evidence, but the court rejected it because the grantor's husband was not a party thereto; and thereupon a verdict was directed for plaintiffs.

If the deed had been received and full effect given to it as a conveyance, the defendants would have been clearly entitled to a verdict. It will thus be seen that the controlling question presented by the record is whether the deed of March 25, 1851, operated as a conveyance of the lots to Stevens, under whom defendants claim. The solution of that question depends upon the construction given to the devising clause above quoted.

It was contended by plaintiffs in error that Mrs. Harris took merely an estate for life, with power independently of her husband to sell or otherwise dispose of the devised property as she might think proper; and, in the event of her dying without having executed the power of sale, an indefeasible estate in remainder was given to her children; that the deed above mentioned was a good execution of the power, and therefore operated as a conveyance of the title in fee to her vendee, James Stevens.

An examination of the will has satisfied us that the construction thus contended for is correct and in harmony with the general scheme of the testator, as evidenced by other clauses of his will. Construing the devising clause in question according to the plain import of the language employed and in the light of other provisions of the will, we think the testator intended to give Mrs. Harris a life estate in the lots, with remainder in fee to her children, subject, however, to divestiture by the execution of the power of sale given in express terms to the life tenant.

The power thus given to Mrs. Harris by her father is a power to appoint, by way of sale or otherwise, to other uses than those specified in the will; and was therefore well executed by herself alone without her husband joining in the deed of conveyance to Stevens. Nothing is better settled than that a *feme covert* may, without the concurrence of her husband, execute any kind of power, whether given to her when single or married. 4 Kent, 324; Sugden, Powers, 148.

To require his concurrence might not only embarrass the depositoe of the power in its execution, but in case of his refusal to concur it would prevent its execution altogether and thus defeat the testator's intention. It is obvious from a consideration of the entire will in this case, that the intention of the testator was to exclude the husband from all interest in or control over the property to which the power of sale relates. Stevens, the vendee of Mrs. Harris, derived title to the lots in question, as part of the estate of Aaron Burns, under and by virtue of the power of sale, and not by virtue of any estate in Mrs. Harris herself. The only estate she had was for life; but the power of sale when executed, as it was by a regular deed of conveyance, vested in him the fee to the lots in controversy; and the plaintiffs in error, claiming under him should have been permitted to show their title.

Judgment reversed and a venire facias de novo awarded.

APPEAL OF Joseph McCULLOCH, Guardian, *et al.*

The Act of April 8, 1833, allowing after born children to take against the will, applies only to those physically born after the execution of the will, and does not apply to those legitimated after the making of the will.

(Decided October 4, 1886.)

APPEAL from a decree of the Orphans' Court of Mifflin County, distributing the estate of George Fetzter, deceased. *Reversed.*

Reported below in 2 Pa. C. C. R. 181.

Rufus C. Elder was appointed auditor to make distribution of the estate. Pending distribution, an issue was directed to decide whether Jennie P. Fetzter, born April 4, 1833, of the body of Mary A. Stetler, subsequently married to George Fetzter, was begotten by George Fetzter. The jury found in the affirmative.

The auditor found further that George Fetzter

made his will August 7, 1833, and married Mary A. Stetler August 9, 1833. No provision was made in the will for Jennie P. Fetzter. She claimed before the auditor the right to take against the will as an after born child.

On this point the auditor reported:

"We now come to consider whether the two Acts of Assembly, viz.: May 14, 1857, and April 8, 1833, place this child in the position claimed by her counsel and give her any share of this estate. Does the Act of 1857 invest this child with the same rights which a child unborn at the time of the execution of its father's will would possess?

"The words of the Act are: 'shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents.'

"The contention for the child is that the words 'as if they had been born, etc.,' gives it the rights of a child born on the day of the wedding, after the ceremony, and as it happened in this case two days after the making of the will.

"This would amount to a legal reborning (if we may use the word) of the child, and would place her in a more favored position than any legitimate child born before actual execution of the will could attain. The spirit and intention of the Act of 1833, as the auditor takes it, is to provide for a child born after execution of a will and of whose existence the father was or might be ignorant at the time of making his will. The reason for it was the ignorance of the parent, of its existence. There is no possibility of the presence of such reason in this case. The child was born, the father knew and acknowledged her as his child and lived in the same house with the child from April 4, 1833, to August 7, 1833, or from her birth until the day he made his will, and indeed to the day of his death; and if he desired to provide for her had the full opportunity to do so.

"'As if born during, etc.,' in the Act are simply descriptive of the rights and privileges which the child would enjoy, and meant the fullest rights of a legitimate child.

"Legitimation on a certain day does not give the child the rights of a child born on that day. A legitimate child born before the execution of its father's will would not take under the intestate laws by virtue of the Act of 1833. This Act provides, 'shall make his last will and testament and afterwards shall marry or have a child or children not provided for in such will and die leaving a widow and child or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow or child or children after born, shall be deemed and construed to die intestate, etc.'

"The words and meaning of this Act are perfectly plain. They provide for an after born child and the auditor cannot see how they could include an after legitimated one. In all cases where we have a judicial interpretation of this Act the necessity of the claimant being after born is distinctly set out.

"Had this child been born on August 8, the day after the will was made, and become legitimated by the marriage of her parents on August 9, then she would have been entitled to the benefits of the Act of 1833.

"This child was entitled to the right of inheritance on the marriage of her parents; but there was nothing to inherit, everything being disposed of by will at that time.

"Jennie P. Fetzer is not an after born child and is not entitled to anything out of this distribution."

Exceptions were filed which were sustained by the court.

The opinion of the court below, by Bucher, P. J., after stating the facts, was as follows:

"There are no decisions under the Act of 1857, known to us, which bear upon the question on hand; but the statute gives forth no uncertain sound. It seems to assume (and it is a fair inference) that a man afterwards marrying and cohabiting with a woman who has given birth to a bastard child was its father. In any event, the fact is not disputed that the testator was the father of the child and subsequently married the mother, and cohabited with her.

"The design and theory of this Act was to lift the unfortunate illegitimate out of the dust, and endow him with the quality and dignity of an heir. Until the marriage of his mother to his natural father he is the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. He has had a physical birth, but is incapable of heirship. His blood is corrupt and he is denied the inheritance, is not the 'lawful heir,' and would not, as in the ancient apologue, have been slain that thieves could steal the inheritance. But the statute gives him a new birth, and he is an heir by the fiat of the law. There is no doubt that the legal birth is the time when heirship developed upon him. Any other construction would defeat his right as heir, and thus the statute fail of its purpose.

"The contention is that this Act of 1857 is retroactive and was intended to make the bastard legitimate from the date of its birth, as it is 'to enjoy all the rights and privileges as if it had been born during the wedlock of the parents;' that is, if the parents marry, the illegitimacy of the child is purged and it is to be considered as if it had always been legitimate. To give the Act this construction would involve the anomaly that the child was legitimate when its parents were unmarried.

"We shrink from such an interpretation of the Act. Even if the effect of the marriage of the parents was made retroactive, so as to legitimate from birth, still a court would hold, to prevent injustice, that the child was only born into the inheritance upon the marriage.

"Then is the case within the Wills Act. That statute says when any person shall make his last will and testament, and shall afterwards marry or have a child not provided for in such will and die, although such child be born after the death of the father (that is, if he has a child after making his will, even if it should be born after his death, as if to say no matter when born so it is born after making the will and unprovided for) as to such child the will is inoperative.

"The third proposition in *Walker v. Hall*, 34 Pa. 483, is stated thus: 'If a man makes his will and has an after born child or children not provided for in such will, and dies leaving such after born child or children, so far as regards

such child or children he dies intestate and his will is revoked *pro tanto*.'

"The provision for the case of birth after the decease of the testator was to meet a child *in ventre sa mere*, so that although *in esse* when the will was made, still, if born after, the will falls as to it. *McKnight v. Read*, 1 Whart. 213.

"In *Young's App.* 39 Pa. 115, the child was born after making the will, and the day before the testatrix died, and the will was held revoked.

"In *Grosvenor v. Fogg*, 81 Pa. 401, one child was born a year before the death of the testator, another three years before, and a third six years prior, but all subsequent to the date of the will; and it was held that the will was revoked *pro tanto* as to them all. The auditor denied the claim of the child, upon the ground that the object of the Wills Act was to provide for a child of whose existence the father was ignorant when he made his will, and that the Act could only apply to a child physically born after the date of the will.

"It must be conceded that all the cases of which we have knowledge, decided under this Act, were cases in which the child was physically born after the date of the will. If the words 'after born' in the Act are to be confined to mean physical birth only, the child would be excluded. On the other hand if the child's legitimate existence is to date from the marriage of its parents and not from the day of its natural birth, the will must open so as to allow it to share in the inheritance. The object of the Act was to provide for a change of circumstances in the condition of the testator after he had made his will, which were unknown to him at the time of making it.

"Indeed, the common-law theory of the revocation of wills by the subsequent birth of issue is that the testator's circumstances have so altered that new duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention. When such is the case it will amount to an implied revocation. This is based upon the idea that the testator must be supposed tacitly to have annexed a condition to his dispositions that the will shall stand, provided no such change happens in the relations of his duty as shall call for a different distribution. *Coates v. Hughes*, 3 Binn. 514.

"In the case on hand the testator knew of the physical existence of the claimant at the time he made his will, but at that time he owed it no duty other than that imposed upon him by the Bastardy Act found in the Penal Code. It was a stranger to his blood; but the marriage having been consummated after the date of the will, new duties developed upon him in relation to it. He was then not only under a natural and moral obligation to provide for it, but under a legal obligation as well, because it then became his child with the same force and effect as if it had been then born unto him.

"We think that the marriage produced such a change in the circumstances of the testator in relation to this child after the date of the will as to revoke it *pro tanto*. In this way alone can we give effect to the Act of 1857, which legitimates bastard children upon the marriage and cohabitation of their parents, and to the Wills

Act of 1833, which declares that the will must open and let in a child which the testator has after the date of the will. This child acquired a legal birth after the date of the will and it would be contrary to all equity to debar it from the inheritable qualities which the law conferred upon it by virtue of this birth."

The matter was recommitted to the auditor who, in accordance with the opinion of the court, awarded a share of the estate to Jennie P. Fetzer. The appellants, legatees, took this appeal, the appellee being said Jennie P. Fetzer, by guardian.

The assignments of error specified the action of the court: 1, in sustaining the exceptions to the auditor's report; and 2, in decreeing that Jennie P. Fetzer is entitled to any portion of the fund in the hands of the administrator; in directing a new distribution and confirming the same.

Messrs. C. S. Marks, J. A. McKee and T. M. Uttley, for appellants:

All our rules in such cases are statutory, established by the Legislature by which the common law has been either repealed or altered, or enforced by positive legislative sanction, and therefore not open to the doctrine of implied presumption.

Walker v. Hall, 34 Pa. 489.

Whenever the court has construed the Act of April 8, 1833, physical birth of the child after the execution of the will is what constitutes the change of circumstances and works the revocation of the will as to the child.

Young's App. 39 Pa. 115; *Walker v. Hall*, 34 Pa. 498; *McKnight v. Read*, 1 Whart. 212.

Mr. Horace J. Culbertson, for appellees:

The Wills Act refers to the child or children a testator has after he makes his will, and it is immaterial how long he has known of their existence; provided such child or children are unprovided for in said will, said will as to such child or children is revoked *pro tanto*.

Act April 8, 1833; *Walker v. Hall*, 34 Pa. 498; *McKnight v. Read*, 1 Whart. 213; *Young's App.* 39 Pa. 115; *Grosvenor v. Fogg*, 81 Pa. 401.

The Act of May 14, 1857, intended to give an illegitimate child, legitimated by the marriage of its parents, all the rights and privileges of a legitimate child.

Big Black Creek Improvement Co. v. Commonwealth, 94 Pa. 455.

Mr. Justice Sterrett delivered the opinion of the court:

The single question presented by the specifications of error in this case is whether Jennie P. Fetzer, appellee's ward, should be considered an after born child of the testator within the meaning of the Act of April 8, 1833, § 15, which provides:

"When any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children afterborn, shall be deemed and construed to die intestate; and such widow, child or children, shall be entitled to such purparts, shares and

dividends of the estate, real and personal, of the deceased as if he had actually died without any will." Purd. 1477, pl. 18.

The facts, definitely settled by the auditor's report and verdict of the jury are, that Jennie P. Fetzer, born in April, 1833, was the natural child of George Fetzer and Mary A. Stetler, who were afterwards lawfully married in August of same year. Two days before their marriage George Fetzer made his will, in which he bequeathed to Miss Stetler, mother of the child, \$1,000 "for her kind treatment of him," and gave the residue of his estate, real and personal, to his son, grandchildren and sister, without making any provision for the child born as aforesaid, out of lawful wedlock.

Before the auditor, charged with distribution of testator's estate, it was contended that under the Act above quoted, in connection with the Act of May 14, 1857, the child in question must be regarded as an "after born" child and therefore entitled to a child's share of testator's real and personal estate. This contention was not sustained by the learned auditor; but the orphans' court, being of a different opinion, entered a decree in her favor. From that decree this appeal was taken by those claiming under the will, and thus arises the question above stated.

The learned auditor, as we think, rightly held that the Act of 1833, in providing for after-born children means a physical birth, and not a mere legislative legitimation, after making the will; that it was intended to provide for children, actually born after the execution of a will, and of whose existence their father is supposed to be ignorant at the time of making his will, and not to those previously born and then in full life.

This certainly accords with the plain, unambiguous wording of the Act, and we have no doubt as to its correctness. Nor do we think the Act of 1833, above quoted, has been, in this respect, qualified by the subsequent Act of 1857, which provides: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents."

Upon no reasonable construction of this Act can it be held that appellee's ward was born after testator's will was executed. The conceded fact is, she was born four months before, and therefore in no proper sense of the term can she be regarded as an after born child within the purview of the Act. The reasoning of the learned auditor is so satisfactory and conclusive of the correctness of his position that it is deemed unnecessary to discuss the subject.

We think the learned court erred in not decreeing distribution of the fund in accordance with the first schedule of distribution reported by the auditor.

Decree reversed, at the costs of appellee; and it is now adjudged and decreed that the net balance, remaining after appropriations made to payment of debts and expenses of audit, viz.: \$5,451.19 be distributed as follows, viz.:

To Mary A. Fetzer, widow	\$1,817.06
Joseph McCulloch, Guardian of Ellen Fetzer, minor	\$1,730.53

Joseph McCulloch, Guardian of
 Gertie Fetzler, minor, etc. \$1,730.53
 Louisa Wollaver \$173.07
By the court.

Mary E. LUCK, Exrx. of Jeremiah Luck, Deceased, *Plff. in Err.*,
v.

Israel Lincoln LUCK.

1. A father took possession of a messuage and tract of arable land, in 1873, under a devise to him and his ten years old son, as tenants in common, subject to the payment of certain legacies to other children of the testator "to equalize said property amongst his children." The son lived with his father until 1880, when he went away. The father paid the legacies and farmed the land until his death in 1884. The son, a few months after he came of age in 1885, brought an action of *assumpsit* against his father's executrix for a moiety in value of the crops, without offering to pay his share of the legacies. The court below refused to instruct the jury:
 (a) That there could be no recovery because the plaintiff had not paid his share of the legacies;
 (b) That the presumption was that the plaintiff had received his share of the profits;
 (c) And refused to allow a set-off for lime necessarily spread upon the land from 1874 to 1884.
2. On writ of error to review a judgment on a verdict for plaintiff, the court was divided as to whether the action

would lie, which would have resulted in an affirmance of the judgment; but judgment reversed for refusal to allow set-off.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Snyder County, to review a judgment on a verdict for plaintiff in an action of *assumpsit* by one tenant in common against another for a moiety of the crops. *Reversed.*

Israel Luck died in 1873, having devised some forty-three acres of land, of which he devised, to his son Jeremiah Luck and his grandson Israel Lincoln Luck, son of Jeremiah Luck, "in common," "and in order to equalize said property amongst my said children, the said Jeremiah Luck and Israel Lincoln Luck, his son, shall pay on in manner following, to wit: to my daughter Margaret, \$75 annually, commencing payments one year after my decease, without interest, until due, continuing said payments until the sum of \$376.67 shall be paid; and my said son Jeremiah Luck and Israel Lincoln Luck, his son, shall pay unto my daughter Elizabeth \$40 annually, also commencing paying out one year after my decease without interest until done, continuing said payments until he shall have paid her the sum of \$156.67."

On April 1, 1874, Jeremiah Luck took possession of this land and at once commenced farming the same, which he continued to do until August, 1884, when he died. Jeremiah Luck paid the whole of the legacies. Israel Lincoln Luck, his son, was born in February, 1864, and consequently was ten years old on April 1, 1874, sixteen years old in August, 1880, and twenty-one years old in February, 1885. From 1874 to 1880 the son was an inmate of his father's family on this land. In

NOTE.—*Rights and remedies of cotenants inter sese.* Norris v. Gould, 15 W. N. C. 187, is a case very similar to the above. In it Thayer, P. J. of the Common Pleas of Philadelphia County, deduces the following principles from the authorities:

1. One tenant in common cannot maintain trespass for mesne profits against his cotenant, without proof of actual ouster or acts amounting to it.
2. Nor can he maintain *assumpsit* for mere use and occupation, except upon an express promise of his cotenant.
3. The Statute of 4 Anne, chap. 16, enabling a tenant in common to maintain account render against his cotenant "as bailiff for receiving more than comes to his just share and proportion, without proof that he had expressly constituted him his bailiff," applies only where one tenant in common receives the money or something else from another person to which both cotenants are entitled.
4. No action will lie, either in law or equity, for mere permissive occupation.

Henderson v. Eason, 9 Eng. L. & E. 387; 79 E. C. L. 701, cited by defendant in error in the above case, is authority for the third proposition and is accepted by Judge Thayer as the reasonable and just exposition of the Statute of Anne. The authorities cited by defendant in error from Massachusetts, Maine and other States may also be authority for the same position.

Poppe v. Harkins, 16 Ala. 321, seems to belong here too, as it was an action for rents actually received.

Decisions in California and Texas seem to support the last proposition, that no remedy exists either in law or equity for mere permissive occupation. Pico v. Columbet, 12 Cal. 414; Neil v. Shackelford, 46 Tex. 119.

See Brooks v. Howison (N. H.), 1 New Eng. Rep. 245, for elaborate collection of authorities and where the decisions from some twelve or more States appear to support Judge Thayer's view.

One of the latest English decisions is Leigh v. Dickeson, 24 Am. Law Reg. 499, where it is stated, PA.

although not the point decided: "Both [cotenants] may enjoy the property; but the one in possession, unless the other is ousted, is not liable for rent."

The case of Luck v. Luck, reported above, would seem to put the question in doubt in Pennsylvania, if it was not already. Judge Sharswood, in delivering the opinion in Kline v. Jacobs, 68 Pa. 67 (1871), states the law to be that unless there was an express contract to pay rent, there could be no recovery. The case was tried before Hare, P. J. of the Common Pleas of Philadelphia County and the learned editor of Smith's Leading Cases in Equity. In Kline v. Jacobs, however, there was an express contract. The dicta of Judge Sharswood, in Kline v. Jacobs, are in direct conflict with Borrell v. Borrell, 33 Pa. 492, which held that *assumpsit* would lie, upon proof that the whole of the profits was received by the defendant.

Borrell v. Borrell is not noticed in Kline v. Jacobs, although cited with approval by Judge Sharswood in 1872 in Allegheny Ins. Co. v. Ransom, 68 Pa. 600. Borrell v. Borrell was decided in 1868. The court was divided, Porter, J., delivering the opinion of the court, and Lowrie, C. J., and Woodward, J., concurring, and Thompson and Strong, JJ., dissenting.

In the recent case of Supple v. Yerkes, 1 Ches. Co. R. 401, 578 (1883) an action of *assumpsit* by one tenant in common against one of three others in possession, Futhey, P. J. of the Common Pleas of Chester County, held that the action would not lie, relying upon Kline v. Jacobs. The case was affirmed by the Supreme Court in a *per curiam* opinion, citing Kline v. Jacobs, but apparently deciding the case upon the ground, that "the ascertainment of the equities between the parties involved an investigation of their several rights which could not properly be determined in this form of action against one cotenant."

For Repairs. The case of Leigh v. Dickeson, *supra*, decides that one tenant in common is not entitled to recover in a common-law action, from his cotenant, contribution in respect of repairs done to

1880 he went to live with friends and strangers, earning his own living.

Jeremiah Luck made his last will and testament, in which he gave his entire estate to Mary E. Luck and his son, Ossie D. Luck, the only child by his second wife. He appointed Mary E. Luck sole executrix of his will.

The plaintiff Israel Lincoln Luck brought this action July 21, 1885.

The declaration contained common counts for goods sold and delivered; work and labor done; money lent and advanced, and paid, laid out and expended; money had and received and money due upon an account stated; and also the following special count:

"For that whereas, the said Jeremiah Luck in his lifetime, to wit: on the — day of August, A. D. 1884, at Penn Township, in the county aforesaid, was indebted to the plaintiff in \$2,000, being the value of the crops and products, or aggregate annual value (due the plaintiff) of all that certain tract of land in said township and county which Israel Luck by his last will and testament devised to the said Jeremiah Luck, deceased, and the plaintiff—the said Jeremiah Luck, deceased, having kept and appropriated to himself in his lifetime, to wit: before August, 1884, all the crops, products and annual value of said tract of land, to wit: for about twelve years, the one moiety of which crops, etc., was and is due the plaintiff, which the defendant promised to pay to the plaintiff in the above suit." The defendant pleaded *non assumpsit*; *non assumpsit infra sex annos*; payment, payment with leave and set-off.

On the trial before Bucher, P. J., the plaintiff showed the title and occupancy of the land, the amount and value of the crops and the rule between landlord and tenant in cropping on shares.

the common property, although such repairs may have been reasonable and necessary. The decision is rested upon the principle that "If money is voluntarily expended by one in such circumstances that another is obliged to reap the advantage of it, his accepting what he is not at liberty to refuse is no evidence of adoption or ratification; and therefore the other must suffer for his generosity." To the same effect, see *Converse v. Ferr*, 11 Mass. 328; and *Calvert v. Aldrich*, 90 Mass. 74.

In *Leigh v. Dickeson*, the court refers to a common-law writ in *Fitzherbert's Natura Brevium*, and to *Coke on Littleton*, 200 b, where it is said: "If two tenants in common, or joint tenants, be of a house or mill and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith *ad reparationem et sustentationem ejusdem teneatur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men."

The court, in *Leigh v. Dickeson*, says: "On looking at it [the writ in *Fitzherbert*] I find that it assumes an obligation, on tenants in common to do repairs. * * * I cannot but think he [Coke] has mistaken the writ in *Fitzherbert*. If the sole owner of a house is not under any obligation to repair, I cannot see how joint owners are."

In Pennsylvania it is generally conceded that an action would lie, on the authority of the above quotation from *Coke*, although the point is not necessarily involved in the decision. See *Deck's App.* 57 Pa. 497; *Beaty v. Bordwell*, 91 Pa. 488; *Crest v. Jack*, 3 Watts, 238; *Kelsey's App.* 4 Cent. Rep. 99.

Leigh v. Dickeson holds, however, that an allowance for improvements can be recovered, when the cotenancy is terminated by partition proceedings, in chancery. The money derived from the sale is increased by the improvements, or, if there is a division of the property, *in specie*, the property to be divided is increased. "It may be that it is considered that what has been done is adopted by taking the

The defendant was allowed to set off the plaintiff's share of the legacies above mentioned, and the taxes and other expenses incurred by Jeremiah Luck.

The court rejected the following offer of evidence:

"Defendant's counsel proposed to prove by this witness that he in a proper manner limed this land to keep it in proper condition, from the time these parties moved on this property, April, 1874, down to the time of his death; and that it was necessary to put the lime on that was put on by Jeremiah Luck. This for the purpose of showing a reduction of the plaintiff's claim."

Plaintiff's counsel objects to this evidence; first, unless it be shown that the lime was put upon this land within six years prior to the bringing of this action; second, that as between tenants in common of arable land, no recovery can be had for improvements put upon the common property of the tenants in common. Also objects that this evidence is incompetent unless it is first shown that the lime, which it is proposed to be proved was put on here, was necessary.

By the court: We sustain the objection on the authority of *Beaty v. Bordwell*, 91 Pa. 440, and reject the evidence. To which the defendant excepts and bill sealed. Twelfth assignment of error.

Defendant requested the court to charge, *inter alia*, as follows:

That unless the jury believe from the evidence in the cause that there was an express contract or agreement on the part of Jeremiah Luck to pay Israel Lincoln Luck rent for the use and occupancy of the land, or to give him a part or portion of the grain and other produce raised on the land, then the plaintiff is not en-

improved value or the improved state of the property in severalty." The court also says that no case has been found (in the English reports) where one co-owner has been made to pay, except in case of a partition suit.

In Pennsylvania, in equitable partition, a tenant in common is entitled to improvements made by him which are reasonably necessary for the proper enjoyment of the land, and not injurious to the estate of the other cotenants. *Kelsey's App.* 4 Cent. Rep. 99. The court says: "It may be conceded that there may be cases of partition in which the improvements should be held to inure to the benefit of all the cotenants. It is well intimated that such might be the case where one cotenant undertakes to improve the whole estate, as by erecting a building covering the whole of a city lot." The improvements allowed in that case were a dwelling house costing some \$19,000, on a coal bearing tract of forty-three acres in the City of Scranton, also coal breaker, office and blacksmith shop. The same rule is held in equitable partition in many other States. See report of master in *Kelsey's App. supra*.

As a legislative interpretation that the common-law remedy is inadequate, the Pennsylvania Act of April 25, 1880, may be mentioned. Section 24 provides: "In all cases in which any coal or iron ore mines have been or shall be held by two or more persons, or tenants in common, and coal, iron ore or minerals have been or shall be taken from the same, by any one or more of said tenants respectively, it shall be lawful for any one of said tenants in common to apply, by bill or petition in equity, praying that an account may be taken, etc." See also the Act of April 22, 1886.

See on the subject generally, *Pickering v. Pickering* (N. H.) 2 New Eng. Rep. 248; *Cooter v. Dearborn* (Ill.) 2 West. Rep. 399; *Foltz v. Wert* (Ind.) 1 West. Rep. 856; *Long v. McDow* (Mo.), 2 West. Rep. 130; *Tuers v. Tuers* (N. Y.) 1 Cent. Rep. 284; *McKinley v. Peters* (Pa.) 1 Cent. Rep. 908; *Fell v. Bennett* (Pa.) 1 Cent. Rep. 409. [J. M.]

titled to recover. Refused. First, second and third assignments of error.

If the jury believe from the evidence in the cause that Jeremiah Luck in his lifetime paid Elizabeth Maurer the sum of \$156.67, and Margaret Luck the sum of \$376.67, for the land devised to Jeremiah Luck and Israel Lincoln Luck by the last will and testament of Israel Luck, deceased, which sums of money by said will were to be paid by Jeremiah Luck and Israel Lincoln Luck jointly, and that Israel Lincoln Luck never paid or offered to pay Jeremiah Luck, nor said legatees, the one half of said sums of money, then the plaintiff cannot recover in this suit. Refused. Fifth assignment of error.

That if Jeremiah Luck and Israel Lincoln Luck went jointly into the possession of the land devised to them by the will of Israel Luck, deceased, in April, 1874, and continued in the joint possession until August, 1880, and farmed it, then the presumption is that each one received his share of the rents, issues and profits during that period of time.

Answer. The law is as stated in this point, if the jury find the fact to be that Jeremiah Luck and the plaintiff too farmed the land; but you must not so find in the absence of evidence. The uncontradicted evidence is, if you believe it, that the lands were farmed by Jeremiah Luck alone: that the plaintiff was in his minority, and lived on the land as an inmate of his father's family, and not as a cofarmer with him of the land. In such case, the plaintiff being between ten and sixteen years of age, the presumption would rather be that the father did not hand over to him his share, by reason of his incapacity to properly take care of it. Sixth assignment of error.

The court charged the jury, *inter alia*, as follows:

"[The declaration is not for use and occupation. If it had been, the contention of the defendant that the action would not lie upon mere proof of the occupation, although the possession was permissive on the part of the plaintiff, would be sound. In such case the action would not lie in the absence of a proof of an express promise on the part of Jeremiah Luck, the cotenant, to pay. Such an express promise has not been shown. But such is not the case before us. The plaintiff is seeking to recover the crops which grew upon the lands held in common, which his cotenant in his lifetime received in excess of his share.]

"The supreme court decided in *Gillis v. McKinney*, 6 Watts & S. 78, that assumpsit may be maintained by one tenant in common against his cotenant, to recover a share of the rent, upon proof that the whole was received by the defendant. It is true in this case there was an express promise on the part of the defendant to pay, but the court says that the plaintiff was entitled to maintain assumpsit, upon proof that the defendant had taken all the proceeds of the land and sold it.

"This was followed by *Borrell's Admr. v. Borrell*, 33 Pa. 492, in which it was distinctly held that one tenant in common could maintain assumpsit against his cotenant to recover a share of the profits, upon proof that the whole was received by the defendant. In such case the law

raises an implied promise to pay over the plaintiff's share.

It is insisted that these cases have been overthrown by the decisions in *Kline v. Jacobs*, 68 Pa. 57, and *Norris v. Gould*, 15 W. N. C. 188; but we do not think so. In the former the action was for use and occupation, and the court held that the tenant in common could not recover against his fellow for the use and occupation of the common property without proof of an express contract to pay rent. An action for use and occupation depends not upon privity of estate, but upon privity of contract.

"The court does not notice the cases of *Borrell's Admr. v. Borrell* and *Gillis v. McKinney*, just referred to, and we do not feel at liberty to regard them as overruled. We best discharge our duty by leaving the responsibility of doing that to the supreme court. We are mindful that *Mr. Justice Thayer*, in *Norris v. Gould*, holds that they are overruled by *Kline v. Jacobs*; but he does not say that the supreme court has plainly declared that such was its intention. While we concede his great ability as a judge, yet we decline to follow his ruling, on account of the serious consequences that would ensue if his views of the law be correct. He there holds that, in a case like the one on hand, where one cotenant passively permits his fellow to have the exclusive possession of the lands held in common and to receive all the rents, issues and profits, he cannot recover, in the absence of an express promise to pay, either by action of assumpsit, or account render under the Statute of 4 Anne, chap. 16, or by bill in equity, or in any other way whatsoever. It is a maxim of the law that it affords a remedy for every wrong. We therefore prefer the doctrine enunciated by the supreme court in the cases which are claimed to be overthrown, and hold that they are still the law and that assumpsit will lie. This remedy is far preferable to the now almost obsolete action of account render, and superior to any that can be invoked, unless it be by bill in equity. [In assumpsit a jury can settle all the equities between the parties and do ample and complete justice. We therefore charge you that this action can be maintained and that the plaintiff cannot be defeated, upon the ground that he has misconceived his action, if you find from the evidence that the plaintiff was the cotenant with Jeremiah Luck, of the land upon which the crops in dispute grew, and that he received more than his share.]

"In such case the plaintiff can recover whatever the defendant received over and beyond his share. It is undeniable that the will of Jeremiah Luck, deceased, given in evidence by the plaintiff, constitutes him a cotenant with Jeremiah Luck, of the lands therein devised to them as tenants in common. [The contention of the plaintiff is that Jeremiah Luck entered upon these lands devised to them as tenants in common in April, 1874, and farmed the same and raised crops thereon until his death, in August, 1884, and that during this entire period of about ten years he appropriated to his own use all the crops, and plaintiff received none of them. How this is will be for you to find from the evidence.]

"The plaintiff called a number of witnesses to testify to the fact that Jeremiah Luck thus

farmed the land; and the evidence fails to show that he paid or delivered any portion of the proceeds to the plaintiff. In other words, the contention of the plaintiff is that the evidence will justify you in finding that Jeremiah Luck received all the crops himself, to the exclusion of the defendant. If you find this to be so you will have to ascertain how much this excess is, and that will be your verdict for the plaintiff.] If, however, you find such is not the fact you will find for the defendant.

In determining the amount of the excess, the jury will have to determine the amount of the crops raised, and from this you will have to deduct the cost and expense of growing the crops, as well as the ordinary necessary repairs put upon the land by Jeremiah Luck; also the taxes paid by him as well as the payments made by him to certain legatees named in the will of Jeremiah Luck, deceased, which the plaintiff and Jeremiah Luck were required to pay."

Verdict for plaintiff for \$1,058.85, and judgment thereon. The defendant thereupon took this writ.

The assignments of error were the rejection of the above evidence, the refusal of the above points, and the portions of the charge enclosed in brackets.

Mr. Charles Hower, for plaintiff in error:

"Neither at common law nor under any statute can assumpsit for use and occupation be maintained upon the mere occupation, although it might be shown to be permissive. Each tenant has an equal right to the possession of the whole; and without an express contract to pay rent, account is the only remedy under the Statute of Anne."

Sharswood, J., in *Kline v. Jacobs*, 68 Pa. 59.

Neither trespass nor assumpsit will lie for mere permissive occupation.

Norris v. Gould, 15 W. N. C. 187; *Chambers v. Chambers*, 14 Am. Dec. 587, and notes on pages 586, 587; *Griffith v. Willing*, 3 Binn. 817; *Steffen v. Hartzell*, 5 Whart. 450; *Irvine v. Hankin*, 10 Serg. & R. 219; *Anderson v. Greble*, 1 Ashm. 186.

An action to recover a share of the products of the land must be for the use and occupancy of the land. Proof of the crops raised and the value of them is only evidence to show what the occupancy was worth.

It is true that one tenant in common cannot put new and valuable improvements upon the common property and make his cotenant pay his share of them, for by doing this he might improve his cotenant out of his property. But this is not the rule as to ordinary and necessary repairs, so as to keep the property in a tenantable condition. Liming land of this kind is absolutely necessary in order to keep it in a condition proper for agricultural purposes.

Anderson v. Greble, 1 Ashm. 186; *Decl's App.* 57 Pa. 472.

Before the plaintiff can claim or recover the products, he must show that he paid or offered to pay Jeremiah Luck the one half of the legacies.

Gregg v. Patterson, 9 Watts & S. 197.

Mr. Chas. P. Ulrich, for defendant in error:

At common law one tenant in common could maintain an action of account against his co-
284

tenant, only where he had expressly constituted him his bailiff of his part. The Statute of 4 Anne, chap. 16, § 27 (Roberts, Dig. 48), allows the action of account render without proof of an express contract. Of course account was the only remedy expressly given under the Statute of Anne, which allows the action against the cotenant "as bailiff for receiving more than comes to his just share or proportion," and these words were held to apply only where he has received more than his just share from others; as, for instance, if one tenant in common should rent the common property to a third party and receive all the rent.

Henderson v. Eason, 9 Eng. L. & E. 337.

This court has decided that assumpsit does lie, under facts exactly similar to those in this case.

Gillis v. McKinney, 6 Watts & S. 78; *Borrell's Admr. v. Borrell*, 38 Pa. 492; *Wright v. Cumpsty*, 41 Pa. 112.

In *Brigham v. Ezeleth*, 9 Mass. 538, it is held, where two were joint owners of a machine and one used it for a considerable period, that assumpsit lay for its use.

In *Jones v. Harrison*, 9 Mass. 540 (in note), where one part owner in possession of a ship made a profit by it, held, that the other could recover his part in assumpsit.

In *Fanning v. Chadwick*, 8 Pick. 420, the part owner of a ship was permitted to recover for a share of the profits made while it was in the occupancy of the other part owner.

Again; in 9 Pick. 84, it is decided that if one tenant in common of a wood cut off and sell a portion, his cotenant can maintain assumpsit for money had and received. See also *Gardiner Mfg. Co. v. Heald*, 5 Greenl. 381.

Assumpsit by one cotenant against another, to recover his share of the rents and profits received by the latter, has been sustained in several of the other States on the grounds: 1, that whenever account can be maintained *indebitatus assumpsit* may also; and 2, that the Statute of Anne, *supra*, being remedial, ought to receive a liberal construction.

Moses v. Ross, 41 Maine, 360; *Miller v. Miller*, 7 Pick. 136; *Munroe v. Luke*, 1 Met. 464; *Shepherd v. Richards*, 2 Gray, 424; *Dickinson v. Williams*, 11 Cush. 260; *Buck v. Spofford*, 40 Maine, 828; *Gouen v. Shaw*, 40 Maine, 58; *Dyer v. Wilbur*, 48 Maine, 287; *Piquet v. Allison*, 12 Mich. 829.

In *Brolasky v. Ferguson*, 48 Pa. 435, this court defines the conditions which must exist, to sustain the action for "use and occupation." Strong, J., says an express contract to pay for the use of the land must be shown, or the law must presume a promise to pay a reasonable rent where the occupancy has been by the permission and knowledge of the plaintiff. Applying these principles to tenants in common it is plain that the action for "use and occupation" can never be maintained against a cotenant, unless an express contract is shown, for none can be presumed from the mere occupation, for the occupancy is not permissive but of right, by reason of his estate.

This suit was not brought to recover rent. The crops having grown out of the land are independent of it; and Jeremiah Luck having received all and having converted the same to his use he is liable for money had and received. We are asking for that which he received be-

longing to us, and which is ascertained, fixed and independent of the land.

Kline v. Jacobs, 68 Pa. 57, is distinguished by all that we have said on this subject. Again; the question now raised was not a point in that case, but the errors assigned were on the admissibility of testimony. Much that was said was only incidental. But all that was said on this question was that "Assumpsit for use and occupation" cannot be "maintained upon the mere occupation."

Norris v. Gould, 15 W. N. C. 187, C. P. of Phila. No. 4, as an authority is not binding here. It adheres to that narrow construction of the Statute of Anne, outlined by us above, which fritters away the Statute, so as to confer but little, if any, benefit in ordinary cases.

At the time Jeremiah Luck paid these legacies he was indebted to his son, Israel Lincoln Luck, by reason of the crops which he received, in excess of his share, from the common property. Even assuming that the rule is applicable here, which requires a purchaser under articles to pay or tender the purchase money before bringing ejectment, yet the fact stated above would be sufficient to dispense with such rule.

Smith v. Lessee of Patton, 1 Serg. & R. 84.

This was not an action of ejectment, and the title was complete under the will. This distinguishes the case from *Gregg v. Patterson*, 9 Watts & S. 209.

Where one tenant in common pays in relief of a common burden, contribution may be enforced from the other; all of which was accomplished in this suit.

Weaver v. Wible, 25 Pa. 272.

Analogous to this is the rule laid down as to improvements by one tenant in common.

Crest v. Jack, 3 Watts, 289.

"A tenant in common is liable to his cotenant for repairs that are absolutely necessary to houses and mills already erected and in being, which fall into decay; but the rule does not extend to wood land nor to arable land."

Mercur, O. J., in *Beatty v. Bordwell*, 91 Pa. 441. See also *Crest v. Jack*, 3 Watts, 289; *Gregg v. Patterson*, 9 Watts & S. 209.

"In this case, added to the equal source of knowledge, there is the further element of legal incapacity, a knowledge of which is always imputed, and in this case an admitted fact, which takes away all claims to equity."

Gliddon v. Strupler, 52 Pa. 405.

Mr. Justice Paxson delivered the opinion of the court:

This was not an action of assumpsit by one tenant in common against his cotenant, to recover the value of the crops raised by the latter upon the common property; in other words, for the use and occupation of the land. I am of opinion that the action will not lie, under the facts of this case; in which opinion two of my colleagues concur. Three of them, however, are of a contrary opinion, and as our brother Trunkey did not hear the case we are unable to pass upon the first three assignments of error.

We all agree, however, in reversing the case upon the twelfth assignment. The defendant's counsel offered to show the amount of lime the defendant had put upon the land, and that it

was necessary to put it on in order to raise the crops. The learned judge excluded this evidence upon the authority of *Beatty v. Bordwell*, 91 Pa. 440.

This was error. That case does not rule this.

This action was assumpsit for the value of the crops. The most that the plaintiff could recover would be the value of the crops after a proper allowance for expenses. The lime or other fertilizer, put upon the land for the purpose of growing the crops, was as much a part of the expenses as was the labor of planting or harvesting it. This is too plain to need elaboration. We notice nothing in the remaining assignments which requires discussion.

Judgment reversed and a venire facias de novo awarded.

PENNSYLVANIA COAL COMPANY,
Plff. in Err.,

J. Gardner SANDERSON and Wife, in Right of the Wife.

1. Everyone has the right to the natural use and enjoyment of his own property, and if, while lawfully engaged in such use and enjoyment, without negligence or malice, unavoidable loss occurs to a neighbor, it is **damnum absque injuria**.

2. The maxim **Sic utere tuo ut alienum non laedas** does not apply to landed property where the injury is caused by acts necessary for the natural use of the land.

3. The right to mine coal is a right incident to the ownership of coal property, and when exercised in the ordinary manner and with due care, the owner can not be held liable in damages to a riparian owner for permitting the natural flow of mine water over his own land, into the water course, by means of which the water supply of a riparian owner is affected in quality or quantity, the mine owner introducing nothing into the water to corrupt it, the impurities being from natural and not artificial causes, and the result being a mere personal injury and not affecting the general health and well being of the community.

4. The working of lower strata of coal by shaft, according to the present practice of mining, and the discharge of water in the shaft by the artificial means of pumping, would seem to be necessary for the natural use of the coal lands.

5. Where the cause of action is the pollution of a water course by water from a coal mine, and where the injury was caused by a combination of mine water which flowed naturally from the mines, which was **damnum absque injuria**, and water pumped from the mines, if as to the latter there would be a liability for injury inflicted, where the injury is estimated without distinguishing between these sources, the judgment will be reversed.

6. Cases reviewed, discussed and distinguished, and the case of *Pa. Coal Co. v. Sanderson*, 86 Pa. 401, overruled.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, to review a judgment for plaintiffs in an action on the case. *Reversed.*

The facts are stated in the opinion of the court.

The second and eleventh specifications of error were as follows:

Second. The court erred in rejecting the following offer of defendant. Counsel for defendant offer to prove by the witness on the stand and other persons having experience in the mining of anthracite coal: 1, that the mining of coal at Gipsy Grove Mine was conducted in a prudent and careful manner, and in the mode in general practice in all similar mines in the anthracite region; 2, that the coal is mined at the said breaker in the only mode feasible or possible; 3, that it is indispensably necessary to the mining of coal at said work to free the mine from water by pumping; 4, that the water pumped from said mine naturally flows into Meadow Brook and cannot be disposed of in any other way; 5, that the mine is properly located.

Eleventh. The court erred in the answer to defendant's first point, which point is as follows: 1. "If the jury believe from the evidence that it was impossible for the defendant to mine the coal on its lands along this stream without discharging the mine water from its mines, and the mining was done without malice or negligence; and that no foreign substance was introduced into the water by the defendant; and that when the mine water was so discharged it followed the law of gravity as directed by the natural conformation of the land and flowed by a natural flow into this stream and thence through the plaintiffs' property; then, even if thereby the plaintiffs were damaged, it is *damnum absque injuria*, and plaintiffs cannot recover."

Answer of the court: My answer to this is: this the law herein stated is ruled by the several decisions of the supreme court made in this case; and in accordance with the decision of that court, this instruction to you must be refused.

Messrs. J. M. & W. P. Gest, Henry W. Palmer, Willard & Warren, Henry M. Hoyt and Andrew T. McClintock, for plaintiff in error:

The question involved here is one of new impression in this State and, notwithstanding previous decisions of the court in this case, is still open to discussion.

Judge Woodward, in his opinion reported in 86 Pa. 401, after laying down the general rule: "*Sic utere tuo ut alienum non laedas*," admits that, from necessity, the rule is sometimes relaxed; and cites in illustration, *Acton v. Blundell*, 12 M. & W. 324, where the owner of land, in mining in the usual way, drains the springs which supply his neighbor's well; followed in *Halckman v. Bruckhart*, 45 Pa. 514, and *Wheatley v. Baugh*, 25 Pa. 528.

In mentioning *Smith v. Kenrick*, 7 C. B. (M. G. & S.), 515, as establishing another excep-

tion, he expresses the opinion that "as a precedent it will probably prove of doubtful value." On the contrary, it was applied by Agnew, J., before whom this present case has been argued, and approved with the remark, by way of caution, that the rule there laid down does not apply to a case where the upper mine owner has been guilty of malice or negligence, which no one pretended it did.

Locust Mountain C. & I. Co. v. Gorrell, 9 Phila. 247.

In England, *Smith v. Kenrick* has been ever since recognized as authority.

Crompton v. Lea, L. R. 19 Eq. Cas. 115; *Lord Chancellor Cairns*, in the House of Lords, in *Rylands v. Fletcher*, L. R. 3 H. L. Eng. & Irish Apps. 890.

Bramwell, B., in *Smith v. Fletcher*, L. R. 7 Exch. 805, said that he fully agreed with the case. See also *Baird v. Williamson*, 15 C. B. N. S. 890, and *Jegon v. Vician*, L. R. 6 Ch. App. 742.

This point is important, as the principle of *Smith v. Kenrick*, as we show in our argument, is strongly in our favor.

The learned judge then argues from the principle that if a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril and is liable for the consequences if it escapes and does injury to another; a doctrine which had its origin in the old common-law rule which required a man, at his peril, to keep his beasts from trespassing on his neighbor's land.

But this doctrine has no application to this case, where: 1, the water was naturally there; 2, it was naturally and unavoidably discharged from our mine; and 3, unavoidably, by the law of gravitation, flowed down the natural water course which necessarily drained that part of the country.

See the remarks of Beasley, C. J., in *Marshall v. Welwood*, 38 N. J. L. 339.

Judge Woodward states as the language of Denman, C. J., in *Mason v. Hill*, 5 Barn. & Adol. 1, what was only a statement of the proposition for which the plaintiff contended. That case has no application here.

Wood v. Sutcliffe, 16 Jur. 75, is a very different case, namely: the pollution of a stream with dye stuff, indigo and potash discharged from the defendant's manufactory. Judge Woodward was under the belief that the injunction was granted in that case, and so states as a fact. This is a mistake; *Vice Chancellor Kindersley* refused to grant an injunction; and one of his reasons was that by so doing "I should inflict serious damage upon the defendant without doing any practical good to the plaintiffs." 8 C. 2 Sim. Ch. 163.

Pennington v. Brinsop Hall Coal Co. 46 L. J. Ch. 773; 8 C. 37 L. T. N. S. 149, and 25 Week. Rep. 874; and in all these reports, and in the carefully prepared *syllabi*, not a vestige can be found of the doctrine which Judge Woodward has built upon in this case. The most careful report of the argument is found in 25 Week. Rep. 874.

Judge Woodward stated the case very unfairly to us when he said that "While the plaintiff's claim (in *Pennington v. Brinsop Hall Coal Co.*) involved the assertion of a prescriptive right, it was discussed mainly in view of the

position of the plaintiff as subriparian owner by the justice who granted the injunction." It was not so discussed. The question was not discussed at all. It was not even hinted at by counsel or court.

The *Little Schuylkill Nav. R. R. & Coal Co. v. Richards* Admr. 57 Pa. 142, was a case of deposit of dirt in the bed of a stream.

Damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice, *damnum absque injuria*.

When the maxim *Sic utere tuo ut alienum non ledas* is applied to landed property, the plaintiff must show, not only that he has sustained damage but that the defendant has caused it, by going beyond what is necessary in order to enable him to have the natural use of his own land.

West Cumberland Iron & Steel Co. v. Kenyon, L. R. 11 Ch. Div. 788.

The obvious reason of the decision in *Rylands v. Fletcher*, L. R. 3 H. L. Eng. & Irish Apps. 339; S. C. 3 Hurl. & Colt. 774; and L. R. 1 Exch. 265, was that the defendant had collected in his reservoir a mass of water which was not naturally there. See also Pigott, Torts, London, 1885, for comment on this case.

One who does an act lawful in itself, from which damage results to another, is not answerable for such damage unless he has been guilty of negligence or other fault in the manner of doing the act.

Loose v. Buchanan, 51 N. Y. 476.

In this case *Fletcher v. Rylands* was cited and stated by the court to be in direct conflict with the law as settled in this country.

In *Garland v. Towne*, 55 N. H. 57, Ladd, J., said he was not aware that any court in this country had gone so far.

See also *Marshall v. Welwood*, 88 N. J. Law, 339.

In *Phelps v. Nowlen*, 72 N. Y. 89, it is ruled that the maxim, *Sic utere tuo, etc.*, does not apply at all to an act lawful in itself, even where the act complained of was done with the express intention to injure the plaintiff.

See also *Pizley v. Clark*, 32 Barb. 268.

But the doctrine of *Fletcher v. Rylands* has been restricted by subsequent decisions in England to such an extent as to show that even there it is considered unsafe as a general rule of liability.

In *Nichols v. Marsland*, L. R. 10 Exch. 255, S. C. L. R. 2 Exch. Div. 1, it was held that it did not apply to the case of an escape of water stored in reservoirs in consequence of extraordinary flood.

Boz v. Jubb, 27 Week. Rep. 415, went a step further in extending the defense of *vis major* or the act of God, to a case where the damage was caused by a third party, over whom defendants had no control, releasing water from defendants' reservoir and thus overflowing the plaintiff's land.

Ross v. Fedden, L. R. 7 Q. B. 661, held that the tenant of an upper floor of a building is not liable, in the absence of negligence, for damages caused by water escaping from the plumbing to the lower floor.

The same point arose in Pennsylvania in *Warren v. Kauffman*, 2 Phila. 259, and the court ruled that while negligence was *prima*

facie made out, yet the defendant was not responsible if he could show that the damage was not caused by his negligence.

Madras R. Co. v. Zemindar of Carvatenagarum, L. R. 1 Ind. App. 364, was a case illustrating the influence of usage and custom upon the ordinary rules of law. The suit was to recover damages for injuries occasioned to the plaintiff's railroad by the bursting of two tanks or reservoirs upon the defendant's land.

In *Smith v. Kenrick*, 7 C. B. (M. G. & S.) 515, 564, the defendant was the owner of a colliery on a higher level than that of the plaintiff. Upon the removal of certain coal by the defendant, from his own mine, the lower mine became exposed to the accumulations of water in the defendant's mine which flowed down into that of the plaintiff.

In *Fletcher v. Smith*, L. R. 2 App. Cas. 781; *Smith v. Fletcher*, L. R. 7 Exch. 805; L. R. 9 Exch. 64, it was decided by the House of Lords that "A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, although his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence."

In *Wilson v. Waddell*, L. R. 2 App. Cases, 95, it was held that the right to work mines was a right of property, which being properly exercised begot no responsibility; and therefore, when the ordinary working of a mine caused a subsidence of the surface land, a consequent flow of rain water into a lower coal field gave no right of action, as the injuries complained of arose entirely from gravitation and percolation.

In *Baird v. Williamson*, 15 C. B. N. S. 376, 4 Morrison Mining Cases, 368, it was held that "The owners of the higher mine have a right to work the whole mine in the usual and proper manner, for the purpose of getting out any kind of mineral in any part of that mine; and they are not liable for any water that flows by gravitation into an adjoining mine from works so constructed. We think the law was correctly laid down to that effect in *Smith v. Kenrick*."

To same effect, see *Crompton v. Lea*, L. R. 19 Eq. Cas. 115.

In *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 6 Ch. Div. 77, S. C. L. R. 11 Ch. Div. 788, the defendant maintained, as we do here, that he had done certain things on his own land which he had a lawful right to do. He sunk a shaft on his own land and, finding that it was getting filled with water, made a drain from the bottom of the shaft to some hollows on his own land, from which the water found its way into the plaintiff's land in exactly the same place, and in exactly the same way, and to exactly the same extent as it would have done if the defendant had not done what he did. The court of appeals sustained this view of the case, L. R. 11 Ch. Div. 786.

The only case in which the contrary doctrine has been even suggested is the *New Boston Coal & M. Co. v. Potomac Water Co.* 54 Pa. 164, in which the water company sought to enjoin the coal company from pumping its mine water

into the stream. The court refused the injunction, although without expressing an opinion on the present question.

Kauffman v. Griesemer, and *Martin v. Riddle*, 26 Pa. 407 and 415, decided that the owner of the superior heritage may improve his lands by agricultural or mining operations, although thereby the quantity of water discharged upon the inferior owner is changed. This is said to occur when necessary for carrying on agricultural and mining operations. By a parity of reasoning the same rule should include a necessary alteration in the quality of the water.

Kauffman v. Griesemer was adopted in the precisely similar case of *Hughes v. Anderson*, 68 Ala. 280, Stone, J., remarking: "The rough outline of natural right or natural liberty must submit to the chisel of the mason, that it enter symmetrically into the social structure."

Judge Agnew, in *Locust Mountain Coal & I. Co. v. Gorrell*, 9 Phila. 247, followed and approved the rule as stated in *Smith v. Kenrick*, 7 C. B. (M. G. & S.) 564, cited above, that it would seem to be the natural right of each of the owners of two adjoining coal mines to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.

In *Howell v. McCoy*, 3 Rawle, 256; *Wheatley v. Chrisman*, 24 Pa. 298, and *McCallum v. Germantown Water Company*, 54 Pa. 40, the water had been fouled by the admixture of dye stuffs or some other injurious substance.

"The right of land owners to deal with surface water and all water mixed with the soil, or coming from underground springs, in any manner they may deem necessary for the improvement or better enjoyment of their own land is most unquestionable. And if by so doing, in good faith and with no purpose of abridging or interfering with any of their neighbors' rights, they necessarily do damage to their neighbors' land, it must be regarded as no infringement of the maxim, *Sic utere tuo ut alienum non laedas*, but must be held *damnum absque injuria*."

Judge Redfield, in note to *Swett v. Cutts*, 11 Am. Law Reg. N. S. 24.

What constitutes a reasonable use of the water course, under the necessities of the case?

"Everything must be looked at from a reasonable point of view; therefore, the law does not regard trifling and small inconveniences, but only regards essential inconveniences." Locality and all other circumstances must be taken into consideration, and in counties where great works have been carried on, parties must not stand on extreme rights.

St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; *Snow v. Parsons*, 28 Vt. 462.

The question how much and what shall constitute a legal wrong must necessarily, it seems to us, be a question of what, under the circumstances, is a reasonable use.

Cooley, Torts, 588.

The rule of "reasonable use" is also applied to the case of cities which are compelled to use streams as outlets for their sewers.

268

Merrifield v. Worcester, 110 Mass. 216; S. C. 14 Am. Rep. 592.

In *Gibson v. Puchta*, 33 Cal. 303, the defendant inundated his own land for the purpose of irrigation. The water percolated through a tunnel in the plaintiff's mine and prevented it from being worked.

In Colorado the right of appropriation of water for the purposes of irrigation is stated in *Schilling v. Rominger*, 4 Colo. 100, to be not only given by statute, "but, in a country like Colorado, to arise *ex necessitate rei*." See also *Funk v. Nichols*, 1 Colo. 551.

Prentice v. Geiger, 74 N. Y. 841.

In Pennsylvania, in *Hetrich v. Deachler*, 6 Pa. 32, it was held that "The reasonableness of the detention of water by the riparian owner above, to the damage of the riparian owner below, depending as it must on the nature and size of the stream, as well as the business to which it is subservient, and on the ever varying circumstances of each particular case, must necessarily be determined by the jury and not by the court."

To the same effect is *Hartzell v. Sill*, 12 Pa. 248.

In *St. Helen's Co. v. Tipping* there were two questions submitted to the jury: first, whether the business there carried on was an ordinary business for smelting copper, and whether it was carried on in a proper place. The judges held that the directions are such as we have given in these cases for the last twenty years.

These were practically the instructions given in *Hole v. Barlow*, 4 C. B. N. S. 334, except that the location there was required to be convenient and proper.

The later case of *Bamford v. Turnley*, 3 B. & S. 62, showed that this test of mere convenience was misleading; but in holding that the locality was not to be considered, this case went too far, and when relied on in the argument of *St. Helen's Co. v. Tipping*, its doctrine was not adopted.

In *Huckenstine's App.* 70 Pa. 102, the court refused to enjoin the burning of bricks because it was essential to brick making, which the court regarded as a useful and necessary business, and necessarily exercised near towns.

See also *Rhodes v. Dunbar*, 57 Pa. 287.

In *Carlyon v. Lovering*, 1 H. & N. 784, a custom to discharge into a stream the waste product of mines was maintained.

In *Rogers v. Brenton*, 10 Q. B. 26, the court recognized the validity of a custom to take up tin mines.

In *Morton v. Solambo Co.* 26 Cal. 527, it was held that where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten.

In another case the local custom of the diggings required every man to work his claim two days in every ten, from May to November. Failure to do so worked a forfeiture of the claim.

Packer v. Heaton, 9 Cal. 568; *Strang v. Ryan*, 46 Cal. 38; *St. John v. Kidd*, 26 Cal. 264.

In the early settlement of the Territory of

Colorado, the location of mining claims was regulated by the local usages and customs of the district.

Sullivan v. Hense, 2 Colo. 424.

These mining customs acquire validity from the acquiescence of the people.

Harvey v. Ryan, 42 Cal. 626.

The miner's right comes from the mere appropriation of the claim, made in accordance with the mining rules and customs of the vicinage.

Gore v. McBrayer, 18 Cal. 582; *Colman v. Clements*, 23 Cal. 245.

The law is the same in Nevada.

Oreamuno v. Uncle Sam Mining Co. and *Mallett v. Uncle Sam Mining Co.* 1 Nev. 215, 188.

"As respects the use of water for mining purposes, the doctrines of the common law, declaratory of the rights of riparian owners, were at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection."

Mr. Justice Field in Atchison v. Peterson, 20 Wall. 507 (87 U. S. bk. 22, L. ed. 114).

In *Snow v. Parsons*, 28 Vt. 459, the reasonableness of the use of a stream by the upper riparian owner was held to be a question of fact, to determine which testimony showing the uniform usage of the country was admissible.

A custom in booming logs is considered in *Saunders v. Clark*, 106 Mass. 381.

In *Watts v. Hoch*, 25 Pa. 411, it was held that the custom of the merchants of Pittsburgh to charge interest after six months on goods sold is so universal and notorious that the courts are bound to take notice of this custom as a part of the law; following *Koons v. Miller*, 8 Watts & S. 271, where a similar custom of the Philadelphia merchants was recognized as valid and binding.

So in *Frankford etc. Turnpike Co. v. Philadelphia etc. R. R. Co.* 54 Pa. 345, a case of fire caused by sparks from an engine, it was held that evidence of the common use of a stack, by many others in the same business, was admissible on the question of the safety of the stack.

In *McMasters v. Pennsylvania R. R. Co.* 89 Pa. 374, proof was admitted of the mode of delivery by a common carrier, according to the practice of the place.

This case was fully sustained by the present Chief Justice in *Carter v. Philadelphia Coal Co.* 77 Pa. 286.

Jones v. Wagner, 66 Pa. 429, relied on by the other side, was a different case: an action for damages for falling in of the surface of the land, caused by removal of the underlying coal. The right of support arises *ex jure natura*, and is essential to the absolute preservation of the surface. A custom to deprive the land of its subterranean support might well be considered unreasonable. It is certainly very different from a custom to mine in the only way the necessity of the case admits of.

Mr. A. Hicketts, for defendant in error, referred to the discussion of the principles in 86 Pa. 401, and, as to custom, 94 Pa. 802, but did not print a detailed argument.

Mr. Justice Clark delivered the opinion of the court:

The Pennsylvania Coal Company is the owner of some 1,600 acres of anthracite coal lands, in the Lackawanna Valley, situate above the City of Scranton, in the basin of a small tributary of the Lackawanna River, known as Meadow Brook, into which, owing to the natural conformation of the surface, the water from these lands is drained.

The Company first opened the coal seams on this land by a drift or tunnel in the year 1867 or 1868; it drove three other tunnels and sunk a shaft, and thereafter mining operations were extensively engaged in, the establishment being known as the Gipsy Grove Coal Works. From the time the first tunnel was driven the mine water flowed by the natural course of gravity into Meadow Brook. As the operation of the mines was increased, the volume of mine water increased. The water which percolated into the shaft was by powerful engines pumped therefrom, and as it was brought to the surface it passed with the flow from the tunnel, by an artificial water course, over the defendant's own land, into Meadow Brook, which we have said was the natural water course for drainage of the entire basin.

The plaintiff, Mrs. Sanderson, in the year 1868, purchased a tract of land in the City of Scranton, some three miles below the Gipsy Grove Works on Meadow Brook, near its mouth. The existence of the stream, the purity of its water and its utility for domestic and other purposes, it is said, was a leading inducement to the purchase. She began and, in the year 1870, finished the erection of a house upon the land; in connection therewith dams were built across the brook to form a fish and ice pond, and to supply a cistern; the water was forced by a hydraulic ram from the cistern to a tank in the house, and was used for domestic purposes and for a fountain.

It is alleged that the large volume of mine water, which the defendant poured into Meadow Brook, has corrupted the water of that stream to such an extent as to render it totally unfit for domestic use; that the fish in the brook have been totally destroyed, the plaintiffs' pipes corroded, and their entire apparatus for the utilization of the water rendered wholly worthless; and that in consequence, about the year 1875, the same was abandoned. This action was brought to recover the damages which the plaintiffs allege they have sustained in consequence of the alleged pollution of the stream.

At the trial of the cause in February, 1878, in the Common Pleas of Luzerne County, the court, after hearing the plaintiffs' case, entered a nonsuit, on the ground that the discharge of the mine water was a necessary incident to mining; that there was neither malice nor negligence shown in the operation of the mine, and the case was therefore one of *damnum absque injuria*. A writ of error was taken to the refusal of the court to take off the nonsuit, and the case was presented for the consideration of this court. 86 Pa. 401.

Upon consideration of the questions involved, this court was then of opinion that, except where it is qualified by the existence of peculiar conditions, the duty of the owner of property is defined by the maxim "*Sic utere tuo, ut*

alienum non ledas," that this case exhibited none of those peculiar conditions, and that the plaintiffs' proofs exhibited a case which should have been submitted to the jury. A *procedendo* having been awarded, the cause was again brought to trial in the Common Pleas of Lackawanna County, where, in October, 1879, a verdict was rendered for the plaintiffs. A writ of error was then taken, by the defendant, but this court adhering to the opinion contained in 86 Pa. 401, the judgment was affirmed. [94 Pa. 302].

The plaintiffs, however, sued out a second writ to the same judgment and assigned for error the ruling of the court as to the proper measure of damages; and upon this the judgment was reversed and a *venire facias de novo* awarded. [102 Pa. 870].

The cause was again tried in the Common Pleas of Lackawanna County in February, 1885; judgment was again entered for the plaintiffs; and it is to this judgment that the present errors are assigned.

The questions which are now to be considered, with a single exception, perhaps, being identical with those which were previously considered and embraced in the judgment reported in 86 Pa. 401, the argument has been practically a reargument of the original case. We have before us not only the same parties and the same questions, but the same case; and if it be true, as it is most persistently argued, that this court was mistaken in its former ruling it is well that the error should be righted in the same case in which it occurred.

If we lay aside our own previous decisions of this case, and regard the cause as coming before us upon a reargument, the main question involved is one of new impression in this State. This court was not then and is not now in harmony with reference to it.

It has been stated that 30,000,000 tons of anthracite and 70,000,000 of bituminous coal are annually produced in Pennsylvania; it is therefore a question of vast importance, and cannot on that account be too carefully considered,—for if damages may from time to time be recovered, either in the present form or as for a nuisance, punitive sums may be resorted to to prevent repetition or to compel the abatement of the nuisance; indeed, if the right to damages in such cases is admitted, equity may and under the decisions of this court undoubtedly would, at the suit of any riparian owner, take jurisdiction; and upon the ground of a continuous and irreparable injury enjoin the operation of the mine altogether.

Whatever rights Mrs. Sanderson may have to the use of this water, and whatever remedy she may have in this case, or in any other form, in law or in equity, is the right and remedy of every other riparian owner along Meadow Brook; and whatever may be the rights and remedies of the owners on Meadow Brook are of course the rights and remedies of all other riparian owners throughout the Commonwealth. It may be that Mrs. Sanderson adopted a more extensive arrangement for the use of this water than any other person, and is consequently more inconvenienced on that account; but the law is the same in her case as in all other cases; if she may recover damages in a large amount others

similarly, but less, affected may recover in a less sum.

Besides, these riparian owners are not limited to their present modes of enjoyment. It is impossible to foresee what other modes of enjoyment they or their successors in title may adopt; or to estimate the extent of damages to which the continued pollution of the stream might proceed; hence, if the responsibility of the operator of a mine is extended to injuries of the character complained of, the consequences must be that mining cannot be conducted, except by the general consent of all parties affected.

It will be observed that the defendant has done nothing to change the character of the water or to diminish its purity, save what results from the natural use and enjoyment of its own property. It has brought nothing on to the land artificially. The water as it is poured into Meadow Brook is the water which the mine naturally discharged; its impurity arises from natural, not artificial causes. The mine cannot of course be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.

It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream in its natural flow may reach his neighbor's land. It has always been considered that land on a lower level owes a natural servitude to that on a higher level, in respect of receiving, without claim for compensation by the owner, the water naturally flowing down to it. In sinking his well he may intercept and appropriate the water which supplies his neighbor's well. *Acton v. Blundel*, 12 Mees. & Welsh 324; *Wheatley v. Baugh*, 25 Pa. 523; *Haldeeman v. Bruckhart*, 45 Pa. 514.

Or if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone, on his neighbor's land, to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone which is his own property, and thereby letting out the water. *Whart. Neg.* 939.

He may to a reasonable extent, *jure natura*, divert water from a stream for domestic purposes and for the irrigation of his land. *Messinger's App.* [1 Cent. Rep. 423].

So, also, each of two owners of adjoining mines has a natural right to work his own mine, in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will occur to the owner of the adjoining mine. *Smith v. Kenrick*, 7 C. B. [M. G. & S.] 515.

One mine owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. *Bainbridge, Mines*, 297.

count of the property. By deed of September 15, 1850, Pratt conveyed the property to Samuel and James. They then paid \$1,000 on account of the purchase money and gave a mortgage for the rest, \$2,000. Samuel swears that at his father's death he had of his own money \$880, all of which he put into the property. The \$2,000, the payment of which the mortgage was given to secure, were paid by Samuel and James as follows: \$500 in September, 1851, \$500 in May, 1852, and \$1,000 in September in that year. The family lived in the hotel (it being kept by Samuel and James, who supported the family there) up to 1856, when the mother removed to another house near by, belonging to Samuel and James.

In 1867 Samuel and James made a division of some of the property which they held together as tenants in common, and in that division Samuel conveyed his interest in the hotel property, except the stable lot, to James. They had, it may be remarked, made very extensive additions to the property both in land and buildings. The bill in this case was not filed until August 23, 1884, thirty-four years after the conveyance of the property by Pratt to Samuel and James, and twenty years after the complainant attained her majority.

In 1883 she called the administrators to an account in the orphans' court for their administration. In that account they were charged with the household goods contained in the inventory, although part of them had been taken by members of the family including the complainant herself, and the rest had been used up by the family while living together with the mother. The result of the accounting was that it was decreed that they were liable to pay a balance of \$377.98. All of the family except the complainant voluntarily released them from payment of any part of the balance. The complainant's share thereof, with interest, was tendered to her, but she refused to receive it. The administration, however, is not involved in this case, which has reference only to the claim of the complainant to the hotel property.

The claim is founded in the first place upon the allegation that Samuel and James were in equity tenants in common of the hotel property with the complainant, and that in taking the title thereto they in equity took it in trust for her to the extent of one-seventh part thereof, and that she is entitled to that share and to an account of the rents and profits in this court, out of her share of which her proportion of the purchase money is to be paid. The claim cannot be supported.

It is clear from the evidence that, as before stated, the heirs of Tobias S. Hendrickson were unable to complete the purchase which he had made, and if Samuel and James had not taken the property, the money paid by their father on account of it would have been lost to the estate, and Pratt would have been free to sell to any one else. Samuel and James not only did not seek to take any advantage of the complainant and her brothers and sister, but they were reluctant to take the property at all, and it was only upon the urgency of Pratt's agent and their mother and friends of the family that they were induced to buy it, and it appears they were led to that determination not so much by hopes of

gain as by a desire to benefit their mother and the younger children by keeping a home for them and providing for them until the children could take care of themselves. It will not be out of place to add that it appears that in all things they discharged with commendable generosity, and to the full, their duty in the premises. The kinship between them and their brothers and sisters did not create a fiduciary relation in the purchase. The heirs of Tobias S. Hendrickson did not upon his death become tenants in common of the property. As such heirs they had a right to have a conveyance of the property to them upon their complying with the terms of sale. It being impossible for the other heirs to comply with those terms, Samuel and James were as much at liberty to buy the property for themselves as a stranger would have been. In view of the circumstances of the other heirs, the contract between Pratt and Tobias S. Hendrickson was properly held by Pratt and Samuel and James to be at an end, and Pratt was at liberty to sell the property again and they or anybody else was at liberty to buy it.

It may be added that both Samuel and James swear that they did not know that there was any written agreement between their father and Pratt for the sale of the property, but that all they know about the matter was that their father had agreed to buy the property and had paid the amount of the Haight incumbrance on account of the price.

The complainant's counsel urges also that it was the duty of the administrators to sell the contract in order to raise the money to pay the price, *i. e.*, the \$3,000 which remained unpaid. In the first place they had no right to sell any interest in real estate without the order of the orphans' court, and such order could not have been lawfully made. The orphans' court is authorized to order the sale of lands, tenements, hereditaments or real estate of a decedent, if necessary to pay his debts. But the land in this case was not the land of the decedent; it was Pratt's property. The court could not order that it be sold. An equitable interest in land under a contract of sale is not within the statute. It may be remarked that it does not appear that the price at which Tobias S. Hendrickson purchased the property was below its value. Some evidence as to its value at that time is to be found in the fact that when he made the agreement he held the property as tenant under Pratt at a rent of \$250 a year, from which it would seem that \$3,000 would have been a full price for it.

There is another important consideration against the complainant's claim which should be mentioned before leaving the case, although the decision, as will have been seen, in no wise rests upon it, and that is the great length of time (over twenty years) which elapsed after the complainant came of age before she brought this suit. It is also in this connection noteworthy that she never, before bringing it, made any claim upon Samuel and James or either of them in respect to the property. And she has lived in Red Bank all her life.

There is no ground on which the bill can be sustained. It will be dismissed with costs.

Henry LARISON, *Complainant*,

John POLHEMUS.

1. A claim of a lien on premises under a mortgage, which has been concealed for over twenty years and until all the parties interested therein adversely are dead, is stale and should not be sustained.
2. A claim which is inconsistent with the claimant's former statement under oath must be regarded as an afterthought.

(Filed June 30, 1886.)

BILL for injunction and to quiet title.
Decree accordingly advised.

The facts are stated in the conclusions of the Vice Chancellor.

Mr. W. H. Vredenburg, for complainant.

Mr. H. G. Clayton, for defendant.

Bird, V. C., filed the following conclusions:

The complainant purchased the lands described in his bill at judicial sale, which sale was confirmed by an order of the court, directing the officer to execute a deed to the complainant. At the time the premises were being offered, the defendant exposed in the presence of bidders, of whom the complainant was one, a mortgage, and declared that he held it as a lien upon the premises. To overcome that claim and to quiet the title as to that mortgage, the complainant comes into this court.

I will briefly state the history of the mortgage, so far as the defendant is concerned. It was given by one Cooper in 1856 for \$6,500, on premises which were afterwards purchased by the defendant's father. In 1859 the owner of the mortgage assigned it to Wm. Norton. In 1862, when the principal and interest were reduced to \$2,270, the defendant says he paid that amount upon the bond, and took the bond and mortgage into his possession, and has had the possession of them ever since as his security. He took no written assignment and makes proof of no assignment other than the delivery. There were indorsed upon the bond by the agent of the owner these words: "April 11th, 1862. Received two thousand two hundred and seventy dollars on the principal and interest in full to this date on this bond and mortgage." Signed "Isaac Norton for William Norton." No claim or any pretense of claim has been in any way proved or attempted to be proved on the part of the defendant against his father, who at the time of the payment was owner of the premises and continued to be until the year 1879, nor against anyone else, since his death, until the period of this judicial sale in 1884.

After the most careful consideration I am unable to give the claim of the defendant that credit which is necessary to warrant me in dismissing the complainant's bill for want of equity. It is true the mortgage was not canceled of record. It is true the defendant holds it, and also the bond which it was given to secure. It is also true that he swears that he paid the \$2,270 and took possession of the bond and mortgage for his protection. He says that that money was his own, admitting, however,

that when he went to make the payment his father paid him a portion of it, but insisting that that money, which his father so paid him, he had previously lent to him.

At the time of this transaction the defendant was unmarried and living at home with his father, and was at the age of about 85. There was no account or statement of any kind between the father and son with respect to this bond and mortgage, and the amount due thereon. The defendant accounts for the absence of any understanding between him and his father, by saying that within the next three or four years his father purchased other lands, and agreed with him and his brother George that if they would work his two farms and earn for him, the father, so much money that he could invest \$12,000, he would then convey to them his said two farms, the one having the mortgage on, to the defendant; he says they accepted this offer and worked and managed said farms until the year 1878, when they had actually earned for their father about the sum of \$12,000; he says that in the spring of 1878 he gave up the farms to them; the one with the mortgage upon to the defendant; and that they remained in the possession of them until the next year, when their father died, without his ever having executed to either of them any deed of conveyance.

It appears that after the father's death a bill was filed for the partition of said lands among his children and heirs at law. The defendant and his brother answered said bill and claimed that in equity they were entitled to the said lands, and that the other heirs at law had no interest in them. In his defense to that suit no part of his resistance was based upon this mortgage by implication or otherwise. In speaking of the farm in his testimony in that case he said "There was a \$8,500 mortgage on it; that was on it until we paid it off; Wm. Norton had this mortgage. * * * I think the mortgage was paid off, but we owed a little something at the time, for we were talking about it."

It will be observed that he says "We paid it off," not, "I paid it off;" nor the slightest inference that he had paid it with his own money. If his statement then made be true, the most favorable construction would be that he joined with some one else in paying it; most probably referring by the term "we" to his brother George; and if that be true, then George has some interest—if not an equal or greater interest than the defendant—in said mortgage. But in his answer in this case he makes no such admission, but claims the benefit of said lien for himself; which shows that his present claim is inconsistent with his former statement under oath; and that therefore one or the other must be false. From a legal standpoint this greatly impairs the value of the defendant's testimony, and strengthens the conviction that this claim is but an afterthought.

Very naturally, in considering this question, the inquiry comes to the mind: Why did not the defendant avail himself of this claim in the proceedings for partition? He says he made the fact of having the mortgage known to his counsel, and that his counsel said to him that was not worthy of consideration, since, under the agreement with his father, he was really the owner of the farm. Who was that counsel?

None other than the late James Wilson, distinguished for his ability in presenting and maintaining all the rights and interests of his clients.

Indeed, the proceedings in the partition case illustrate what I say. In that case, when the discussion and the application of legal principles seem to weigh heavily against John, this defendant, and George, his brother, who claimed the farms, then Mr. Wilson insisted that by virtue of their prayer for general relief in their cross bill they were entitled to be heard upon a claim for compensation for services rendered their father during all the years that they worked and managed said farms for him. *Larson v. Polhemus*, 9 Stew. 508; *S. C.* on appeal, 12 Stew. 803.

He prevailed and had such claim considered, and they recovered such compensation as they proved their services to be worth within the period limited by law.

But in all that controversy, lasting a long period, no claim was made of any rights of this defendant as against his father or his estate, arising from the payment by this defendant of said bond and mortgage. To my mind it seems incredible that he should have made the statement and claim of right to Mr. Wilson that he now says he made. There was then due upon the bond and mortgage, if anything, over \$5,000; and if the defendant himself had regarded the lien of the mortgage as *bona fide*, and had made the fact known, Mr. Wilson never would have disregarded a matter of such high importance. This consideration alone shatters to atoms the claim of the defendant.

This, however, is not all. The claim is stale, both with respect to the ancestor and his estate, and also the complainant. It needs no argument to show that courts should hesitate a long time before they support a claim which had been kept from the light for over twenty years, and until all the parties interested therein adversely are dead. And this principle can justly be claimed by all those who claim title to the land in question, under such ancestor, although it be but five years from the death of such ancestor until the time when the claim is made known.

The case in hand strikingly illustrates the danger which may flow from giving credit to such demands. For years there was a contest in open court respecting the title to this land. The defendant in this suit was also defendant in that; and every possible opportunity as well as every conceivable incentive was offered for him to present and if possible establish the lien of this mortgage. By every path he would have been enabled to support if not maintain whatever other claim he had to make by virtue of this supposed lien.

I shall advise a decree in accordance with the prayer of the bill. The complainant is entitled to costs.

Mary Francis GULICK, Complainant,
v.

William GULICK et al.

In an action in which a trust estate or fund is sought to be protected or admin-
N. J.

istered or its true character is sought to be established, the trustee is entitled to his costs out of the estate or fund, in preference to claims of creditors.

(Filed July 1, 1886.)

PETITION for surplus moneys.

The facts are sufficiently stated in the conclusions of the Vice Chancellor.

See also *Gulick v. Gulick*, 2 Cent. Rep. 225.

Mr. J. F. Hageman, for petitioner.

Mr. W. J. Gibby, for W. V. Scudder.

Bird, V. C., filed the following conclusions:

Two hundred and eighteen dollars and one cent are the moneys claimed by the petitioner, Mary Francis Gulick, who was the complainant in the above cause. These moneys came into court under foreclosure proceedings in another suit in which the above named parties were defendants upon a mortgage given by them.

After they had executed and delivered the mortgage, a dispute arose between them as to their respective rights and interest in the property; and among other things it was decided by the chancellor that the premises in dispute were held in trust for the children and grandchildren of the parents. During the pendency of these proceedings the premises were sold, as above stated, to satisfy a mortgage given for money loaned. After the payment of the mortgage, the \$218.01 remained.

Mrs. Gulick insists that she is entitled to have her costs, incurred in the above stated suit, paid out of this surplus. She rests her claim upon the ground that the suit was instituted to ascertain the rights of the parties; and that among other things, as above stated, the court declared that the property was held in trust; which being so, she claims that she is entitled to her costs out of the estate. The law seems to be well settled that in such case the estate or fund sought to be protected or administered, or the true character of which is sought to be established, shall pay the cost of the litigation. 2 Dan. Ch. Pr. 4th ed. 1877, 1411; 2 Perry, Tr. §§ 894, 899.

The principles upon which these authorities stand give the costs in this case to Mrs. Gulick out of the fund.

But Mr. Scudder comes in with his judgment, and claims, by virtue thereof, title to these same moneys. His judgment was obtained against one of the parties prior to the suit to foreclose the mortgage, by virtue of which he was made a party to that suit and obtained a decree in his favor for the amount of the judgment. But it appearing, before his judgment was satisfied, that these lands were only held in trust by the judgment debtor, and that Mr. Scudder had no claim whatever against the *cestuis que trust*, who were not parties to the foreclosure proceedings, the moneys arising from the sale, after satisfying the mortgage, were ordered paid into court.

Mr. Scudder thinks he has as good a title to this money as Mrs. Gulick. Indeed, he claims that his lien or right is as substantial as that of the mortgagee, who had a lien upon the lands by virtue of his mortgage as he has had by virtue of his judgment. It is not for me to determine the rights of Mr. Scudder by a comparison

with the mortgagee, who is out of court and has his money; nor with Mrs. Gulick as a creditor simply. The only question for me to determine is whether these moneys are first subject to the payment of the costs incurred in the litigation in establishing their character. My understanding is that in every such case, creditors, whether they be by simple contract or by judgment, or have special liens, are always postponed to the payment of the costs. This is a familiar rule and adopted in every court.

The costs incurred in the litigation being greatly in excess of the fund in court I will advise an order directing the payment of the \$218.01 to the petitioner, Mrs. Gulick, to be applied to the payment of her costs in the above stated case.

Charles M. WOOD, Complainant,

HILLSBOROUGH MUTUAL FIRE ASSURANCE ASSOCIATION.

1. A bill to recover money due upon a policy of insurance, which states no ground of equitable relief except an apprehension that defendant might set up, as a bar to a recovery at law, a by-law, which the company has waived, cannot be sustained.
2. Waiver of such by-law could be shown in an action at law.

(Decided June 15, 1886.)

ON general demurrer to bill to recover money due upon policy of insurance. *Allowed.*
The case is stated by the court.
Mr. J. J. Bergen, for demurrant.
Mr. J. Schomp, for complainant.

Runyon, Chancellor, delivered the following opinion:

The demurrer must be allowed. The bill states no ground of equitable relief. The complainant has an adequate remedy at law. The only grounds on which it may be conjectured that the suit is brought in this court are that the complainant apprehends that the defendant will set up as a bar to his recovery at law the existence of the by-law which he says it pretended existed when the policy was issued, and that it has waived the enforcement of the by-law if it existed.

But he avers that such by-law did not exist; and he states no ground of relief as against it, in case it should be shown to exist, except waiver; and that would be available to him at law.

SUPREME COURT OF NEW JERSEY.

STATE, LATTA *et al.*, Prosecutors,

Mayor and Common Council of HOBOKEN.

*The Act entitled "An Act to Provide for the Draining of Certain Low Lands Lying in the City of Hoboken and the Township of Weehawken" (P. L. 1866, p. 941) did not take from the common

*Head note by DEPUE, J.

council of the city of Hoboken the power to alter and fix the grade of streets in the city, delineated on the grade map mentioned in and confirmed by the second section of the Act of 1866.

(Decided June 15, 1886.)

CERTIORARI to review an ordinance passed September 15, 1885, for the improvement of Adams Street in the city of Hoboken. *Dismissed.*

Statement of facts by Depue, J.:

This writ brings up an ordinance for the improvement of Adams Street from the northerly line of Third Street to the northerly line of Seventh Street, passed September 15, 1885. This ordinance provides for the grading of the street between the limits mentioned to the highest established grade, the resetting of the curbs and relaying of the flagging.

The lands adjacent to said street and in that locality were part of the estate of John G. Coster, deceased. In 1860 the heirs of Coster caused a map of said lands to be made, entitled "Map of Property Situate at Hoboken, Hudson County, New Jersey, Belonging to the Estate of John G. Coster, Deceased," laying out said tract into lots, blocks and streets, which map they filed in the Hudson county clerk's office, and since then have sold lots to several persons by reference to said map.

The whole of said tract was low marsh or meadow land, the natural surface of which was below mean high tide. Adams Street is one of the streets laid out and designated on said map. In 1866 an act entitled "An Act to Provide for the Drainage of Certain Low Lands Lying in the City of Hoboken and the Township of Weehawken" was passed, approved April 4, 1866. P. L. 1866, p. 941.

The grade map mentioned in the second section of said Act was filed by the owners thereof in the city clerk's office of the city of Hoboken May 24, 1866.

The grade designated on said map is two feet above mean high tide at street corners, and rises eight inches per hundred feet to the center of blocks.

The map is entitled "A Grade Map of Property Belonging to the Estate of John G. Coster, deceased, situate at Hoboken, Hudson County, 1866" made by Robert C. Bacot and L. W. Post, Civil Engineers and Surveyors." At the foot of this map a note was added in these words: "It is recommended (with a view to future raisings of grade) that all buildings of a permanent nature should be placed two feet six inches above the grades shown on this map."

The plans adopted by resolution of the mayor and council of the city for the improvement of Adams Street, pursuant to the ordinance set out in the return to the writ, fixes the grade of said street at four feet above mean high tide at street crossings, and at five feet six inches above mean high tide at the center of blocks, which is two feet higher than the grade shown on the said Coster grade map.

Several houses have been built on the streets above named to correspond with the grade shown on the Coster grade map.

Mr. S. C. Benson, for the prosecutors.
Mr. James Minturn, *contra*.

Depue, J., delivered the following opinion:

By the charter of the city the common council has power to pass ordinances to make, lay out and improve all public streets, to regulate and govern the leveling, pitching and construction of streets, and also the power to grade, pave and remove obstructions in all streets that were or might become public streets or highways by dedication or otherwise. P. L. 1885, pp. 464, 477; § 40, p. 6; § 56.

The ordinance to grade and improve the street in question, and the resolution fixing the grade, were in compliance with the powers granted by the city charter.

The single question is whether these powers were withdrawn from the city authority with respect to the lands in question by the Act of 1866. The second section of the Act is the only part of it that is material to this controversy. It created the commissioners a corporation under the name of "Commissioners to Drain Certain Low Lands Lying in the City of Hoboken and in the Township of Weehawken," and gave them power to reclaim and drain said lands in accordance, as nearly as practicable, with two certain maps made by Robert C. Bacot and Levi W. Post, dated February 1, 1866—the one for sewerage and the other for grades of the lands of the Coster estate, which said maps were therein established and confirmed, with the monuments shown thereon. It also empowered the commissioners to construct, maintain, manage, and use all dykes, dams, ditches, sluices, sluice gates, and all other works, structures and machinery necessary, useful or convenient to reclaim and drain said low lands or any part thereof; to employ a surveyor, engineer and other agents; to make maps of the said low lands; to contract for the execution of the said works; and to do any act and thing necessary to complete and maintain a proper drainage of said low lands or any part thereof. Subsequent sections gave the commissioners power to make assessments on the land so drained for the expenses thereof, and to collect the same by the sale of lands on which assessments were laid; to condemn lands required for the execution of the works necessary for the said improvement, and to borrow money and issue bonds therefor.

The authority conferred upon these commissioners was for the execution of a specified work,—the drainage of low lands in the localities mentioned; and all the powers granted to them were subsidiary to this single purpose. That the legislative scheme was limited within that scope is apparent from the title of the Act as well as from the enumeration of the powers and duties of the commissioners in the body of the Act. It is true that the maps referred to in the Act, and established and confirmed had delineated upon them streets which were proposed as such, among which was Adams Street, and that the confirmation of these maps was an adoption of those streets. But the recommendation annexed to the maps shows that it was not contemplated by the makers of them that they should be taken as an adoption of an established grade for the streets delineated, and the legislative adoption of the grade indicated on the maps was expressly of the grades of the lands according to which, as nearly as practi-

cable, the commissioners were to execute the work of drainage.

Furthermore, the Legislature withheld from the commissioners those governmental powers which were already vested in the municipality, of opening and improving streets, incident to which is the power to fix and establish grades, and limited their duties to the execution of such works as were needful to effect and maintain suitable means to accomplish the draining of the lands within the scope of the legislative plan.

But if it be conceded that the Act of 1866 was the establishment of the grades indicated on these maps, this Act has not superseded the powers granted to the municipality to regulate and establish the grades of streets within the city. It has not done so expressly, and the provisions of the city charter on that subject are not so irreconcilable with the powers of the commissioners as that a repeal of the power by implication would be effected.

In this view of the Act of 1866 the utmost that could be said is that in case the city should exercise the powers granted by the charter in establishing a new grade of the streets, abutting owners would be entitled to recover the damages arising from the alteration of such grade pursuant to the Act of 1858. Rev. 1009, § 70.

The ordinance under review was a legitimate exercise of the powers of the common council under the city charter, and in pursuance of the stipulation of counsel *this writ should be dismissed without costs.*

William F. STILES, *Plff. in Certiorari,*
v.

James H. P. VANDEWATER.

- *1. A defendant in a justice's court, in an action of debt upon contract begun by a warrant on the ground that the debt was fraudulently contracted by means of false and fraudulent representations with regard to the defendant's property and circumstances, may apply to the justice to set aside the warrant for the insufficiency of the affidavits on which the order of arrest was made, and for a wrongful refusal of such an application may have remedy by appeal. But he cannot offer evidence to show that he made no such representations and that he was perfectly responsible for all debts he might incur. *Cole v. Oliver*, 14 Vroom, 182; *S. C.* 15 Vroom, 212, distinguished.
2. Parol evidence that a note payable in three months was given upon an agreement that it should be renewed when it became due is incompetent within the rule that oral testimony cannot be received to vary the terms of a contract in writing.

(Decided June 15, 1886.)

CERTIORARI to the Common Pleas of Monmouth County, to review a judgment affirming a justice's judgment for plaintiff, in an action upon a promissory note. *Affirmed.*

*Head note by DEPUÉ, J.

The facts are stated in the opinion. Argued before Depue, Dixon and Reed, *JJ.* **Mr. R. T. Stow**, for plaintiff in *certiorari*. *Messrs. E. H. Arrowsmith and B. B. Ogden, contra.*

Depue, J., delivered the opinion of the court:

This suit was brought before a justice of the peace in the court for the trial of small causes. The action was in debt on a promissory note made by the defendant for the sum of \$200, dated June 7, 1884, payable three months after date. The note was given for the price of a team of horses sold by the plaintiff to the defendant. The suit was commenced by a warrant to arrest the defendant. The justice made an order for the issuing of a warrant, pursuant to the fourteenth section of the Justice's Court Act (Rev. 541), on the ground that the defendant had fraudulently contracted the said debt.

The affidavits on which the order for a warrant was made set out that the defendant, at the time of the purchase of the horses, represented that he was the owner of the premises then occupied by him and built and owned the buildings thereon, and that the sale of the horses on a credit without security was induced by that representation, and also contained some proof that these representations were false.

The defendant on the appearance day filed a plea setting out a denial that he made such representations, and averring that he was perfectly responsible for all debts he might incur. The defendant then "requested a preliminary hearing to decide upon the matters set forth in the affidavits upon which the order of the justice that a warrant issue was founded." The justice refused the application, and, after hearing evidence on the merits, gave judgment for the plaintiff for \$200 debts and costs. On appeal and a trial before the court of common pleas, judgment was also given in favor of the plaintiff for \$200 and the costs below and upon the appeal. This writ of *certiorari* removes the latter judgment.

The defendant's plea is without warrant of law. It is a traverse of facts set out in the affidavits on which the order for arrest was made, on which the justice adjudicated that the defendant fraudulently contracted the debt for which he was sued. In that respect the plea is totally unlike a plea to the jurisdiction in the nature of a plea in abatement on the ground of a personal privilege, such as was sustained in *Cole v. Oliver*, 14 Vroom, 182; *S. C.* on error, 15 Vroom, 212.

In that case the plea filed was that the defendant was a freeholder, and resided in the county in which the process issued, and the statute which empowers a justice of the peace to issue a warrant expressly exempts freeholders and residents of the county from such process. In such cases the justice has no jurisdiction to proceed by warrant. The defendant's plea was not of this character. It did not propose to show exemption from arrest as a personal privilege on the ground that the defendant was a freeholder and resided in the county. It simply denied the facts set out in the affidavits with respect to the representations made.

In the higher courts, in virtue of the sixty-fourth section of the Practice Act, a judge may

order the taking of testimony concerning the truth of the affidavits and proofs upon which an order for arrest was made, and upon the testimony so taken may set aside the order for arrest. Rev. 859. This statute does not extend to justices' courts, and in that court the common-law rule prevails that the affidavits on which the order is made are taken to be true.

The defendant might have moved the justice to set aside the order for a warrant for the insufficiency of the affidavits, and for a wrongful denial of such a motion might have had remedy upon the appeal. Rev. p. 556, § 95.

The entry in the justice's docket will bear the construction that such a motion was made before him, but it does not appear that it was made in the court of common pleas. All that appears to have been done in that court is that the defendant "moved that the judgment of the justice be reversed because the justice declined to recognize, and to hear testimony in support of, the plea interposed and filed with said justice." This motion being denied, the defendant applied to the court to hear evidence in support of the plea. Both these motions were properly denied.

Another ground of reversal is that the court refused to hear evidence offered by the defendant to show that the note, although payable by its terms in three months, was given upon an agreement that it should be renewed. The offer was not to show an agreement to that effect in writing. It must be taken, therefore, to be an offer to establish such an agreement by parol, and oral testimony was incompetent to vary the terms of the written contract. 2 Pars. Bills, 508; 1 Danl. Neg. Inst. § 80; *Wright v. Remington*, 12 Vroom, 49; *S. C.* 14 Vroom, 451.

The judgment should be affirmed.

Frank PATTERSON, *Plff. in Err.*

v.

STATE of New Jersey.

1. In a criminal case the record need not show that a copy of the indictment and a list of jurors was served on the defendant as required by the statute. If the defendant proceeded to trial without objection on this account, the presumption against him is conclusive that copies were duly served.
2. It is not a ground of exception that some of the general panel of jurors failed to answer to their names when the case was moved for trial. The statute requires now that the forty-eight jurors shall be summoned for service, and that a list of them shall be served on the defendant. It does not require that all the jurors shall be present when the case is moved.
3. The court has power to excuse jurors for good cause.
4. It is within the discretion of the court to determine the order in which the right to challenge shall be exercised by the State or by the defendant; and

- no exception lies to the exercise of that discretion.
5. It was not error in the trial court to order the sheriff to have present in court on a future day the requisite number of qualified jurors to serve as talesmen.
 6. It is not necessary to select talesmen from those actually present in or about the court room. The officer may go out into the county and summon them.
 7. There was no error in ordering the tales, when three of the original panel of jurors had not appeared and answered to the call of their names.
 8. A defendant is entitled to two days' service of the tales. The proper practice is, unless service is waived in open court, to adjourn the cause for the purpose of making service.
 9. The tales having been duly served in this case, it was not a legal ground of exception that three of the talesmen did not answer to their names when the trial proceeded.
 10. It is not a ground of exception that one of the talesmen is exempt from jury duty. That which exempts but does not disqualify is no cause for challenge.
 11. The general panel of jurors for the term must be drawn in the presence of the court of common pleas. In Monmouth County the presence of three judges is necessary to constitute the court of common pleas.
 12. The judge of the court having under our statute the duty to try challenges, his finding upon questions of fact involved in a challenge is conclusive. His decision is reviewable only when he makes a mistake in principle in determining whether a challenge shall prevail.
 13. The facts that a juror had served in another case of the State against the same defendant at the same term, and that he had formed an opinion in that case, is not sufficient to sustain a challenge by the State.

(Decided June 10, 1886.)

ERROR to the Monmouth Quarter Sessions, to review a conviction upon indictments for forgery. *Reversed.*

The facts sufficiently appear in the opinion. Argued before Beasley, Ch. J., and Van Syckel, Knapp and Parker, JJ.

Messrs. R. F. Stout and Wm. T. Hoffman, for plaintiff in error:

"Any action of the common pleas requiring the concurrence of three judges shall be valid and effectual, when concurred in by a majority of the judges of such court."

See Laws of 1880, p. 240, § 2; *Poulson v. Union Nat. Bank*, 11 Vroom, 563.

In selecting a jury all acts of the sheriff in the presence of the court, and proceedings of the court at the time, are directory, except the making of the certificate; that is mandatory.

See *Poulson v. Union Nat. Bank*, *supra*. If the certificate is a record and in existence,

it is conclusive and cannot be inquired into or explained.

See *Hickman v. McCurdy*, 7 J. J. Marsh. 555; *Camden v. Beach*, 65 Ala. 286; *Perry v. Adams*, 83 N. C. 266; *Wade v. Odeneal*, 3 Dev. 423; *State v. Harrison*, 10 Yerg. 542.

Unless the panel is reduced below the number possible to select a jury, it is no cause to challenge or delay; only a list of forty-eight jurors of the general panel is required to be served on defendant.

Smith v. Clayton, 5 Dutch. 357. See §§ 71-78 of Crim. Proc. Act, R. S. pp. 280, 281.

The question of the order of challenges to individual jurors on trials of crimes under the grade of homicide is a mere matter of practice, and is voluntary as to which party should challenge first.

See 1 Archb. Crim. Pr. & Pl. pp. 553, 556, 557.

In Indiana the accused challenges first.

See 1 Archb. Crim. Pr. & Pl. p. 557.

The form of challenge, whether for principal cause or to the favor, is immaterial.

In the one case the juror is legally inadmissible.

In the other case the juror is disqualified by his own act.

State v. Fox, 1 Dutch. 556; *Mann v. Glover*, 2 Green, 195.

If challenge is made to the satisfaction of the court it is sufficient.

See 1 Archb. Crim. Pr. & Pl. p. 555.

A list of talesmen for jurors was served on the defendant two entire days.

See *State v. Aaron*, 1 South. 242.

Matter that exempts and does not incapacitate is no cause for challenge.

See 1 Archb. Crim. Pr. & Pl. 549.

Messrs. Charles Haight and John W. Swartz, for the State:

The crime of forgery was not proven to have been committed. In criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is not enough that the evidence was to show guilt; it must be inconsistent with the reasonable supposition of his innocence.

§ Greenl. Ev. 29, 30, 81, and authorities cited. See also Lawson, Presumptive Ev. 483; *State v. Wilson*, Coxe, 442.

There must be the names of forty-eight jurors in the box from which to draw.

Revision, p. 280, § 72.

If a juror once served in a cause between the State and a defendant, he is disqualified from ever again serving where the State and the defendant are parties. If the juror had before served upon this same case and had officially examined, and under the sanctity of his oath decided the guilt or innocence of the prisoner in this case, then the law presumes this solemn decision is final,—the mind is closed against a re-examination.

State v. Fox, 1 Dutch. 595.

It is no legal objection to a juror that he had been one of the jury in another cause against the same defendant for a different offense.

U. S. v. Watkins, 3 Cranch, C. C. 443; *Thomson & M. Juris*, pp. 194, 195; *Commonwealth v. Hill*, 4 Allen, 591. See *Pearse v. Roger*

& Fin. 137; *Bowman v. State*, 41 Tex. 417; *State v. For*, 1 Dutch. 566-598.

A party has a right to except to the decision of the court upon such challenge, which, if erroneous, must be corrected by awarding the party a new trial.

Thompson & M. Juries, p. 307. *Jones v. Buttersworth*, Pen. 456.

Tales cannot be ordered until all the panel is exhausted.

U. S. v. Watkins, 3 Cranch, C. C. 448; Thompson & M. Juries, p. 87; *Smith v. Clayton*, 5 Dutch. 358.

No challenge, either to the array or to the polls, can be taken until a full jury has appeared; therefore, where the challenges are taken previously, they are irregularly made and out of season.

Rex v. Edmonds, 4 B. & Ald. 471.

No jury can be challenged until a full jury appears in the box.

Reg. v. Lacey, 3 Cox, C. C. 517; Thompson & M. Juries, p. 232.

The well settled rule of construction where contrary laws come in contact is that the general law must yield to the special.

Noy, Maxims 19; *State v. Branin*, 3 Zab. 485; *State v. Clarke*, 1 Dutch. 54; *State v. Mills*, 5 Vroom. 180; *State v. Trenton*, 7 Vroom. 201.

Van Syckel, J., delivered the opinion of the court:

The defendant below was convicted in Monmouth Quarter Sessions of forgery. During the progress of the trial many exceptions were taken, for alleged errors in the proceedings, which constitute the grounds upon which a reversal of judgment is asked for.

In the early days of English criminal jurisprudence, when even a trifling larceny was punishable with death, there was reason why the judicial mind should exhaust its ingenuity in aid of the defense, and seize upon every technicality to avert from the prisoner a punishment so disproportionate to his crime. In our time a more humane system of criminal law has been adopted, which graduates the punishment according to the magnitude of the offense; and in which there is nothing to shock our sense of justice. The reason for resorting to mere technicality to enable the criminal to evade the sanctions of the law no longer exists; and the practice to which that reason led should therefore cease. Men who make their lives a scourge to society must answer its violated laws, and can justly demand in a judicial tribunal nothing except a fair trial according to the laws of the land, in which no substantial right is denied them. The legislation of our State has given expression to this view in the 87th section of the Criminal Procedure Act, in the following language:

"No judgment given upon any indictment shall be reversed for any imperfection, omission, defect in or lack of form, or for any error, except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits."

It is of the utmost importance to society that its criminal classes shall understand that the penalty surely follows the crime.

With these convictions I enter upon the con-

sideration of the questions involved in this controversy.

The Criminal Procedure Act provides that the defendant shall have a copy of the indictment and a list of the jury two entire days at least before the trial, and that he shall not be put upon his trial without his consent deliberately expressed in open court, unless he had such jury list duly served.

The first error assigned is that the record does not show that a copy of the indictment and list of jurors was served as required by the statute.

The answer is that the record need not show compliance with the statute in this respect. The presumption is that all things were rightly done. The defendant knew his rights, and if he proceeded to trial without objection on this account, the presumption against him is conclusive that the copies were duly served. If by the record it appeared that he had objected on that ground in the trial court, and it had there appeared that the jury list had not been served, it would be essential to the validity of the judgment that it appear of record that the defendant's consent to be put upon trial was deliberately expressed in open court.

In this respect no error is apparent. Intendment will be made against the party excepting and in favor of the judgment. Powell, Appellate Jur. p. 129, § 21.

The second assignment of error is that the facts set forth in said cause do not constitute any crime committed against the laws of the State.

The point made is that the evidence did not justify conviction; that the jury should have resolved the doubt in the case in favor of the defendant and rendered a verdict of acquittal.

That question cannot be considered on a writ of error. If the premises are well founded it constituted good ground for an application for a new trial. There was sufficient evidence to go to the jury, and it was submitted with proper instructions by the court.

The third assignment of error is that the court allowed the call of the jury to proceed before all the jurors were present and without a full list thereof.

The record shows that after the challenge to the array was overruled, the court ordered the list of jurors to be called. Upon the call six jurors did not answer.

The counsel of defendant objected to proceeding until all the jury were present. The objection was overruled, and the names of the forty-eight jurors summoned were put in the box from which the jury for this cause was drawn.

If it is necessary that every juror of the forty-eight, summoned for service at the term, should be present in court when a case is called for trial, it would be quite impossible to conduct the prosecution of criminal trials successfully. Our statute requires only that the list of forty-eight jurors be served; it does not require that all the jurors shall be present when the case is moved.

The language of the section with respect to a tales clearly shows that the presence of all is not essential. It provides that if by reason of challenges, or the default of jurors or otherwise, a sufficient number cannot be had of the

original panel to try the issue, a *tales* may be awarded.

The power of the court to excuse a juror from the general panel for cause is recognized in this as well as in other States. *Smith v. Clayton*, 5 Dutch. 358; *Ware v. Ware*, 8 Me. 42; *State v. Ward*, 39 Vt. 280.

As the ninth ground for reversal, the defendant assigns for error that the court below refused to direct that the State should challenge first.

On the trial of a capital case, *Commonwealth v. Piper*, reported in 120 Mass. 185, it was held that it is within the discretion of the court, in the absence of statutory regulation or a general rule of court, to determine the order in which the right to challenge shall be exercised by the State or by the defendant; and no exception lies to the exercise of that discretion.

The same rule has been adopted in other States, and I deem it to be well founded in reason. *State v. Pike*, 49 N. H. 406; *Mfy. Co. v. Canney*, 54 N. H. 295; *Schnufflin v. State*, 20 Ohio St. 238.

The next alleged error is that the court ordered the sheriff to summon forty-two qualified jurors to serve as talesmen in said cause on the following Monday.

It has long been settled, both in England and in this country, that it is not necessary to select talesman from persons accidentally present in court; they may be persons whose presence the sheriff has taken previous means to obtain. 5 Bacon, Abr. *Juries*, D, 387; *King v. Dolby*, 2 Barn. & C. 104.

State v. Allen, 47 Conn. 121, was a capital case. The court, before the trial commenced, ordered the sheriff to have in attendance men from whom talesmen could be chosen for the trial of that cause.

The court of review held that the sheriff might take talesmen from those in attendance, or he might go outside, according to his discretion; and that there was no error in the court suggesting to the sheriff to have proper men in attendance.

In *U. S. v. Loughery*, 18 Blatchf. 267, Judge Benedict ruled that the marshal may select talesmen from those not present in or about the court house, and that when they were returned by the officer, they became bystanders, within the meaning of the statute.

Bird v. State, 14 Ga. 48, was also a capital case, in which the trial court directed the sheriff to send out into the county, and have in attendance a large number of citizens to act as talesmen if necessary. The appellate court said it was not error, but on the contrary a commendable practice, calculated to secure a fair jury and prevent delay.

It is within the general power which every court has, to arrange the order of business and provide for the probable necessities which may arise in the conduct of a trial.

This construction gives full effect to the language of our statute, which directs the sheriff to summon the tales from "the bystanders or others."

There was no error in this direction to the sheriff.

Nor was there error in ordering the tales when three of the original panel had not appeared and answered to the call of their names.

N. J.

Nor can the defendant avail himself of the objection that of the forty-two talesmen summoned only thirty-nine appeared and answered to their names.

As has been before stated, the law requires only that the tales as well as the original panel shall be summoned and the list served. The presence of every juror when the list is called is not essential.

It is also assigned for error that the court below ordered the sheriff to serve the list of talesmen on the defendant not later than Saturday morning, July 11, at half past nine, and that the trial was proceeded with on Monday morning, July 13.

In *State v. Aaron*, 1 South. 232, the right of the prisoner to two entire days' service of the tales was recognized. The proper practice now is, unless service is waived in open court, to adjourn the cause for the purpose of making service.

In the case before us, although the order of the court was that service might be made as late as Saturday morning, it was in fact made on Friday evening, July 10, two entire days before the trial proceeded, and therefore the defendant had no legal ground of complaint in that respect.

A further error is assigned: that the sheriff did not return qualified jurors to serve, one of said jurors being exempt by law from jury duty.

The juror in question was duly qualified to serve, but had a right on his own motion to be excused from service. That which exempts but does not disqualify is no ground for challenge. 1 Archb. Cr. Pr. 549.

The next assignment of error is the refusal of the trial court to sustain the defendant's challenge to the array. The challenge interposed was made on the ground that the court of common pleas, before which the general panel of jurors was drawn for the term, was not legally constituted. In this respect the statute (Rev. 583, pl. 44) is mandatory; in other respects it is directory, except as to the certificate. *Poulson v. Union Nat. Bank*, 11 Vroom. 563.

The challenge interposed in writing was that Judge Hendrickson was not present at the drawing of the jury, and that but two judges were present, and also that but two judges signed the certificate. This the defendant offered to prove. The record before us shows that this offer of the defendant was overruled. We must therefore assume the fact to be that but two judges were present.

Did a duly constituted court certify to the return of the general panel of jurors?

In this case only two judges of the court of common pleas were present when the panel of jurors was drawn and certified.

The Laws of 1869, p. 681, § 1, provides that the Court of Common Pleas for the County of Monmouth shall consist of four judges in addition to the justice of the supreme court holding the circuit in said county.

The Laws of 1873, p. 428, in order to explain the true construction of the above Act in respect to the number of judges necessary to constitute the courts of common pleas, general quarter sessions and orphans' court of said county, provides that any two of said judges shall be sufficient to make and constitute the court of

quarter sessions; and any three of said judges shall constitute the court of common pleas.

These are special laws, but they were passed before the constitutional amendments prohibiting special and local legislation, and therefore, to constitute a court of Common Pleas in Monmouth County, the presence of three judges is indispensable, unless this special legislation has been repealed.

The State claims that the Act of March 11, 1880 (p. 240), must be held to have that effect.

The former Act provides "that hereafter the number of lay judges of the inferior court of common pleas shall consist of two in those counties having a law judge and of three in all other counties, provided this Act shall not apply to counties having a population of more than 50,000 inhabitants according to the last census."

The latter Act provides: "1. That no further appointments of lay judges of the inferior courts of common pleas in the respective counties of this State shall be made until the number of such judges shall be reduced to two in counties having a law judge, and three in all other counties; and thereafter there shall be but two lay judges of such court in counties having a law judge, and not more than three lay judges in all other counties.

"2. That any action of said court, requiring the concurrence of three judges, shall be valid and effectual when concurred in by a majority of the judges of said court."

It is not necessary to decide whether this general legislation applies to Monmouth County.

Conceding that it does, it in no wise affects the requirement of the special law that three judges must be present to constitute a Court of Common Pleas in Monmouth County.

The utmost effect that can be given to the 2d section of the Act of 1880 is that when the court is legally constituted,—that is when in Monmouth County three judges are present,—any Act theretofore requiring the concurrence of three judges will be valid if concurred in by a majority of the judges.

The certification of the general panel of jurors was not the act of the court of common pleas, the panel not having been drawn in presence of a lawful court, and therefore the trial court erred in overruling the challenge of the defendant to the array.

The remaining questions to be considered relate to challenges to the jurors. At common law, upon the trial of such challenges, the finding of the triers as to facts was not reviewable. The functions of the triers being, by our statute, vested in the trial court, the finding of the judge upon questions of fact involved in a challenge are conclusive. The decision of the judge is the subject of exception only when he makes a mistake of principle in determining whether the challenge shall prevail. Under a system of criminal jurisprudence which shields a defendant by the presumption of innocence, by a liberal right of peremptory challenge and by the necessity of a unanimous verdict to convict, courts of review should not be astute to seize upon ground for reversal, where the challenge by the State to the favor has been successfully made. There should be very clear error to constitute a mistrial.

380

The State challenged Sidney H. Sproul to the favor.

It appeared that at the same time he had served as a juror in another case of the State against the same defendant, Patterson, in which he had formed an opinion; but he stated that he knew nothing about the present case and supposed he could try it according to the evidence.

Two other jurors were challenged by the State for like cause, and the challenges were sustained by the court.

"It is no legal objection to a juror that he had been one of the jury in another case against the same defendant for a different offense." *U. S. v. Watkins*, 3 Cranch, C. C. 443.

The fact that jurors have tried and convicted a defendant of a crime does not disqualify them from sitting as jurors in the trial of another indictment against him for a similar offense at the same term. *Commonwealth v. Hill*, 4 Allen, 591; *Thompson & M. Juries*, 194, 195.

In sustaining these challenges the trial court erred.

The State also challenged William J. Johnson to the favor, because it appeared that the defendant is a brother to one Austin Patterson, and that the said Austin Patterson and the father of said Johnson married sisters. This was no legal ground of challenge, and it was erroneously sustained.

The defendant challenged John S. Hubbard to the favor, because he was tenant in common of certain real estate with two of the indorsers on the promissory notes alleged to have been forged by the defendant. This challenge was properly overruled.

For the reasons given, the judgment must be reversed and a new trial ordered.

COURT OF CHANCERY OF NEW JERSEY.

Jacob KENTNER, *Complainant*,

v.

Peter KLINE.

***Where the testimony of several witnesses, giving positive testimony to the same fact, stands in irreconcilable conflict, the question of numbers, if the witnesses are of equal credit, becomes one of the highest importance; for, as a general rule, the evidence of the greater number is more likely to be true than that of the smaller number.**

(Filed June 29, 1896.)

BILL to ascertain and settle the title to certain trees. *Dismissed.*

Final hearing on bill and answer and proofs taken in open court.

The facts are fully stated in the opinion of the Vice Chancellor.

Messrs. Chester Van Syckel and John A. Bullock, for complainant.

*Head note by VAN FLEET, V. C.

Messrs. William A. Cotter and John N. Voorhees, for defendant.

Van Fleet, V. C., delivered the following opinion:

The object of the bill in this case is to have the title to 126 hickory trees, standing on lands of the defendant, ascertained and settled. The complainant claims to have purchased that number of trees of the defendant for \$320; and to have paid him, at the time of the purchase, \$310, and to have subsequently tendered him the other \$10.

The defendant admits the purchase, but says that the price the complainant agreed to pay was \$420, and not \$320. In consequence of the defendant's refusal to allow the complainant to enter upon his lands to cut and remove the trees, the complainant has brought this suit. He asks that the title to the trees may be adjudged to be in him, and that the defendant may be enjoined from interfering with him while he is cutting, working up and removing the trees.

The dispute between the parties is confined to a single question: Was the complainant to pay \$320 or \$420 for the trees? If the proofs show that the price of the trees was \$320, the complainant is entitled to the relief he asks; if, on the contrary, they show that it was \$420, his bill must be dismissed. The burden of proof is on the complainant. To be entitled to prevail, his proofs, on the point of dispute, must outweigh those of the defendant. But for a piece of written evidence produced by the complainant, the case, on the question as to which way the proofs preponderate, would be free from the least difficulty.

Four persons were present when the parties commenced their negotiations, namely: the complainant and the defendant and two of the defendant's grandsons. All four give substantially the same account of what occurred, except as to the price. They agree that the complainant opened the negotiation by asking the defendant what he would take for all his hickory trees, and that the defendant replied that he would not sell all, but would sell 100 trees; and that the complainant then asked the defendant what he wanted for 100 trees. The defendant and his two grandsons say that the reply to this question was, "\$400; \$4 a tree, as I told you before," and that the complainant then said, after a short pause, "I will give you \$420 for 126 trees."

The complainant, on the contrary, says that the defendant's answer to his question, asking what he wanted for 100 trees, was \$300, and that after a short pause he offered the defendant \$320 for 126 trees.

Each of these witnesses seem entitled to equal credit. In testifying they all spoke with apparent candor and truthfulness, and seemed to utter what their consciences told them was the truth. Awarding equal credit to each, it is obvious that the weight of the evidence inclines strongly against the complainant. The knowledge, recollection and veracity of three credible witnesses, two of whom are without the least pecuniary interest in the result of the suit, stand opposed to him. He is not only alone, but he stands contradicted by three witnesses, each of whom is his peer in credit and respectability.

R. J.

Where the evidence of several witnesses, giving positive testimony to the same fact, stands in irreconcilable conflict, the question of numbers, if the witnesses are of equal credit, becomes one of the highest importance, for, as a general rule, the evidence of the greater number is more likely to be true than that of the smaller number. And the reason this is so is, that it is much easier for one person to get a wrong impression about a fact, or to fall into a mistake concerning it, than it is for three or even two; and if two or more persons do become mistaken about a fact, it is highly improbable that they will all fall into the same mistake. And it is also much more improbable that two or more persons will commit perjury than that one will. All that one person need do, who resolves to commit perjury, is to invent and arrange a story so as to give it the appearance of truth; and if, while he is under the trial of cross examination, he discovers that his story is improbable or incomplete, he may at once, without serious danger of detection, make such changes in it as he may think will cure its defects; but where several persons conspire to commit perjury, there must be concert; they must first be persons so depraved that they are willing to join in the commission of a high crime, and so lost to all sense of shame as to be willing to confess their infamy to one another; they must likewise agree, not only upon the main body of their story, but upon its details, and upon the order in which they occurred; and if, while they are undergoing the ordeal of cross examination, defects in their story are exposed, they will not dare to change it, for if they do they will run the risk of being contradicted by their associates; and if they adhere to it they know that they will incur the hazard of detection, together with all of its dangerous consequences; so that in a case like the present, where the testimony of three witnesses stands in direct contradiction of a single witness, the probabilities are so overwhelmingly in favor of the truth of the evidence of the three that it must be believed.

The weight of the oral evidence on the point in dispute is very strongly against the complainant; and unless his case is supported by some other kind of evidence it is manifest that his bill must be dismissed.

There is other evidence. The complainant has a receipt, signed by the defendant, acknowledging the payment of \$320 "for 126 choice hickory trees of his (the complainant's) selection." If the defendant had written this receipt himself it would furnish very strong if not conclusive evidence that the price agreed upon was \$320. Neither of the parties, however, wrote it. The contract was made during the afternoon of the first day of March, 1886. As soon as it was concluded, the complainant handed the defendant \$10 to bind the bargain, and then went to his house, about four miles distant, to get the money he had there to make an additional payment. While at his house, his wife, at his request, wrote the receipt; he then returned to the defendant's house and paid him \$300, making \$310 in all, and procured the defendant's signature to the receipt.

If the defendant signed the receipt clearly understanding that it stated the price of the trees to be \$320, he should be held to be cor-

cluded by it. He swears that he did not so understand it. He is about seventy years of age and cannot read without the aid of glasses. He says that his glasses at this time were broken, so that they were useless, and that he tried to read the receipt without them, but could not. He also says that even with the aid of glasses he cannot read written matter understandingly until he has first had an opportunity to study it.

It is admitted that the complainant read the receipt to the defendant or pretended to do so; but the defendant and his daughter both say that he did not mention any sum, but read the paper as though it merely stated that the complainant had purchased of the defendant 126 trees. The receipt is confessedly inaccurate. It admits a payment of \$10 that was not made. It is a receipt for \$320, but the complainant confesses he only paid \$310.

If the amount stated in the receipt had been read so that the defendant clearly understood that, if he signed it, he would admit the payment of \$10 which had not been paid, it is almost absolutely certain that he would have called attention to the fact that the amount was erroneous and asked to have it corrected.

But nothing of that kind seems to have occurred. No allusion was made by either party, so far as the evidence shows, to the fact that the sum stated in the receipt was in excess of the sum actually paid. And this circumstance serves, in my judgment, to show, either that the sum was not mentioned, or, if it was, that the defendant did not fully comprehend its meaning, for I regard it as entirely certain that no man having sufficient capacity to understand such a transaction would sign a paper of this kind, which he knew to be erroneous, and which he also knew contained an admission against his interest, without at least calling attention to its error. He would do that, if for no other purpose, to show that he knew what he was doing.

But there is other evidence tending very strongly to show, as I think, that the defendant did not understand, at the time he signed the receipt, that it fixed the price of the trees at \$320. The receipt was signed on Monday. The next day the defendant heard that the complainant claimed that he had purchased the trees for \$320. On Wednesday the defendant sent his son-in-law to complainant, to tell him that he heard that the complainant had claimed that he had purchased the trees for a price less than that which he understood the complainant had agreed to pay, and also to tell the complainant that he wanted to see him. The complainant did not call until the following Saturday. The defendant then told the complainant that the price he was to receive for the trees was \$420; that that was the price the complainant had offered and that he had agreed to accept. The complainant denied this, declaring that all he had offered was \$320, and that that was the sum for which the defendant had agreed to sell; but he made no allusion to the receipt. He did not say: "Why there should be no dispute between us about this matter, you know we had not only a distinct understanding about the price, but you afterwards gave me a receipt which I read to you, and which you know states the price to be \$320."

If the defendant's signature to the receipt had

been procured in the manner in which the complainant states it was; if he had read it to the defendant so that he understood it, the receipt was the complainant's strongest and best witness, and the one to whom he would almost involuntarily have made his first and most confident appeal. But he did not mention it nor did he take it with him. Although he knew that the defendant disputed the correctness of the price stated in the receipt, and that the defendant wanted to see him, to see whether the misunderstanding on that subject could not be cleared up, yet when he went to see the defendant he left his receipt at home. He went without the instrument, which, if it had been procured in the way he says he procured it, would at once have disproved and utterly overthrown the defendant's claim of mistake.

It should also be remarked in this connection that the evidence of the complainant is not entitled to receive the consideration which would be given to the testimony of an unimpeached witness. His testimony on the most vital point of the case has been contradicted by such a volume of opposing evidence as to make it the duty of the court to discard his evidence; and this fact necessarily weakens the force of his evidence upon every disputed point.

On a full view of the whole case, my conclusion is that the weight of the proofs, by a decided preponderance, is against the truth of the allegation on which the complainant's right to relief rests.

His bill must therefore be dismissed, with costs.

Joseph SMITH, Complainant,

v.

The HUNTERDON COUNTY MUTUAL FIRE INSURANCE COMPANY.

***The defendant reinsured all its risks, and had a large sum of money in the treasury, being the proceeds of cash payments by the then present and also past policy holders, and the interest upon the investments thereof, which sum has been of about the same amount for several years. Held, that all the policy holders who contributed to such sum are entitled to a proportion thereof according to the amount of their payments, whether they continued to be policy holders at the period of distribution or not.**

(Filed June 12, 1890.)

BILL to compel the distribution of the surplus funds in the treasury of an insurance company, among the policy holders who contributed to such funds. On bill and answer. Decree in accordance with prayer of bill advised.

The facts are stated by the Vice Chancellor.

Messrs. W. A. Hayhurst and A. G. Richey, for complainant.

Messrs. C. A. Skillman and John H. Stewart, for defendant,

Bird, V. C., delivered the following opinion:

The Hunterdon County Mutual Fire Insur-

*Head note by BIRD, V. C.

ance Co. was organized in the year 1845, by virtue of an Act of the Legislature of that year, as a mutual company. Twenty years later its powers and privileges were extended. In 1865 its directors conceived that it would be better to reinsure all risks and make distribution of the money then in the treasury. A meeting of the policy holders was called for March 5, 1865. At that meeting a resolution was adopted authorizing the directors to reinsure and to make distribution of any surplus. Reinsurance was effected. A large sum of money was then in the treasury and had been for several years. This sum arose from premiums paid in excess of the demands upon the Company for losses and expenses, and from interest on such excess.

June 29, 1865, the board directed a committee to make distribution of these funds among the policy holders in proportion to the amount of their respective policies held at the time of reinsurance. A majority of the committee was about to make distribution, when one member filed his bill to restrain them from making distribution among those only who were policy holders at the time of reinsurance; because to limit such distribution to those only would be inequitable and unjust; since many others, perchance, who were not then policy holders, had contributed as much as, and in many cases more than, many who were. An injunction was allowed, and the sole question is: Are policy holders who contributed to the fund now in the treasury entitled to share in the distribution thereof, although their policies expired a day, or a month, or a year, or five years before the time of reinsurance? Are the present holders to reap the only benefit of the management or mismanagement which rendered it advisable, if not necessary, to reinsure?

What principle shall guide the court? Will it be just to declare that those who come in the last moment and were members but a day, shall take all the profits made by those who had been members for five or ten years, but were not at the time of reinsurance? Did they earn this fund either by their labor or by their investments? Clearly, if the court allows the present policy holders to take all the surplus, it will be permitting the contributions of many to benefit the few.

What was the contract? It was a mutual obligation to share losses by fire. And to make the contract as absolutely certain as possible, the amount supposed to be necessary for that purpose was required to be paid in advance. But a mutual obligation to share losses was not all; this mutuality extended to an equal distribution of any surplus. The cash paid or advanced was not paid to protect some future policy holder against loss, or to enable him to draw out of the treasury more than all his premiums, but simply to insure the existing policy holders against loss. That is the venture; that is the contract. The members for the time being bind themselves each to the other only; not to any third persons; not to those who may become members afterwards, and when their policy shall have expired. The money paid by the members for the time being, is a trust fund held for themselves only, and to divert it to the profit of others is a plain breach of trust.

But it is said that this obligation to make mutual distribution must necessarily be limited

to those who are members at the period of distribution. It is insisted that no one can be recognized except members, and that by the provisions of the charter, no one can be considered a member for any purpose except those who have a living, running policy. Why should this be so in reason? The policy holders whose terms expired a day, a month, or a year before the reinsurance had, at the time of such expiration, an interest in the surplus then in the treasury. Part of such surplus was their money actually paid in by them. And I cannot doubt but that they could have compelled the recognition of their right to it. That interest they did not assign or transfer. The directors had no right to assign it, or make any disposition of it except to pay it out for losses arising during the period of time covered by the policy. Clearly the right to such fund was in the policy holders for the time being, and it remained in them. I cannot see that change of time or circumstance has worked a devolution of the fund. Are not the members of such mutual insurance company, in this respect, if in no other, like the members of a copartnership? When a partner retires, without more, he does not forfeit to those who remain, or to new members, the profits of the trade or the capital invested; such profits and capital remain his as certainly as before. The fact that he does not withdraw them when he himself withdraws, or before, cannot change the legal liability of those who remain. The continuing firm is indebted to him, at that instant, for his share of profits and capital, and remain so until some legal bar—such as payment, release, or statutory limitation—be interposed. This reasoning is not in conflict with the doctrine established in *Mut. Benefit Life Ins. Co. v. Hillyard*, 8 Vroom, 444.

Again, as intimated, it is urged that, by the charter, all persons cease to be members when their policy expires; and that, this being so, all rights or claims cease also. As all men well know, this is not exactly the law. The holder of a policy does not lose his right to recover for loss sustained at any time before the expiration thereof simply because it has so expired. His right to present his claim, to maintain his suit, and to enforce his judgment is every day verified. And such right is not abridged because he ceases to be liable for subsequent losses.

It is to be remembered this Company is a mutual, not a stock company. And I also remember that it has been declared that policy holders in a mutual company stand in the same relation to each other that stockholders do in a stock company. Certainly stockholders for the time being take all dividends. And it is as certain that, if there be funds in the treasury to make dividends, the court will compel them to be declared. And this would seem to be a fair representation of the rights of the policy holder in a mutual company. When the time for settlement comes, when the period for which a member engaged to share in the risk has ended, then he is entitled, as such policy holder or such joint-stock holder, to a share of what remains of the whole fund contributed by the several members to make the venture good. But it is still urged that at the dissolution of a stock company the then existing stockholders take all the assets. This is true; but it does not

militate against what seems to me to be the wise and equitable rule in the other case. The stockholder takes his share of the assets in the end, in accordance with the contract. That was the agreement whenever made, whether ten or fifty or a hundred years before.

In a stock company the stock is issued for the whole period of the company's existence. In a mutual, the policy (the stock) is issued for a limited period—a certain number of years only. Either may be assigned, but one for the existence of the company, and the other for the life of the policy. In the one a certain number of shares represent the worth of the company and its business; in the other a certain number of policies; the former generally remain the same in number, though they may increase or diminish in value; while the latter fluctuates, the number of policies being liable to be much greater at sometimes than at others.

And it is claimed that because the owners of the stock in a joint-stock company take all the assets at the dissolution, the owners of policies take all at the period of final dissolution of a mutual company. The inference is not exactly correct reasoning. I admit that the time of dissolution is the time of distribution; but think that while there can be but one time of dissolution for a stock company, there are as many times for dissolution of a mutual as the recurrence of times for the expiration of policies. In other words, whenever a policy expires, a dissolution is effected as between the rest and the holder of that policy. And at such time he is entitled to his share of the assets, if, under the management during the period he was such policy holder (such stockholder), there be any. If I take any other view of the case, I find myself going against reason and fair dealing, and taking the money which was given and held in trust for one and giving it to others.

In my judgment, every policy which has been issued by the Company since the year 1876, on which a premium has been paid and which has not been forfeited, should be represented in making distribution of the surplus now on hand, and the respective owners and holders thereof receive their fair proportion. I think this proportion should be ascertained upon the basis of premiums paid rather than the amount of reinsurance covered by the policy. For premiums increase by time and amount and are regulated accordingly. A policy for \$5,000 for five years would be worth less than for ten years. And besides the premium is the amount actually paid, and this seems to render it the proper basis of calculation. See *Carrollton v. Southern Mutual Ins. Co.* 72 Ga. 371; *S. C.* 18 Rep. 75; and 13 Ins. Law Jour. 565.

In my judgment the court would not be justified in lending its countenance to a principle which would enable stockholders and directors, at a favorable opportunity, to divide among themselves the surplus in the treasury, the cash accumulations of years. In my judgment the court would not be justified in taking the cash payments made by former policy holders and giving them to present policy holders.

I will advise a reference to a master to ascertain and report the amount of money now in the treasury of the defendant Company, and

who the policy holders have been since the year 1876, and the amounts due on each policy according to the principles above stated.

ENGLAND'S EXRS., Petitioners,

v.

The Daniel F. BEATTY ORGAN & PIANO COMPANY.

- *1. The president of a manufacturing corporation is not entitled to the lien given by the Act for what he earns while serving the company as president.
2. He is a member of the corporation as well as an officer, and therefore is part of the head or force which employs, and cannot be both employer and employee, as the Act now stands.
3. To give a preference to the members of a corporation for sums claimed by them for services would be against the true spirit of the Act and against public policy.

(Filed May 28, 1886.)

PETITION to establish a lien for wages.
Dismissed.

The facts are stated by the Vice Chancellor. *Messrs. Barkalow, Pennington & Beam*, for petitioners.

Mr. G. A. Hobart, for receiver.

Bird, V. C., delivered the following opinion: The petitioners say that their testator was the president of the Daniel F. Beatty Organ & Piano Company for several months before his death, and that during that time he rendered it very valuable services for which he got no compensation, although he expected to receive about \$1,000 per month; and that a receiver was appointed under the statute in such case provided; and they insist that, under such statute, they are entitled to such compensation as said testator earned as one of the employees of said Company.

Reference was made to a master, who reported that the said testator was entitled at the time of his death, and that his executors are now entitled, to \$3,750 for services rendered to said Company by said testator while president of it. The question is upon the confirmation of this report.

The statute (Rev. 188, § 63) provides "that in case of the insolvency of any corporation the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character for, or as workmen or employees in the regular employ of, such corporation."

Is the president of a corporation, when engaged in and about the business of his company, whatever its character may be, a laborer within the contemplation of the Act? Does the Act fairly mean to embrace one or all of the members of the company as well as all or

*Head notes by *BIRD, V. C.*

any others who may be employed by it? Can the members of a corporation employ themselves respectively, and, in case of failure, stand upon the statute for any compensation that may be due?

The president of a corporation, under the Act, is and must be a director. He is part and parcel of the organization. There must be employer as well as employed; and the question arises: Does the Act authorize the organization, which is the employer, to employ itself? Does the statute mean to go so far as to empower the directors of a corporation to employ themselves, as the workmen and laborers, to do all the work and labor necessary to be done, and then, in case of insolvency, to give them the statutory lien, and to prefer them to all the general creditors? I cannot so understand the Act. I think, under our statute, every court would do nothing more than place every such creditor upon the same footing as the general creditor. I cannot perceive any reason for giving the slightest advantage to those under whose management such a concern is wrecked.

I am well satisfied that to make favorites of this class would be against the true spirit of the Act as well as against a wise public policy. The spirit of the Act is manifestly to pay "laborers," "doing labor or service of whatever character for, or as workmen or employees in the regular employ of, such corporation," and not to give a preference to the individual members of the corporation; and not that they may employ themselves and maintain both attitudes, employer or employee, as their individual gain and the loss of creditors may dictate. And as to the public policy of so extending the construction as is urged, let it be considered how strong the inducement, as well as how convenient, for every director to be employed, "doing labor or service as a workman or employee" for his company; and let it also be considered what a prolific source of injustice and fraud such construction would prove to be. There are numerous considerations in this direction which will arise to the mind of the thoughtful.

It has been pressed upon my attention that in this very case the secretary of the Company has been preferred to the extent of his claim. What was the relation of the secretary to the Company besides being secretary (that is whether he was a director or not) does not appear. The secretary and treasurer need not be directors, but the Act provides that the directors shall elect one of their own number president.

As the Act under consideration is worded I cannot see my way clear to advise that the president is entitled to a preference over general creditors for what may be due to him for services rendered while acting in that capacity.

I think the petition should be dismissed with costs.

David P. DEY, *Complainant,*

v.

HATHAWAY PRINTING, Telegraph & Telephone COMPANY *et al.*

*1. A complainant is bound to exercise reasonable diligence in the prosecution of his suit; and if he fails for a year

*Head notes by VAN FLEET, V. C.

N. J.

after filing his bill to bring the defendant into court, his laches may be regarded as an abandonment of his suit; and his bill may, for that reason, be dismissed.

2. The entry of an appearance for a defendant carries with it a presumption that it was entered by his authority; and if the contrary be alleged, the defendant, in order to oust the jurisdiction of the court, must show affirmatively that it was entered without his authority.

(Filed June 16, 1886.)

MOTION to dismiss bill for want of prosecution. *Overruled.*

The case is stated in the opinion.

Mr. Thomas B. Harned, for motion.

Mr. Joseph Coult, *contra.*

Van Fleet, V. C., delivered the following opinion:

The defendants move to dismiss the complainant's bill for want of prosecution. The bill was filed April 28, 1885.

On filing his bill, the complainant obtained an order to show cause why an injunction should not issue, and on the return of this order, the defendants answered such parts of the bill as they deemed necessary to show that an injunction should not be granted. The questions thus raised were then discussed; and on the 21st day of May, 1885, they were decided, an injunction being refused.

So far as the record now shows, no order denying the injunction has as yet been entered. On the 5th of May, 1886, the defendants gave notice that they would move the court, on the 10th of the same month, to dismiss the complainant's bill. Their motion is made under § 30 of the Rules, which ordains that if a suit be suffered to lie without prosecution for one year it shall be considered abandoned, and the bill may be dismissed.

The motion is premature. When the notice of the motion to dismiss was given, the suit had not lain without prosecution for one year. As already stated, the complainant's application for an injunction was not decided until May 21, 1885. It was argued a few days before that date, but up to the time the decision was made, the complainant was ceaselessly prosecuting his application. While his application remained in the hands of the court for consideration, his prosecution did not cease, but was constantly going on. In no case should a suitor be held responsible for the delay which may ensue while his case is under consideration by the court. The complainant here prosecuted his suit regularly and vigorously up to the 21st of May, 1885; and this motion, having been made in less than a year after that date, is not entitled to prevail.

On the argument it was stated that the defendants were not yet in court so as to be answerable to a decree, the claim being that they have not been served with process; nor has the court acquired jurisdiction over them in any other way, so that it may lawfully make a decree against them. If this is true, the complainant's bill should be dismissed. If he has

for over a year after filing his bill neglected to notify the defendants of the institution of his suit, and to call upon them, in the manner prescribed by law, to make defense, his laches for so long a period should be regarded as plenary evidence that he had abandoned his suit. Except in certain cases it is irregular for a complainant to issue subpoena for the defendants to answer before the bill is filed; but it is as soon as his bill is filed subpoena should issue. *Crowell v. Botsford*, 1 C. E. Green, 458.

Chancellor Williamson, in *Lee v. Cargill*, 2 Stock. 331, held that it should be exacted of every complainant that he use due diligence in expediting his cause. A suitor in a court of equity is required to exercise reasonable diligence in matters of practice, as well as in other matters. Laches are always discountenanced by courts of conscience. It has been said that nothing will call forth the activity of a court of equity, but conscience, good faith and reasonable diligence.

An inspection of the record in this case shows however that the defendants, on whose behalf this motion is made, are already in court. An appearance was entered for them on the 28d of May, 1885, in the name of the solicitor who makes this motion. But he says it was entered without his authority and also without his knowledge. Take that to be so; still, I think the complainant was justified in treating the defendants as in court. In the absence of notice to the contrary, he had a right to believe that the record was true, and that the defendants had procured their appearance to be entered to dispense with the necessity of bringing them into court by the service of process or otherwise. The entry of an appearance for a defendant carries with it a presumption that it was entered by his authority. If the contrary be alleged, affirmative proof must be produced; and until it is the defendant will be treated as properly in court. *Gifford v. Thorn*, 1 Stock. 723.

As the record now stands, the defendants must be considered in court. There is nothing before the court, which can be regarded as evidence, tending to show that their appearance was entered without authority. Their solicitor says it was, but his unsworn statement is not evidence. The question whether or not the defendants are in court, so that the court may make a valid decree against them, in case it shall appear that the complainant is entitled to a decree, should be settled at once. The record shows that they are in court. If they mean to dispute the record they should do so without delay. They may do so by applying to have the appearance, entered for them, expunged from the record. Twenty days will be allowed for that purpose. If they do not apply within that time, their right to make such application will be considered waived, and they will be considered and treated as properly in court.

The complainant has been guilty of negligence, but while his laches have not been so great as to entitle the defendants to the dismissal of his bill, they have been sufficient to make it the duty of the court to direct his future movements in the prosecution of his suit. But no such direction can be given until after the time allowed the defendants to show that they are not in court has expired.

The direction to be given must, in a large de-

gree, depend upon how that question shall be decided, and should therefore be deferred for the present.

DOMESTIC TELEGRAPH & TELEPHONE COMPANY, Complainant,

METROPOLITAN TELEPHONE & TELEGRAPH COMPANY *et al.*

* The complainant entered into a written contract with the Bell Telephone Co. of New York, by which the former was licensed to use the Bell Telephone in the district composed of the city of Newark and the townships of Harrison and Kearney for the term of five years, with an express stipulation that if, at the end of the term, the Bell Company did not desire to run the district itself or to merge it with any other, "but should desire to have such business conducted for it, then the party of the second part (the complainant) shall have the first right of acquiring the license or agency to conduct such business, at such rate or rental and upon such terms as may then be fixed and determined by the party of the first part;" the bill of complaint was amended showing a subsequent parol agreement containing a promise to the complainant that if it would pay the cost price of the Western Union plant in its district, its license should be renewed for five years, with other conditions or provisions. **Held:**

(a) That when in a contract there is a clause which provides that one of the parties shall have the first right to a new contract (not a renewal of the existing one), upon such terms as shall be fixed upon by the other party, and during the continuance of such contract, new terms are added upon the assurance that such clause gives the right to review or will fully protect the right to review, a court of equity ought to enforce such contract, and secure its renewal to the party to whom such promise is made, if the terms contemplated in the clause giving such first right have been fixed, or any principle acknowledged by the parties to be bound by which they can be ascertained.

(b) That in this case there was a distinct verbal promise to renew upon the conditions named.

(Filed May 6, 1886.)

BILL for injunction and specific performance. Decree advised accordingly.

The facts are stated in the conclusions of the Vice Chancellor.

Messrs. Thomas N. McCarter and Henry Young, for complainant.

Messrs. James McMorro and J. D. Bedle, for defendants:

This case as now prosecuted is an entire departure from that as originally made.

* Head notes by BIRD, V. C. 

the only party that was to assume any responsibility under it was that Company, the Bedford & Bridgeport Railroad Company being utterly insolvent and its bonds, without the guaranty, being worthless.

"The proposition was accepted by Mr. Morgan, and assented to by a sufficient number of those for whom he agreed to act, to make it binding; the securities were delivered to him, but had not come into the hands of the stockholders when the injunction was issued.

"Counsel for defendants earnestly contend that these facts show that the Pennsylvania Company is the party agreeing to purchase the stock and securities and stipulating for the control of the South Pennsylvania Railroad Company. We have carefully considered all the arguments so ably advanced in support of this theory, but we cannot avoid coming to the conclusion that, as argued for the Commonwealth, the Pennsylvania Railroad Company is the real party in the transaction. This is clearly shown by the testimony of Mr. Morgan and Mr. Roberts. Morgan testifies that, on his suggesting to Mr. Roberts that 'the thing could be carried through' if the Pennsylvania Railroad Company was prepared to give bonds bearing 3 per cent interest for the amount paid in on the South Pennsylvania stock subscriptions, Mr. Roberts 'doubted the policy or the ability of the Pennsylvania Railroad Company, as such, to buy off or in any way to interfere with what might be rival roads;' whereupon, Morgan 'suggested that there were plenty of corporations that would do it and that would work in harmony with the Pennsylvania.'

"And again he says: 'The only thing that was stipulated was that the security that should be given to the subscribers should bear the absolute guaranty of the Pennsylvania Railroad Company. As to what company it came from or anything of the kind, that was of course immaterial.' And again: 'I addressed Mr. Roberts because I was acting in harmony in trying to get this road out of the way of the Pennsylvania Railroad Company. It was the Pennsylvania Railroad that was complaining of the construction of the road;' and he assented to the statement that the negotiations were based on this idea.

"And Mr. Roberts states frankly that they came to 'talk about' the Pennsylvania Company, in this negotiation, 'simply because the character of the securities and the condition of the South Pennsylvania Road were such that it would in all probability be beyond the chartered powers of the Pennsylvania Railroad Company to build it or to purchase the securities. * * * And he answered in the affirmative, without comment or explanation, the following question of the Attorney-General: 'Therefore, as I understand you, the Pennsylvania Railroad Company was the party to this negotiation; but so far as the details of carrying it out were concerned, and to be within the law, you were to use the name of the Pennsylvania Company, or any other company that you were connected with that you might be able to do?' And he further says that 'for all purposes of the transactions that were then going on, or discussion there had, it would be fair and proper to assume that I was president of, and being

conversed with as president of, the Pennsylvania Railroad Company.'

"And, as we have already seen in the letter of August 5, signed by him as president of the Pennsylvania Company, he contracts on behalf of the Pennsylvania Railroad Company that the bonds to be delivered shall bear its guaranty, and that, if the principal of the bonds shall mature, it will replace them or at its option pay them in cash; these being the only two clauses in the contract which involved the giving of anything in value.

"In view of this plain and candid statement of the real facts of the case by the parties themselves, it is impossible, as we have already said, to draw any other inference than that the real party contracting and stipulating for the control of the South Pennsylvania Railroad Company was the Pennsylvania Railroad Company, and that any title to any stock or securities intended to be held in the name of the Pennsylvania Company was to be a mere naked legal title, to be held in trust. In other words, that the Pennsylvania Railroad Company intended to do in fact what it feared it was forbidden by law to do, and therefore attempted to give the transaction the appearance, in the eye of the law, of being other than it really was. This, of course, cannot avail in a court of equity, which looks at substance without being controlled by form.

"It is further strenuously urged, on behalf of defendants, that even if the Pennsylvania Railroad Company be the real party to the contract, it has not done or stipulated for anything prohibited by the Constitution, for the reason that the purchase of the stock of a 'parallel or competing line' is not among the things prohibited; and the case of *Pullman Palace Car Co. v. Mo. Pacific R. Co.*, recently decided by the Supreme Court of the United States, and not yet reported, is cited to sustain the proposition that the ownership of the stock of a corporation does not give control of the corporation.

"We have carefully considered the opinion delivered in that case, which, although not of binding authority upon the state courts, because not deciding a federal question, is yet, in view of its source, entitled to the highest respect. But we do not think it sustains the position contended for. The decision of the question of control was not called for in the case, which was already decided on another and a fundamental point. But, waiving this, the point decided is, merely, that the ownership of the stock does not necessarily give control of the road. The *Chief Justice* says, speaking of the stockholding company: 'Practically, it may control the company, but the company alone controls its road.' [Bk. 29, L. ed. 502.] This distinction seems very narrow, but it is certainly involved in the conclusion reached, which cannot stand unless it is recognized, for it is too plain to bear argument that the ownership of the stock of a corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact.

"All this was well understood by Mr. Roberts, as is shown by the stipulation that the capital stock to be assigned 'shall be adequate to insure the control of the Corporation of the South Pennsylvania Railroad Company;' and the intention to control is shown by the condition in the contract that the things to be assigned were 'the securities and contracts and control of the South Pennsylvania Railroad enterprise;' and the further condition that the assignment of the securities and stock should be accompanied by 'the resignation of all the directors and officers of the said South Pennsylvania Railroad and American Construction Companies, and of a majority of the committee of said syndicate, and the substitution in their stead of persons to be indicated by Mr. Roberts or his nominee.' Not only was the South Pennsylvania to be controlled, but also the company having the contract for the construction of its road; and as to this, its entire capital stock was to be obtained, 'free from all debts and contracts of any kind whatever.' This would insure not only control of the Railroad Corporation as it then stood, but also the power to abrogate the contract then held by the construction company for the building of the road.

"We have found as a fact that the line of the South Pennsylvania Railroad Company connects at Port Perry with the line of the Pittsburgh, McKeesport and Youghiogheny Railroad Company, and that it has a traffic contract with that company giving it access to Pittsburgh. A line running from Harrisburg to Port Perry could hardly be said to be a 'parallel or competing line' to and with the Pennsylvania Railroad; although if extended from Port Perry to Pittsburgh it certainly would be such. But defendants contend that the fact of the traffic contracts ought not to be taken into consideration, and that as the line of the South Pennsylvania does not itself extend to Pittsburgh, we must conclude that this corporation does not own or control a parallel or competing line.

"We are unable to adopt this view. The traffic contract gives it the right to use the Youghiogheny Road between Port Perry and Pittsburgh. Section 1 of article XVII of the Constitution secures it the right to have its cars received and transferred over all railroads in the State with which it may connect; we cannot doubt that it would in fact compete; and it is competition in fact which the Constitution designs to encourage, as it was competition in fact which the defendants were endeavoring in this case to prevent, and which they knew would occur over this line if it were not "'taken out" of the railroad situation,' to use Mr. Morgan's expressive phrase.

"But the argument was earnestly pressed upon us that the prohibition of the Constitution applies only to a corporation owning or having under its control a railroad completed and in operation; that in the nature of things there can be no competition in transportation when there is no road over which to transport. The Constitution forbids a railroad corporation to 'in any way control any other railroad * * * corporation having under its control a parallel or competing line,' not parallel or competing railroad; and we cannot doubt that the word 'line' was employed advisedly, in this place, in-

stead of 'road' or 'railroad.' It is the term constantly used to denote the route of an intended railroad. Thus, in section 2, Act of February 19, 1849, relating to the assessment of damages for lands taken, it is provided that viewers may be appointed, 'neither of whom shall be residents or owners of property upon or adjoining the "line" of such railroad,' where manifestly the term 'line' is used to designate the surveyed route, and not the completed road, as the view may be had before the road is constructed. So in section 2, Act of Congress of July 29, 1866, incorporating the Atlantic and Pacific Railroad Company, the company is authorized 'to take from the public lands adjacent to the line of road, material of earth, stone, timber and so forth, for the construction thereof.'

"These are random instances of a use of the term which is so common as to leave no doubt as to its meaning in the clause of the Constitution under consideration. And, understanding this meaning, we are bound to give it due force and effect. If we do not, the purpose of the Constitutional Convention in enacting the clause, and of the people in ratifying it, might always be and in this case would be entirely defeated. The purpose undoubtedly was to promote competition in railroad traffic. But if a corporation engaged in constructing a competitive road may be controlled by its rival until the road is completed, it would be entirely within the power of the rival to determine whether that event should ever happen; as of course it never would, when it was the interest of the rival to prevent it, for no company would complete a road to hand it over to a competitor.

"For these reasons we think the proper construction of the phrase, a 'parallel or competing line,' is that it includes a projected road, surveyed, laid out and in process of construction, as we have found to be the fact in this case; if such road when completed and in operation would actually compete with the road seeking control. Before completion it is 'parallel;' when completed it becomes 'competing.'

"During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock, as of other property, carries with it the legal right to sell, and contended that the owners of the shares of the South Pennsylvania Railroad Company could not legally be restrained from so doing, and that an injunction against the purchaser would have this effect.

"We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of the individual shareholders to sell their several shares *bona fide* in the open market. This, so far as they are concerned, is an intended sale in combination for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the Act incorporating the company, and of putting the control of their corporation into the hands of its rival. This is an act contrary to the public policy of the State, which they have no right to do.

"Indeed, all the parties to this transaction seemed to have failed to appreciate the relations they sustain to the public. A charter is a contract, and a contract must always have two contracting parties, upon each of whom it imposes duties as well as confers rights. The charter of

a railroad company especially, while it confers and because it confers rights of the highest kind, imposes corresponding duties. It invests the corporation with part of the sovereignty of the State, the right to take private property for (let it be clearly understood) public use. But if the taking of private property for the purpose of constructing a railroad upon it is taking it for public use, then the public must have an interest in such use. And such is the case. 'A railroad is a public highway for the public benefit. * * * The public has an interest in such a road when it belongs to a corporation, as clearly as they would have if it were free. * * * The companies may be private but the work they do is a public duty; and along with the public duty there is delegated a sufficient share of sovereign power to perform it. The right of eminent domain is always given to such corporations, but the right of eminent domain cannot be used for private purposes. * * *' *Sharpless v. Mayor*, 21 Pa. 169.

"The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a State Legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies.' *Olcott v. Superintendents*, 16 Wall. 694 [83 U. S. bk. 21, L. ed. 382], per *Mr. Justice Strong*.

"And the same eminent jurist, when a Justice of the Supreme Court of this State, said of an unfinished railroad that 'the Commonwealth had a right to demand that all the resources, rights and credits of the company should be devoted to its completion;' and that the directors of a railroad corporation are 'trustees, in a very just sense, for the Commonwealth.' *Bedford R. R. Co. v. Bousier*, 48 Pa. 29.

"But, as our purpose here is to show, merely, that the parties to the transaction were not dealing with a purely private matter, we will not pursue this subject further. Nor are we now concerned with the question whether there be power in the courts to compel the construction of a railroad by a corporation which has undertaken it. What we here decide is, simply, that the corporators have no such right to sell their stock as can in any way interfere with the granting of an injunction to prevent a competing corporation from obtaining control of the corporation charged with the duty of its construction.

We have not overlooked any of the questions argued by counsel; but in our view the case does not call for the decision of any other than those considered above. The result of the discussion is that the injunction must be continued as to the Pennsylvania Railroad Company, the Pennsylvania Company, and the Bedford & Bridgeport Railroad Company, and dissolved as to the other defendants; and a decree may be drawn accordingly."

A decree was entered January 27, 1866, continuing the injunction until final hearing, enjoining the Pennsylvania Railroad Company from purchasing, directly or indirectly, or ob-

taining in any manner control of the stock, franchises and property of the said South Pennsylvania Railroad Company, or in any manner from controlling said stock, property and franchises; and further that you and they do absolutely refrain from guarantying or in any manner becoming responsible for either principal or interest of any bonds or other obligations of the South Pennsylvania Railroad Company or of any other corporation, etc.; restraining the Bedford & Bridgeport Railroad Company from issuing or, if issued, from delivering, either directly or through any other corporation or person, any of the above named mortgage or debenture bonds, or other obligations; and restraining the Pennsylvania Company from delivering, either directly or through any other corporation or person, any of the above named mortgage or debenture bonds, or other obligations.

The assignment of errors specified the action of the court: 1, in entering the decree of January 27, 1866, against the appellants; 2, in not defining in said decree the meaning of the word "control" used therein; and 3, in seeking by a preliminary injunction to undo what had been completely done before the filing of said bill.

Messrs. J. T. Brooks, David W. Sellers, Hall & Jordan, John Scott and Wayne MacVeagh, for appellants:

The Pennsylvania Company was fully authorized by its charter to make the purchases and perform the acts herein complained of.

Act 1870, P. L. 1025.

Its charter is in nowise affected by the present Constitution, it being a pre-existing Corporation.

Hays v. Commonwealth, 82 Pa. 528.

The right to purchase stock in the South Pennsylvania Railroad Company was a vested right of property. The State could not, without compensation, by any means, whether it be called the adoption of a Constitution or in any other way, take from the Pennsylvania Company this valuable grant.

Dartmouth College v. Woodward, 4 Wheat. 518 (17 U. S. bk. 4, L. ed. 629); *Hays v. Commonwealth*, 82 Pa. 519.

The power of charging more than the usual rates of interest cannot be taken away.

Hazen v. Union Bank, 1 Sneed, 115.

Nor the right to consolidate with other corporations.

Zimmer v. State, 30 Ark. 680.

Nor can the right to cumulative voting be given without the consent of the stockholders when, prior to the new Constitution, each share of stock was entitled to one vote.

Hays v. Commonwealth, 82 Pa. 519.

The amendment of the Constitution of 1838 was a grant to the "Legislature" of all the power "to alter, revoke or amend any charter of incorporation hereafter conferred * * * whenever, in their opinion, it may be injurious to the citizens of the Commonwealth."

The adoption by the people of the new Constitution does not establish the *casus foederis*, upon which and which only the change can be made.

Hays v. Commonwealth, 82 Pa. 523.

The police power is superior to all charters in one sense, but never in the sense of permit-

ting the State under it to take for nothing the property rights of citizens or corporations.

Beer Co. v. Mass. 97 U. S. 83 (Bk. 24, L. ed. 989).

It being legitimate for the Legislature to grant such a right to the Pennsylvania Company, it does not fall within the class of cases where the courts have held that as to public morals in regulating the sale of whisky, or gambling, or lotteries, and the like, no Legislature can bargain away the power to regulate and even to wholly abolish.

Stone v. Miss. 101 U. S. 814 (Bk. 25, L. ed. 1079).

The power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded not in calamity or fault, as is the police power, but in public utility.

Water Works Co. v. Rivers, 115 U. S. 870 (Bk. 29, L. ed. 525); 81 Pa. 85.

The Pennsylvania Railroad Company is fully authorized to become the guarantor of the debentures issued by the Bedford & Bridgeport Railroad Company.

Act of March 17, 1869, P. L. 11.

The prohibitions have no application unless there be a railroad. They do not apply to a thing merely projected or authorized. The entire article of the Constitution relates to highways in fact.

Op. §§ 1, 3, art. XVII, Const.

Under a charter or franchise to make a road only, a lease cannot be made of a road already built.

Sharswood, J., in *Wood v. Bedford & B. R. R. Co.* 8 Phila. 95.

"And the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury, as in other civil issues."

Art. XVII, § 4, Const. 1874.

Where the fact of competition and being parallel was denied, the county court denied the injunction, and the supreme court affirmed the decree, remarking: in such a state of facts the case should stand over to final decree, and no preliminary injunction should be awarded.

Guyger's Appeal, 15 W. N. C. 513 (1885). See also *McCallum v. Germantown Water Co.* 54 Pa. 40; *Shipley v. Continental R. R. Co.* 13 Phila. 138.

"Lines of railroad" refer to the line owned as contradistinguished from lines leased or operated under traffic agreements.

State v. Vanderbilt, 37 Ohio St. 590.

The control of the purchase by the Pennsylvania Company is not the control of the share-holder in contemplation of law.

Pullman Car Co. v. Mo. Pacific R. R. Co. 115 U. S. 588 (Bk. 29, L. ed. 499).

That any relation lawfully assumed in nowise changes corporate powers and duties is illustrated further in the case of *Pennsylvania R. R. Co. v. Sly*, 65 Pa. 207.

If the right of property, incident to the lawful ownership of stock, is taken from the Pennsylvania Railroad Company, the Declaration of Rights is violated.

Art. I, § 10, Const. 1874.

The reasoning in *Commonwealth v. Pittsburg & C. R. Co.* 53 Pa. 47, shows how this clause has been maintained.

There is an express intention in the present Constitution to preserve all laws existing prior thereto, and to save all contract rights previously accrued, although it would be now in conflict.

Sec. 2, schedule to Constitution; *Parkins v. Slack*, 86 Pa. 270.

Article XVII, § 4 of the Constitution of 1874 does not include any influence arising from the ownership of stock. This is made apparent from the use of appropriate words in section 12 of article XVI, where it was sought to include stock in the consolidation of telegraph companies.

It is to be read as limiting the application of prior lawful methods of securing lines of railroad.

Act of May 16, 1861, P. L. 702; March 24, 1865, P. L. 49; April 23, 1861, P. L. 410; June 21, 1865, P. L. 852.

If the Pennsylvania Company was the lawful owner of stock, its motives are not the subject of inquiry; it is a question of the exercise of a legal power. If that exists, it fulfills the law; if that fails, the motive is of no avail.

Pender v. Lushington, L. R. 6 Ch. Div. 70; *Pa. R. Road's App.* 80 Pa. 290.

It is believed that the cases in this State are tempestuous in their expression that a preliminary injunction cannot undo that which has been completed before litigation. Such is the office of a final decree and of that alone. See the remarks of Judge Sharswood in *Audenried v. Philadelphia & Reading R. R. Co.* 68 Pa. 375.

Messrs. Lewis C. Cassidy, Atty-Gen. and Robert Snodgrass, Deputy Atty-Gen., for appellee:

Findings of fact will not, in any event, be disturbed except for plain and palpable error; but where there is not even an attempt to criticize their correctness, they must be taken as conceded for all the legitimate purposes of this argument.

Baltimore, etc., Co's App. 10 W. N. C. 530; *S. C. 8 Am. & Eng. R. R. Cas.* 246; *Kisor's App.* 62 Pa. 428; *Orouell v. James*, 2 W. N. C. 176; *Trester v. Mensing*, 2 W. N. C. 680.

A corporation can exercise no powers except those which are expressly conferred upon it or those which arise by necessary implication.

Commonwealth v. Erie etc. R. R. Co. 27 Pa. 851; *Fertilizer Co. v. Hyde Park*, 97 U. S. 566 (Bk. 24, L. ed. 1086).

The power to purchase bonds and securities, contained in the Act of 1870, does not include the power to purchase stocks. Securities and stocks are two distinct and well recognized classes of property; and in the general and ordinary acceptance of the term securities would not include stocks, unless it be clearly so intended.

Oyle v. Knipe, L. R. 8 Eq. Cas. 434; *Hopkins v. Abbott*, L. R. 19 Eq. Cas. 222.

The charter of the Pennsylvania Company was taken subject to the Act of May 30, 1855, and the constitutional Amendment of 1857, and was, therefore, liable to modification by either the General Assembly or the Constitutional Convention, under the single restriction "that no injustice shall be done to the corporators."

Pa. R. R. Co. v. Duncan, 17 W. N. C. 193; *Phila. & Reading R. R. Co. v. Patent*, 17 W. N. C. 198; *Same Cases*, 2 Cent. Rep. 551, 554.

The corporate power of the Pennsylvania Railroad Company to purchase and hold the stock of any other railroad company, or to guaranty the bonds of any such company, has not been conferred by its special charter or any amendment thereto, but exists solely under general statutes applicable alike to all railroad corporations of the State.

Act of March 17, 1869, P. L. 11.

If the powers conferred by this Act had been in the form of an amendment to its special charter, such powers could have been withdrawn unless founded upon a new consideration as the basis of a new contract.

Johnson v. Crow, 87 Pa. 189.

The repeal or withdrawal of such powers could be effected, either by legislative action, or in the form of a constitutional provision subsequently adopted.

Pa. R. R. Co. v. Duncan, 2 Cent. Rep. 551.

The Constitution has modified the Act so as to prohibit the acquisition of stock and securities, with a view to control competing lines.

Art. XVII, § 4, Const. 1874.

The opinion of the learned judge presents a clear interpretation of what is a parallel or competing line.

The *Street Passenger Railway Cases* cited do not touch the question, *Judge Mitchell* expressly holding, in *Guyger's Appeal*, 15 W. N. C. 513, that "Article XVII of the Constitution, prohibiting the leasing of parallel and competing railroads and canals, did not apply to or include what are known as passenger railways."

The debentures are void because they are not authorized by the Bedford & Bridgeport charter.

Act of March 31, 1868; P. L. 1870, p. 1860.

They are also void because they are fictitious increase of stock.

Art. XVI, § 7, Const. 1874.

The consolidation of competing lines of railroad is against the public policy of the State and will be restrained and set aside by a court of equity.

Central R. R. Co. v. Collins, 40 Ga. 532; *Hartford, etc. R. R. Co. v. New York & N. H. R. R. Co.* 3 Robt. 411; *Thomas v. West Jersey R. R. Co.* 101 U. S. (Bk. 25, L. ed. 950). See also, *Currier v. Concord R. R. Corp.* 48 N. H. 321; *Hooker v. Vandewater*, 4 Denio, 349; *State v. Hartford etc. R. R. Co.* 29 Conn. 588; *State v. Vanderbilt*, 37 Ohio St. 590; *Tipppecanoe Co. v. Lafayette etc. R. Co.* 50 Ind. 85; *Steinart v. Erie etc. Transportation Co.* 17 Minn. 372.

The constitutional provision under consideration in this controversy is within the police power of the State, which cannot be bargained away and to which all charter contracts are subject.

"Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

Stone v. Miss, 101 U. S. 817 (Bk. 25, L. ed. 1079). See also *Cooley*, Const. Lim. *575-576; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (17 U. S. bk. 4, L. ed. 629); *Commonwealth v. Alger*, 7 Cush. 84.

PA.

Per Curiam:

Decree affirmed and each appeal dismissed, at the cost of the appellant.

PENNSYLVANIA R. R. CO. and NORTHERN CENTRAL R. CO. *Appts.*,

v.

COMMONWEALTH of Pennsylvania.*

A railroad company negotiated through another railroad company for the purchase of a controlling interest in the stock of a parallel or competing line, the legal title of the stock to be held by the other railroad, but the consideration coming from the competing company. A preliminary injunction to restrain the execution of the contract was granted, and a decree entered continuing the injunction until final hearing was affirmed on appeal.

(Decided October 4, 1886.)

APPEAL by defendants from a decree of the Common Pleas of Dauphin County, continuing a preliminary injunction. *Affirmed.*

Reported below, 1 Pa. C. C. R. 223.

The facts are stated in the opinion of the court below, by McPHERSON, J.:

"The motion before us is to continue the preliminary injunction heretofore granted. The opposing views of the parties have been argued with such candor and ability as befit their great importance, and it only remains to state the conclusions of the court. They are these:

"First. That the injunction must be continued until final hearing, so far as the Pennsylvania Railroad Company and the Northern Central Railway Company are concerned; and

"Second. That the evidence before us does not require its continuance against the other defendants.

"The jurisdiction of the court to interfere by injunction was earnestly denied, and it was insisted that a writ of *quo warranto* was the proper remedy. This position, however, does not seem to be sound in view of the express language of section 13 of the Act of 1836, P. L. 789.

"That section, together with the Act of 1857, P. L. 89, gives to the courts of common pleas the power and jurisdiction of courts of chancery so far as relates, *inter alia*, 'to the prevention or restraint of the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals.' From this provision it seems plain, and not to need discussion, that if the acts being done or proposed to be done are or would be in violation of the Constitution and prejudicial to the interests of the community, we have express authority to restrain their commission or continuance. Whether or not the remedy by *quo warranto* is also proper, we need not now consider.

"A considerable amount of testimony was taken, but there is substantial agreement as to all points now material. We find the important facts to be as follows:

*See preceding case, by Google

"1. The Pennsylvania Railroad Company is a railroad corporation of this Commonwealth, and leases, operates and controls the Tyrone & Clearfield Railroad and the Bald Eagle Valley Railroad, with their branches and connections. These leased roads reach portions of the Clearfield coal region in the Counties of Clearfield and Centre.

"2. The Beech Creek, Clearfield & Southwestern Railroad Company is a railroad corporation of this Commonwealth, owning and operating a practically completed line of railroad, which also reaches portions of the Clearfield coal region.

"3. The leased roads alone above mentioned are direct and substantial competitors with the Beech Creek Road for certain freight and passenger traffic in the said region.

"4. The Northern Central Railway Company is a railroad corporation, chartered in part by this Commonwealth, owning or leasing and operating a line of railroad which, so far as we are now informed, does not of itself compete with the railroad of the Beech Creek Company. It is not leased by the Pennsylvania Railroad Company, but the latter company owns six thirteenths of its capital stock, and the business relations between the two companies are close and harmonious.

"5. The Pennsylvania Railroad Company, through certain of its executive officers acting in its behalf, has offered to buy 60 per cent of the capital stock of the Beech Creek Company upon the following terms, viz.: the legal title to said stock to be transferred to and held by the Northern Central Railway Company; and in consideration of such transfer, the Pennsylvania Railroad Company to indorse upon \$5,000,000 of the bonds of the Beech Creek Company now issued, a contract to buy at 4 per cent upon said \$5,000,000 the semi-annual 6 per cent interest coupons thereof, with subrogation to the rights of the bondholders upon said coupons against the Beech Creek Company. This offer has been practically, although perhaps not formally, accepted by the owners of said 60 per cent of stock, but nothing further has yet been done, and no formal corporate action upon the proposition has yet been had. The evidence, however, warrants us in finding that the proposition will be carried into effect, if this court does not continue to prevent.

6. The Pennsylvania Railroad Company, through its said executive officers, was a principal actor in negotiating for the purchase of this stock; and the chief object of the transaction upon its part was to destroy or materially disable the direct and substantial competition between its said leased lines and the Beech Creek Road, so far as the traffic to and from certain portions of the said coal region is concerned.

"These are the important facts; and the question is whether a violation of section 4, article XVII of the Constitution, is threatened by the defendants, or by any of them? If it is, we may enjoin it, for it need not be argued that to destroy such competition as is here disclosed is prejudicial to the interests of the community.

"The section referred to, so far as now material, is as follows: 'No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation,

shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line.'

"It is clear that a violation of this section would be threatened if the Pennsylvania Railroad Company, which leases certain roads directly and substantially competing with the Beech Creek Road, were about to buy and hold in its own name a majority of the stock of the latter company; for in that case the Pennsylvania Railroad Company, as such lessee, would certainly 'control another railroad corporation owning or having under its control a parallel or competing line.' It will be seen that this language differs, in an important respect, from the language lately construed by the Supreme Court of the United States in the case of **Pullman's Palace Car Co. v. Mo. Pacific R. Co.*

"There the contract spoke of 'roads' under the control of the defendant; and it was declared that to own a majority of the stock of a railroad corporation did not give the control of the road, although it might give control of the company. Here, however, the clause of our Constitution just quoted speaks of the control of the company, not of the control of the road; and it seems evident, therefore, that the case referred to is not now in point and need not be further considered. Indeed, it was expressly conceded upon the argument that the Pennsylvania Railroad Company, as the lessee of lines competing with the Beech Creek Road, could not buy this stock and hold it in its own name; but it was strongly urged upon us that the Northern Central Railway Company is to be treated as the purchaser because it is to hold the legal title, and that the question of legality must be determined as if it concerned only this latter Company and the Beech Creek Corporation.

"This is a vital point in the defense of the Pennsylvania Railroad and Northern Central Railway Companies, and we have therefore given it the fullest consideration in our power, but without being able to conclude that we must look at this bargain in any other light than that now cast upon it by the truth. The evidence does not support the position we are asked to take. The offer before us does not in fact come from the Northern Central Railway Company, but from the Pennsylvania Railroad Company through its executive officers; and we are therefore able to deal, even in form, directly with the latter company. Its officers helped to carry on the negotiations, acting in its behalf, and they agreed in its name to the final terms; it is to furnish the only consideration by guaranteeing in part the coupons of the Beech Creek bonds; and its interest, chiefly and avowedly, is to be advanced by the transaction.

"Is the further fact, that, because it cannot lawfully hold the stock it has contracted to buy, it proposes to have the legal title thereto held by the Northern Central Railway Company, enough to make of no importance the other facts detailed? The case does not even present us with a finished transaction and a legal title already passed. Up to this time, it is the Pennsylvania Railroad Company, acting by its

*Bk. 29, L. ed. 499.

proper executive officers, which has been directly dealing with the owners of the Beech Creek stock, and the transaction can and should be looked at as in truth it is.

"If we consider, also, the reason which led the real parties to propose that the Northern Central Railway Company should hold the legal title to this stock, it will become more clear that justice does not require us even to treat this bargain as already carried out. That reason was, avowedly, to evade the constitutional provision already quoted; and it was believed that if the legal title was held by the Northern Central Railway Company, such evasion could be brought about. We are now asked to deal with the transaction as if it was complete and thus, in effect, to aid the parties in their effort to avoid the law. They are not yet clear of legal difficulties, and we are asked to help them out by assuming the facts to be other than they are, in order that a plain provision of law may be evaded. Legal fictions are not intended for such purposes; they should only be used to bring about a just result, and not to aid in covering up the truth.

"Further, we do not think the Pennsylvania Railroad and the Northern Central Railway Companies are in a position to urge, before a court of equity, that the bargain, if fully carried out, would not violate the Constitution. The facts, again, are these: the Pennsylvania Railroad Company made the contract in question, and agreed to furnish the sole consideration, for the purpose chiefly of destroying or disabling a serious competition between its leased lines and the Beech Creek Road; that is, for the purpose of violating the Constitution; but when it appears that the illegal nature of the transaction was too plain, the Pennsylvania Railroad Company proposes, and the Northern Central Railway Company agrees, that the legal title to the stock shall be held by the latter; not because the true nature of the bargain has been changed, and not because of a change in purpose, but simply in order that such nature and such purpose may be, as it is thought, effectively disguised. Being prevented, however, by injunction, they now urge that no such purpose as that intended will in fact be brought about, and ask us to look at the matter as if the Northern Central Railway Company was the independent *bona fide* purchaser of the stock in question.

"When such a case is in truth presented, we will then determine the questions so earnestly and ably argued, viz.: whether such a holding by the Northern Central Railway Company would in itself violate the Constitution; and if not, whether it would nevertheless be a violation because of the relation between that Corporation and the Pennsylvania Railroad Company. But we repeat, the evidence does not now permit these questions to be raised, for, with the facts as stated, the situation is quite different, and we must take it as the parties have made it for themselves. We shall not be doing injustice to the corporations named if we assume that they could do what they were willing to attempt; and they cannot successfully ask us to say that their motive and purpose were different from those which they distinctly avowed.

"If the view above expressed is correct, it

fully disposes of the case, for no contract right to do the thing forbidden is set up, and it follows that the injunction against the Pennsylvania Railroad and Northern Central Railway Companies must be continued until final hearing. As to the other defendants, it is enough to say that nothing now before us requires us to consider whether in any case they are properly subject to the constitutional provision in question. As the evidence now is, at least, nothing has been proved which calls upon us to continue the injunction against them, and so far as they are concerned it is therefore dissolved.

"A decree may be prepared in accordance with this opinion."

A decree was entered, January 27, 1886, continuing the preliminary injunction until final hearing.

The assignments of error specified, *inter alia*, the action of the court, 1, in entering the decree of January 27, 1886; and 3, in refusing to qualify its decree against the Northern Central Railway Company so as to enjoin it only from acting in the premises as the instrument or agent of the Pennsylvania Railroad Company.

Mr. Wayne MacVeagh, for appellants:

The Pennsylvania Railroad Company is fully authorized to become the guarantor of the obligations above mentioned.

Act of March 17, 1869.

The public policy of the Commonwealth is to encourage the consolidation of management and interests of railroad companies.

Acts March 29, 1859; April 23, 1861; May 16, 1861; April 27, 1864; March 24, 1865; April 2, 1868; April 14, 1868; March 17, 1869; April 10, 1869, of February 17, 1870, of April 26, 1870, and of May 8, 1871.

The constitutional prohibition operates to prevent any consolidation of the stock, property or franchises; the lease of the works or franchises; the purchase of the works or franchises; or the control of a competing line. This does not include an influence arising from the ownership of stock. If it had been so intended, appropriate language would have been used, as in the case of telegraph companies.

Art. XVI, § 12, Const.

The constitutional provision, read in the light of the prior legislation, leads to the same conclusion.

Unless there be restrictions in the charter on the purchase and sale of stock the courts will not add them.

Ins. Bank v. Bank of U. S. 4 Pa. L. J. Clark's ed. 128 (125).

In *State v. Hartford etc. R. R. Co.* 29 Conn. 538, and the *New York Case* in 3 Robertson, 415, and the later cases in Georgia, Ohio, New Hampshire and New York, there was no privilege granted by law to the companies to do the thing they claimed to do.

The case in New York (reported in 12 Abb. N. C.) is a case also of an attempted consolidation of corporations which were held to be competitive in their nature, and therefore incapable, in the absence of legislative authority, to consolidate with each other; but no such question arose there as arises here.

The leading case in Pennsylvania is that of the *Morris Run Coal Co. v. Barclay Coal Co.*

68 Pa. 173. The case deals with the general subject of public policy as affected by an agreement to prevent competition, but does not touch the question here raised.

The Northern Central Railway Company is not a competing line, and the injunction cannot be sustained against it, in any event. Its motives are not a subject of legal inquiry. The only question is as to the exercise of a legal power possessed by it. If such power exists, it fulfills the law; if that fails, the motive is of no avail.

Pender v. Lushington, L. R. 6 Ch. Div. 70; *Pa. R. R. Co's App.* 80 Pa. 290.

The Supreme Court of the United States has declared the law to be that the legal meaning of "control" does not include the mere ownership of stock even when it amounts to a majority ownership, because such stock may be bought and sold at the will of one party only, and therefore has no character of permanency about it, but contemplates only control by a contractual relation of a stable and permanent character.

Pullman Car Co. v. Mo. Pacific R. Co. 115 U. S. 588 (Bk. 29, L. ed. 499).

Messrs. Lewis C. Cassidy, Atty-Gen., and Robert Snodgrass, Deputy Atty-Gen., for appellee:

"In the light of ordinary language, of the circumstances attending its formation, and the construction placed upon it by the people, whose bond it is" (*Agnew, J.*, 54 Pa. 260), it is idle in construing this provision of the Constitution to say that a control resulting from an ownership of stock is not within the prohibition.

The whole scope of prior legislation relating to the consolidation and control of railroad companies in any form, whether by lease, merger, purchase of stock and bonds or otherwise, was intended to be affected by it; and whatever may have been the prior policy in that regard, it thenceforth became the policy to prohibit, in a modified degree, what it had previously encouraged.

When the people voted upon and adopted this portion of the Constitution, they intended what the language naturally and necessarily imports: a control by any means whatever, whether legal or actual.

Pullman Palace Car Co. v. Mo. Pacific R. Co. 115 U. S. 588 (Bk. 29, L. ed. 499), under its facts, has no application here. The meaning there given to the word "control" is not its true meaning as used in our Constitution.

In the first place, the court was there construing a private contract, in regard to which the rules of construction are essentially different from those applicable to constitutional interpretation.

In the second place, the "control" there considered was of the railroad and not of the company. The *Chief Justice* said: "It [the stock holding company] may control the company, but the company alone controls the road."

The Corporation in this case was to issue or at least use its bonds, to enable its stockholders to sell their stock. Article XVI, § 7 of the Constitution, forbids any corporation from issuing "stocks or bonds except for money, labor done, or money or property actually received."

Per Curiam:

Decree affirmed, and each appeal dismissed, at the costs of the appellant.

Isaac RINEHART, *Plff. in Err.*,

v.

CITY OF LANCASTER.

1. To entitle one to a reward offered for the arrest and conviction of a criminal, it is necessary that the claimant should be principally instrumental in securing the arrest and conviction. It is not sufficient that he was only an instrument in the hands of others.
2. A party who, at the request of another, joins in the pursuit of a criminal and identifies him and afterwards testifies in court is not, without more, entitled to a reward.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment on a verdict for defendant in an action of assumpsit to recover a reward for the detection of incendiarism. *Affirmed.*

The incendiary was first pursued by one Graeff, but made his escape. A lad, about eleven years old, saw them running on the street and, after Dungan's arrest, identified him as the party who had been pursued, and testified to these facts in court.

Further facts are stated in the opinion.

Mr. B. F. Davis, for plaintiff in error.

Mr. J. W. Johnson, for defendant in error.

Mr. Justice Gordon delivered the opinion of the court:

On the 17th of April, 1879, the City of Lancaster, through its mayor, John T. Macgonigle, Esq., offered a reward of \$500 for the arrest and conviction of "any party or parties setting fire to buildings of any description within the limits of the City."

The plaintiff in the present suit claims this reward, alleging that he was principally instrumental in securing the arrest and conviction of one Jerry Dungan for an attempt to fire a stable or barn in the said City, belonging to George Hastings.

We agree with the learned counsel for the plaintiff, that the question was not properly whether the guilty party was convicted on the plaintiff's testimony, or upon that of others, for it was not necessary in order to entitle himself to the reward that he should have testified to any matter concerning the case.

Had he, as the detectives say, "worked up the case," that is, had he discovered and arranged the evidence which warranted Dungan's arrest, and on which he was convicted, he would have entitled himself to the reward, although he might not have appeared on the stand as a witness, and had in fact, no personal knowledge of anything tending to a proof of Dungan's guilt. The City was not offering a bonus for witnesses, but neither did it intend to reward those who might be called upon to assist

in the apprehension of incendiaries. Hence, unless Rhinehart was indeed principally instrumental in the arrest and conviction of the offender he had no claim against the City, and the judgment as it now stands must be regarded as well rendered.

It requires, however, but a cursory examination of the evidence to demonstrate the utter futility of the plaintiff's suit. He neither discovered the evidence nor was he the cause of the guilty party's arrest. According to his own showing, he knew nothing about the attempt to fire the barn until Hastings informed him; and he joined the constable and others in the pursuit, at the instance of Hastings and that only because of his ability to identify Dungan as the person who was at the building about the time when Graeff discovered the roll of paper and the matches. If, then, Hastings, the owner of the property, was the person who not only gave the plaintiff the information on which he acted in assisting to make the arrest, but who also originated the pursuit, on what ground does he now found his claim against the City?

He was not the cause of the arrest; he discovered no evidence; neither did he conduct the prosecution. Had the matter rested with him, Dungan never would have been put on trial, much less convicted. What did he discover, and what did he do? He saw Dungan lounging about the premises but did not know, until he was so informed by Hastings, that Dungan had done or intended any harm, and upon being asked so to do, he joined the constable in effecting the capture of the supposed criminal. So far, then, from being the discoverer of the offender, or the moving cause of his arrest and conviction, he was himself but an instrument in the hands of others, and an unimportant one at that, for it does not appear that he materially contributed to the result.

The judgment is affirmed.

James MOORE *et ux.*, *Plffs. in Err.*,

v.

LOGAN IRON & STEEL CO.

A lessor who has, by request of the tenant, made a deep excavation on the premises for a privy well, and left it uncovered and full of water, is not liable in damages for the death of the tenant's grand child, between two and three years of age, who, visiting the tenant with his mother, and by her left in charge of an aunt acquainted with the premises, strays away and is drowned in the well.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Mifflin County, to review a judgment on a reserved point, *non obstante veredicto*, for the defendant, in an action of trespass on the case for negligence. *Affirmed.*

The facts are stated by BUCHER, *P. J.*, in the following opinion delivered upon the entry of the judgment in the court below:

"The admitted facts are that the defendant was the owner of a dwelling house and lot of ground, which it leased to the mother and brother of James Moore's wife, one of the plaintiffs. The defendant, after the lease, at the request of the lessees, dug a hole at the end of the lot, fifty-eight feet from the steps at the rear of the dwelling, for a water closet or privy. This excavation was dug in the last of June, 1883, and was six feet in depth. It filled with water as soon as it was dug, and remained uncovered until the 26th of July of the same year, a period of about four weeks. On the last mentioned day, Mrs. Moore, one of the plaintiffs, and a daughter of Mrs. Caldwell, one of the lessees, visited the latter, in company with her two children, the one being a boy, aged two years, four months and about fifteen days. The mother of the child on the day aforesaid left it in the custody of its aunt, a daughter of one of the lessees and an inmate of the family, while she visited a neighbor.

"The existence of the excavation was well known to all the members of the family, including the aunt in whose care the child was left by the mother, and the lot was inclosed from the public by a fence. There was a path through the lot leading over the fence about four or five feet from the excavation. The child, whilst in the custody of the aunt (the latter being engaged in sweeping the room and her back being turned four or five minutes), wandered into the lot, fell into the excavation and was drowned. The contention on the part of the defendant, at the trial, was that it owed no duty to the plaintiffs and was not liable to them for leaving the excavation uncovered.

"We reserved the question whether the defendant owed a duty to the plaintiffs, as guests of the tenants, to have guarded this excavation so as to avoid danger.

"The case was sent to the jury to find from the evidence whether the defendant was guilty of negligence in leaving the excavation unguarded, and whether the mother of the child, or its custodian the aunt, was guilty of contributory negligence. The jury found against the defendant and assessed the damages. The defendant then moved for judgment *non obstante veredicto*; and this brings us to consider the sole question for investigation:

"Is the defendant lessor liable in damages under these facts to the guests of the lessees and parents of the drowned child? The question is novel. No case precisely like it has been brought to our attention, and we must solve it on principle.

"First, then, it seems to us very clear that had this child been of the lessees' family there could be no recovery, because the family knew of the pit and were put upon their guard.

"Second. The presence of the drowned child on the premises must fall under one of two classifications, to wit: either as a trespasser, or as a member of the lessees' family. In either case the parents cannot recover.

"As between the lessor and the child, and its parents, the lessor owed no duty. A duty to them could only arise out of some contract obligation, either express or implied. None exists, as out of some confidence or trust reposed, as where an express or implied license or invitation has been held out, or out of some duty

NOTE.—*Cf.* on the general subject, Schilling v. Abernethy, 3 Cent. Rep. 168.

to the public at large which would include them. This excavation was dug at the express solicitation of the lessees; and as between them and the lessor they could not complain if they fell into it, because they knew of its existence and could, with ordinary care, avoid it.

"*Hydraulic Works Co. v. Orr*, 83 Pa. 332, as qualified by *Gillespie v. McGowan*, 100 Pa. 144, 149, means 'that a person who maintains such a dangerous trap (it was a platform in a private alley which leaned a little over plumb against a wall, requiring but little force to carry it over the perpendicular and then it would fall) close to a public highway in the heart of a large city might be liable to a person injured thereby, although such person was a child of six years of age trespassing on the premises; and the familiar principle was invoked that one may not justifiably, or even excusably, place a dangerous pitfall or wolf trap, or a spring gun purposely to catch even willful trespassers poaching on his own grounds. *Hydraulic Works Co. v. Orr* is authority only for its own facts. It was not intended to assert the doctrine that a child cannot be treated as a trespasser or wrong doer.' Its authority was materially shaken in *Gillespie v. McGowan*, *supra*.

The latter case holds that a deep well eighty feet from the nearest highway on a private lot need not be guarded. So, too, *Gramlich v. Wurst*, 86 Pa. 74, holds that the owner of land, in the exercise of lawful dominion over it, may leave an excavation thereon, which is so distant from the highway that no one can reach it without becoming a trespasser, unprotected. Thus it is clear that if this mother and child had gone into this lot without the sanction of the lessees and the accident had happened as it did, no one would be liable. Then their presence on the lot was by the license of the lessees; and as their guests they became incorporated into their family, and thus they were lawfully on the premises, but upon the same conditions as to the lessor's accountability as the lessees; and thus the lessor was under no duty to the guests whatever.

"It would be far more reasonable to hold the hosts liable, for they were bound to reasonable diligence in warning and guarding their guests against known dangers while in their house. Where would such doctrine of the lessor's liability lead to? * * *

"The law does not demand that the owner of a tenement should be more careful of the children of a visitor than he should be for his own. There are certain risks in life which we must all take and these are some of them. We say again: to hold that the owner of the premises was liable under such circumstances is tantamount to holding that he is an insurer of the lives of his own family as well as the lives of all strangers who come within his gates. If such be the law the owner dare not admit the children of another as guests where there are descending steps, open doors and windows, without having them so securely guarded that it is impossible for them to blunder and fall. 'If the dangers are patent and visible, the visitor who comes to and is received within the home must share these dangers in common with the other members of the family.'

"*Southcote v. Stanley*, 1 Hurlstone & N. 246.

"In *Flower v. Pa. R. R. Co.* 69 Pa. 210, where

a boy, at the request of the fireman, climbed upon the locomotive and was thrown off by a jar and killed, it was held that the company owed him no duty.

"In *Knight v. Abert*, 6 Pa. 472, *C. J. Gibson* says: 'A man must use his property so as not to incommode his neighbor; but the maxim only extends to neighbors who do not interfere with it or enter upon it. If it were not so, a proprietor could not sink a well, or a saw pit, dig a ditch, or a mill race, etc.'

"While it is true where there is negligence and the injured party is a child, its negligence cannot be set up, still it must be remembered in this case there was no negligence on the part of the defendant, because the pit was dug on its own land with the consent of and at the request of the lessees, so that the case stands as if there was no tenant, and the excavation was on defendant's own land, away from any public highway, and the child had wandered there. The defendant was only called upon to guard against the lessees' injury, and the lessees, knowing all, were bound to protect their guests by warning or otherwise.

"It is true the jury found that the aunt was not guilty of negligence in taking care of the child; but we incline to the opinion that it was error under the evidence to submit this to them. The admitted fact is that the aunt and custodian of the child had knowledge of the existence of this 'man trap,' as the zealous counsel for the plaintiffs call it, and having assumed the duty of guarding it during the absence of the mother, it was her bounden duty to see to it, that it did not escape her vigilance, and having permitted it to be exposed and alone for any time was negligence.

"For these reasons we must enter judgment for the defendant on the reserved point. And now, January 12, 1884, the rule is made absolute and judgment is entered in favor of the defendant, to which plaintiffs except and bill sealed at their instance."

The assignment of error specified the action of the court in entering judgment for the defendant on the reserved point, *non obstante veredicto*.

Messrs. A. Reed and T. M. Uttley, for plaintiffs in error:

The rule of duty in cases of negligence varies with circumstances.

Hydraulic Works Co. v. Orr, 83 Pa. 332.

Gillespie v. McGowan, 100 Pa. 144, does not qualify *Hydraulic Works Co. v. Orr*, so as to affect its application to the case on hand.

In *Gillespie v. McGowan* the child lacked but a few months of being eight years of age, and the court held that the jury must be allowed to pass upon the question of contributory negligence, which was done in this case.

A landlord who, being solicited by his tenant to have an outhouse repaired, gratuitously undertakes to make the repairs and negligently and unlawfully performs the work, whereby the tenant's wife is subsequently injured, is liable for the injury.

Gill v. Middleton, 105 Mass. 477.

If a person, being on the premises of another on lawful business, without any fault or negligence of his own, falls through a hole on such premises, the occupier will be responsible, al-

though the hole be necessary for carrying on the business of the occupier and there is no duty upon such occupier as between himself and his servants to keep the hole fenced.

Indermaur v. Dames (L. R. 1 C. P. 274; 2 Id. §11), cited and approved in 1 Add. Torts, §228.

While the defendant as landlord might not be liable to the tenant or his guests for any defects on the premises when rented, he certainly is liable for such gross negligence as this case exhibits, committed by him while the property was leased.

Phila. & Read. R. R. Co. v. Long, 75 Pa. 257; *Kay v. Pa. R. R. Co.* 65 Pa. 269; *Woodbridge v. Del. Lack. & West. R. R. Co.* 105 Pa. 460.

Messrs. D. W. Woods & Son, for defendant in error:

No member of the lessee's family could recover damages for an injury resulting to him or her by falling into this hole, and the lessor's duty to a visitor is no higher or greater than to the members of the family.

1 Add. Torts, pp. 280, 281, pl. 258.

If the dangers are patent and visible, the visitor who comes to and is received within the house, must share those dangers in common with other members of the family.

Southcote v. Stanley, 1 Hurlstone & Norm. 246; Add. Torts, *supra*.

A visitor is at best merely a licensee.

Balt. & Ohio R. R. Co. v. Schweindling, 101 Pa. 258; *Erie v. Magill*, 101 Pa. 616; *Woodbridge v. Del. Lack. & West. R. R. Co.* 105 Pa. 460.

An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner or to the public.

Gramlich v. Wurst, 86 Pa. 74; *Gillespie v. McGowan*, 100 Pa. 144; *Knight v. Abert*, 6 Pa. 472; Add. Torts, *supra*.

Per Curiam:

The opinion of the court on the reserved point contains a correct statement of the law applicable to the facts of this case. On that opinion the

Judgment is affirmed.

Jacob GRIEL, Sr., *Plff in Err.*,

v.

B. R. BUCKIUS.

1. Where an affidavit of defense is made by a stranger, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability on the part of the defendant existed, which prevented him from making the affidavit himself, and the circumstances giving rise to it.
2. An affidavit of defense filed by one styling himself "attorney for the defendant," and alleging that he transacted all the business in the case and has full knowledge, etc., will not be received.
3. The allegations of defense, on the merits of the case, held insufficient, as being too general, vague and indefinite.

(Decided October 4, 1886.)

ERROR to Common Pleas of Lancaster County, to review a judgment for plaintiff for want of a sufficient affidavit of defense. *Affirmed.*

Scire facias sur mechanics' lien for plumbing, material, labor, etc., with a bill of items containing amounts and dates.

The following affidavit of defense was filed:

"John F. Griel, attorney for Jacob Griel, Sr., being duly affirmed, deposes and says that the claim of B. R. Buckius v. Jacob Griel, Sr., for \$771.55 with interest, is unjust and exorbitant; and said amount is not due plaintiff by defendant, and is largely in excess of what is due for said work and materials claimed to be furnished; that defendant has a just defense to a large portion of said bill, and he firmly believes that charges are made for work and material never furnished, and the charges are largely in excess of what was agreed upon by plaintiff as the prices of work and material; and the defendant expects on trial to prove that the claim of plaintiff is not due by the defendant, and he has a just and proper defense to said suit."

The plaintiff took a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense.

A supplementary affidavit was then filed as follows:

"John F. Griel, being duly affirmed, deposes and says that by power of attorney of Jacob Griel recorded Letter Attorney Book No. 7, page 491, he has full power to sign the affidavit of defense in this case, as he transacted all the business in the case, and has full knowledge of the whole work alleged to have been done.

"Plaintiff agreed to do the work and furnish the material for the same price as paid for similar work on a house occupied by John F. Griel, viz.: \$680.08; and not more than that sum would be due plaintiff, if work were well done, and labor and material furnished at regular rates.

"Deponent specifies the following items as charged for more than agreed upon and as excessive, viz.: globes to chandeliers, charged \$16, should be \$10.50, chandeliers \$1 to \$1.50 in excess of price, \$30 for fixing bath tub, bath bibb \$10 instead of \$5; and on trial it is proposed to show that the whole bill is in excess of price agreed upon, and is extortionate, and labor and material charged for which was not furnished."

The power of attorney referred to in the supplemental affidavit of defense was as follows:

"Know all men by these presents that I, Jacob Griel, Senior, of the City of Lancaster in the County of Lancaster, and State of Pennsylvania, have made, constituted and appointed, and by these presents do make, constitute and appoint, and in my place and stead put and depute my son John F. Griel of the City of Lancaster, aforesaid, my true and lawful attorney for me, and in my name, and for my use to ask, demand, sue for, recover and receive all such sum or sums of money, debts, goods, wares and other demands whatsoever, which is or shall be due, owing, payable and belonging to me by any manner or means whatsoever, and sufficient receipts and acquittances for the same to make, execute and deliver. Also to make, draw, sign and indorse notes and checks for me and in my name, and to enter into articles of agreement

for the sale and conveyance of real estate; giving and granting unto my said attorney my whole power and authority in and about the premises; holding for firm and effectual whatsoever my said attorney shall lawfully do in pursuance hereof. In witness whereof I have hereunto set my hand and seal the 18th day of November, A. D., 1875.

The court directed judgment for the plaintiff, which was accordingly entered by the prothonotary.

The assignments of error specified, *inter alia*, the action of the court in directing the entry of judgment for the plaintiff.

Mr. A. C. Reinochl, for plaintiff in error:

An affidavit of defense need not set forth the very fact which will be produced in a trial, but is sufficient if it contains enough to satisfy a reasonable court that a just defense can be made.

Under the decision of the supreme court in *Sleeper v. Dougherty*, 2 Whart. 177, it was held that an affidavit made by a third person interested in the event of the suit is sufficient to prevent a judgment by default.

Mr. W. H. Roland, for defendant in error:

An affidavit by one not appearing to be a party in interest will not be regarded.

Bancroft v. Sterr, 1 W. N. C. 132; *Gross v. Painter*, 1 W. N. C. 154; *Stollaker v. Lardner*, 1 W. N. C. 169; *Philadelphia v. Devine*, 1 W. N. C. 358; *Russell v. Foran*, 1 W. N. C. 470; 76 Pa. 473.

How can a stranger come in? He is a meddler.

Philadelphia v. Gross, 2 W. N. C. 429.

An affidavit by defendant's attorney upon information of his client is not sufficient.

Crine v. Wallace, 1 W. N. C. 293.

When an affidavit is made by a clerk of the defendant, it must set forth why it could not be made by the principal.

Couperthwait v. Roney, 10 W. N. C. 482.

If the affidavit be evasive the plaintiff is entitled to judgment.

Gill v. Cullen, 8 W. N. C. 58.

An affidavit setting forth a partial failure of consideration should state the exact amount.

Weil v. Michael, 10 W. N. C. 337; *Peck v. Jones*, 70 Pa. 83.

A general affidavit that the plaintiff's charges are excessive is insufficient.

Wolcott v. Schwartz, 89 Legal Int. 131.

Mr Justice Paxson delivered the opinion of the court:

The affidavit of defense in this case is clearly insufficient. It is not only evasive but it was made by a stranger to the record. It is true he styles himself "Attorney for Jacob Griel," but whether he was attorney at law or attorney in fact does not appear. No reason is given why the defendant did not make the affidavit himself, nor does the affidavit show that it was made for and on behalf of the defendant, nor even with his knowledge.

Nor are these defects cured by the supplemental affidavit; nor by the fact that the affiant refers to a power of attorney from the defendant as giving him "full power to sign the affidavit of defense in this case." But an inspection of that instrument discloses no such authority; it refers to other matters in no way connected with this suit.

298

It has never been held that no one but the defendant can make the affidavit of defense. Cases may arise where it would be physically impossible for the defendant to make such an affidavit. Under such and similar circumstances we have no doubt that an affidavit of defense may be made on behalf of the defendant by an attorney at law or other person duly authorized; but the reason why it is not made by the defendant should be set forth in the affidavit. The court can then judge of the sufficiency of such reason. It would never do to allow a stranger to the record to intermeddle in this manner.

The correct rule would seem to be that when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability.

This rule is generally observed in practice throughout the State so far as I have had an opportunity of ascertaining. It is certainly the rule in force in Philadelphia, where the practice under the affidavit of defense law is older than in most of the other counties of the State. See *Bancroft v. Sterr*, *Gross v. Painter*, *Stollaker v. Lardner*, *Philadelphia v. Devine* and *Russell v. Foran*, 1 W. N. C. 132, 154, 169, 358, 470; *Phila. v. Gross*, 2 W. N. C. 429; *Couperthwait v. Roney*, 10 W. N. C. 482.

The allegation in the supplemental affidavit that the affiant "transacted all the business in the case, and has full knowledge of the whole work alleged to have been done" does not meet the difficulty. It furnishes no reason why the defendant did not make the affidavit. For that purpose he is entitled to avail himself of the knowledge of others and may aver his facts upon information and belief.

Nor is the supplemental affidavit specific. The original is wholly evasive, as before observed. Neither sets up more than a defense to a portion of the claim, and there is no admission anywhere of how much the defendant admits to be due. Such language as that "The whole bill is in excess of the price agreed upon, and is extortionate, and labor and material charged for which was not furnished," is too vague. How much labor and material were charged for and not furnished? Surely if the defendant knows the fact to be so he can tell the amount. And as to the few items which are more specific, there is no distinct averment made of any agreement with the defendant in regard to their price. It does not appear whether the contract referred to was oral or written, nor with whom made.

Judgment affirmed.

BOROUGH OF CARLISLE, *Plff. in Err.*,

John F. BRISBANE.

1. The general rule of law is, where one suffers an **injury through the concurrent negligence of two or more persons they are jointly liable**, and may be proceeded against for the **damages sustained, either jointly or severally.**

2. **Where a passenger rides, without pay, with another who is driver of a team, exercising entire control over it and who is in no sense the passenger's agent or servant, the negligence of the driver cannot be imputed to the passenger so as to bar an action by him against a negligent third party. The passenger is answerable for his own negligence only.**
3. **It is not important that the driver was familiar with the condition of the road. The driver's knowledge would not affect the passenger with notice. The latter having no knowledge of it, the jury is to consider the case as if both were passing over the road for the first time.**
4. **Where a municipality improving a public highway causes an obstruction to be put upon the road, it is its duty to give some appropriate warning of the fact; and if there is nothing to indicate to a stranger that the traveled route is at the side of a road, it is presumed to be in the center.**
5. **In an action by a stranger against a municipality for an injury caused by an obstruction in the center of the highway, evidence to show that the plaintiff took the center of the road and that the traveled route had previously been there is admissible.**

(Decided October 4, 1886.)

ERROR to the Common Pleas of Cumberland County, to review a judgment on a verdict for plaintiff in an action on the case. *Affirmed.*

Brisbane, the defendant in error, resided in Philadelphia. While on a visit to Carlisle on December 28, 1884, he was invited by Cornman, a friend, to take a drive with him into the country in a sleigh. Returning they drove up the poor house road a quarter of a mile to North Street, one of the principal thoroughfares of the Borough. The Borough was then engaged in piking North Street, which is sixty feet wide, and had filled the north half of it with broken stones to the depth of from ten to twenty-five inches, leaving the south half in its previous condition. There were thus two distinct ways or tracks passing over North Street, each thirty feet wide, the one on the north side being piked and elevated from one to two feet above the one on the south side which was known as the summer road. These two ways or tracks both began on a level at the poor house road. The night was dark and cloudy and the ground was covered with snow. Mr. Cornman turned his horse into this street and drove for the center of the street. After driving about fifty feet he struck the middle of the street, and the left runner of his sleigh went suddenly over the edge of the piking, which was about sixteen inches deep at that point; and the sleigh was upset, throwing Brisbane out. He sustained injuries and this action was brought to recover damages.

Upon the trial, before SADLER, P. J., the defendant made the following offer: We offer to prove by the witness on the stand and by other

witnesses, that Mr. Cornman, the driver of the sleigh in which the plaintiff was riding, was familiar with the road on which the accident happened and that he knew of the repairs going on and of the manner in which the employees of the Borough were making them; and further that there was another convenient and safe road leading from the poor house road to the town, which was well known to Mr. Cornman, and by taking which all possible danger could have been avoided. This for the purpose of showing contributory negligence.

Objected to; first, that the knowledge of Cornman of defects in the road would not be notice to the plaintiff; second, negligence of Cornman could not be imputed to the plaintiff; and third, that the offer is incompetent and irrelevant.

The court: It is not proposed to show that Mr. Cornman was a common carrier or that the plaintiff in this case was either the owner of the vehicle or horse, or that he knew of the defects alleged to have been known of by Mr. Cornman. We think the negligence of Cornman cannot be imputed to him, or the knowledge of Cornman of the condition of the street cannot be imputed to him. The offer is overruled and defendant excepts, and bill sealed. *First assignment of error.*

Plaintiff in rebuttal offered to prove by a witness "That the course traveled from the poor house road on to North Street was, before the piking, close to the northwest corner of the junction of the poor house road and North Street, and then by a regular course to the middle of North Street, and then along the middle of North Street to Garrison Lane; and that this is the course traveled now and has been since the completion of macadamizing North Street, and this for the purpose of showing that the plaintiff on the night of December 28 took the usual course of travel from the poor house road into and up North Street."

Objected to as immaterial and irrelevant.

The court: I will admit the testimony for the present and allow a bill of exceptions. I am a little in doubt about it. I will admit it for the present and if I think it is wrong, withdraw it. Bill of exceptions sealed for defendant. *Second assignment of error.*

The court charged the jury, *inter alia*, as follows: "But in order to excuse the defendant, if it has been shown that the accident was caused by its negligence, it must appear that the plaintiff, in the present case, was guilty of some negligence on his part. If he was acquainted with the condition of the road and did not endeavor to avoid the danger, negligence would be imputed to him; but the fact that Mr. Cornman, the driver, and whose guest he was, had this knowledge, cannot be imputed to him and would not bar his right of action. He must not be held liable for the negligence of Mr. Cornman unless he could have averted it. If there were any indications which would have arrested the attention of a careful person to the danger in the street, and they were discernable by a person exercising ordinary care, and they were observed or could have been observed by the plaintiff in the use of ordinary care at the time of day on which he passed over it, and snow on the ground, as you may find from the evidence, or if Brisbane saw the

ridge in the center of the street and could have prevented the accident by his interposition, either stopping the horse or changing its direction, and made no such effort, and did not act as a reasonably prudent man would have done under the circumstances, he would be guilty of contributory negligence. You will conclude from the evidence what the plaintiff saw and what his opportunities were to have averted the accident if any. But a jury are not at liberty to imagine that such was the case. It must appear to them from mouths of witnesses, or other competent evidence, that the plaintiff was guilty of negligence and that it contributed to the accident in some degree, before negligence on his part is entitled to any consideration as a defense to this action."

The assignment of error specified, *inter alia*, the action of the court in the admission and rejection of the evidence above noted, and in charging the jury as above.

Messrs. Hepburn, Jr., & Stuart, and Martin C. Herman, for plaintiff in error:

A traveler on the highway who does not avoid a known danger when he might do so, but rushes recklessly and heedlessly upon it, is guilty of contributory negligence.

Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306; *Forks Township v. King*, 84 Pa. 230; *Erie v. Magill*, 101 Pa. 616.

Where a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it, and of another party, the carrier must answer for the injury.

Lockhart v. Lichtenthaler, 46 Pa. 151; *Phila. etc. R. R. Co. v. Boyer*, 97 Pa. 91.

In *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, the injury complained of was caused by a locomotive coming into collision with a wagon in which the plaintiff, a woman, was riding, while it was being driven across the railroad track by the owner of the team, and it was held that his negligence affected the right of the plaintiff to recover, equally with her own negligence.

In a private conveyance the driver is under the control and direction of the passenger, and if not, the latter may well decline to entrust his safety farther in such a conveyance.

Cuddy v. Horn, 46 Mich. 596.

In *Mann v. Wieand*, 4 W. N. C. 6, the negligence of the owner and driver of the wagon, in driving with insufficient harness, was mere negligence in a general sense and in no sense contributed directly to the accident. The vicious conduct of the defendant's dogs was the direct cause.

Bennett v. N. J. R. R. & Trans. Co. 36 N. J. L. 226, and *Chapman v. New Haven R. R. Co.* 19 N. Y. 341, are in direct conflict with our cases of *Lockhart v. Lichtenthaler*, and *Phila. etc. R. R. Co. v. Boyer*.

Robinson v. N. Y. Cent. & Hud. Riv. R. R. Co. 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228; and *Masterston v. N. Y. Cent. & Hud. Riv. R. R. Co.* 84 N. Y. 247, are not defensible under the law as it exists in Pennsylvania.

Messrs. F. Maust, F. E. Beltzhoover and J. M. Weakley, for defendant in error:

Negligence in a general sense by the driver would not protect the plaintiff in error from liability for a direct and proximate injury caused by its own negligence.

Mann v. Wieand, 81* Pa. 243; *Webster v. Hudson Riv. R. R. Co.* 88 N. Y. 260; *Knapp v. Dagg*, 18 How. Pr. 165.

Lockhart v. Lichtenthaler, 46 Pa. 151, and *Phila. etc. R. R. Co. v. Boyer*, 97 Pa. 91, are both cases of carrier companies in which the law is held to be that a passenger must look to his carrier in case of injury, upon the ground that it is more just that the owner should answer to his employer rather than one in whom the employer reposed no confidence.

"It is the general American rule that there is no privity in negligence between passenger and carrier; and that therefore when the passenger brings an action of negligence, the contributory negligence of his carrier is not to be imputed to him in any degree for the purpose of barring his remedy."

Beach, Cont. Neg. § 36; citing, *Danville L. & N. Turnpike Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Bennett v. N. J. R. R. & Trans. Co.* 36 N. J. L. 225; *Trans. Co. v. Kelly*, 36 Ohio St. 86; *Allison v. Hetrick*, 90 Ind. 545; *Cuddy v. Horn*, 46 Mich. 596; *Wabash, etc. R. Co. v. Shacklet*, 105 Ill. 364; *Knapp v. Dagg*, 18 How. Pr. 165; *Chapman v. New Haven R. R. Co.* 19 N. Y. 341; *Webster v. Hud. Riv. R. R. Co.* 38 N. Y. 260; *Robinson v. N. Y. Cent. etc. R. R. Co.* 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Masterston v. N. Y. Cent. etc. R. R. Co.* 84 N. Y. 247; *Ricker v. Freeman*, 50 N. H. 420; *Eaton v. Boet. & Lowell R. R. Co.* 11 Allen, 500; 12 Minn. 357; 23 Ala. 469. Also *Shearm. & Redf. Neg. § 46*; *Whart. Neg. § 395*; *Thomp. Carr.* 284; 1 Smith, L. Cas. 8th ed. 505.

"The passenger has no control over the driver or agent in charge of the vehicle; and it is the right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant."

Bennett v. New Jersey & R. R. & Trans. Co. 36 N. J. L. 225.

Where the evidence shows that the injury was occasioned by the joint negligence of the carrier and a third party, the plaintiff is entitled to recover.

Transfer Co. v. Kelly, 36 Ohio St. 86.

"It was not error in this action to refuse to instruct the jury that if another was driving the team which was hauling the wagon in which the plaintiff was voluntarily riding and the negligence of the driver contributed to the injury, the plaintiff could not recover."

Allison v. Hetrick, 90 Ind. 545.

"Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence."

Cuddy v. Horn, 46 Mich. 596.

"A passenger by railroad is not so identified with the proprietors of the train conveying him or their servants as to be responsible for negligence on their part."

Chapman v. New Haven R. R. Co. 19 N. Y. 341.

"A person injured is not responsible for the negligence of a person over whom or over whose conduct he has no control. Had the plaintiff ridden with a man who was known to her to be intoxicated, or physically or mentally incapable of managing a horse, other and different responsibilities might result."

Robinson v. N. Y. C. & Hud. Riv. R. R. Co. 66 N. Y. 11.

To the same effect is *Dyer v. Erie R. Co.* 71 N. Y. 228.

In *Masterson v. N. Y. Cent. etc. R. R. Co.* 84 N. Y. 247, the plaintiff and two others were riding in a wagon from which plaintiff was thrown and injured.

In *Ricker v. Freeman*, 50 N. H. 420, it is held that where an injury is the result of two concurring causes, one party in fault is not exempted from liability for the injury, although another party may be equally culpable.

It is settled law in Pennsylvania that "An excavation in a road or street made for a lawful purpose must be fenced and lighted."

Humphreys v. Armstrong Co. 56 Pa. 210; *Lower Macungie Township v. Merkhoffer*, 71 Pa. 276; *Scott Township v. Montgomery*, 95 Pa. 444.

Mr. Justice Clark delivered the opinion of the court:

The general rule of the law undoubtedly is where one suffers an injury through the concurrent negligence of two or more persons, they are jointly liable and may be proceeded against for damages sustained, either jointly or severally, at the option of the party injured, unless the latter by his own negligence has contributed to the injury; in which case the law will not afford him any remedy whatever against any or all of the persons whose wrong in concurrence with his own caused the injury; the rule is, however, not without its exceptions.

Where goods in the hands of a common carrier are injured by the negligent act of a third party, to which the negligence of the carrier contributes, and an action is brought by the owner against the third party, the carrier's contributory negligence is a good defense. *Vanderplank v. Miller*, 1 Mood. & M. 169; *Simpson v. Hand*, 6 Whart. 311.

So, also, where a passenger is personally injured by the joint negligence of his carrier and another party, his remedy is against the common carrier alone. The latter question was first raised in this court, and was very fully discussed in the case of *Lockhart v. Lichtenhaler*, 46 Pa. 151.

The decision in that case was grounded upon the doctrine of the English cases: *Bridge v. Grand Junc. R. Co.* 3 Mees. & Welsb. 247 (1838) in the Court of Exchequer; *Thorogood v. Bryan*, and *Cattlin v. Hills*, 65 Eng. C. L. 114 and 123 in the Common Bench (1849). These cases have since been followed and approved in the Exchequer by *Armstrong v. Lancashire & York. R. Co.* 44 L. J. Exch. 89.

The principle upon which all these English cases appear to have been determined, is that the passenger is so far identified with the carriage in which he is travelling that want of care on part of the driver will be a defense of the owner of the other carriage that directly caused the injury.

Our own case of *Lockhart v. Lichtenhaler*, *supra*, was followed by *Phila. etc. R. R. Co. v. Boyer*, 97 Pa. 91, an action against the railroad company, to recover damages for the death of a person, caused by a collision of the defendant's train with a street car in which the deceased was a passenger. It was held that in order to recover, the plaintiffs must show, not only that the death resulted directly from the defendant's

negligence, but that the negligence of the carrier company did not contribute to the result.

Therefore, although there is certainly a wide difference of opinion between the courts of this and other States on the subject, it seems to be well settled as the law of Pennsylvania that the remedy of a passenger, injured by the joint negligence of his carrier and another, is against the common carrier only. Cornman, however, was not a common carrier; he was the owner of the horse and sleigh and was the driver. Brisbane was a friend of Cornman's, visiting Carlisle, and occupied a seat in the sleigh by his invitation; the accident occurred while returning from a visit to the poor house. Nor was Cornman the servant of Brisbane; as the driver he was neither under Brisbane's direction or control, nor was Brisbane under his control. Brisbane had simply accepted the friendly offer of a seat in Cornman's sleigh; he had a right to expect from Cornman ordinary skill and care, in the management of the conveyance, and precisely the same degree of care from the municipality of the Borough of Carlisle, in the condition and repair of the streets over which they might pass.

There is no evidence whatever that Brisbane knew that Cornman was a reckless or unskillful driver, or that he saw or by the exercise of reasonable care at the time could see or ought to have seen the dangerous condition of the street. Indeed, the jury has found that he was not personally aware of either; and no question can arise involving this view of the case. It is said, however, that although there is no evidence of any actual negligence on the part of Brisbane, upon the principle of *Lockhart v. Lichtenhaler*, the negligence of Cornman is to be imputed to him.

The rationale of the rule in *Thorogood v. Bryan*, is said by Colton, J., to be the identity of the passenger with his own vehicle; but in *Lockhart v. Lichtenhaler* this reason is rejected, and we think the foundation of the principle is expressed by Mr. Justice Thompson, with much more care and accuracy, as follows:

"I would say the reason for it is that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier, as already noticed, from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care and has been compensated for so doing, rather than him upon whom no such obligation rests and who not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured."

When the reason of a rule of law ceases, the rule itself ceases. The law fixes the responsibility of the persons or parties involved in this transaction upon precisely the same basis; there

is certainly no policy of law which requires that the driver of a private carriage or sleigh who, actuated by the motive of kindness alone and without compensation, may undertake to convey a friend through the streets of a city or town, shall be held to a higher standard of care towards that friend than the city or town through whose streets they pass. Both Cornman and the municipality of Carlisle Borough were bound to Brisbane for the exercise of ordinary care and diligence only. If Cornman had been a common carrier, he would have been a carrier for compensation and would have been obliged to observe the highest degree of diligence and care; the policy of the law, in such a case, it is said, would not permit him to escape by interposing the negligence of others of a less culpable character.

The doctrine declared in *Loelchart v. Lichten-thaler and Phila. etc. R. R. Co. v. Boyer* is not applicable to this case; and there is no sound principle of law which will preclude the plaintiff from seeking redress from both or either of the persons through whose negligence he was injured. Brisbane was answerable for his own negligence alone; the negligence of Cornman under the circumstances cannot be imputed to him so as to bar his recovery in this case.

The case at bar is in every respect similar to the case of *Robinson v. N. Y. Cent. etc. R. R. Co.* 66 N. Y. 11, where a female accepted an invitation to ride in a buggy with a person who was entirely competent to manage a horse; and it was held that if the defendant company was negligent and the plaintiff free from negligence herself, she might recover from the company, although the driver of the buggy might have been guilty of negligence which contributed to the injury.

This case was followed by *Dyer v. Erie R. Co.* 71 N. Y. 228. Mr. Justice Miller delivering the opinion of the court says:

"It is insisted that the court erred in charging the jury that the negligence of Stimpson was no bar to the action, and that the negligence of the driver would not prevent a recovery. The solution of the question raised must depend upon the position which Stimpson occupied toward the plaintiff. The plaintiff rode with Stimpson at his invitation, gratuitously, in Stimpson's wagon. The latter, driving the team, exercised entire control over it and was traveling entirely on business of his own. Stimpson was not hired by the plaintiff or in his employ, or in any sense his agent; nor had the plaintiff any control or direction of the team, or its management or over Stimpson himself. There is no pretense but that Stimpson was entirely competent to take charge of the team himself, nor that he did not possess the requisite skill to manage and control the same. It is difficult to see upon what principle the negligence of Stimpson can affect the plaintiff or be imputed to him."

These cases in New York were afterwards followed by *Masterson v. N. Y. Cent. etc. R. R. Co.* 84 N. Y. 247, which is to the same effect.

It is true that the authority of these cases may be supposed to be somewhat impaired in Pennsylvania, by the fact that in New York the rule of *Thorogood v. Bryan* has been repudiated; *Chapman v. New Haven R. R. Co.* 10 N. Y. 34; but as we hold the rule of policy only to apply to the case of a common carrier, there is no

reason to discredit the authority of that court in cases where this rule of policy does not apply.

In this view, it is not important what Cornman may have previously known as to the condition of the road; and as it is shown that Brisbane never had any knowledge of it, the case was to be considered by the jury, so far as Brisbane is concerned, just as if both were passing over the road for the first time. A stranger, in the twilight or when snow was on the ground, as matter of fact might certainly assume that the center of a public road or street within the corporate limits of a populous town, over which hundreds of wagons passed every day, especially if no other route is plainly designated, was in a passable condition. In the consideration of a question of negligence on part of a stranger, certainly under such circumstances, it was proper to show that he took the center and not the side of the opened street.

There may be cases where the conformation of the ground itself would clearly indicate that the center of a public road is not the traveled route; and in such case this circumstance may be sufficient to give notice; but in all ordinary cases the center of a public street passing between the open lots of a populous town, in the usual course of travel, and in the night time, or when the route is obscured by snow, may be taken as the traveled route; if the municipal officers caused an obstruction to be placed on that part of the highway, it was their duty to give some appropriate warning of the fact.

Nor can we see any valid objection to the evidence showing where the actual traveled route was before the street was macadamized. If there was nothing to indicate to a stranger that the route for travel was at the side of the road, we have said he might assume the route to be in the center. How, then, could it harm the defendant to show that the route had previously been in the center, although the plaintiff did not know the fact? The evidence was clearly competent, however. Its tendency was to show that the only obstruction of the street was that which the officers of the Municipality had themselves negligently placed there, and that there was nothing in the natural conformation of the ground to prevent the use of the central part of the road at this point, or to warn the plaintiff that the traveled route was not in the center, but along the side of the street.

It is an undoubted and indeed an undisputed fact that the center of the street had been the usual course of travel; and we think it was certainly competent to show it. The learned court very plainly instructed the jury that "if the way provided was safe, convenient and so well marked that no man of ordinary prudence could mistake it, it was not necessary that it should have been along the middle of the street, and that in providing such a way at the side of the street they did their whole duty to the public, unless on the central part, where it had previously been used as the highway, they placed a dangerous obstruction without giving any warning of the fact."

The principle upon which this evidence was admitted is perhaps inaccurately stated; but as the proof was properly received, we cannot reverse upon the ground that proper reasons were not assigned for its admission.

The judgment is affirmed.

NEW YORK.

COURT OF APPEALS.

John S. SCHULTZE *et al.*, Exrs. of James Brown, Deceased, *Respts.*,
v.

MAYOR, Aldermen and Commonalty of the City of NEW YORK, *Appts.*

1. Under Laws 1858, chap. 338 (N. Y. City Consolidation Act, Laws 1882, chap. 410, § 898), conferring the right to maintain a proceeding to reduce an assessment upon any person "aggrieved thereby," legal ownership of the assessed property is not essential.
2. The right to restitution of overpayment on an assessment subsequently reduced extends to everyone in whose behalf the proceeding to reduce the assessment was brought.
3. It is presumed that one who held the title to assessed property for the convenience of another acted in such other person's behalf in maintaining a proceeding to vacate an illegal assessment; and that one who pays money under the coercion of an assessment had an interest in the land assessed.
4. The action of the court in reducing an assessment is conclusive that money overpaid thereon was obtained by the municipality without right and is therefore held by it for the payer's use.

(Decided October 5, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the New York Special Term in favor of plaintiffs in an action to recover the amount of a reduction made by the court in an assessment for the construction of a sewer. *Affirmed.*

Memorandum of decision below, 39 Hun, 654.

The facts are stated in the opinion.

Messrs. E. Henry Lacombe, D. J. Dean and Arthur H. Masten, for appellants:

The fact that the purchase price of this property was paid by James Brown, while the legal title was conveyed to his two sons, does not constitute him the equitable owner of the property. The presumption is that the purchase is intended as an advancement, unless the contrary is established by proof.

Welton v. Divine, 20 Barb. 9. See also *Prosser v. McIntyre*, 5 Barb. 424, 432.

The person paying the consideration money must take the conveyance to himself, or he can have no legal or equitable interest in the land.

Garfield v. Hatmaker, 15 N. Y. 475, 478; *Everett v. Everett*, 48 N. Y. 218.

As the plaintiffs' testator was not the owner of the property, nor the party aggrieved by the assessment, he paid it as a volunteer and plaintiffs cannot now recover that part of it which has been vacated by the court.

Peyser v. Mayor, 70 N. Y. 499; *Purcell v. Mayor*, 85 N. Y. 330.

Mr. Cecil Campbell Higgins, for respondents:

Defendants' answer expressly admits that an assessment for Sixty-Sixth Street outlet sewer in the City of New York to the amount of \$49,262.90, was laid upon lots of plaintiffs' testator.

This is an admission of ownership by which defendants are bound.

Till v. Beyer, 38 N. Y. 161; *Paige v. Willet*, 38 N. Y. 28; *Thomas v. Austin*, 4 Barb. 265; *Schreyer v. Mayor of N. Y.* and *Bruce v. Kelly*, 7 Jones & S. 1, 27; *Quackenbos v. Edgar*, 61 N. Y. 653; *Donovan v. Bd. Education*, 12 Jones & S. 53; *Mott v. Consumers Ice Co.* 73 N. Y. 550; *Potter v. Smith*, 70 N. Y. 299.

Upon the facts before the court the plaintiffs are the parties entitled to recover the assessment.

Peyser v. Mayor, 70 N. Y. 497; *Purcell v. Mayor*, 85 N. Y. 330.

Danforth, J., delivered the opinion of the court:

The money in question was paid by the testator, to prevent the enforcement of illegal assessments imposed upon certain lots in the City of New York; and within well settled principles of law it may, under the circumstances of the case, be recovered back as so much money received by the defendants for the testator's use.

The assessments were confirmed in June, 1871, and with interest amounted to \$67,151.97. Proceedings to vacate or reduce the assessments were soon thereafter instituted in the name, as may be inferred, of John Crosby Brown, the then owner of record of the lots assessed, under the "Acts in relation to frauds in assessments for local improvements in the City of New York." Laws 1858, chap. 338; Laws 1870, chap. 283, § 27.

But while they were pending and undetermined, the plaintiffs' testator was required to pay and did pay the whole amount above stated, to the defendants. Afterwards an order was made by the supreme court, in the proceedings referred to, reducing the above sum to \$34,632.52, which was adjudged to be a proper assessment upon said lots. This left in the hands of the defendants the sum of \$32,519.45; being the excess over the legal and just assessment, and for this amount the plaintiffs have had judgment.

It was affirmed by the general term, and we cannot, upon the matters alleged and established by the record, see any other way in which judgment could have been given.

At the close of the plaintiffs' evidence the defendants' counsel moved to dismiss the complaint, upon the sole ground that the plaintiffs had failed to show ownership by their testator of the property assessed; and the only reason for this appeal is the denial of that motion. As to that it appeared that the testator purchased and paid for the property, but the title was taken in the names of his sons "for convenience sake;" and one of them afterwards conveyed to the other, who after the testator's death conveyed to his executors, the plaintiffs here.

Legal ownership of the assessed property is not essential, even in proceedings to reduce the assessment. That right is conferred upon any person "aggrieved thereby" (Laws 1858, chap. 338; *Purcell v. Mayor*, 85 N. Y. 330); and the

question was necessarily disposed of in those proceedings.

So the right of restitution extends not only to the person in whose name these proceedings were taken, but to everyone in whose behalf they were instituted; and here it may well be presumed that one who held the title for the convenience of another acted in his behalf in seeking to rid the land of an illegal assessment; and also that he who paid the money under the coercion of that assessment had an interest in its protection. It is enough that the payment was not voluntary; and the modification of the assessment shows that it was obtained from the plaintiffs' testator without right.

The learned counsel for the appellant relies upon the enactment that where a grant for a valuable consideration shall be made to one person, and the consideration paid by another, no trust shall result in favor of the person paying the money, if the conveyance shall be so made by consent of the owner of the fund, and the title shall vest in the alienee. 1 R. S. §§ 50, 54.

We do not see that this statute has any application to the case in hand. It does not appear that the testator consented to an unconditional and absolute conveyance to his son; nor but that he supposed the purpose or "convenience" to be served would be expressed in it; *Lounsbury v. Purdy* 18 N. Y. 515; and no presumption can be indulged in to support a defense which in any view is without merit, for the defendants' apprehension that it may hereafter be vexed for the same money by John Crosby Brown, the party moving in the reduction proceedings, is not well founded. He paid no money; he is one of the parties plaintiff here, suing in the right of his testator, and rests his case upon allegations wholly inconsistent with any personal claim. The action of the court in reducing the assessment must be held to be conclusive that the money now at stake was obtained by the defendant without right, and is therefore held by it for the testator's use. *Peyser v. Mayor, etc. of N. Y.* 70 N. Y. 497; *Pursell v. Mayor, supra*.

The judgment only requires restitution to his representatives and should be affirmed.

All concur except **Miller, J.**, absent, and **Finch, J.**, not voting.

Re Application of STATEN ISLAND RAPID TRANSIT R. R. CO., to Acquire Lands.

1. Under the statutory provisions railroad corporations have power to acquire lands, under the right of eminent domain, not only from individuals but also from the State, for prospective as well as present uses; provided the necessity for such use in the immediate future is established beyond reasonable doubt, and the proposed use is clearly embraced within the legitimate objects of the power.

2. Held, on the facts of the case,

(a) That the application of the petitioning corporation to acquire title to certain lands for terminal facilities in excess of its own local requirements, to enable it

to fulfill a contract with the Baltimore & Ohio R. R. Co. to give the latter company access to the Port of New York, was properly granted;

(b) That the benefit to arise from such a connection, both to the public and to the petitioner's road, rendered the object for which the appropriation of land is sought a public use;

(c) That the fact that the construction of certain structures necessary to connect the two roads was not yet begun did not affect the good faith of the application, such construction being assumed by contract obligations, and the necessity of the appropriation of all the property sought for the proposed use being clearly shown.

8. The fact that the condemnation of land by a domestic railroad corporation is also desired by a foreign corporation and will inure to its benefit furnishes no reason for denying the application, provided the petitioning corporation has brought itself within the statute authorizing the proceeding.

(Decided October 5, 1886.)

APPEAL from an order of the Supreme Court at General Term in the Second Department, affirming an order of Special Term, adjudging that certain water-front lands of which the People of the State of New York are owners, sought to be condemned in this proceeding, were necessary for the uses claimed by the petitioner, and appointing commissioners of appraisal. *Affirmed*.

Memorandum of decision below, 33 Hun. 664.

The question presented and the facts relating thereto are sufficiently stated in the opinion.

Messrs. Denis O'Brien, Atty-Gen., Augustus Schoonmaker and Thomas W. Fitzgerald, for the People, appellants:

We ask a reversal of this order, upon the ground that no evidence, either written or verbal, was offered in this proceeding, either upon its trial or in the preliminary proceedings therein, that it was authorized by the Railroad Company at any meeting of its board of directors, or that the secretary was ever authorized to sign the petition for same; nor does his affidavit state that such authority was given; and for this reason we claim that this order should not have been granted. The court will find that no witness attempted to show authority, either express or implied; and we claim that there must be some record evidence of the fact before a court can go on and condemn under this statute.

Rensselaer & Saratoga R. R. Co. v. Davis, 43 N. Y. 139; *Re N. Y. Cent. etc. R. R. Co.* 77 N. Y. 249.

It is submitted that a careful examination of the testimony herein can lead to but one conclusion, and that is that there is no reasonable or other necessity for this land now, or within a reasonable time, nor from the evidence does it appear with any degree of certainty that there ever will be; and we submit that there is no power in any court in this State to take private property for a public use until those facts are conclusively and affirmatively proven by evidence which admits of no reasonable doubt.

Rensselaer & Saratoga R. R. Co. v. Davis, supra; N. Y. & Harlem R. R. Co. v. Kip, 46 N. Y. 553; *Flower v. London, Brighton & S. C. R. Co.* 2 DREWRY & S. 830.

The Act of the Legislature upon which the petition herein is predicated provides for two contingencies before the force of that statute can be put in operation: 1, the company must be incorporated; 2, it must have constructed its railroad and it must be in full operation.

We admit the incorporation, but the evidence of the Railroad Company shows that the second contingency has not been reached; therefore we claim and insist that this proceeding was premature, and for this reason this order should be reversed.

Sharp v. Johnson, 4 Hill, 92-99; *Sprague v. Birdall*, 2 Cow. 419; *Rensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 137; *Webb v. Manchester & L. R. Co.* 1 R. R. & Canal Cas. 576.

There must be a clear case of public necessity, before a railroad company can invoke the right of eminent domain in connection with the claim set up in the petition here.

State v. Comrs. of Mansfield, 23 N. J. L. 510; *Mayor of Alleghany v. Ohio & Pa. R. R. Co.* 26 Pa. 360; *South Wales R. R. Co. v. Board of Health*, 4 Ellis & B. 189; *Bennett v. Boyle*, 40 Barb. 551; *Varick v. Smith*, 5 Paige, 137; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9; *Re Albany St.* 11 Wend. 149; *Re John & Cherry Streets*, 19 Wend. 659; *Embury v. Conner*, 3 N. Y. 511; *Nesbitt v. Trumbo*, 89 Ill. 111-117; *Hoye v. Swan*, 5 Md. 237; 43 N. Y. 144.

As against the "People of the State of New York" this Railroad Company cannot, nor can other railroads, condemn the land, for the reason that it is land under water, dedicated by statute to the purposes of commerce.

Edgerton v. Huff, 26 Ind. 35; *Geisy v. Cincinnati etc. R. R. Co.* 4 Ohio, 303.

It is settled law that a railroad company having the right to condemn property for the purposes set forth in this petition must have a present necessity for the use of the property sought to be condemned. Property for these purposes cannot be condemned in anticipation of a necessity that may arise in the future, nor for conjectural or speculative purposes; but the statute only authorizes condemnations to be made in cases where a road has been constructed and a necessity for additional property for terminal or storage purposes has been ascertained to exist, and that necessity is made clearly to appear to the court.

Rensselaer etc. R. R. Co. v. Davis, 43 N. Y. 139; *Re N. Y. Cent. & H. R. R. Co.* 77 N. Y. 248.

Section 25* of the Railroad Act of 1850 under which the right to condemn is claimed, applies only to companies formed under the Act, and to lands required for the construction of the road.

It does not apply to foreign corporations, nor to the "real estate in addition to what has already been acquired for the purposes of such railroad," for the "purposes of its incorpora-

tion" particularly specified in section 21** of the Act. The difference in phraseology is significant.

The lands in question are desired for the purposes specified in section 21, and not to make the road.

The objection, then, is that the right to take lands under water, and especially the right to take such lands for the "additional purposes" specified in section 21, has not been given by the fair construction of section 25.

Re N. Y. West Shore & B. R. R. Co. 29 Hun, 269, holds that lands under water may be condemned for rights of way.

That decision we claim to be erroneous; but it does not cover the question presented here and does not conclude this court.

The question remains whether the State has affirmatively consented to the taking, by condemnation against the State alone, of lands under water for terminal and storage purposes authorized by section 21, and thus divesting riparian owners of their water fronts.

In the case of *St. Louis etc. R. R. Co. v. Trustees, Inst. for Blind*, 43 Ill. 303, there was a legislative grant to the railroad company in these words: "All such land, materials and privileges belonging to the State are hereby granted to

** § 21 (as amended by Laws 1869, chap. 237). And if, after the construction of any railroad operated by steam by any company now existing, or that may hereafter be created, such company, or any company owning, operating or leasing such railroad, shall require for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned or leased by such company, any real estate in addition to what it has already acquired, or shall require any further right to lands or the use of lands for switches, turnouts, or for the flow of water occasioned by railroad embankments or structures now in use or hereafter rendered necessary, or for any other purpose necessary to the operation of such railroad; or any right to take and convey water from any spring, pond, creek or river, to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same; or any right of way required for carrying away or diverting any waters, streams or floods from such railroad, for the purpose of protecting the same, or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring or damaging the property of any person or parties who may be rendered liable to injury by reason of such embankment, excavation or structure, as the same may have been constructed previous to such time, or may then exist; such company may acquire such additional real estate, or any property or real estate which they now use or occupy, or right of way, or other rights hereinbefore specified, by purchasing the same of the person or parties owning the same, or interested therein, or to be affected thereby, and by paying to such parties such damages as they may sustain by reason thereof, if the amount of such compensation or damages can be agreed upon between such company and such person or parties; and if such company shall, for any cause, be unable to agree for the purchase of such real estate or right of way, or other rights, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or right of way, or other rights already acquired or attempted to be acquired, shall, for any cause prove defective or imperfect, then, and in every such case, such company may proceed to acquire or perfect title to such real estate or right of way, or other rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this Act prescribed. Nothing in this Act contained shall authorize the taking of any waters that shall at the time of such taking be commonly used for domestic, agricultural or manufacturing purposes, to such an extent as to injuriously interfere with such use in the future.

* § 25. The commissioners of the land-offices shall have power to grant to any railroad company, formed under this Act, any land belonging to the People of this State which may be required for the purposes of their road on such terms as may be agreed on by them; or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals.

said corporation for said purposes;" and it was held that although the language of the statute was sufficiently comprehensive to embrace any property owned by the State, it will not be construed to embrace property used by the State for specific purposes. In such a case it cannot be inferred that it was the intention of the Legislature to grant such property.

See also *Mayor of Atlanta v. Central R. R. Co.* 53 Ga. 120; *Boston Water Power Co. v. Boston & W. R. R. Co.* 23 Pick. 368; *Milwaukee & St. Paul R. R. Co. v. Furibault*, 23 Minn. 167; *Re Buffalo*, 68 N. Y. 167; *Re Boston & A. R. R. Co.* 53 N. Y. 574.

The delegation of the right of eminent domain is to be construed in like manner as the delegation of the taxing power. And the rule is universally recognized that the grant in general terms to a subordinate jurisdiction of the right to tax will not authorize a tax on state or county property.

Baltimore Co. Comrs. v. Md. Insane Hospital, 62 Md. 127; *Worcester Co. v. Worcester*, 116 Mass. 193; *Cooley, Tax.* 59 and cases cited in note.

The real party in interest and the one sought to be benefited by the condemnation of the lands is a foreign Corporation. As that Corporation is not a citizen of the State of New York, and no legislative authority has been given to it to condemn or acquire lands for its use in this State, it has no standing in our courts for the purpose of this proceeding.

Bank of Augusta v. Earle, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274); *Runyan v. Lessee of Coater*, 14 Pet. 122 (39 U. S. bk. 10, L. ed. 382).

A foreign corporation cannot exercise the right of eminent domain in this State.

Mills, Em. Dom. § 352; *Re Townsend*, 89 N. Y. 171; *Re N. Y. L. & W. R. R. Co.* 99 N. Y. 21.

One railroad company cannot condemn property for the uses of another railroad company.

Louisville etc. R. R. Co. v. Quinn, 14 Lea (Tenn.) 65; 22 Am. & Eng. R. R. Cas. 111, 114; *Holbert v. St. Louis etc. R. Co.* 45 Iowa, 28.

That it has been the settled policy of this State not to permit a foreign corporation, directly or indirectly, to condemn lands for railroad purposes within this State is evident from the fact that the Legislature has conferred express authority in some instances upon foreign corporations for such purposes.

Re Townsend, 89 N. Y. 171; *Laws* 1855, chap. 296.

It being admitted and found in this proceeding that the petitioner does not and never will need the lands in question for its own uses and purposes, but that they can only be required for the uses and purposes of the lessee when the conditions of the lease shall have been fulfilled, the proceeding can only be sustained upon the theory that the domestic corporation has entered into a valid agreement or lease of its own franchises and property to the foreign corporation.

The agreement or lease in this case is not a valid instrument. It is beyond the powers of the domestic corporation, and the object of its creation; and it is not shown to be within the powers of the foreign corporation. It is therefore void, and these proceedings, founded upon its provisions, cannot be maintained.

Pa. R. R. Co. v. St. Louis etc. R. R. Co. 118 U. S. 290 (Bk. 30, L. ed.) citing and reaffirming

the principles enunciated in *Thomas v. West Jersey R. R. Co.* 101 U. S. 71 (Bk. 25, L. ed. 950); *Green Bay etc. R. R. Co. v. Union Steamboat Co.* 107 U. S. 98 (Bk. 27, L. ed. 413); *Davis v. Old Colony R. R. Co.* 131 Mass. 258; *Pearce v. Madison etc. R. R. Co.* 21 How. 441 (62 U. S. bk. 16, L. ed. 184); *York & Md. Line R. R. Co. v. Winans*, 17 How. 80 (58 U. S. bk. 15, L. ed. 27), and a number of English authorities.

The objection that the corporation instituting the proceeding lacks or has lost the power to condemn may be taken in this proceeding.

Re Brooklyn etc. R. Co. 72 N. Y. 245; *S. C.* 75 N. Y. 335; *Brooklyn W. & N. R. Co.* 81 N. Y. 69; *Brooklyn Steam Trans. Co. v. Brooklyn*, 78 N. Y. 524.

The acts of a lessee company are of no avail to the lessor company.

Re Brooklyn W. & N. R. Co. supra.

Except as against the State when acting as the Sovereign, the riparian owners have rights in the lands under water, entitling them to compensation, when such lands are taken. Very numerous authorities in state courts and in the courts of the United States sustain the principle that riparian owners have property rights to the lands under water adjoining their freeholds, and that such rights are valuable and entitled to protection.

Bell v. Gough, 3 Zab. 624; *Keyport Steamboat Co. v. Farmers Trans. Co.* 8 C. E. Green, 13, 511; *Atty-Gen. v. Hudson Tunnel R. R. Co.* 12 C. E. Green, 176; *Yates v. Milwaukee*, 10 Wall. 497 (77 U. S. bk. 19, L. ed. 984); *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.* 109 U. S. 682 (Bk. 27, L. ed. 1073); *Weber v. Harbor Comrs.* 18 Wall. 57 (85 U. S. bk. 21, L. ed. 798); *Lehigh Valley R. R. Co. v. Trone*, 28 Pa. 206. See also *Story v. N. Y. El. R. Co.* 90 N. Y. 122; *Mayor v. Hart*, 95 N. Y. 460; *Smith v. Rochester*, 92 N. Y. 477.

Messrs. Stewart & Boardman, for petitioner, respondent:

A railroad company organized under the railroad laws of this State has power to make any arrangement that may be thought provident, with any other railroad company, for the interchange of business and traffic.

See *Woodruff v. Erie R. Co.* 93 N. Y. 619; *Arnot v. Erie R. Co.* 67 N. Y. 315.

The company need not wait until the want is instant, pressing and overwhelming; but it may, in a provident and business-like manner, anticipate the imminent necessities of the corporation.

Re New York Cent. & Hud. Riv. R. R. Co. 77 N. Y. 250; *Re New York, L. & W. R. R. Co.* 99 N. Y. 12; *Lodge v. Phila. etc. R. Co.* 8 Phila. 345.

The Act of Congress recently passed "to authorize the construction of a bridge across the Staten Island Sound, known as Arthur's Kill, and to establish the same as a post road," of course removes all obstacles to the making of the proposed connection within a few months.

See *S. Carolina v. Ga.* 93 U. S. 4 (Bk. 23, L. ed. 782); *Cool. Const. Lim.* p. 525; *State v. Wheeling etc. Bridge Co.* 13 How. 566 (54 U. S. bk. 14, L. ed. 269); 18 How. 434 (59 U. S. bk. 15, L. ed. 435); *Newport etc. Bridge Co. v. U. S.* 105 U. S. 479 (Bk. 26, L. ed. 1147); *McCready v. Va.* 94 U. S. 394 (Bk. 24, L. ed. 248); *Weber v. Harbor Comrs.* 18 Wall. 66 (85

U. S. bk. 21, L. ed. 802); *Clinton Bridge Case*, 10 Wall. 463 (77 U. S. bk. 19, L. ed. 971).

Ruger, Ch. J., delivered the opinion of the court:

Many of the questions discussed in the learned brief of the appellants' counsel do not seem to be open for consideration here, as they were neither raised in the court below nor authorized by the order under which they were permitted to defend. Aside from a request to dismiss the proceedings upon the ground of indefiniteness in the description of the land proposed to be taken, and which is not now raised by counsel, we find no objection in the record to the adjudication under consideration except that of the alleged insufficiency of the evidence to show that the property proposed to be taken was required for the purposes of the petitioning corporation. A motion was made to dismiss the petition for that reason, which was denied, and the appellants excepted to this decision. This exception presents the only material question exhibited by the record before us.

The appellants were restricted to this ground of objection by the terms of an order vacating *pro tanto* an adjudication already made in the proceedings, and were therefore precluded from raising any other ground of defense.

Questions as to the corporate organization of the petitioning Company, its action in authorizing these proceedings, the right of a railroad company to acquire lands under navigable water as against the State, and the rights and interests of littoral owners in such lands, are therefore all excluded from the controversy by the terms of the order opening the appellants' default.

The original order of condemnation appointing commissioners to appraise the value of the land proposed to be taken, constituted an adjudication in favor of the respondent, upon the questions involved, disposing of every question which might have been raised in opposition hereto except that allowed to be litigated by order referred to.

It was conceded by the petitioner upon the hearing that the lands in question were not required for its present uses; and it is strenuously contended therefrom by the appellants that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future.

It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement; and it is therefore well settled in this State that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party is not necessarily a defense to a proceeding to condemn it.

The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain, not only from individuals but also from the State, for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt. *Lansing v. Smith*, 8 Cow. 146; 8 C. 4 Wend. 9; § 21, Laws 1850, chap. 140;

Rensselaer etc. R. R. v. Davis, 43 N. Y. 187; *Re N. Y. C. & H. R. R. Co.* 77 N. Y. 249.

The exercise of this power is in derogation of individual rights and is always burdensome and often injurious to the owner, beyond the power of pecuniary compensation to wholly redress, and should be allowed only when the necessity for the land clearly appears and its proposed use is clearly embraced within the legitimate objects of the power.

The only question therefore in the case is whether the evidence shows such a case as renders it probable that these lands will be required within a reasonable period for the uses of the petitioning corporation.

No evidence was offered by the appellants upon the question at the trial; and they rely wholly for their defense upon the insufficiency of the proof given by the petitioner to establish a case for condemnation. The special term found as a fact that "The land was required by the petitioner for the purposes of its incorporation, to wit: for tracks, switches, sidings and depot grounds, whereon cars may be moved, loaded and unloaded, stored, received and dispatched; for freight sheds wherein freight may be received and stored and then loaded into cars and delivered to consignees; and for necessary terminal grounds for the purpose of the incorporation of said Company and for the purpose of constructing and operating its railroad."

It was further found that such use was not required for the purpose of its local traffic, but for the purpose of enabling it to fulfill the obligations of a contract made between it and the Baltimore & Ohio Railroad Company, whereby it had bound itself to furnish to such company accommodations over its road for transporting freight, passengers, express and mail matter between the proposed termini of such Baltimore & Ohio Road at Elizabethport in New Jersey, to and from the City of New York. We think the evidence fully supported these findings.

The proof shows that the petitioner is a domestic railroad corporation, operating a line of road on Staten Island which has been mainly used heretofore for local purposes but which it is now proposed to utilize as a connecting link between the system of railroads known as that of the Baltimore & Ohio and the Port and City of New York. The vast increase of business which such a connection will occasion to the petitioner's railroad and the necessity of increased facilities for handling it is too obvious to be disputed. The benefit to be derived from such a connection, not only to the public but also to the petitioner, is clearly apparent from the evidence and renders the object for which the appropriation of the land in question is sought a public use, within the meaning ascribed to that term by the decisions of this court. *N. Y. & Harlem R. R. Co. v. Kip*, 46 N. Y. 547; *Re N. Y. C. & H. R. R. Co.* 77 N. Y. 268.

The fact that the condemnation of the land in question is also earnestly desired by a foreign railroad corporation and will inure largely to its benefit furnishes no reason for denying the relief asked for by the petitioner, provided it has brought itself within the language of the statute authorizing such a proceeding. *Re N. Y. L. & W. R. R. Co.* 99 N. Y. 21.

It is claimed that because certain structures which are required to be built in order to form the connection between the two systems of railroads are not yet begun or completed, and that their construction is conjectural and uncertain and does not afford a sufficient degree of probability of their ultimate construction as authorizes the court to condemn the property in question for its proposed uses.

The principal structures referred to are the extension of the petitioner's railroad over a bridge or viaduct to be erected across Arthur's Kill, which divides Staten Island and New Jersey, and the building of a railroad track by the Baltimore & Ohio Railroad Company from Bound Brook to Elizabethport in New Jersey, a distance of about sixteen miles, connecting the roads of the contracting parties.

The evidence shows that the petitioner is bound by its contract with the Baltimore & Ohio Railroad Company to construct such bridge and perfect its facilities for accommodating the increased traffic within one year from the date of the contract, viz.: October 28, 1885, unless obstructed and delayed by hostile legal proceedings or want of lawful authority to do so, and in case of delay from such causes, then with all reasonable diligence after such obstacles have been removed and authority obtained.

The same contract provides that the Baltimore & Ohio Railroad Company shall within one year from the date thereof, or if delayed by hostile legal proceedings, with all reasonable diligence, perfect its connection at Elizabethport with the railroad of the petitioner. It thus appears that the contemplated connection between the petitioner's railroad and the vast system of railroads controlled by the Baltimore & Ohio Company is assured, by contract obligations between parties interested in making such connection and presumptively able to comply with their obligations if no legal obstacles prevent. It also appears that the contracting parties have already built and leased lines stretching over several hundred miles for the purpose of carrying out the purpose in view, and that the Baltimore & Ohio Railroad Company has already in the performance of its contract assumed liabilities for the Staten Island Rapid Transit Railroad Company to the amount of \$2,500,000, and has advanced and expended money in the purchase of property on Staten Island and elsewhere and in extending its tracks for the purpose of the traffic contemplated to be carried on over the petitioner's road to upwards of \$1,000,000.

The pecuniary expenditures made and the liabilities assumed by both of the contracting parties, as well as the manifest interest which both of them have in carrying into effect the projected enterprise, afford the most conclusive assurance that this application is made in good faith and for the sole purpose of acquiring property for the use of the petitioning Railroad Company. All of the testimony taken on the hearing concurs as to the necessity of the appropriation of all the property described for the proposed use; and we have been referred to no circumstance appearing in the case which seems to cast any suspicion upon the motives of the petitioner in preferring the application.

While the limitations under which the appel-

lants are permitted to defend this proceeding do not permit them to raise any questions as to the authority of the court to entertain the proceeding and grant the relief sought, it may be proper to say that it seems to be fully authorized by sections 21 and 25 of the General Railroad Act, and the cases of *Lansing v. Smith*, 8 Cow. 146, and on appeal 4 Wend. 9; *Gould v. Hudson River R. R. Co.* 6 N. Y. 524, and *R. N. Y. C. & H. R. R. R. Co.* 77 N. Y. 248.

It is also proper to say that the enactment of Congress during its last session of a bill authorizing the contracting parties hereinbefore referred to, to build a railroad bridge or viaduct across Arthur's Kill, has apparently removed any legal objections to such a structure and rendered it quite certain that the connections contracted for between such parties will be made and the property sought to be obtained by this proceeding devoted to the purposes alleged in the petition.

The order should be affirmed, with costs.
All concur except *Miller, J.*, absent.

Louis BAJUS, *Respt.*,

v.

SYRACUSE, BINGHAMTON & NEW YORK R. R. CO., *Appl.*

1. **Where the only result of defects in a locomotive engine is to diminish its power, the responsibility of the railroad company for such defects is no greater than it would be in the case of a new engine of the same power as the defective engine at the time of an accident claimed to have been caused thereby.**
2. **A railroad company is not bound to have at a given point an engine of sufficient power to avert the consequences of an accident which it had no reason to anticipate.**
3. **Hence, where an employee of a railroad company was, in the course of his employment, caught by the brake beam of a moving car and injured, the company was not liable merely because the engine attached to such car (with the capacity of which the person injured was acquainted) was, by reason of a defect in its flues and main steam valve, not sufficiently powerful to stop the car in time to avert the injury.**

(*Danforth and Andrews, JJ., dissenting.*)

(Decided October 12, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Onondaga Circuit in favor of plaintiff in an action to recover damages for personal injury. *Reversed.*

Reported below, 34 Hun, 153.

The facts and the question presented are fully stated in the opinions.

Mr. Louis Marshall, for appellant:

A master is under no obligation under all cir-

circumstances to make use of the safest known appliances and instruments; nor is he responsible for a failure to discard one which is not such and to supply its place with something safer.

2 *Thomp. Neg.* 983; *Jones v. Granite Mills Co.* 7 *Rep.* 146; *Piper v. N. Y. C. & H. R. R. R. Co.* 1 *Thomp. & C.* 290; *Salters v. Delaware & Hud. Canal Co.* 8 *Hun.* 338; *Hayden v. Smithville Mfg. Co.* 29 *Conn.* 548; *Kelley v. Silver Spring Co.* 12 *R. I.* 112.

A railroad corporation is not liable for an injury resulting from breaking or failure of machinery, unless it is shown that the corporation has been guilty of negligence in regard thereto.

De Graff v. N. Y. Cent. & H. R. R. R. Co. 76 *N. Y.* 125.

In *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 83 *Mich.* 133, it was held that a railroad company is not to be deemed guilty of negligence for using in its train an old mail car, which was lower than others composing the train, so as to be liable to a servant who suffered an injury in consequence of an attempt to couple the old car with another, although the danger was greater than it would have been if the cars had been of equal height.

In *Indianapolis etc. R. R. Co. v. Flanigan*, 77 *Ill.* 365, it was held that if the coupling of a freight car suddenly became out of repair, the company using it would not be liable to an employee, for an injury received in consequence thereof, unless its attention had been called to the defect, or it could have discovered the defect and had an opportunity to make the needed repairs.

See also *De Forest v. Jewett*, 88 *N. Y.* 264.

The mere existence of a defect, occurrence of an accident or omission of a duty is not sufficient to create liability. It is necessary to proceed further and to show that the defect or omission of duty caused the accident.

Marble v. Worcester, 4 *Gray*, 395; *Fogg v. Nahant*, 98 *Mass.* 578; *Cosgrove v. N. Y. C. & H. R. R. R. Co.* 13 *Hun.* 329; *Barringer v. N. Y. C. & H. R. R. R. Co.* 18 *Hun.* 398; *Masterson v. N. Y. C. & H. R. R. R. Co.* 84 *N. Y.* 247; *Pakalinsky v. N. Y. C. & H. R. R. R. Co.* 82 *N. Y.* 424; *Morrison v. New York & New Haven R. R. Co.* 32 *Barb.* 568; *Sheldon v. Hudson R. R. Co.* 29 *Barb.* 226.

The proximate cause of the plaintiff's injury, according to his own statement, was the catching of his foot by the brake shoe. That accident not being attributable to the defendant, it is not liable for the consequences.

Fogg v. Nahant, 98 *Mass.* 578; *Hofnagle v. N. Y. C. & H. R. R. R. Co.* 55 *N. Y.* 608. See also *Crain v. Petrie*, 6 *Hill*, 522; *Loverly v. Western Union Tel. Co.* 60 *N. Y.* 198.

The plaintiff, in attempting to uncouple the cars by getting inside the rails while the train was in motion, and by continuing to move along with the train after he ascertained that the pin would not pull, was guilty of contributory negligence which should debar a recovery.

Morrison v. Erie R. Co. 56 *N. Y.* 302; *Burrows v. Erie R. Co.* 63 *N. Y.* 556; *Phillips v. Rensselaer etc. R. R. Co.* 49 *N. Y.* 177; *Van Schaick v. Hudson R. R. Co.* 43 *N. Y.* 227; *Toomey v. Turner*, 24 *Hun.* 599; *O'Mara v. Del.*

& Hud. Canal Co. 18 *Hun.* 192; *Timmons v. Cent. Ohio R. R. Co.* 6 *Ohio*, 105; *Pa. Co. v. Hankey*, 93 *Ill.* 580; *Toledo etc. R. Co. v. Asbury*, 84 *Ill.* 429; *Chicago & Alton R. R. Co. v. Bush*, 84 *Ill.* 570; *Muldoney v. Ill. Cent. R. Co.* 89 *Iowa*, 615; *Williams v. Cent. R. R. of Iowa*, 43 *Iowa*, 396; *Kroy v. Chicago etc. R. R. Co.* 92 *Iowa*, 357; *Marsh v. South Carolina R. R. Co.* 56 *Ga.* 275.

The court should have charged the following propositions as requested by the defendant's counsel:

1. That if the plaintiff knew, as well as the defendant's board of directors, of the existence of defects in the locomotive in question, or had the same means of knowledge, he cannot recover.

Warner v. Erie R. Co. 89 *N. Y.* 476.

2. That in order that the plaintiff may recover, the jury must be satisfied from the evidence that the plaintiff had no knowledge or the equal means of obtaining knowledge of the defects in question that were possessed by the defendant.

Wright v. N. Y. C. R. R. Co. 25 *N. Y.* 566; *Gibson v. Erie R. Co.* 63 *N. Y.* 449; *Mehan v. Syracuse, etc. R. R. Corp.* 78 *N. Y.* 585; *De Forest v. Jewett*, 88 *N. Y.* 264; *Kelley v. Silver Spring Co.* 12 *R. I.* 112; *McGlynn v. Brodie*, 31 *Cal.* 376, 379.

Messrs. Goodelle & Nottingham, for respondent:

The defendant was guilty of negligence in employing such machinery as the engine in question, in the business of handling trains in a freight yard, and such negligence caused the injury.

Cone v. Delaware etc. R. R. Co. 15 *Hun.* 172; *affd.* in 81 *N. Y.* 206; *Brabbits v. Chicago etc. R. R. Co.* 88 *Wis.* 289; *Ellis v. N. Y. L. E. & W. R. R. Co.* 95 *N. Y.* 546; *Wasmer v. Delaware etc. R. R. Co.* 80 *N. Y.* 212; *Laning v. N. Y. C. R. R. Co.* 49 *N. Y.* 521; *Flike v. Boston & A. R. Co.* 58 *N. Y.* 549; *Painton v. Northern Cent. R. Co.* 83 *N. Y.* 7; *Fuller v. Jewett*, 80 *N. Y.* 46.

When the evidence is conflicting or, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible and as to which reasonable men might differ, it is for the jury to decide.

Hart v. Hud. Riv. Bridge Co. 80 *N. Y.* 622; *Weber v. N. Y. C. & H. R. R. R. Co.* 58 *N. Y.* 451; *Wolfkiel v. Sixth Ave. R. R. Co.* 88 *N. Y.* 49; *Payne v. Troy, etc. R. R. Co.* 83 *N. Y.* 572.

Nonsuits are rarely permissible in actions of negligence.

Stackus v. N. Y. C. & H. R. R. R. Co. 79 *N. Y.* 464; *Garvey v. Clark*, 12 *N. Y. Week. Dig.* 496; *Ireland v. Onwego, H. & S. Plank Road Co.* 13 *N. Y.* 533.

Even if the plaintiff had been placed in a perilous situation by his own negligence, and yet ordinary care on defendant's part in furnishing suitable machinery would have prevented the injury, the latter is liable.

Wasmer v. Delaware etc. R. R. Co. 80 *N. Y.* 212; *Radley v. London & N. W. R. Co.* 18 *Eng. Rep.* 37, 42; *Austin v. N. J. Steamboat Co.* 43 *N. Y.* 75, 82.

Plaintiff had no such knowledge of the defects of this engine, or appreciation of the dangers incident to its use, as made it negligence for him to continue in the service, even without a promise to repair.

Mehan v. Syracuse etc. R. R. Co. 78 N.Y. 585; *Hawley v. Northern Cent. R. Co.* 17 Hun, 115, 118; *affd.* in 82 N.Y. 370; *Kain v. Smith*, 89 N.Y. 376; *Palmer v. Dearing*, 98 N.Y. 7; *Laning v. N. Y. C. R. R. Co. supra.*

The promise of another engine, then in process of construction, relieved plaintiff of any imputation of negligence in this regard.

Laning v. N. Y. C. R. R. Co. supra; *Patterson v. Pittsburg & C. R. R. Co.* 76 Pa. 889; *Palmer v. Dearing, supra.*

It was not negligence for the plaintiff to attempt to uncouple while the train was in motion.

Plank v. N. Y. C. & H. R. R. Co. 60 N. Y. 607; *Snow v. Housatonic R. R. Co.* 8 Allen, 441.

The Iowa cases which are cited in Thompson on Negligence, as holding that it is negligence to attempt to uncouple cars in motion, do not bear out the proposition.

Thomp. Neg. p. 1019; *Williams v. Cent. R. Co. of Iowa*, 43 Iowa, 896; *Muldoney v. Ill. Cent. R. Co.* 39 Iowa, 615.

The catching of the plaintiff's foot by the brake beam was not the proximate cause of the injury. Without defendant's negligence the accident would not have happened, since the train would have been stopped in time.

Radley v. London & N. W. R. Co. 18 Eng. Rep. 37, 42; *Merritt v. Fitzgibbons*, 29 Hun, 634; *Ring v. Cohoes*, 77 N.Y. 88; *Wasmer v. Delaware etc. R. R. Co.*; *Austin v. N. J. Steamboat Co.* and *Ellis v. N. Y. L. E. & W. R. R. Co. supra.*

Earl, J., delivered the opinion of the court:

The plaintiff was, in 1877, the yard master of the defendant at Syracuse, and as such it was his duty to superintend and aid in the shifting of cars and to couple and uncouple cars. The shifting engine at that place, on the day alleged in the complaint, was attached to twelve cars, and, after drawing them a short distance up an ascending grade, it became stalled and then, under the direction of the plaintiff, the engine was backed so as to enable him to uncouple some of the cars. For that purpose he went between two cars, while they were moving slowly backward, and his foot caught under a brake beam and he was dragged along about forty-five feet when a car wheel ran over one of his legs and crushed it so as to make its amputation necessary. This action was brought to recover damages for the injury thus caused, and the claim of the plaintiff is that the injury was due solely to neglect chargeable to the defendant.

The plaintiff does not complain that the road bed or the cars or any of the appliances which he was required to use were insufficient or out of order. His sole complaint is that the engine was out of repair, and insufficient for the use to which it was devoted; and against it he makes these complaints which I will notice specially.

1. The flues of the engine were foul and somewhat stopped up. The only effect of this was that steam was generated less rapidly and the power of the engine was thus diminished.

2. The main valve in the steam chest leaked and that diminished the power of the engine by just so much as the steam escaped, and it had no other effect.

8. But the more serious defect was that the throttle valve leaked. One effect of a leakage of steam through the throttle valve is that the steam cannot be entirely shut off; and the consequence is that an engine with such a defect may move from its position when placed at rest, unless blocked. But when the throttle valve is open and the engine in motion, there can be no leakage as all the steam passes through the open valve; and hence this defect does not interfere with the power of the engine.

There is another effect caused by the leaking of the steam through the throttle valve, which is the only one so far as I can perceive which can be claimed to have any bearing here. In the case of such leaking it is frequently more difficult to throw over the lever and thus reverse the engine.

The claim of the plaintiff is that when his foot was caught, he immediately signaled the engineer to stop; and that if the throttle valve had been in order, the engineer could have more readily reversed the engine and thus have arrested its motion before his leg was crushed. But the difficulty with this claim is that the undisputed facts stand in its way. There is no proof that the engineer saw or heard plaintiff's signal when he first gave it. The only person who was upon the engine and saw what took place there was called as a witness by the plaintiff, and he testified that when the engineer heard the signal given by the plaintiff, he at once threw over the lever and reversed the engine, and that he did this quickly and without any difficulty and thus arrested the motion of the engine so that thereafter it passed backward only about five feet.

The defect in the throttle valve, therefore, had no relation whatever to this accident; and the plaintiff's sole reliance for the maintenance of his action must be upon the defective condition of the flues and of the main steam valve, the sole consequence of which was the diminished power of the engine. These defects may have diminished the power of the engine by several horse-power so that the engine, instead of being, for instance, eighty horse-power, was only seventy.

It matters not that this diminished power came from these defects, nor how the engine came to be of only seventy horse-power. The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine of precisely the same power.

The plaintiff was familiar with the capacity and power of the engine and in no way entrapped or deceived by its use. Suppose, then, the defendant had furnished a new engine of seventy horse-power, precisely the same power which we may assume this had at the time of the accident; upon what principle could it be said that it would be liable for such an accident?

Can it be laid down as a principle of law that it is bound to furnish to its employees engines suitable and adequate in power to every emergency? Who but the employer shall determine how powerful an engine shall be at any place and for any purpose? Suppose at this place the defendant had furnished an engine capable of moving but three cars at a time and running but ten miles an hour and the plaintiff had known it, could he justly complain of it?

Would such an engine, in any legal or proper sense, be dangerous?

If an employer should furnish to an employee a horse which from natural weakness or from disease should not have strength for the work in hand, and the employee should in consequence thereof receive some injury, could he hold the employer responsible for his damages?

These inquiries need not be pursued. The answers to them are obvious. This was not a dangerous engine and it did not cause the injury. That was caused by the break beam accidentally catching plaintiff's foot; and the engine simply failed to rescue him from the danger in which he was placed. It was an accident which the defendant had no reason to anticipate, and hence it was not bound to have an engine there adequate to avert its consequences. It cannot be charged with negligence in not foreseeing that such an accident might occur and that then the engine would lack power to stop suddenly enough to ward off injury. A more powerful engine could start a train more suddenly and, for the same reason, could stop one more suddenly.

It would impose upon every railroad company very embarrassing, onerous and unjust responsibilities if, in the case of accidents with moving trains, it was to be a subject of inquiry before a jury whether the particular accident might not have been avoided with an engine of greater or less power.

If this engine, drawing a train upon a railroad, had in consequence of its imperfect condition become stalled so that the passengers and freight failed to reach their destination in proper time; or if it had broken down and thereby injured some one; or if when placed at rest it had run away in consequence of the leakage through the throttle valve, different questions would have been presented for our consideration.

But without violating any rules that have been laid down for the protection of employees we are constrained to hold in this case that this was not, as to the plaintiff, a dangerous engine; that it was reasonably safe and proper; and that there was no negligence on the part of the defendant in putting it to the service in which it was employed; and that therefore, upon the facts, as they now appear, the plaintiff has no cause of action against the defendant; and this conclusion finds ample support in the cases of *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering* and *Sweeney v. Berlin & Jones Envelope Co.* 101 N. Y. 896, 520; [*Same Cases*, 2 Cent. Rep. 419, 457].

In the case of *Marsh v. Chickering*, Judge Miller, following prior authorities, said: "The rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable; such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances."

Suppose in that case the ladder had, when new, been furnished with hooks and spikes, and they had by use been broken off; how could it have been claimed that the liability of the master would be different? Would the master have been bound to replace hooks and spikes which had come off, while he owed no

duty to his servant originally to place them upon the ladder?

So here, Was the defendant bound to restore this engine, by repairs, to the power which it originally possessed, while it owed no duty to purchase a new engine of greater horse power than this then possessed? It is plain that the answer to these questions should be in the negative. *Jones v. Granite Mills*, 126 Mass. 84; *Kelley v. Silver Spring Co.* 12 R. I. 112; *Smith v. St. Louis etc. R. Co.* 69 Mo. 34; *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Western, etc. R. R. Co. v. Bishop*, 50 Ga. 465; *Wonder v. Balt. & O. R. R. Co.* 32 Md. 411; *Philadelphia etc. R. R. Co. v. Keenan*, 108 Pa. 124.

The judgment should, therefore, be reversed and a new trial ordered; costs to abide event.

Rapallo, Miller and Finch, J.J., concur; **Danforth, J.**, reads for affirmance, with whom **Andrews, J.**, concurs; **Ruger, Ch. J.**, takes no part.

Danforth, J., dissenting:

Upon the trial it appeared that the plaintiff was in the service of the defendant as yard master, and in the performance of his duty was shifting cars in its freight yard. The train of twelve cars, part of them empty, was drawn a short distance up a slight grade, towards a switch, where part were to be cut off; but the resistance proved too much for the engine and it was stalled. The train was then slowly backed to enable the plaintiff to take off a portion of the cars. To do this he stepped between the third and fourth car, but found a square pin driven fast in a round hole and immovable. He then tried the other, all the time keeping up with the movement of the train; this pin also was tight, and before he could remove it, his right foot was caught between the brake beam of the car behind and the ground.

He at once signaled and the engineer attempted to stop; but before he succeeded, the plaintiff's other foot caught in a frog, and he was pulled partly down, the car wheel ran upon his leg, and when the train stopped the wheel stood on his knee which was, of course, fractured, and the leg afterwards amputated.

Between signaling to stop and the final stroke, the plaintiff, pushed also by the brake beam, had hobbled along on one foot the length of a car and a half, or forty-five feet. He recovered damages, upon the ground that the injuries complained of resulted from the defendant's failure in the exercise of ordinary care to provide a suitable engine for his use in the work required.

It is too well settled to permit discussion, that a master is under an obligation to use due care to supply its servant with suitable instruments and means to carry on the business intrusted to him. That a locomotive engine was necessary upon occasions like the one in question, that one was furnished, and that it in fact was defective, I do not understand to have been controverted. Indeed, at the end of the plaintiff's case, and again at the close of the evidence on both sides, the defendant in moving for a nonsuit claimed, not that no defect was proven, but "That the evidence failed to establish any defect in the locomotive which contributed to plaintiff's injury;" and again, "That

it fails to show that any defect existed in the locomotive, of sufficient importance to charge the defendant with knowledge of its existence;" or that it was "of a sufficiently serious character to charge the defendant with negligence in permitting the locomotive to be used in its business." By implication certainly, the existence of defects was conceded, and their effect and consequence only called in question.

The motion being denied, the propositions involved in it were submitted to the jury in a charge to which no exception was taken. They were told to inquire: "first, whether the engine in question was actually unsafe or not; and second, whether defendant knew or ought to have known of its condition."

The trial judge also said to them: "It is not only necessary that the plaintiff should satisfy you that the defendant was guilty of negligence, but also that this negligence caused the injury of which he complains;" and calling attention to the particulars alleged against the defendant, added: "Did these defects, if they existed (the defect in the throttle valve, the defect in this main valve), either or both combined, cause the injury?"

He also said: "If you find that the defects existed, that the defendant had notice of them, and that those defects caused this injury, then you reach the third question of fact; and that is whether or not the plaintiff was guilty of any negligence on his part that contributed to this injury;" adding: "No matter how gross the negligence of the defendant may have been on the occasion in question, if the plaintiff by slight negligence on his part contributed to the injury which he received, he cannot recover;" and these questions having been answered by the jury in favor of the plaintiff, the propositions to which the attention of the trial judge was called, are restated upon the appellant's points, and upon them the defendant mainly relies to get rid of the finding of the jury.

As to the alleged want of care or vigilance on the plaintiff's part, it is enough to say that the evidence was quite sufficient to permit that tribunal to find that there was no departure by him from the line of duty, or the requirements of his service; no recklessness or carelessness on his part, contributory to the accident, or essential without knowledge; but on the contrary, a faithful application by him, to the want in hand, of the lessons of a long experience in similar operations.

The substantial question is whether there is evidence reasonably tending to show that the injury resulted from any defect in the engine. Its throttle valve leaked. So did its main valve, or as it is sometimes called, the valve in the steam chest. Its flues were badly stopped up. The various uses of these parts of the engine are explained by witnesses. The flues connect the fire box with the smoke box, and present the radiating surface through which heat is conducted to the water, and steam generated.

The throttle valve admits or shuts off steam from the cylinders, and regulates its supply. The valves in the steam chest are intended to govern the admission and exhaustion of steam to and from the cylinder; and when in fit order to perform its function, it will admit steam to one end only of the cylinders at one time, and allow its escape from that end as soon as it is

admitted to the other, and must cover the steam ports so as not to permit steam to escape from the chest into the exhaust port.

The throttle valve is controlled by the engineer. He may direct the steam into either end of the steam chest and thus give a backward or forward motion to the engine, or exclude it altogether and make it motionless. It is obvious then that it is of the greatest importance that a throttle valve should remain closed and tight after steam is shut off. If it opens accidentally, by reason of defective gearing or other cause, or if it is so worn as to leak, that result follows which led to the action of *Cone v. Delaware etc. R. R. Co.* 81 N. Y. 206.

There, through a leaky valve, steam escaped into the cylinder; the engine was put in motion without the intervention of the engineer; the plaintiff was crushed between two cars, and the defendant, by reason of the unfit condition of the engine, was charged with negligence and held liable for the injury.

The evidence shows that the engine in the case at bar was in the same condition. It had more than once before this accident moved off when no person controlled it. It had been left standing, but the steam passed into the cylinder, in spite of the adjustment of the valve by the engineer with intent that it should remain stationary.

Speaking of the very time of the accident, one witness says: "Neither the engineer nor any other man could shut the throttle valve off so that she would stay still;" to effect that, besides placing the lever in the center, it was necessary to block the wheels, a stick placed each side of the driving wheel, so that she could go neither one way nor the other. Again: "The throttle valve leaked whenever the engine was used;" "The throttle would leak so the steam would accumulate in the cylinder, so when you went to throw over (the lever) you couldn't; and when you did throw over, she would jump, and you couldn't couple after with safety, as you ought to do;" and illustrating the effect of the unregulated passage of steam through the leaking valve into the chest, the witness says: "You could not depend upon her; if you threw her a little too far ahead she would take a jump; and if you threw her the other way she would jump backwards. At that rate you can't couple cars. If the engine was going backward and you wanted to stop her, the engineer would throw her; and the minute he got over so the steam got over the other side of the piston he would throw her up in the center; the engine would churn backwards and forwards till the steam got out of the cylinder."

Another witness, familiar with the engine and accustomed to its use, states that when wishing to keep it stationary, he not only "hailed her up in the center" but "put a block on each side of the driving wheel and set the brake on the tender."

Another witness, an engineer in defendant's employ on and before January 27, 1877, and then running this engine, says: "At that time the engine was in very bad condition; her main valve leaked: that is, the steam blew through; that is what I call leaking; the throttle valve leaked and she was a very hard engine to handle * * * a leaky throttle valve, to my notion, makes an engine harder to handle and a good deal worse

to stop. I think that when the throttle leaks that of course throws the pressure on the valve all the while when the throttle leaks, and the more pressure on the valves the harder it is to handle the engine; that is my idea of it."

Another, an engineer of abundant experience in the yards of the Central Railroad Company, in shifting trains, and whose competency is not disputed, says, in answer to a question embodying the defects referred to, that such an engine is not in a safe condition to do shifting with, because "You wouldn't have control of it." "If you received a signal to stop, you can't stop any too quick. When you are stopping, if you have an engine with a leaky throttle, moving along slowly, as you would be, of course the steam would act against you; you would naturally have a little momentum, and shut your throttle off with your hand on the lever ready to reverse at the signal; and if that throttle leaked it would be just the same as if the throttle was partially opened and the steam flowing on into the dry pipes, and from the dry pipes into the steam chest, and of course if you reversed your engine you might get it over and you might not. If you are just slacking up to uncouple, and you give her a little steam, and then shut her off and move back by the momentum you have got, a leaky throttle would have the same tendency as though the throttle was open; upon your motion backward it increases your motion as long as you don't reverse your lever. If your lever is in the backward motion and you shut off the throttle, then if she leaks it gives you more momentum, to the extent of the leak."

Again the witness says: "A leak in the throttle has the effect upon a locomotive which would be had if the throttle were partly open; that is to say, there is always some steam passing down to the steam chest, and its effect is solely upon the power of the engineer to manage the lever; it takes the certainty of handling the engine away from him; its effect is to interfere with the management of the locomotive."

As to the existence of these defects, and their importance, therefore, the evidence is overwhelming. Did the defendant have notice of them? Possibly not, in words, that the valves leaked, that this or that particular part was affected; but of the general weakness and inutility of the engine, reiterated notice.

In the first place it was an old engine and repeatedly in the defendant's repair shops. Harvey, who for four years ran for the defendant, and this engine in January 1877, describes her defects and asked the master mechanic "to do some work upon her." He said he "was short of engines and just as quick as he got a chance, he would take the engine and do some work upon her."

Some weeks before the accident the plaintiff knew of the engine running away, and that it was not in good condition; what ailed it he did not know, but he reported the engine to Niver, the superintendent. "I told him," he says, that "I was not able to do my work with the engine. He asked me what was the matter with her, and I told him I didn't know; so he gave me an order on the master mechanic to give me another engine; but he had nothing to give me in place

N. Y.

of it. He gave me an order; that (producing a paper) is the order; he wrote it and signed it." These are its words: "Buchanan, give the yard master some other engine to do the work. (signed) W. K. Niver."

Niver was a witness for the defendant. He denies nothing of this. Asked by defendant's counsel a single question: "Were you ever notified by anybody, prior to this accident to Mr. Bajus, that that engine as to its valves was out of condition," he answers: "I have no recollection of ever being notified of any such thing; I had no knowledge of its being out of repair with reference to its valves."

The master mechanic, however, was not unfamiliar with the seat of probable trouble. Testifying for the defendant, he says the engine was rebuilt in 1874; the valves were then fixed by facing and surfacing, and three weeks after that she came back for repairs, and her throttle was fixed again, and how often it was at the repair shop after that is not stated.

The evidence disclosed not merely a feeble and inefficient machine, but an impaired one. The trouble was not in its original design, but came from age and wear. It needed repairs. The necessity for them was known by the defendant, but they were not made. Did the defects cause the injury?

The circumstances of *Cone's Case* (*supra*) illustrate the effect of an untimely application of steam through machinery designed, but which through imperfection failed, to shut it off. Those of the case at bar are in one respect different. The engineer was at his post, seeking to obey the signal of the plaintiff. He wanted to stop the engine. He changed the lever to the forward motion, and this should have directed the full head of steam into the forward port, and would have done so if the valve had not leaked and so permitted part to go into the other.

The travel of the valve is placed under the control of the engineer, that he may employ the greatest power of the engine by admitting steam into the cylinders, or by excluding it, suspend motion, as in his judgment the exigency of the case requires.

Unless it responds to his will the machine is necessarily imperfect. If the steam without his action can pass into the port ways, to some extent he loses control over it and must overcome its resistance before his own will can be effective. In such a case there is not a mere loss of power, but a misapplication of power. The steam passing out is met by steam coming in, and the motion of the piston is necessarily hindered. So, as we have seen, it is testified to in this case, the engineer in an effort to control the engine, "would have," as the witness says, "to operate against all the steam in there," the chest. "If the throttle valve had been tight there would have been no steam in there." Again, the witness says: "It is harder to handle an engine when the throttle leaks than when it does not leak."

So although "you shut her off in the backward or forward motion, and the throttle leaks, she would go that motion." In other words the shut-off is not effectual. The steam still enters the chest.

Thus it is apparent that the ports of the

engine were so worn and out of repair as to defeat the object for which they were constructed; that they caused the machinery to act independently of the control of the engineer and took from him the power to stop quickly, or make sudden starts, as the emergency of coupling or uncoupling, or making up a train, required. In other words, a machine whose motor was intended to be distinct from its operator and so controllable by him, was made by these defects to act automatically both as to power and movements. In its principal operations it was independent. Hence, when the plaintiff gave the signal to stop, the engineer sought to do so; but although the train was backing slowly, the engine failed to obey. If sound and in good order it should have become motionless after a few revolutions of its wheels, or, as the jury might have found, in the traverse of less than ten feet. Had it done so the plaintiff would not have suffered. It actually passed over forty-five feet, and the injury occurred.

It surely cannot be said as matter of law that it was not brought on by the incapacity of the engine, by reason of its defective condition, to be subject to the will of the engineer, nor that the steam on which he had a right to rely as a power to do his bidding was not in fact applied in resistance to his intent. Nor can we say that the resistance of the escaping steam, nor the prolonged motion made inevitable by the unexpected restraint upon the lever, was not the material and efficient cause of the accident, nor that by reason of the leaky throttle valve, motive power was supplied while the engineer sought and expected to exclude it.

To save the plaintiff it was necessary to shut off steam and at once stop the engine. The leaky throttle was as a throttle partly open, and made that impossible. It might even accelerate and prolong motion which except for that would have been suspended.

In any view the action of the engine was shown to have been unnatural, and its eccentricity due to its defective condition. It was in evidence that if it had been sound and of normal capacity, the engineer might have so checked and controlled the train as to insure the plaintiff's safety. It was therefore for the defendant to prove that the injury was caused without its fault, and was to be accounted for by other causes than one produced by its negligence. *Seybolt v. N. Y. L. E. & W. R. R. Co.* 95 N. Y. 570.

In *Flike v. Boston & A. R. R. Co.* 58 N. Y. 549, the train had one less than its usual number of men, and the evidence tended to show that if the absentee had been there, he with the others could have controlled the impetus of the cars and prevented the accident. The defendant was held liable, the court saying: "As well might the company be relieved if the train had started without an engineer, or without brakes, or with a defective engine." There the injury was occasioned by collision with cars accidentally broken from the train, and the principal protection in such cases was said to be the prompt and efficient application of the brakes, and the defendant held liable, because a sufficient number of men to perform that duty was not present.

Here we have the defective engine instead of the absent brakeman. In principle the cases are not unlike. In this a sound appliance was lacking; in that the full tale of operators. The contract implied between the parties is the same; the character of negligence is the same; the consequences of the default the same; and a difference in liability can stand upon neither reason nor authority.

But in any aspect the question presented turns in part at least upon these considerations and is one of fact; the jurors passing upon it have found that the injury not only came from the defects, but that the consequences were such as might naturally result from them under the circumstances in which the plaintiff was placed, and that the defective condition of the engine was imputable as negligence to the defendant through the nonperformance of a positive duty to make those repairs which it knew, or which from their character it might have known were needed for the efficient and safe operation of the machine. Clearly, the evidence was sufficient in some reasonable view to justify these conclusions.

It was therefore properly submitted to the jury, and the judgment should be sustained, upon the ground warranted by their verdict: that the defendant failed in its duty to furnish to its servant machinery reasonably fit for the use to which it was to be applied, and in a condition not to endanger his safety. To hold otherwise would relieve the defendant from just responsibility to its employees, and go far to abrogate a rule of action which up to this time we have declared to be unqualified, and by which a master is required to use all the reasonable care, diligence and caution in providing for the safety of those in his employ, and furnishing for their use in his work, safe, sound and suitable tools, implements, appliances and machinery in the prosecution thereof, and keeping the same in repair; *Benzing v. Steinway*, 101 N. Y. 547 [S. C. 2 Cent. Rep. 491]; to the end "that the servant shall be under no risks from imperfect and inadequate machinery or other material means and appliances." *Laning v. N. Y. C. R. R. Co.* 49 N. Y. 532.

So this is declared to be (*Id.*) "a duty to be affirmatively and positively fulfilled and performed," and in language governing the case before us is added: "There is not a performance of this duty until there has been placed for the servant's use perfect and adequate physical means, or due care used to that end." (*Id.*)

The cases cited by the appellant furnish no exception to these rules. In *Marsh v. Chickering*, 101 N. Y. 396 [S. C. 2 Cent. Rep. 419], the instrument was perfect of its kind, and so it was in *Sweeney v. Berlin & Jones Enr. Co.* 101 N. Y. 520 [2 Cent. Rep. 457], and we held that the master was not bound to procure either the best known or conceivable appliances, or discard an old but sound machine for a new invention.

The loss to the plaintiff here resulted neither from lack of a new invention, or a different contrivance, but from a known imperfection resulting from the omission to repair a machine which the defendant was bound to keep in order.

The judgment should be affirmed.

Margaret L. WILMERDING, *Appt.*,

v.

John MCKESSON, Impleaded with George G. Wilmerding, *Respt.*

1. Where an executor has knowledge, or by the use of reasonable diligence could have knowledge, that funds of the estate in possession of his coexecutor are not being properly invested, but are being used in the business of a firm of which the coexecutor is a member, with allowance of interest thereon, and he fails to endeavor to have such funds properly invested or to remonstrate with his coexecutor, he is liable for loss arising from such use of the funds.
2. If the circumstances are such as to create a doubt in respect to the safety of uninvested funds of the estate, an executor is not exonerated from the duty of vigilance in protecting them and seeing that they are properly invested, by the fact that such funds were never in his possession or under his actual control, but were received by and were in the exclusive possession of his coexecutor.
3. An executor is not a guarantor for the safety of securities committed to his charge and does not warrant such safety under all circumstances, and hence is not liable for a breach of trust on the part of his coexecutor in wrongfully taking and converting securities belonging to the estate, lawfully in the sole possession and charge of such coexecutor, unless it appears that he had knowledge of or assented to the acts of his coexecutor, or had notice which should have put him on inquiry.

(Decided October 12, 1886.)

APPEAL by plaintiff from a judgment of the Supreme Court at General Term in the First Department, modifying and affirming as modified a judgment of the New York Special Term, in favor of plaintiff in an action to charge defendants as executors and trustees with an alleged loss incurred to plaintiff's interest in the estate of her father. *Reversed.*

Memorandum of decision below, 32 Hun, 243.

The facts and questions raised are stated in the opinion.

Messrs. Nash & Holt, for appellant:

Executors and trustees cannot allow one of their number to manage the estate by himself, without being responsible for his acts as their agent. If indeed a trustee simply joins in a receipt for mere conformity, he is not by that act made conclusively liable; but if he has further duties to perform in respect to the moneys so received in the way of security, investment or otherwise, and neglects these duties, delegating the whole trust to his cotrustees, he becomes liable for his defaults.

Monell v. Monell, 5 Johns. Ch. 283; *Clark v. Clark*, 8 Paige, 152; *Spencer v. Spencer*, 11 Paige, 299, 305, 306; *Adair v. Brimmer*, 74 N. Y.

Y. 561; 95 N. Y. 85; *McCabe v. Fowler*, 84 N. Y. 814; *Croft v. Williams*, 88 N. Y. 884; *Glaucus v. Fogel*, 88 N. Y. 434; *Earle v. Earle*, 93 N. Y. 104; following the English rule as applied in *Egbert v. Butter*, 21 Beav. 560; *Styles v. Guy*, 1 Macn. & G. 422; *Ingle v. Partridge*, 32 Beav. 661; *Candler v. Tillett*, 22 Beav. 257; *Toplis v. Hurrell*, 19 Beav. 423; *Cowell v. Gatecombe*, 27 Beav. 568; *Thompson v. Finch*, 22 Beav. 816; *S. C. affd.* 8 De G. M. & G. 560.

Defendant was chargeable with notice of the contents of the books kept by the accountant of the estate. The accountant was the agent of the trustees, to keep the entries, and his knowledge was theirs.

Allen v. Colt, 6 Hill, 818; *Adair v. Brimmer*, 74 N. Y. 589, 564; *Ward v. Warren*, 82 N. Y. 265.

It was the duty of the trustees to make all investments in their joint names, and to keep a joint possession of the property.

Walker v. Symonds, 8 Swanst. 58-9; *Mendes v. Guedalla*, 2 Johns. & Hem. 259; *Lewis v. Nobbs*, L. R. 8 Ch. Div. 591.

By the explicit directions of the will, the executors and the guardians were directed to set apart and keep separately invested the several sums appropriated for testator's daughters, and to declare the same by a proper instrument in writing.

Wms. Exrs. 1796 (7th Eng. ed.).

This action is not barred by the statute; as between cestui que trust and trustee in the case of a direct trust no length of time is a bar, for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title.

Lewin, Tr. p. 733; *Perry*, Tr. § 863.

Messrs. John L. Logan and William Allen Butler, for respondent:

The rule is that where several persons are appointed by a testator as the executors of his will, they have respectively equal rights to the possession and custody of the securities of the estate; and where one of several executors has in the first instance the actual custody, he has the right to retain possession.

Langford v. Gascoyne, 11 Ves. 383; *Edmonds v. Crenshaw*, 14 Pet. 166-168 (39 U. S. bk. 10, L. ed. 402); *Williams v. Nixon*, 2 Beav. 472; *McKim v. Aulbach*, 130 Mass. 481; *Croft v. Williams*, 88 N. Y. 884; *Burt v. Burt*, 41 N. Y. 46.

The surviving partners of the testator's firm of Wilmerding & Mount were at his death lawfully in possession of the entire copartnership property and entitled to retain the same in their control and to liquidate the affairs of the firm, accounting to the personal representatives of the deceased partner for his share as ascertained.

Coll. Partn. § 129; *Case v. Abel*, 1 Paige, 898.

The evidence clearly showed that the plaintiff sustained no injury from the circumstance that there was no actual separation of the securities. The want of a declared separation by sealed instruments did not in any manner occasion or induce the spoliation of the estate by the defaulting executor; nor would the existence of such instruments have prevented it.

Croft v. Williams, 88 N. Y. 884.

The general rule is that there must be a conjunction of wrong and loss to sustain an action. Conceding the wrong for the purpose of argument, no loss can be shown as the result of it.

2 Add. Torts, p. 1004, *Dudley & Baylies' ed.*; *Hubbard v. Briggs*, 81 N. Y. 518; *Chester v. Comstock*, 40 N. Y. 575, note.

The estate having been all once invested, and the loss occasioned solely by the wrongful act of George G. Wilmerding, the defendant McKesson cannot be charged with moneys which he never in fact received, nor with moneys which his cotrustee wasted or misapplied, unless he is shown to have knowingly permitted such waste and misapplication.

The rule is stated in *Williams on Executors*, 6th Am. ed. 1877, p. 1820: "A *devastavit* by one of two executors or administrators shall not charge his companion, provided he has not intentionally or otherwise contributed to it, for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other."

See also Story, Eq. Jur. §§ 1280, 1283; Hill, Trustees, p. 309, and note p. 470, 4th Am. ed.

This is the settled law in England and in this country.

Monell v. Monell, 5 Johns. Ch. 288; *Townley v. Chalenor*, Cro. Car. 812; *White & T. L. Cas. Eq. 2 H. & W.'s Notes*, p. 628; *Leigh v. Barry*, 3 Atk. 584; *Williams v. Nixon*, 2 Beav. 472; *Sutherland v. Bruah*, 7 Johns. Ch. 17; *Kirby v. Turner*, Hopk. Ch. 852; *Sherman v. Parish*, 58 N. Y. 483; *Banks v. Wilken*, 8 Sandf. Ch. 108; *Manahan v. Gibbons*, 19 Johns. 427; *Adair v. Brimmer*, 74 N. Y. 539; *Peter v. Beverly*, 10 Pet. 532 (35 U. S. bk. 9, L. ed. 522); *Ormiston v. Olcott*, 84 N. Y. 839; *McCabe v. Fowler*, 84 N. Y. 814; *Earle v. Earle*, 98 N. Y. 104; *McKim v. Aulbach*, 180 Mass. 481; *Croft v. Williams*, 88 N. Y. 884.

A trustee is liable only for his own acts and defaults, and not for those of his cotrustee nor for funds collected by his cotrustee.

93 N. Y. 111; *Hun v. Cary*, 82 N. Y. 71; *Adair v. Brimmer*, 74 N. Y. 539.

The authorities relied upon by the appellant's counsel to visit the consequences of culpable negligence on defendant McKesson, and saddle him with the penalty of the breach of trust by his cotrustee, are all cases where the particular circumstances made the general rule inapplicable.

Miller, J., delivered the opinion of the court:

This action was instituted by the plaintiff against the defendants, for the purpose of making them liable as executors and trustees of the estate of William E. Wilmerding, deceased, who was the father of plaintiff, and as guardians of his minor children, upon rendering an account of their proceedings for an alleged loss incurred to the plaintiff's interest in said estate.

Two other persons were named as executors and trustees in the will, in addition to the defendants, one of whom is dead and the other has taken no part in the administration of the estate.

At the time of the testator's death he was the senior member of the auction house of Wilmerding & Mount, an old established firm of high credit and repute; and a considerable portion of his estate was the interest which he had

in this firm, which interest was valued upon the inventory of the executors at \$140,909.14.

The survivors of the firm, after the testator's death, consisting of his three sons and William S. Mount, continued the business under the same firm name. The new firm failed in 1874 and there was a loss to the estate, by reason thereof, of about \$150,000, which was entirely attributable to the fact that the trust moneys were allowed to be intermingled with the moneys of the firm and used in the business and thus exposed to its hazards, and also to the fact that the securities of the estate were left under the individual control of the defendant George G. Wilmerding, one of the executors and trustees, who was a half brother of the plaintiff, and were appropriated by him for the benefit of the firm of Wilmerding & Mount, of which he was a member.

The plaintiff, at the time of the death of the testator, was twelve years old.

The complaint alleged that the interest of the plaintiff in her father's estate was, first, one equal undivided third part of the separate estate of plaintiff's deceased mother in her father's possession; second, a legacy, under her father's will, of \$10,000, to be invested by the trustees in the same manner as her share of the residuary estate; third, a life interest in the income of one thirteenth part of the residuary estate of her father, which, together with the legacy of \$10,000, aforesaid, was to be kept invested by the trustees for her benefit, and the income paid to her for life.

Plaintiff's right to maintain this action is based upon the ground that her interest was not kept separately invested so as to be distinguishable, and that the funds of the estate were permitted to be used by the firm of Wilmerding & Mount.

The proof upon the trial established, and the judge found, that during the entire administration of the estate until the failure of Wilmerding & Mount, the executor, George G. Wilmerding, had the custody and control of the securities belonging to the estate; that he had two tin boxes, in one of which he kept the bonds, mortgages, stocks and other securities, and in the other the account books and vouchers for payments, which boxes were kept in the safe of the firm, and the defendant McKesson had no access to the boxes or the safe in which they were kept; that he never saw them except when they were occasionally produced by the defendant Wilmerding at the office of the accountant; that he never examined them, having full faith and confidence in the integrity and fidelity of his coexecutor, Wilmerding.

Moneys which were realized from the estate in the course of administration were paid to the firm of Wilmerding & Mount, under the authority of the executor George G. Wilmerding; and the evidence shows that these moneys were used from time to time, while they remained in the possession of the firm, in the transaction of its business, and that the firm paid interest on said moneys, which was credited from time to time on the account books of the estate. This continued down to and including the time of the failure of the firm.

The loss to the estate clearly arose from the unlawful act of George in intermingling its funds with those of the business in which he

was engaged; and no question is raised as to his liability.

The trial court also found that the defendant McKesson had knowledge at the time he filed his accounts as executor, and afterwards down to the time of the failure of the firm of Wilmerding & Mount, that the moneys of the estate were from time to time received by said firm as depositaries or bankers; that cash balances accumulated in their hands and were left with them, on which they allowed interest; that he could at all times, by inspecting the books kept by the accountant of the estate, have ascertained the particulars in respect to such balances, and that he was negligent in not keeping himself informed of the contents of said books, and in allowing said balances so to remain with said firm; that he was also guilty of negligence as executor and guardian in allowing the moneys of the estate to accumulate in the hands of his coexecutor and coguardian, George G. Wilmerding, after the first of January, 1870, as securities were paid off, in the discharge of which he took part.

The court further found that after the failure of Wilmerding & Mount the total loss to the estate of the testator, as shown by the indebtedness of said firm to the guardians' and to the executors' accounts and to the special funds was, by the direction of the defendant McKesson, ascertained and apportioned ratably upon the interests of the several beneficiaries which were still in the hands of the defendants as executors and guardians; and the amount so charged against the plaintiff was, in respect to the property she is entitled to absolutely, \$16,177.25, and in respect to the property in which she has an interest for life, \$22,686.20, as of the 31st day of December, 1874.

It was also found that the account between the guardians and trustees and the plaintiff, brought down to October 15, 1880, stood as follows: amount of principal of life estate on hand December 31, 1879, \$14,289.19; amount of loss admitted on said life estate \$22,686.20; making a total of \$36,975.39.

Also that the amount on hand of the account current was, on January 1, 1880, \$6,308.56; amount of loss admitted under term "contingent," \$16,177.25; interest on \$38,863.45, on aggregate of losses from January 1, 1875, to January 1, 1880, \$12,653.94; payments since January 1, 1880, deducted, \$964.64; interest from January 1, 1880, to October 15, 1880, on \$71,145.50, \$2,816.67; making a total of \$36,986.78; and judgment was rendered in favor of the plaintiff for the sum of \$36,986.78, with interest thereon from October 15, 1880, due to her absolutely, and for the sum of \$36,975.39, with interest thereon from October 15, 1880, due from defendants in respect to the life estate, and that the last mentioned sum be paid over to a trustee to be appointed in the place of the defendants.

This judgment was modified by the general term by reducing the first named sum of \$36,986.78 to \$11,300.26, and the last named amount of \$36,975.39 to \$17,033.34.

The decision of the general term exempted the defendant McKesson from all the loss of \$16,177.25, except \$1,915.82, with which it charged him, and from all the loss of \$22,686.20 except \$2,744.65, with which it charged him.

N. Y.

The sum of \$17,315.12 was the amount due to the estate from Wilmerding & Mount, December 31, 1871, as appears from the findings, which also show that there was due December 31, 1872, from the firm to the estate \$102,176.95, and on December 31, 1878, \$111,992.01.

The opinion of the general term holds that the evidence justifies the finding that the defendant McKesson was liable for the balance due the estate at the close of the year 1871, but that he was not chargeable with the increase of the balances due the estate as shown in 1872 and 1878, which was owing to the receipt by the firm of the proceeds of investments paid off which at once went into their business, as well as to the misappropriation made by George during that period.

The deposits with the firm, of moneys received, included moneys realized in the due course of administration of the estate. While the use and conversion of the securities was a dishonest and unlawful misappropriation of the funds which constituted a *devastavit* upon the estate committed by the defendant Wilmerding, the liability of the defendant McKesson, for the loss incurred by the estate rests upon the ground that he failed to perform his duty, as an executor and guardian, in not taking charge of and protecting the interests intrusted to his keeping, and that the loss was occasioned by reason of his negligence and want of care.

The trial court found that he was chargeable with negligence in allowing the money to accumulate after January 1, 1870, as securities were paid off, in the discharge of which he took part. The evidence shows that there was no bank account kept by the executors jointly which would require the signatures of both executors to draw upon it, but only a bank account in the name of George G. Wilmerding, as executor; and this was discontinued in 1864, as inconvenient.

If this precaution had been observed, no money could have been drawn belonging to the estate without McKesson's direct authority. He had knowledge or means of knowing that the moneys which were paid in to George and were awaiting investment were used in the business of the firm of Wilmerding & Mount. When he rendered his account as executor, the account showed that the firm was allowing the estate interest on moneys in its hands, paying about \$3,000 a year, which indicated that large sums were there belonging to the estate. After December 31, 1868, it appears that no new investments were made, and for six years afterwards moneys paid on securities which became due accumulated in the hands of the firm.

As we have seen, in 1872 over \$100,000 was due the estate, as the books of account showed, and in 1878 over \$111,000. McKesson had access to the books and could easily have ascertained what the amounts were in the hands of George or the firm of Wilmerding & Mount. He could have learned from the books, if from no other source, that this firm was using the moneys of the estate and paying interest thereon. His own evidence shows that when speaking to George on the subject of the accumulation of money about the time when \$64,000 was paid in on the asylum bonds and \$12,000 on the bond and mortgage, and other large sums were on hand as appeared by the account for

the year 1872, he was informed that it would be needed to pay off "the boys."

This hardly furnished sufficient excuse for failing to see that the moneys of the estate were properly and safely invested. At this time, it may be remarked, "the boys" had been settled with, and afterwards large sums were paid in, which constituted the basis of the heaviest defalcation by George. His duty was to see that these large sums which were paid in were drawing interest from investments safely made; and if he had been vigilant in making inquiry he could not but have learned, if he did not know before, that the firm was using and allowing interest on moneys belonging to the estate. His neglect to make inquiries is evidence that he was negligent in looking after the interests entrusted to him.

It is true that the moneys which remained uninvested did not come into his hands; and perhaps it may be said that he had not the control over the same he would have had if they had been paid directly to him; but that fact did not excuse him from the use of ordinary care in protecting the funds from loss; and he must have known or he could have known, if he did not, that the funds had been diverted from the usual course of investments by being used in the business of the firm of Wilmerding & Mount; and he should at least have sought to have the same invested or to remonstrate with his co-executor for the use to which they had been appropriated.

Except as already stated, the proof does not show that he insisted that investments should be made, or took any measures with the view of procuring the same. The question whether he should have resorted to legal measures for the purpose of taking the funds out of the hands of his associate under the circumstances, does not distinctly arise, as it is not apparent that he affirmatively insisted upon a different disposition of the same; and it appears by his conduct that he acquiesced in their remaining in the condition in which they had been.

Although McKesson testified that before the failure of Wilmerding & Mount he never knew of the use, by George G. Wilmerding or his firm, of any moneys or funds of the estate, yet there is strong evidence to establish the fact that he must have known it, as the court substantially found; and if he did not, upon inquiry he could have ascertained it; and in failing to do so he was chargeable with carelessness and a neglect of a plain duty.

Cases may arise where one executor is responsible for the acts of his co-executor in the management of funds which have come into his hands; but where the funds of the estate were lawfully received by one of the executors or were originally in his hands or properly paid to him in the due course of administration and there is nothing to excite suspicion as to the integrity or responsibility of such trustee, or to create a belief that the funds have been improperly used or invested in violation of the established rules applicable to such cases, or were unlawfully allowed to remain uninvested, there is no rule which charges the executor or trustee who has not control of the fund, with the wrongful acts or misconduct of his associate.

If, however, the circumstances are such as to create a doubt in respect to the safety of the

funds, a coexecutor is not exonerated from the duty of vigilance in protecting them. If the executor is merely passive and simply does not obstruct the collection or receipt of assets by his associate, he is not liable for the latter's waste; but where he knows and assents to such misapplication, or negligently suffers his co-executor to receive and waste the estate, when he has the means of preventing it by proper care, he becomes liable for a resulting loss. *Croft v. Williams*, 88 N. Y. 384.

McKesson did not occupy the position of a passive trustee, merely joining in receipts, etc. for conformity. He was active to a considerable extent as to matters connected with the trust, advised as to investments, passed his accounts as executor, received his lawful commissions, consulted counsel, and united in employing an accountant; he did everything that was required by the position he occupied except that he neglected to protect the estate from the hazards of the business of Wilmerding & Mount. His duty demanded that he should see that the moneys of the estate did not lie idle and that they should be protected from loss.

For his neglect in not attending to this duty he was clearly liable, except for the deficiency caused by the wrongful taking and conversion of the securities of the estate by George G. Wilmerding without his knowledge or consent. This was a breach of trust committed, after the plaintiff became of age in 1872, by George by the abstraction of securities in his possession and the hypothecation of the same for moneys loaned to himself or his firm. His fraudulent acts in this respect constituted a spoliation and waste of the funds of the estate for which McKesson was not responsible. The estate had been lawfully invested and the loss was caused by the wrongful and fraudulent acts of George G. Wilmerding, without the knowledge of McKesson, and with nothing to excite his suspicion that his cotrustee would be guilty of thus misappropriating and wasting the funds of the estate.

In such a case a cotrustee is not responsible for the acts of his associate. An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge, and does not warrant such safety under any and all circumstances and against all contingencies, accidents or misfortunes. *McCabe v. Fowler*, 84 N. Y. 314.

The general rule as to the liability of one executor or trustee for the acts of his coexecutor or trustee is laid down in *Williams on Executors*, 6th Am. ed. p. 1820, as follows: "A *deustavit* by one of two executors or administrators shall not charge his companion provided he has not intentionally or otherwise contributed to it, for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other."

For the *deustavit* of a coexecutor or trustee, an executor or trustee is not liable, unless it appears that he had knowledge or assented to the acts done or had notice which should excite his suspicion and put him on inquiry. This rule is fully sustained by the authorities. *Sutherland v. Brush*, 7 Johns. Ch. 17; *Sherman v. Parish*, 53 N. Y. 483; *Adair v. Brimmer*, 74 N. Y. 539; *Ormiston v. Olcott* and *McCabe v.*

Fowler, 84 N. Y. 339, 314; *McKim v. Aulbach*, 180 Mass. 481; *Croft v. Williams*, 88 N. Y. 384; *Peter v. Beverly*, 10 Pet. 532 [35 U.S. bk. 9, L.ed. 522].

None of the cases cited by the plaintiff's counsel are in conflict with the views laid down; and we are unable to find any ground upon which McKesson can be held liable for the fraud and misconduct of his cotrustee, in reference to the securities which were unlawfully abstracted by the latter.

George G. Wilmerding being lawfully in possession of the securities, and having sole custody and charge of the same, and there being no ground for interference with his right to hold them, no reason exists why McKesson should be held liable for the wrongful acts of his cotrustee. McKesson was not chargeable with connivance or culpable negligence; and none of the decisions, as we have seen, sustain the rule that, under the facts presented, he should be held to the most strict and rigid accountability.

The amount appropriated by George G. Wilmerding, consisting of \$36,000, in government bonds, \$4,000 in Erie railroad bonds, and some other securities, with interest on the same, was improperly allowed against McKesson, by the judge at special term.

In this respect the judgment was erroneous and should be corrected by the deduction of the several items mentioned.

The failure of the defendants to make a separation of the securities, as contemplated by the will, did not induce or cause the spoliation of the estate by George G. Wilmerding; nor would it have been prevented if such separation had been made. There must be a conjunction of wrong and loss to sustain a liability upon any such ground; *Croft v. Williams*, 88 N. Y. 384; and as this does not appear, the appellant's claim cannot be upheld.

The Statute of Limitations was no defense to the plaintiff's claim.

The judge in his findings has allowed interest on losses computed from January 1, 1875, to January 1, 1880, with annual rests, at 6 per cent until January 1, 1879, and 5 per cent thereafter. We think that this is not a case where annual rests should be made, and, in view of the circumstances, there being no wrongful intention on the part of McKesson, we think that he should not be made liable for the full amount with legal interest. At most he should be charged only with interest at 5 per cent, and in this respect the judgment should be corrected.

For the reasons stated, the judgment of the General Term should be reversed and the judgment of the Special Term modified in the particulars indicated.

Amendments may be drawn and served by the respective counsel in conformity with the suggestions in this opinion and the judgment settled, upon notice, by the judge. *Neither party should have costs of appeal to the Supreme Court or to this court, as against the other.*

All concur.

Anna W. DWIGHT *et al.*, Exrs., *Respts.*,
v.
GERMANIA LIFE INSURANCE CO.,
Appt.

insurance, the assured warrants the truth of the **answers** to questions in the **application**, compliance with such **warranty** is a condition of the validity of the contract; and any substantial **deviation** from the truth in such answers is material to the risk and constitutes a **breach** of the contract, rendering the policy void.

2. Parties to an **insurance contract** have the right to insert therein such **lawful conditions** as they may agree upon or which they may consider necessary and proper to protect their interests, which, when made, **must be construed and enforced according to the expressed intent** of the parties.

3. If an insurance policy, in plain and unambiguous language, makes the observance of an **apparently immaterial requirement** the condition of a valid contract, it **cannot be disregarded**, nor can a new contract be constructed, by implication or otherwise, in the place of that made by the parties; and such contract is **open to construction only** when it appears upon the face of the instrument that its meaning is **doubtful** or its language is ambiguous or uncertain.

4. Hence, when the insured, in his application, answered "no," to the question **whether he was then or had been engaged in or connected with the manufacture or sale of wine, beer or intoxicating liquors**, and the evidence showed that he had kept a hotel, wherein no bar was maintained, but where he had a supply of wines and liquors; that he had licenses and permits to carry on the business of selling beer, wines and liquors at retail to be drunk on the premises; and that he systematically sold wines and liquors in bottles to such of his guests as desired, but not to other persons—the facts constituted a **breach of warranty** as matter of law; and it was **error** for the trial court to **refuse a nonsuit** and to leave it to the jury to say whether the sales of liquor proved were sales at all, within the intent and meaning of the contract.

5. If the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the **duty of the court to direct a verdict**. It is **not the rule** that if there is a **scintilla of evidence** in support of a proposition or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury.

(Decided October 12, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a judgment of the Chango Circuit Court in favor of plaintiffs entered on a verdict in an action on a policy of life insurance. *Reversed.*

Memorandum of decision below, 35 Hun, 665. The action was brought to recover the amount

of a policy on the life of the plaintiffs' testator, Walton Dwight.

In answer the defendant takes issue on the fact of death; avers that Dwight's answers to certain questions in the application were not true, to wit: that his occupation was "real estate and grain dealer;" that he had not had the disease of spitting of blood; that he was insured in two companies in which he was not in fact insured; that he had not applied for insurance which had not led to insurance; and that he falsely answered a question as to having been engaged in or connected with the sale of beer, wine or other intoxicating liquors.

The defendant further says in its answer that the insured committed suicide; that he was put to death by his own procurement; and that he entered into a conspiracy to get a large amount of insurance, to wit: \$250,000 on his life and to be put to death, to defraud the defendant and other companies.

The cause was tried at Norwich, Chenango County, N. Y., in the months of November and December, 1883, and resulted in a verdict for the plaintiffs.

At the close of the trial, which had occupied a month, the defendant moved for nonsuit on the grounds:

That Walton Dwight's answer that he was a real estate and grain dealer was untrue, constituting a breach of warranty.

That his answer that he was not and had not been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquor was untrue, and constituted a breach of warranty, avoiding the policy.

That his answers that he had not had the disease of spitting of blood, and that he was insured in two insurance companies, by him named, and that he had not applied for insurance to any company where the application had not led to an insurance were untrue and were a breach of warranty avoiding the policy.

The court denied the motion and in submitting the case to the jury, submitted special questions which, with the answers of the jury, were as follows:

Q. Was the occupation of Walton Dwight for the ten years preceding August 22, 1878, real estate and grain dealer, within the intent and meaning of the contract?

A. Yes.

Q. Was Walton Dwight engaged in the sale of any beer, wine or other intoxicating liquors at any time within five years prior to August 22, 1878, within the intent and meaning of the contract?

A. No.

Q. Was Walton Dwight connected with the sale of any beer, wine or other intoxicating liquors at any time within five years prior to August 22, 1878, within the intent and meaning of the contract?

A. No.

Q. Had Walton Dwight at any time prior to August 22, 1878 had spitting of blood, resulting from disease of the lungs or other respiratory organs?

A. No.

Q. Was the ailment of Walton Dwight, at Williamsport in March, 1887, a mere temporary ailment, from which he recovered?

A. Yes.

Q. Was the policy of insurance on the life of Walton Dwight, in suit in this action, obtained by him with the preconceived design and intent to defraud the defendant?

A. No.

Q. Did Walton Dwight die by suicide?

A. No.

The jury then rendered a general verdict for the plaintiffs for the full amount of the policy.

The terms of the policy relating to the effect to be given to the application are as follows: "This policy is issued, and the same is accepted by the said assured, upon the following express conditions and agreements: that the same shall cease and be null, void and of no effect; and that this Company shall not be liable for the payment of the sum assured, or any part thereof, but that all premiums previously paid shall be absolutely property of the Company, without any account whatever to be rendered therefore; * * * 1. If the representations made in the application for this policy, upon the faith of which this contract is made, shall be found in any respect untrue."

The application contained the following: "It is hereby declared that the above are fair and true answers to the forgoing questions, and it is acknowledged and agreed by the undersigned (the applicant, Walton Dwight), that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on, or before the day it becomes due, will render the policy null and void, and forfeit all payments made thereon."

The evidence bearing upon the questions discussed in the opinion is set out therein.

Messrs. Joseph Larocque and William M. Evarts, for appellant:

I. The policy with the application therefore together constituted the contract of insurance between Walton Dwight and the defendant.

May, Ins. § 158.

By the contract of insurance the validity of the policy is made to depend upon the truth of the statements and representations contained in the application and the materiality of each and every answer made by Dwight to the questions contained in the application was agreed to by the parties.

May, Ins. § 158.

The effect of a breach of warranty is to annul the policy, without regard to materiality of the warranty or whether the breach had anything to do in producing the loss.

Ripley v. Aetna Ins. Co. 30 N. Y. 186, 162; *Foot v. Aetna Life Ins. Co.* 61 N. Y. 571; *Baker v. Home Life Ins. Co.* 64 N. Y. 648; *Barreau v. Phoenix Mut. Life Ins. Co.* 67 N. Y. 595; *Graham v. Firemans Ins. Co.* 87 N. Y. 69, 74.

This general rule fully established in this State is in harmony with the general rule prevailing elsewhere.

Anderson v. Fitzgerald, 17 Jur. 995; *Caseneuve v. British Eq. Ins. Co.* 5 Jur. N. S. 1909; *S. C.* 6 Jur. N. S. 826.

II. The answer given by Dwight, to the question as to whether he had been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors, was untrue and it avoided the policy, and it was error to submit the question to the jury.

It involved only the construction of a written contract. It is the peculiar province of a court to construe written instruments and to declare their legal effect; and the submission of such questions to the jury is error.

Glacius v. Black, 87 N. Y. 563; *St. Luke's Home v. Association etc.* 52 N. Y. 191; *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 477; *Nash v. Drisco*, 51 Me. 417; *Roth v. Miller*, 15 Serg. & R. 100; *Shepherd v. White*, 11 Tex. 846; *Drew v. Towle*, 30 N. H. 531; *Thomas' Ezz. v. Thomas*, 15 B. Mon. 178; *Perth Amboy Mfg. Co. v. Condit*, 21 N. J. L. 659; *Brown's Admrs. v. Hatton*, 9 Ired. (N. C.) 819; *Williams v. Waters*, 36 Ga. 454; *Levy v. Gadsby*, 8 Cranch, 180 (7 U. S. bk. 2, L. ed. 404); *Welsh v. Dugar*, 3 Binn. 837; *Denison's Ezzs. v. Wertz*, 7 Serg. & R. 873, 876; *Short v. Woodward*, 13 Gray, 86; *Rhodes v. Chesson*, Busb. (N. C.) 836; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Lomer v. Meeker*, 25 N. Y. 362.

III. In the case of *Schuyllkill etc. Improvement Co. v. Munson*, 14 Wall. 442 (81 U. S. bk. 20, L. ed. 867), the court says: "Nor are judges any longer required to submit a question to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. * * * Formerly it was held that if there was what is called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule: that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed." P. 449 (L. ed. 872).

See also *Burke v. Witherbee*, 98 N. Y. 562.

The power to nonsuit results from the principle that the court is the judge of the law where there is no dispute about facts.

Pratt v. Hull, 13 Johns. 334; *Labar v. Koplin*, 4 N. Y. 547; *People v. Cook*, 8 N. Y. 75; *Milbank v. Dennistoun*, 21 N. Y. 386.

Mr. Isaac S. Newton, with **Mr. G. L. Sessions**, for respondents:

It is not clear that the intent of the parties to the contract of insurance was to make the exact truth of Dwight's statements a condition precedent to its validity. Such intent is necessary before plaintiffs can be held to the rule of a rigid warranty.

Moulou v. Am. Life Ins. Co. 111 U. S. 335 (Bk. 28, L. ed. 447).

Many of the questions asked in the application show that the defendant did not expect an application to warrant Dwight's answers to be exactly true, but only substantially so. It is unreasonable to suppose that the Company could expect an applicant forty years old to strictly warrant that he had never had any disease of the heart or any other important organ. A warranty to that extent was not within the contemplation of the parties.

Conn. Mut. Life Ins. Co. v. Union Trust Co. 112 U. S. 250, 257, 258 (Bk. 28, L. ed. 708, 711); *Home Mut. Life Assn. v. Gillespie* (Pa.), 1 Cent. Rep. 184. S. C. 15 Ins. L. J. 390.

N. Y.

The question: "Can you communicate any material fact in regard to the health of the party whose life is to be assured, or to the insurance contract, which has been omitted in the above questions?" shows that the "above questions" are aimed at material facts only.

Peasley v. Ins. Co. 15 Hun, 227.

The answers are "declared" not "warranted," to be fair and true in the "declaration" signed by the applicant, and are also referred to as "statements" therein. The courts lean in favor of the construction which makes a declaration or statement a representation rather than a warranty.

Bliss, Ins. § 55; *May, Ins.* §§ 164, 165.

What the Company calls representations the court has no right to elevate into warranties.

Ibid.; *Price v. Phoenix Ins. Co.* 17 Minn. 497 (10 Am. Rep. 166).

In *Burleigh v. Gebhard Ins. Co.* 90 N. Y. 220, while it was held that there was a warranty of no building within 100 feet of the insured property, it was likewise held that the reasonable intent only made the warranty applicable to such a building as increased the risk; and hence it was a question of fact whether the building was one that did increase the risk.

Grattan v. Metropolitan Ins. Co. 92 N. Y. 280, 281; *Home Mut. Life Assn. v. Gillespie* (Pa.) 1 Cent. Rep. 184; S. C. 15 Ins. L. J. 390; *Conn. Mut. Life Ins. Co. v. Union Trust Co.* 112 U. S. 250, 257, 258 (Bk. 28, L. ed. 708, 711).

Technical variances are held not to be within the intent of the parties.

Cushman v. U. S. Life Ins. Co. 70 N. Y. 72; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 411, 420, 421; *Ins. Co. v. Rudwig*, 11 Ins. L. J. 608; *Van Valkenburgh v. Am. P. L. Ins. Co.* 70 N. Y. 605; *Fitch v. Am. P. L. Ins. Co.* 59 N. Y. 557; *May, Ins.* § 164.

The evidence in regard to Dwight's selling liquor is hearsay, Dwight's mere declaration, his use of a single word, and is not conclusive; and it was for the jury to say what weight should be given to that declaration.

Mich. Carbon Works v. Schad, 88 Hun, 71, 75; *Stephens v. Vroman*, 18 Barb. 250; 2 Wait, L. & Pr. 381; 1 Greenl. Ev. § 201.

The question as to the truth of Dwight's answer in the inquiry in the application was a mixed question of law and fact and hence belonged to the jury.

3 Wait, Pr. 172, 174.

The question only called for such an engagement in or connection with a sale, etc., as increased the insurable risk.

Burleigh v. Gebhard Ins. Co. 90 N. Y. 220.

The above case is not distinguishable from the case in hand.

See also *Home Mut. Life Assn. v. Gillespie* (Pa.) 1 Cent. Rep. 184; S. C. 15 Ins. L. J. 390.

Defendant has not proven that Dwight's answer to the question in the application, as to his occupation, was untrue. Defendant had the affirmative and was bound to show its falsity before plaintiffs were required to prove anything.

79 N. Y. 230; 99 N. Y. 36, 42.

Ruger, Ch. J., delivered the opinion of the court:

At the close of the evidence on the trial the

defendant moved for a dismissal of the complaint, upon the ground among others that the uncontradicted evidence showed that the answers made by the assured to certain questions in the application for insurance were false and untrue and constituted a breach of warranty which avoided the contract.

The trial court denied the motion and the defendant excepted. A further motion was thereupon made for the direction of a verdict in favor of the defendant, upon the same grounds, which were also denied by the court and an exception was taken thereto.

The main question in the case, which we shall discuss, arose over the validity of these exceptions.

It was assumed both by the trial court and by the general term that by the terms of the policy the assured warranted the truth of the several answers referred to, and that therefore compliance with such warranty was a condition of the validity of the contract of insurance. This determination of the courts below was properly acquiesced in by the counsel for the respondents upon the argument before us, as it could not have been successfully questioned.

It must therefore be assumed in the further consideration of this case that any substantial deviation from the truth in the answers so given was material to the risk and constituted a breach of the terms of the contract, rendering the policy based upon such answers void. *Armour v. Transatlantic F. Ins. Co.* 90 N. Y. 450.

Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon or which they may consider necessary and proper to protect their interests, and which when made must be construed and enforced like all other contracts according to the expressed understanding and intent of the parties making them.

If an insurance policy in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties. *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253; *Footo v. Aitna Life Ins. Co.* 61 N. Y. 591; *Graham v. Firemans Ins. Co.* 87 N. Y. 69; *Armour v. Transatlantic F. Ins. Co.* *supra*.

Such contracts are open to construction, like all other contracts needing interpretation, but are subject to it only when upon the face of the instrument it appears that its meaning is doubtful or its language ambiguous or uncertain. May, Ins. 172.

An elementary writer says: "Indeed, the very idea and purpose of construction imply a previous uncertainty as to the meaning of a contract, for where this is clear and unambiguous there is no room for construction and nothing for construction to do." 2 Pars. Cont. 500.

The same author says "That courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law;" and quotes the language of Lord Chief Baron Eyre, in *Gibson v. Minet*, 1 H. Bl. 569, that "All latitude of construction

must submit to this restriction, namely: that the words may have the sense which by construction is put upon them." *Id.* 494.

In *Parkhurst v. Smith*, Willes, 332, Willes, J., says: "I admit that though the intent of the parties be never so clear it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them."

Addison on Contracts, p. 165, lays down the rule that "The judgment of the court in expounding a deed must be simply declaratory of what is in the deed. It has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used;" and "When the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain and common meaning of the words themselves; and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible." *Shore v. Wilson*, 9 Clark & F. 565.

In considering the language of an insurance contract, the words of a promise are to be regarded as those of the promisor, while those of a representation upon which the promise is founded are the words of the promisee and are to be taken most strongly against the party using them. May, Ins. § 175.

In view of the fact that these principles have been plainly disregarded by the courts below, we have thought it proper to refer more extensively to elementary authors than would otherwise have been deemed necessary. Their application will be seen by an examination of the situation of the case at the time the objectionable rulings were made.

Among the facts which the defendant deemed it important to know before entering into a contract of insurance with the deceased was his previous business and occupation. The materiality of truthful information in relation thereto was impressed upon the applicant by specific inquiries, and the requirement that truthful answers thereto should be made the condition of a valid contract.

With the view of eliciting the information desired, a series of questions was proposed to the deceased, embracing not only an inquiry as to his general business and occupation, but special inquiries as to certain particular trades and employments. Among those which we deem it important to refer to in this case were the following:

"A. For the party whose life is proposed to be assured, state the business carefully specified." Ans. "Real estate and grain dealer."

"B. Is this business his own or does he work for other persons and in what capacity?" Ans. "His own."

"C. In what occupation has he been engaged during the last ten years?" Ans. "Real estate and grain dealer."

"D. Is he now, or has he been engaged in or

connected with the manufacture or sale of any beer, wine or other intoxicating liquors?" Ans. "No."

An application dated August 28, 1878, containing the questions and answers stated was signed by Walton Dwight in his character of an applicant for insurance, and also in that of the assured, and was delivered by him to the defendant.

In pursuance of the request contained therein the defendant on August 28, 1878, delivered to the applicant the policy in suit containing, among others, these provisions: "This policy is issued and the same is accepted by the said assured upon the following express conditions and agreements: that the same shall cease and be null and void and of no effect * * * if the representations made in the application for this policy, upon the faith of which this contract is made, shall be found in any respect untrue."

Dwight died November 15, 1878, immediately before the payment of a second quarterly premium became due; and this action was commenced in April, 1879, about seven months after the delivery of the policy.

Upon the trial it appeared that Dwight was engaged in the business of keeping hotel at Binghamton, from May, 1874, until March, 1877, and that during that period he regularly and systematically sold wines and liquors, in bottles of various sizes, bearing the name of his hotel blown in the glass, to such of his guests as desired them. He kept a wine or liquor room in which was stored a large supply of wines and liquors; and each year while so engaged he applied, paid for and received, from the representatives of both the State and National Governments, licenses and permits authorizing him to carry on the business of selling beer, wine and liquors at retail, to be drank upon his premises. It also appeared that he kept no bar and did not sell to persons who were not his guests.

These facts were undisputed. Their absolute truth was assumed by the trial judge in charging the jury, and by the general term in passing upon the appeal to that court. That the answer given by Dwight to the questions (relating to the sale of liquor) was incorrect was admitted by both tribunals. That Dwight did not misconceive the meaning and intent of the question conclusively appeared from repeated answers made by him to other companies within three weeks prior to this time to similar questions in applications for other insurance in which he stated that he had kept a hotel for three years in which liquor was sold in packages.

Upon denying the motion for a nonsuit the trial court refused to pass upon the question as to whether the facts constituted a breach of warranty or not, but left it to the jury to say whether the sales of liquor proved to have been made were sales at all, within the intent and meaning of the contract. In this we think that the court erred, no question arising upon the evidence which authorized its reference to the jury. If there was any room for doubt in respect to the true meaning and intent of the inquiry answered by the deceased, it presented a question of law for the court to determine, and not one for the jury. *Lomer v. Meeker*, 25 N. Y. 361; *Glacius v. Black*, 67 N. Y. 563. But

we are of the opinion that no such doubt existed in the case.

The contract was in writing subscribed by the parties; and they expressed their agreement in clear, unambiguous and intelligible language. Its import and meaning was not obscured by any reference to the situation and circumstances surrounding the transaction, or by the consideration of other parts of the same instrument. On the contrary an examination of the context and associated questions make more certain and definite its object and intent. The assured had been previously interrogated as to his general business and employment and, it is to be assumed, had given such answers in respect thereto as satisfied the object of the inquirer.

He was then specially requested to state whether he was then or had been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors. The information called for was made material, not only by the express agreement of the parties, but also by the object for which it was required, plainly apparent from the nature of the transaction.

The question called for no opinion and was capable of a precise, definite and categorical answer. It was intentionally framed in broad and comprehensive terms, apparently to avoid any evasion of its object, but was nevertheless expressed in clear and unambiguous language. If an intention to inquire concerning the conduct of the regular or principal business of the assured could be implied from the use of the word "engaged," an idea that such was the only meaning of the question was negated by the further words "or connected with the manufacture or sale of any beer," etc., which pointed unmistakably to every transaction of the kind described, however limited its character or remote his connection with it might have been.

The motive prompting the question was reasonable, natural and proper, and apparent even to the most careless reader. The inquiry could not have referred to the general business employment of the insured, because inquiries on that subject had previously been exhausted and the question had no office to perform in that respect. It carried upon its face the object which the insurer had in making it, and required an answer as to whether the applicant was or had been engaged in or connected with the manufacture or sale of liquors, etc., not in a limited or restricted capacity or employment but in any and every way in which such acts could have been performed.

The question itself assumes that persons engaged in or connected with the manufacture or sale of liquors, in any manner, were more hazardous subjects for insurance than those occupied in more reputable employments, and that the insurer would regard such employment as an objection to the proposed contract.

The extent to which the employment affected the character of the applicant, or his value as a risk, was a question solely for the insurer. The defendant had a right to a full and frank disclosure of any and all facts bearing upon the subject, and this confessedly it did not obtain. It was misinformed as to the precise fact which

had been agreed upon as a fact material for it to know in determining the propriety of entering into the proposed contract and by the party who had assented to the proposition that such information should invalidate any contract made.

If the fair import of the language used indicates that the interrogator intended to include within its scope and meaning single transactions or incidental occupations, neither courts nor juries have authority to say that such transactions may properly be disregarded in the answer made. The defendant must be deemed to have meant what it said; and its express language embraces all transactions, and its express contract has made every transaction of the kind referred to material to the risk.

The legal effect of this contract can be avoided only by making a new one for the parties, or denying any significance to language. We are unable to see any ground upon which the ruling of the trial court can be supported.

The case of *Moulton v. Am. Life Ins. Co.* 111 U. S. 335 [Bk. 28, L. ed. 447], has been cited as tending to support the ruling. The question there arose under an exception to so much of the charge of the trial judge as stated that if the answers to certain questions in the application then under consideration were untrue, the policy was void, whether the assured knew them to be so or not. The court held that a consideration of the language of the whole policy rendered it doubtful whether it was intended to warrant the absolute truth of the answers in question, without regard to the good faith of the assured in making them, and therefore held as a question of law that the instructions were erroneous and the exception well taken. This decision undoubtedly accords with the well settled doctrine on the subject, but is not an authority upon the question here presented. See *Armour v. Transatlantic Fire Ins. Co. supra*.

When the terms and language of a contract are ascertained, its meaning and intent present questions of law only; and it is the duty of the court and not of the jury to determine and declare what that is. Parsons, in his work on Contracts, Vol. 2, p. 492, says that the first rule in the construction of contracts is "That what a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. If any one contract is properly construed justice is done to the parties directly interested therein. But the rectitude, consistency and uniformity of all construction enables all parties to do justice to themselves. For then all parties, before they enter into contracts or make or accept instruments, may know the force and effect of the words they employ, of the precautions they use and of the provisions which they make in their own behalf, or permit to be made by others. It is obvious that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or in other words is matter of law, and here arises the very first rule." This principle has been repeatedly approved and uniformly acted upon in the decisions of this court; *Groat v. Gile*, 51 N. Y. 431; *St. Luke's Home v. Association et al.* 52 N. Y. 191; *Glacius v. Black*, 67 N. Y. 563; *Arctic F. Ins. Co. v. Austin*, 69 N. Y. 470; and it is the

uniform doctrine of the cases and text books. *Levy v. Gadeby*, 3 Cranch, 180 [7 U. S. bk. 2, L. ed. 404]; *Short v. Woodward*, 18 Gray, 86; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Dennison's Exrs. v. Wertz*, 7 Serg. & R. 373; *Welsh v. Duar*, 8 Binn. 329; Add. Cont. 165, *et seq.*

It would seem, from the authorities hereinbefore referred to, that no questions affecting the interpretation of contracts can properly be submitted to a jury, except those arising upon conflicting evidence as to the terms of the agreement, or when extrinsic evidence raises some doubt over the identity of the subject matter, or of the claimants thereunder. Add. Cont. p. 165.

Instead of following the plain rule laid down in the authorities cited, the trial court assumed the existence of an ambiguity and referred the legal questions involved in the construction of the contract to the jury for their speculations. The logical effect of such a disposition was the holding that contracts expressed in the same language and executed under the same circumstances might legally be held valid in one locality and invalid in another according to the capricious and often conflicting opinions of juries.

The theory upon which the trial court submitted the case to the jury is implied from the circumstances pointed out in the charge for its consideration. Its attention was directed to the fact that Dwight kept no bar and did not sell liquor to people generally, but only to his guests and as an incident to the business of keeping a hotel; and from these facts it was impliedly advised that it was authorized to find upon this question for the plaintiffs. In other words, the jury was instructed that because the assured had not been engaged in or connected with the manufacture or sale of liquor, etc., in a particular way, he could truthfully represent that he had not been connected with it in any way; and if he did not sell to everybody, without limitation or exception, that he was justified in replying to the question that he did not sell to anyone. The fallacy of such a charge is too plain for argument.

The defendant was further prejudiced before the jury by the reference in the charge to the claim made by the plaintiffs: that the question was incapable of a truthful affirmative or negative answer, for it was said if Dwight had answered it affirmatively it would have been an admission of his connection with the manufacture of liquor, which concededly was not true; and it was implied therefrom that his only safe answer was a negative one.

This circumstance was pointed out to the jury as having a bearing upon the question, and it was impliedly authorized to find that the question was equivocal because not capable of a direct and positive answer. The reference was obviously misleading and erroneous, for the interrogatory being in the alternative could truthfully have been answered in the negative only in case the assured had been engaged in neither of the occupations referred to, and would have been answered truthfully in the affirmative if he had been connected with either.

This error was further aggravated by the refusal of the court, upon request, to charge that the question could be truthfully answered

in the affirmative if he had been connected with the sale of liquor. This refusal was clearly erroneous, and the exception taken there-to was well taken.

We are, for the reasons stated, of the opinion that this branch of the case presented no question for the jury, and the court erred in denying the motion for a nonsuit. *Lomer v. Meeker*, 25 N. Y. 361; *Appleby v. Astor Fire Ins. Co. supra*; *Glacius v. Black, supra*.

We are also of the opinion that the answers of the assured, to the questions relating to his business and occupation, were evasive and untrue and upon the whole evidence required the dismissal of the complaint. There was not only an absence of satisfactory evidence in the case that he had ever been engaged in the business of a real estate or grain dealer for himself, in the ordinary acceptance of those terms, but such an acceptance was negated by his repeated sworn declarations to the contrary and the proof of circumstances of the most convincing character. The evidence upon these questions is substantially all to the same effect, and presents a case so preponderating in character that a verdict against it could not be allowed to stand.

The case, therefore, presented a question of law as to whether the business engaged in by the deceased constituted him a dealer in real estate and grain, within the ordinary meaning of those terms.

Undoubtedly the *onus* of showing the falsity of the representations made by Dwight, in respect to his business and occupation, rested affirmatively upon the defendant; but when it had produced his sworn declarations, made but a few months previous to the representations expressly negating their truth, and the story of his life had been testified to, showing his constant employment in other occupations, it had overcome the presumption of truth existing in favor of the representations, and made a case calling for affirmative evidence to overthrow it.

The plaintiffs, although surrounded during the trial with relatives and friends of Dwight, who were acquainted with his history and appeared as witnesses and detailed his former occupation and employment, gave no such evidence. There is not a scintilla of direct evidence that Dwight had ever been in business as a grain dealer; and the circumstances of his life as disclosed by the proof show that he could not have been so employed. He had never resided at Chicago, the alleged theater of his dealings in grain, and had never been there, except for a short period in the spring and summer of 1878, during which he was a bankrupt, hopelessly in debt and precluded much of the time, by sickness, from engaging in any business.

The plaintiffs did not produce the slightest proofs of any such occupation, and the only evidence referring to it was Dwight's statement, made in a gasconading manner, to one of the defendant's witnesses in June, 1878, and incidentally appearing in evidence in which he said "that he had been to Chicago and just returned; that he went there to make some money and went into partnership with a couple of brothers who had money but no experience, and he had experience but no money, and he wanted to operate in grain. In two transac-

tions he cleared \$30,000, and was taken sick and his partners thought he made money so easy they could do the same; and while he was sick they in their operations lost the \$30,000 he had made, so that left him without a dollar."

This declaration was obviously not made to inform anyone as to his business but apparently with the object of exalting his own sagacity and shrewdness; and if it could be considered any evidence of his calling it was of the most inconclusive character, and showed that the business, whatever it was, had been abandoned in June, 1878, and never after resumed. It falls far short of being sufficient to authorize the finding of a jury that he was a grain dealer, or that he was on the 22d of August, 1878, and for ten years previous thereto had been such dealer.

There is no evidence that during the ten years previous to the application Dwight owned, bought, sold or dealt in real estate. It did appear that at some period of his life he had owned scattered parcels of wild land in three or four different States; but previous to the ten years referred to in the inquiry, he had caused this property, so far as it had any appreciable value, to be conveyed to his wife; and it was thereafter owned by her and generally employed as security for borrowing money upon, probably for the purposes of its improvement.

The evidence given to establish the falsity of the representations in question consisted largely of the sworn statements of Dwight, made between December, 1877, and March, 1878, in bankruptcy proceedings, in which he testified, among other things: "I think I opened the Dwight House in May, 1874. I furnished part of it then and ran it partly as a hotel, and rented part of it in the spring of 1875." "The only business I had was the Dwight House business and livery. The other business was my wife's business, although I had always kept it as my own account." "I kept no open bar; liquors were sold in packages. I should think I had some \$2,000 or \$3,000 worth of those when I opened the house; the stock was larger then than at any time afterwards; that included liquors I took out of my private house some \$600 or \$700 worth of liquors that were not invoiced. I kept wines, liquors and cigars all through my business." "I say the Dwight House was the only business I had as a regular business."

Q. When did the Dwight House open?

A. It opened in 1874; the 26th of May, I think.

Q. And closed when?

A. It closed the 8th day of March, 1877.

Q. I understand you made your settlement on your wife about when?

A. It was done in the latter part of June or July, 1868.

Q. From that time down to the time of the commencement of the Dwight House business, had you any business of your own?

A. I had not; not further than my lawsuits, general living and the like of that. I had no business of my own.

In addition to this explicit evidence of the untruthfulness of his representations, it appears from an examination of the application made by him for insurance during the month of

August, 1878, that his representations as to his business and occupation were quite contradictory and misleading.

On July 31, 1878, in his first application, he describes himself as a general dealer in grain and produce, and his place of business as being mostly in Chicago. In subsequent applications he quite uniformly describes himself as a real estate and grain dealer, but occasionally varies the description by statements that "it was formerly real estate." "Real estate and grain dealer always." "Formerly same, speculator, army, hotel keeper." "Formerly same as now." "Real estate and grain dealer always." "Real estate and grain dealer always; no change in occupation or employment." "Always been dealer in real estate and grain."

It is quite impossible to reconcile these various statements with each other or with the established facts of the case.

The history of his life, as related by himself, shows that from 1868 to 1878 the only business or occupation pursued by him in his own name was that of a hotel keeper. All allusion to this business is suppressed in the application in question. From 1868 to 1874 he was engaged in building upon and improving about thirteen acres of land in Binghamton; and if this afforded any justification for his description of business as a real estate dealer the conceded ownership of such property by his wife rendered the declaration that such business was "his own" untrue.

The trial court, in charging the jury, stated that Dwight's sworn declarations as to his business and occupation did not constitute an estoppel against the plaintiffs, as to the truth of such statements. This may be admitted to be correct, without invalidating their force as evidence of the facts stated. They did constitute evidence of such facts, and in the absence of countervailing evidence became conclusive upon Dwight's representatives as to such facts.

It is quite clear that these answers gave no information as to the actual employment and business of Dwight to the defendant, and would have been quite as correct and satisfactory if he had represented himself to be a geologist or professor of elocution.

We think it was clearly the duty of the trial court, upon this evidence, to have directed a verdict for the defendant.

It is claimed by the plaintiffs that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury.

We do not so understand the rule. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court, as contrary to the evidence, then it is the duty of the court to direct a verdict. *People v. Cook*, 8 N. Y. 67; *Wilds v. Hudson River R. R. Co.* 24 N. Y. 433; *Appleby v. Astor Ins. Co. supra*; *Kelsey v. Northern Light Oil Co.* 45 N. Y. 509; *Caggar v. Lansing*, 64 N. Y. 427; *Neuendorff v. World Mut. L. Ins. Co.* 69 N. Y. 392.

It was said in *Baulee v. N. Y. & Harlem R. R. Co.* 69 N. Y. 366, by Judge Allen, that "It is not enough to authorize the submission of a question as one of fact to the jury that there is 'some evidence.' A scintilla of evidence or a

mere surmise that there may have been negligence on the part of the defendant would not justify the judge in leaving the case to the jury," quoting from *Williams, J., in Toomey v. London B. & S. C. R. Co.* 3 C. B. N. S. 146. See *Culhane v. N. Y. C. & H. R. R. Co.* 60 N. Y. 136; *McKeever v. N. Y. Cent. & H. R. R. Co.* 88 N. Y. 667.

In *Hyatt v. Johnson*, 91 Pa. 300, *Justice Sterrett* says: "Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established;" citing *Ryder v. Wombwell*, L. R. 4 Exch. 39.

The rule held by the Supreme Court of the United States is expressed by *Mr. Justice Clifford* in *Schuykill etc. Improvement Co. v. Munson*, 14 Wall. 442 [81 U. S. bk. 20, L. ed. 867], as follows: "Nor are judges any longer required to submit a question to a jury, merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule: that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof rests."

To the same effect are *Pleasants v. Fant*, 22 Wall. 120 [89 U. S. bk. 22, L. ed. 782]; *Comrs. of Marion Co. v. Clark*, 94 U. S. 284 [Bk. 24, L. ed. 61]; *Griggs v. Houston*, 104 U. S. 553 [Bk. 26, L. ed. 840]; *Bailey v. Cleveland Rolling Mill*, 21 Fed. Rep. 159; *Wittkowsky v. Wasson*, 71 N. C. 451.

We think this a case where the conclusive character of the proof required the application of the rule, and that the court should have intervened to prevent a verdict upon evidence so insufficient to support it.

Many other questions arose under the various defenses presented upon the trial which would, if it were necessary to the decision of this appeal, be instructive and interesting to examine and discuss; but in the view we have taken it would be a work of supererogation to do so.

The questions arising over the defense that the whole scheme of insurance conceived and carried into effect by Dwight originated in a design to cheat and defraud the insurers, and the further allegation that Dwight's answer to the question, whether he ever had the disease of spitting blood, are among the most prominent of those presented upon the argument.

The circumstances of the case are quite extraordinary and unnatural and might well give rise to various and conflicting theories and conjectures, in the effort to account for its strange and abnormal features; but in view of the fact that a new trial must be ordered upon other grounds, it would serve no useful purpose to attempt to determine the questions raised thereby.

The judgments of the courts below are therefore reversed and a new trial ordered, with costs to abide the event.

All concur except **Danforth, J.**, dissenting, **Miller, J.**, not voting, and **Finch, J.**, taking no part.

Alfred N. BEADLESTON, *Appt.*,

v.

Mary E. BEADLESTON, *Respt.*

Held, on the facts, in an action of **divorce** where, before trial, an allowance had been ordered and paid to the wife for the expenses of her defense, that a further allowance, after the referee had reported against her and the plaintiff had moved for judgment, to pay expenses incurred in the past conduct of her defense, should have been refused.

(Decided October 29, 1886.)

APPPEAL from an order of the Supreme Court at General Term in the First Department, modifying and affirming as modified an order of the New York Special Term, made in an action for absolute divorce, granting defendant an additional allowance for expenses of the action. *Reversed.*

Memorandum of decision below, 39, Hun, 658.

The case is stated in the opinion.

Mr. Samuel Untermyer, for appellant:

There was no power in the court below to make the order appealed from, after the case had been decided adversely to the defendant; and the order is therefore appealable.

Collins v. Collins, 71 N. Y. 275.

Section 1769 of the Code of Civil Procedure only authorized an order directing the payment of money "necessary to enable the wife to carry on or defend the action." Her defense to the action had been completed and a decision rendered against her before the order appealed from was made.

The report of the referee was a final determination of the action, since his findings could not be reviewed by the special term.

Schroeter v. Schroeter, 28 Hun, 280; *Ross v. Ross*, 81 Hun, 141; *Goodrich v. Goodrich*, 21 Week. Dig. 264.

"Where the facts appearing upon an application for alimony *pendente lite* in an action for divorce are such that, on general principles of equity, the wife is not entitled to demand the same, the question of the granting thereof is one of law reviewable in this court."

Collins v. Collins, *supra*.

Mr. Eugene D. Hawkins, for respondent:

I. In actions for divorce the court may, in its discretion "during the pendency thereof, from time to time, make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, * * * having regard to the circumstances of the respective parties."

Code Civ. Proc. § 1769.

This power is constantly exercised.

Donnelly v. Donnelly, 68 How. Pr. 481; *Lee*

lie v. Leslie, 11 Abb. Pr. N. S. 811; *McQueen v. McQueen*, 61 How. Pr. 282; *Winton v. Winton*, 12 Abb. N. C. 159; *Green v. Green*, 8 Daly, 358.

II. At the time this additional allowance was made, no judgment whatever was entered. There was merely a report of the referee on file, to which exceptions had been filed, awaiting the action of the court. Until judgment thereon was rendered by the court, none existed and none whatever could be entered.

Code Civ. Proc. § 1229; Rule 77, Gen. Rules Pr.

The action of the court might be favorable to the report, or it might be adverse. The power to make orders for additional allowances is coextensive with the power to make orders for alimony. The power to make these two classes of orders is contained in the same section and sentence of the statute; and the decisions as to when there is such a final determination of the action as will stop alimony show the limit within which the court has power to make additional allowances for the counsel fee and expenses of the wife's defense.

"The rule as to payment of alimony is that the same is to be paid up to the entry of the final judgment, even if the decision of the trial should be adverse to the wife."

Moncrief v. Moncrief, 15 Abb. Pr. 188.

In *Green v. Green*, 8 Daly, 359, the court said: "The action is still pending and cannot be said to be finally determined, not only not until after the entry of the decree, but also not until the right to appeal therefrom has been lost by lapse of time or other cause." To the extent that the action is not finally determined until the entry of the decree, but is still pending, and an additional allowance for counsel fee may be granted, this case has not been overruled.

See also *Freeman v. Freeman*, 8 Abb. N. C. 174; *Germond v. Germond*, 1 Paige, 83; *Lovedon v. Lovedon*, 1 Phil. 208; *Stanford v. Stanford*, 1 Edw. Ch. 817; *Brinkley v. Brinkley*, 50 N. Y. 194.

III. The stay upon the entry of the judgment in the order appealed from was entirely proper under the circumstances, and within the power of the court to grant.

Miannay v. Blogg, 41 N. Y. 521.

IV. The sole question for consideration on this appeal is whether in granting the order appealed from the court exceeded its power.

By section 190, subd. 2 of the Code of Civil Procedure, the court of appeals has no jurisdiction to review a discretionary order. Its jurisdiction to hear appeals from orders is limited to those which are not discretionary.

Kennedy v. Kennedy, 73 N. Y. 873; *Witkowski v. Paramore*, 98 N. Y. 470; *Anon.* 59 N. Y. 315; *Martin v. Windsor Hotel Co.* 70 N. Y. 108; *De Llamosas v. Llamosas*, 62 N. Y. 618; *Security Bank v. Nat. Bank*, 48 How. Pr. 137.

V. In *De Llamosas v. Llamosas*, 62 N. Y. 619, it was held that no testimony was needed to fix the amount of an allowance "that the court could determine, from its own experience and from the facts and circumstances of the case as they appeared to it from the pleadings and other papers and proceedings, what was a reasonable fee."

See also *Green v. Green*, 8 Daly, 359.

VI. The fact that the referee's report is against the defendant has no bearing whatever upon the propriety or the amount of the allowance to be ordered by the court to enable her to pay her counsel for the services and expenses of the defense. The counter charges are by statute a legitimate and proper part of her defense.

Code Civ. Proc. § 1758.

Earl, J., delivered the opinion of the court:

The plaintiff commenced this action against the defendant for an absolute divorce, on the ground of her adultery. She recriminated in her answer, and denied the charges made against her. The cause being at issue was referred to a referee to hear and determine the same; and he, after hearing the evidence, made his report, wherein he finds the defendant guilty of the adultery charged, and the recriminating charges untrue, and he ordered judgment in plaintiff's favor.

Before the trial of the action the court, upon motion of the defendant, made her an allowance, besides alimony, of \$1,000 for the payment of counsel fees and other expenses in making her defense. That allowance the plaintiff paid.

After the report of the referee, the plaintiff moved for judgment thereon, and the defendant moved for a further allowance to pay her expenses, including counsel fees incurred in the defense of the action, and all plaintiff's proceedings were stayed until her motion could be heard and determined.

In her moving papers the defendant did not claim that she needed any allowance to oppose plaintiff's motion for judgment; but her sole claim was that she needed it to pay expenses theretofore incurred, and for that purpose the court at special term granted an allowance of \$3,500.

Upon appeal by the plaintiff to the general term, the order of the special term was modified by reducing the sum allowed to \$2,500, and as thus modified it was affirmed. The allowance was not claimed at any time, nor granted, upon the ground that it was necessary to enable the defendant to carry on her defense to the action.

We think the allowance was unauthorized. The authority to make such an allowance during the pendency of the action rests entirely upon the statute (Code, § 1769), which provides that the court may, during the pendency of the action, "from time to time make and modify an order or orders, requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action."

The purpose of the statute is to furnish the wife means to carry on her action or to defend the same during the pendency thereof. The allowance looks to the future. There can be no necessity for an allowance to make a defense which has already been made, or solely to pay expenses already incurred.

There is ample power in the court to make allowances from time to time to enable a wife to carry on her defense, and when she needs money for that purpose she must apply for it. But if she has succeeded in making her defense from her own means, or upon her own credit,

she cannot before judgment, while the action is pending, have an order compelling her husband to pay such expenses; and there is no statutory authority in the court to make such an order and thus to compel him to pay her debts.

We confine our decision to the precise facts of this case as they appear in the record. We have no doubt that an allowance to a wife, during the pendency of the action for some past expense, might be authorized if it were shown that its payment was necessary to enable her to further carry on the action, or her defense thereto.

The orders of the Special and General Terms should be reversed and motion denied.

All concur except **Ruger, Ch. J.**, and **Danforth, J.**, dissenting.

Mary WIEDMER

v.

NEW YORK ELEVATED R. R. CO.

An appeal lies directly to the court of appeals from a judgment entered on a verdict after a decision by the general term reversing an order granting a new trial, and from the order of reversal.

(Decided October 12, 1886.)

MOTION by plaintiff to dismiss defendant's appeal. *Denied.*

Action for damages for personal injuries alleged to have been caused by the negligence of defendant.

Reported below 24 N. Y. Week. Dig. 431.

Upon the trial at the New York Circuit, at the close of plaintiff's case defendant moved to dismiss. The motion was denied and defendant excepted and, relying upon its exception, offered no evidence. The case went to the jury, who found a verdict for plaintiff. Thereupon defendant moved the trial judge to set aside the verdict as contrary to the evidence, etc., which motion was granted and a new trial ordered.

On appeal by plaintiff the general term reversed the order granting a new trial. No judgment had up to that time been entered. The opinion of the general term, and the order of reversal entered in accordance therewith, did not in terms direct entry of judgment on the verdict, but, probably through inadvertence as to the state of the record, stated that the judgment was affirmed. After the verdict was restored by the decision of the general term, plaintiff entered judgment thereon. From this judgment and from the order of reversal the defendant appealed to the court of appeals, and the plaintiff moved to dismiss the appeal.

Mr. Jacob A. Gross, with **Mr. David Levy**, for the motion:

The attempted appeal from the order is not authorized by subdivision 2 of section 190 Code Civ. Proc.

See *Dodge v. Mann*, 85 N. Y. 643.

The judgment in question has not been reviewed by the general term and hence no appeal from it lies to this court.

Code Civ. Proc. § 190; *Dodge v. Mann*, 85 N. Y. 643; *White v. Del. etc. R. R. Co.* 41 N. Y. 520; *New York, etc. R. R. Co. v. Schyler*, 34 N. Y. 81.

The direction of the general term order that the judgment be affirmed is mere surplusage, the appeal pending before that tribunal being from the order setting aside the verdict; and as no judgment had been entered thereon, there was none in this respect to be affirmed.

Mr. Howard Townsend, with Messrs. Davies & Rapallo, contra:

Cited *Cook v. Floating Dry Dock Co.* 18 N. Y. 229; *Julian v. Rathbone*, 39 N. Y. 869; *Eaton v. Erie R. Co.* 51 N. Y. 546; *Caughey v. Smith*, 47 N. Y. 244.

Danforth, J., delivered the opinion of the court:

Motion to dismiss appeal from the judgment and order is put upon the sole ground that this court has not jurisdiction. The contrary is well settled. 39 N. Y. 869; *Beecher v. Conradt*, 11 How. Pr. 181.

The motion should be denied.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.

Oscar F. BECKWITH, *Appt.*

1. To constitute **manslaughter** there must have been **no design to kill**. If such design be present, the offense is murder in one of its degrees.
2. For the existence of the **deliberation required to constitute the statutory crime of murder in the first degree** the time need not be long and may be short. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled.
3. In a case of homicide, **held**, that the facts disclosed the existence of a **design to kill** and of **premeditation and deliberation** sufficient to warrant a conviction of murder in the first degree.

(Decided October 26, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Columbia Oyer and Terminer on conviction of defendant of murder in the first degree. *Affirmed.*

Memorandum of decision below, 40 Hun, 638

The general facts of the case were as follows:

The deceased Simon A. Vandercook approached and entered the defendant's cabin where, in a struggle with the defendant or otherwise, he was stabbed by defendant with a knife, which wound, either of itself or with other injuries inflicted upon him by the defendant with an ax, caused his death. The defendant at once proceeded to mutilate the body in a revolting and inhuman manner, actually destroying some portions of it by burning. He immediately and before the homicide was known, fled and remained absent for about three years, when he was discovered in Canada

N. Y.

bearing a fictitious name, and from whence he was brought back to answer the charge laid against him in the indictment. Articles identified as having belonged to the deceased were found in his possession. It was also proved that he entertained unfriendly feelings toward the latter, with whom he had unsatisfactory business relations in reference to a mine in which both were interested, and the prisoner claimed that Vandercook attempted to poison him a few days previous to the date of the killing.

It was proved that the prisoner had expressed a desire that some one would put the deceased out of the way, and that it would be to the pecuniary advantage of one to do so.

The physician who examined Vandercook's remains testified that the wound inflicted with the knife was in his opinion inflicted before death occurred, inducing a possible inference that the immediate cause of death was because of the injuries inflicted with the ax. He also testified that such wound would not necessarily cause immediate death, although if not given attention it would eventually prove fatal.

As bearing upon the question whether there was a struggle between the parties, as was asserted by the defendant, the physician stated that the wound with the knife was apparently made by one coming up behind, although it might have been inflicted by one in front reaching over.

The defendant gave exculpatory evidence in his own behalf, to the effect, as claimed by him, that he acted simply and solely in self defense. He testified that Vandercook came into his cabin unbidden and against his will, by actually breaking the door fastenings; that he ordered Vandercook out, saying he was afraid he would poison him again; that Vandercook expressed regret that the poison failed of its purpose; that the prisoner applied to Vandercook an opprobrious epithet, to which the latter replied, and that an altercation immediately ensued accompanied by a blow from the deceased, followed at once by a scuffle and struggle between them; that Vandercook seized a stick of wood, and there was a further struggle for its possession; that Vandercook was getting the advantage, pushed him against the wall, and seized him by the throat, whereupon he (defendant) reached out, took a butcher knife from a shelf, passed it to his other hand and used it; that this caused Vandercook to stagger a little; he added:

"We then had a kind of scuffle, then a little and I was a little the best for him about that time; got him down and choked him awhile, * * * I guess he did not get up very far; I don't think he did; I don't think he ever did get up very far; I hung onto him and choked him some time; I finally found that he was about past recall; I let him go; I was afraid I had killed him."

His cross examination on this matter was as follows: Q. It is not true that Mr. Vandercook started for the door and you struck him on the head with an ax? A. No sir; not then. Q. When was it? A. When he fell I jammed him over near the door perhaps two feet; I don't know how far from the door; about that time I used the ax. Q. Where did you use it on him? A. On his skull; blood flew up against the door.

Q. Was not he in such condition, after the stab with the knife, that you could have handled him without this blow from the ax? A. I don't know whether it was so or not. Q. Did not stop to find out? A. No sir. Q. You could have handled him without crushing in his skull with an ax after that blow with a knife? A. I don't know. Q. You did not care? A. I did not care much about it, one way or the other; I considered I had a right.

The question presented, together with other portions of the evidence, are stated in the opinion.

Mr. L. F. Longley, for appellant:

Where, as in this case, there is evidence of an altercation and attack by the deceased upon the defendant, previous expressions of ill will on the part of the defendant, even if amounting to threats, will not alone furnish evidence that the homicide was committed in pursuance of a deliberate purpose. There must be some act of defendant indicating his purpose preceding the killing.

People v. Hovey, 29 Hun, 882; *Sindram v. People*, 88 N. Y. 196; *People v. Majone*, 91 N. Y. 211; *People v. Cornetti*, 92 N. Y. 85; *Leighton v. People*, 10 Abb. N. C. 261; 2 Stark. Ev. p. 948.

It was held in *Stokes v. People*, 53 N. Y. 164, that under the statute classifying homicide, mere proof that one has been deprived of life by the act of another fails utterly to show the class to which the homicide belongs.

The prisoner may, in certain instances, extenuate his crime and reduce it from murder to manslaughter, by proof that the act was committed during a transport of passion and resentment, excited by sudden provocation which for the time subdued his reason. What degree of provocation and under what circumstances, heat of blood, the *furor brevis* will or will not avail the defendant, is usually a question of law, arising upon the special facts of the case.

Roscoe, Cr. Ev. 964.

It is the nature of the provocation and not the mere effect of it on the mind of the prisoner, which the law regards; and the sufficiency of the provocation to extenuate the prisoner's guilt is a question of law. If one kill another immediately upon a grave and serious provocation, likely to excite great passion, the offense will amount to no more than manslaughter, although the defendant used a deadly weapon.

Id. 965.

"Where, after mutual combat, a question arises whether there has been time for excited passions to subside, the question always takes this form; whether there had been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger."

People v. Sullivan, 7 N. Y. 400.

"The indulgence which is shown by the law in some cases to the first transport of passion, is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason."

1 Russ. Crimes, p. 518, and cases cited.

"Death in the course of mutual combat, though in some cases it amounts to murder, is generally found to constitute manslaughter only."

186

Roscoe, Cr. Ev. 640.

There is no evidence of any time for passion to cool.

Id. 714; *Leighton v. People*, 88 N. Y. 117.

There is no legal evidence of the deliberate and premeditated design required (Penal Code, § 188) in the definition of murder in the first degree, and which is an element in the *People's Case* necessary to be established affirmatively.

If Vandercook was dead before the blow with the ax was struck, as may fairly be inferred from the defendant's testimony, when he swears that he choked the deceased until he was about past recall before striking him with the ax (on this point as on every other, he is entitled to the benefit of the doubt), this case is within section 205 of the Penal Code, defining justifiable homicide, for it will be remembered that the deceased had broken into his dwelling by violence, had refused to go out when ordered, and after striking defendant with his fist, seized a billet of wood and attacked him with that.

1 Russ. Crimes, p. 662; Roscoe, Cr. Ev. p. 710.

Mr. A. B. Gardenier, Dist. Atty., for the People:

The court plainly submitted to the jury the question whether the blow with the ax was necessary to the defense or protection of the life or person of the prisoner when it was administered, and they found that it was not necessary, by their verdict.

The rule is that if a fatal blow be struck in self defense, the homicide is not justifiable unless the prisoner first retreated as far as possible.

People v. Harper, 1 Edm. Sel. Cas. 180; *Shorter v. People*, 2 N. Y. 198; *Foster v. People*, 50 N. Y. 609.

A man is presumed to intend the natural consequences of his act.

Phillips, Ev. p. 632.

In *People v. Conroy*, 2 N. Y. Crim. Rep. 532, this court held: "Where the inferences to be drawn from the testimony are not clear and incontrovertible, and men of ordinary judgment and discretion might differ as to its significance, it is the exclusive province of the jury to pass upon the question involved." Citing:

Thurber v. Harlem R. R. Co. 60 N. Y. 331; *Morrison v. Erie R. Co.* 56 N. Y. 308.

It was said by Judge Johnson in *People v. Clark*, 7 N. Y. 393: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design is formed at the instant of striking the fatal blow or whether it be contemplated for months."

In *Leighton v. People*, 88 N. Y. 117, Judge Danforth says: "If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome, a choice made as the result of thought, however short the struggle between the intentions and the act, it is sufficient to characterize the crime as deliberate and premeditated murder."

See also *People v. Majone*, 91 N. Y. 211; *People v. Conroy*, 97 N. Y. 62-76; *People v. Kiernan*, 4 N. Y. Crim. Rep. 88; *S. C.* 2 Cent. Rep. 99; *People v. Jones*, 3 N. Y. Crim. Rep. 252.

It is submitted that the supreme court alone exercises the powers conferred by section 527

of the Code of Criminal Procedure; and unless exceptions have been regularly taken to the rulings of the trial court, claimed to be erroneous, this court will not review.

People v. Donovan, 4 N. Y. Crim. Rep. 86; *S. C.* 1 Cent. Rep. 802; *People v. Hovey* and *People v. Boas*, 92 N. Y. 554, 560.

Finch, J., delivered the opinion of the court:

That the prisoner killed the deceased by the blow of an ax he himself has testified. While the jury were not bound to believe his account of the struggle and its origin, and might well have doubted it, as in many respects improbable and unreasonable, yet, if they gave it credence, it furnished, in connection with the other evidence, sufficient ground for the verdict which they rendered.

The argument before us was largely devoted to the point that the final blow was delivered at the close of a furious struggle and before sufficient time had elapsed for the prisoner's passions, engendered by the conflict, to subside and cool; and so the crime was manslaughter only. But that grade of homicide is marked by the important characteristic that there is no design to kill. If such purpose be present the offense is murder in one of its degrees. The evidence very clearly shows the existence of that design.

Granting all that the prisoner says of the struggle, yet it is apparent that while the blow of the knife might have been given in the heat of the affray, and without a purpose to kill, the blow of the ax admits of no such explanation. That was struck when the struggle had ended, and the victim lay paralyzed and unresisting. The knife had penetrated the lung, and weakened him perceptibly, and the prisoner had choked him until, to use his own expression, he was "about past recall," and then, with no danger remaining, his own personal safety assured, and abundant opportunity to escape from the cabin without injury, or hand the assailant over to justice, he nevertheless "let go" of his antagonist, rendered helpless and harmless, went after and obtained his ax, and with it ended the life not yet destroyed by the blow of the knife and the choking which followed.

The weapon was selected and the blow was struck with a palpable design to effect death. No other inference is reasonable. If we assume, what the evidence does not show, and the prisoner does not say or pretend, that the ax was near at hand and easily and swiftly grasped, and the knife had been dropped in the struggle, which also is wholly unproved, it is still true that the conflict was at an end and the prisoner himself says: "I let him go; I was afraid I had killed him."

That was a natural fear, and the presence of such an emotion, the shock of discovering that he had endangered the life of his adversary is quite inconsistent with the continuance of frenzy and rage. The passion of the fight was probably replaced by the fear of consequences naturally born of the condition of the deceased. Scarcely anything would cool the prisoner's anger more swiftly than the sight of the dying man on the floor and the consciousness of having perhaps killed him; for one strong emotion drives out another. That fear of consequences, he tells us, came into his mind

and following it seems to have arisen an evident purpose to evade those consequences by making sure of the death of his enemy, and proceeding to mutilate and destroy the body, with a view to escape detection. And so the ax was wielded with a settled design to kill.

There was some degree, also, of premeditation and deliberation. The process of reasoning which the prisoner's own words suggest shows that he deliberated. He reflected enough to be conscious that his victim was in danger of death; enough to feel an emotion of fear for the consequences to himself; enough to decide that it was safer to finally kill him than run the risk of his recovery, or his death lingering and discovered; enough to select and choose the ax as the surest weapon, instead of the knife which he had already used; and then, having inflicted death, to proceed coolly to the logical end of his deliberation by burning so much of the body as could be identified, by taking from the pockets of the dead man whatever would reveal his name, by a thoughtful preparation for flight, by escape into Canada, and concealment under a false name. When he was asked why, when further violence was unnecessary for his own defense, he persisted in the work of killing his antagonist, he answered first that he did not know what he was about, but finally said: "I thought I had a right."

Ordinarily we are compelled to infer the intent from the nature and surroundings of the act, and these alone in this case would furnish a sufficient answer; but the prisoner himself reveals two of the thoughts that arose in his mind, and with their aid we can quite accurately ascertain the rest. As he looked upon the result of his action, there came a consciousness of what he had done, and with that consciousness a shock that would sober almost any rage. Then arose the fear that his victim might linger and die, and he himself be detected and punished. How to avoid that result was the natural sequence of his thoughts; and then came the other reflection of which he tells us, brutal and ignorant it may be, but with which he braced his nerves and hardened his courage for the final act: that he "had a right" to kill the man, who was not yet dead, and so avoid detection and punishment. Then followed the choice of a weapon. The knife which he had just used would naturally come first to his mind; but he either sees or remembers his ax and chooses that as the more effective weapon of the two, and possibly also because he had then in mind a mutilation of the body which would prevent identification. In all this there is very much more than impulse or an unreflecting blow. There is thought, choice and plan.

The rule as to deliberation and premeditation has been stated so often as to have become familiar. The time need not be long and may be short. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled. The jury were justified in their conclusion that there was a deliberate and premeditated design to kill, even though they

credited the prisoner's account of the affray. But they may have disbelieved it entirely. Why should Vandercook, on finding the cabin door barred, proceed to force an entrance? What foundation was there for an accusation of poisoning? When Beckwith made that accusation Vandercook is represented as having admitted it, and as coolly expressing his regret that it failed of its purpose because Beckwith threw it off of his stomach. If there was any quarrel between these men it was about the mine; that was their sole cause of hostility; and yet neither mentions it at all, or broaches the subject by a word. On the contrary, Beckwith calls Vandercook by an opprobrious epithet as far away as possible from the subject of difference, and thereupon the latter, who had borne without emotion the charge of attempted murder, flames into a rage at being called a "whoremaster" and resorts to violence.

In relating what occurred, as a witness, the prisoner at first on his direct examination conceals the fact of a blow with the ax given after the close of the struggle, and confesses it only when pressed by the cross examination. After that blow he admits that he cut Vandercook's throat and pulled out his tongue. The atrocity of the act is here said to indicate frenzy; but the prisoner gives a different and very strange explanation, saying that it was "same as the masons do; that is the penalty they have to inflict on one another."

The answers that he made often had about them a tone of brutality, of cold unconcern; and the jury may very well have disbelieved his story of an affray and reached their conclusion with little trust in the prisoner's explanation. In that view of the case they had before them the quarrel about the ownership of the mine which had developed in the prisoner a considerable degree of hostility; his repeated threats to put his enemy out of the way, and his tempting another to murder, with the suggestion of the money to be gained from the man he hated; the opportunity offered by Vandercook's presence in the solitary cabin hidden in the ravine and little exposed to observation; the thrust of the knife indicating a blow struck from behind; the chopping of the body into fragments and burning whatever could be identified; the falsehood told to explain Vandercook's absence, and the final departure and flight; these facts taken together tend to the conclusion which the jury reached.

The grade of the crime was a question of fact for their determination acting under proper instructions as to the law. There is no complaint of those instructions, and the verdict rendered on the question of fact it would be our duty to respect, even if it bred in us a doubt—which we do not feel.

The request to discharge the juror, Neir, after he had been accepted and sworn was by the statute within the discretion of the trial judge. Code, Crim. Proc. § 871.

That discretion was not at all abused, and if we were at liberty to review it, we should feel that it was not unwisely or improperly exercised.

Discovering no error in the record, our duty is to affirm the conviction.

The judgment must be affirmed.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.

Lipman ARENSBERG, *App't.*

1. It is essential, to create the offense prohibited by Laws 1885, chap. 183, § 7, as amended by chapter 458, that the article not produced from milk or cream, the manufacture and sale of which is forbidden, should be in imitation or semblance of butter.
2. Whether "oleomargarine" is or is not, in a given case, an imitation of butter, is a question of fact.

(*Earl, J. dissenting*, discusses the constitutionality of the Act.)

(Decided October 29, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Court of Sessions of Kings County on conviction of defendant of selling oleomargarine. *Reversed.* Reported below, 40 Hun, 358.

Statement made by *Earl, J.*, prefatory to his dissenting opinion:

The defendant was indicted and convicted for selling oleomargarine at the City of Brooklyn, in this State, in violation of section 7 of chapter 183 of the Laws of 1885, as amended by chapter 458 of the same year.

Upon the trial a witness, who described himself as a state dairy expert, testified as follows: that the defendant was engaged in the business of manufacturing oleomargarine; that on the 16th day of July, 1885, he bought of him personally three tubs of oleomargarine; that he asked for oleomargarine and bought it as such, and that he subsequently delivered a sample of it to Mr. Gladding, who was also called as a witness and testified that he was a chemist; that the sample delivered to him by the previous witness was of a yellow color resembling butter; that it was composed of animal fat, or animal or vegetable oils, not produced from unadulterated cream; that he did not know the particular substance used to give it color, but that a coloring substance had been used; that he was acquainted with oleomargarine and its ingredients, and that in its pure manufacture it has a dull, pearl white color, resembling tallow. On his cross examination he testified that the article was probably made of tallow or of lard or of a mixture of both, and that it was composed of the same things as are found in milk, except that in milk they are combined with other things and in different proportions; that it contained all the ingredients found in pure butter, but in different proportions and differently combined.

Another witness, a chemist, called on the part of the People, gave similar evidence.

When the defendant began to call his witnesses, the trial judge announced that he would hold that any affirmative testimony on his part as to the qualities of oleomargarine or its constituent parts was inadmissible, unless he proposed to show that it was made from pure unadulterated milk or cream.

The defendant called an expert chemist and

asked him: "What is the difference between oleomargarine and butter, if any?" The plaintiffs objected to this, and on the admission of defendant's counsel that he did not pretend that the article sold by the defendant was made of unadulterated milk or cream, the judge again stated that he should exclude all affirmative testimony on the part of the defendant as to the constituents of the oleomargarine, as to its manufacture and healthfulness or otherwise, and he excluded the question.

The witness was then asked to look at the sample of oleomargarine produced by the plaintiffs and state "whether it is not butter." This was objected to by the plaintiffs and excluded. The following questions were then put to the same witness, and all, on the objection of plaintiffs' counsel, were excluded: "Look at that (Gladding's analysis of the specimen of oleomargarine), and state whether or not the ingredients which go to make up that compound are not in themselves separately and in the compound, wholesome articles of food." "State whether an article made of these separate ingredients would or would not constitute a healthful and cleanly article of food." "You have stated that the article we have spoken of as oleomargarine had been invented by a Frenchman in 1870 or 1871; will you state, if you please, whether since that time this article has been used extensively all over the world as an article of food?" "Will you state whether there is or is not in this composition, any thing which is not found in butter?" "Is there anything in butter which is not found in this article?" The same questions were also put to Professor Chandler, an expert chemist, and excluded.

The defendant was sworn as a witness on his own behalf, and testified that he had been in the oleomargarine business for about five years; that there was a large sign with the word "Oleomargarine" thereon on the outside of his place of business, and that he had there machinery and property employed in that business. He was then asked the following questions, which, on the objection of plaintiffs' counsel, were excluded: "What was the value of that machinery and property on the 80th day of April, 1885?" "What would be the value of that machinery and property in case you were not allowed to use it in the manufacture of oleomargarine?" He then offered to prove that the article in question "is a form of butter made otherwise than by the natural process." Plaintiffs' counsel objected to this on the ground that "the offer is not to prove that the product is made from substances other than those prohibited by section 7 of the statute," and the evidence was excluded.

The counsel for the defendant requested the judge to direct the jury to acquit him, on the ground that the statute under which he was indicted was unconstitutional, and also on the ground that the statute was aimed only at fraud, and that here there was no evidence of any fraud. The judge denied the request, and then charged the jury "that this is a valid and constitutional law; that if you believe that the defendant did sell this article called oleomargarine, and that it was not a production of pure, unadulterated milk, or cream of the same,

then he committed an offense under the law. The simple question for you to decide is, Did this defendant, or did he not, sell an article known as oleomargarine? and was that article made of pure, unadulterated milk or cream of the same? If he did so sell that article, and if it was not so made, he is guilty of the violation of this statute, which I again charge you is a valid and constitutional law." Proper exceptions were taken to this portion of the charge and to all the rulings against him.

The jury found him guilty, and his conviction having been affirmed at the general term, he appealed to this court.

Mr. F. R. Coudert and Wheeler H. Peckham, for appellant: Claimed that the charge of the court, that if the defendant sold an article called oleomargarine as such and it was not manufactured from milk or cream, the defendant was guilty under the third count, was error; and also claimed that the statute under which defendant was indicted was open to the same objections as that held invalid in *People v. Marx*, 99 N. Y. 877.

Messrs. Edward B. Thomas and W. P. Quinn, for respondents:

I. The appellant was not indicted for having made or sold an article "designed to take the place of natural butter." The words, "or designed to take the place of" can be separated from the other provisions of the section. They do not therefore affect the validity of the balance thereof. In the amendments to the law enacted since the one under which the defendant was indicted they have been omitted. No one has ever been indicted for having made or sold an article "designed to take the place of natural butter" which was not "an imitation or semblance thereof."

Village of Deposit v. Vail, 5 Hun. 318; *Re De Vaucene*, 81 How. Pr. 343; *People v. Briggs*, 50 N. Y. 566; *People v. Kenney*, 96 N. Y. 802; *Duryee v. Mayor*, 96 N. Y. 491; *People v. Marx*, 99 N. Y. 388; *People v. Cipperly*, 1 Cent. Rep. 804; Cooley, Const. Lim. 178.

Without the words "or designed to take the place of," section 7 under which the appellant was convicted prohibits the manufacture from the forbidden ingredients and in the manner stated therein of any article "in imitation or semblance of natural butter produced from pure unadulterated milk or cream of the same," it being sold, kept for sale or offered for sale, whether made in this State or elsewhere.

No guilty knowledge or intent to deceive is required to constitute a violation of the section.

U. S. v. Bayaud, 16 Fed. Rep. 384; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Smith*, 108 Mass. 445; *Commonwealth v. Wentworth*, 118 Mass. 441; note to *Farrell v. State*, 30 Am. Rep. 617, 620; *Carroll v. State*, 38 Alb. L. Jour. 9.

Decisions in our courts are in accord with these authorities.

Baker v. Richardson, 1 Cow. 77; *Morris v. People*, 8 Denio, 403; *Rogers v. Jones*, 1 Wend. 288; *Perry v. Edwards*, 44 N. Y. 225; *People v. Cipperly*, 37 Hun, 820, 823.

II. The police power of the State Legislatures has been the subject of numerous decisions by the various courts of the United States.

See *New Orleans Gas Light Co. v. Louisiana*

Light etc. Co. 115 U. S. 651 (Bk. 29, L. ed. 516); *Beer Co. v. Mass.* 97 U. S. 83 (Bk. 24, L. ed. 989); *Slaughter House Cases*, 88 U. S. 62 (Bk. 21, L. ed. 394); *Munn v. Illinois*, 94 U. S. 125 (Bk. 24 L. ed. 77); *Commonwealth v. Alger*, 7 Cush. 85; *State v. Addington*, 12 Mo. App. 221; *Metropolitan Bd. Excise v. Barrie*, 84 N. Y. 666.

The authority to suppress any trade which is injurious to the public health, welfare or morals is recognized in *Wynehamer v. People*, 18 N. Y. 413, 451, 459, 474, 486.

Under it, States have prohibited intoxicating liquors.

Bartemeyer v. Iowa, 85 U. S. 129 (Bk. 21, L. ed. 929); *Beer Co. v. Mass.* 97 U. S. 25; (Bk. 24, L. ed. 989); *Metropolitan Bd. Excise v. Barrie*, 84 N. Y. 666.

The killing or possession of game during certain seasons has been forbidden.

Phelps v. Racey, 60 N. Y. 10.

Slaughter houses have been regulated and excluded in villages and cities.

Metropolitan Bd. Health v. Heister, 87 N. Y. 663; *Cronin v. People*, 82 N. Y. 823; *Slaughter House Cases*, 16 Wall. 36 (83 U. S. bk. 21, L. ed. 394).

Laundries have been controlled and work therein forbidden after certain hours.

Barbier v. Connolly, 118 U. S. 27 (Bk. 28, L. ed. 928); *Soon Hing v. Crowley*, 118 U. S. 703 (Bk. 28, L. ed. 1145).

Warehouses have been regulated.

Munn v. Illinois, 94 U. S. 113 (Bk. 24, L. ed. 77).

The price of water and gas has been fixed and exclusive privileges to supply the same to villages and cities given to corporations.

New Orleans Water Works Co. v. Rivers, 115 U. S. 679 (Bk. 29, L. ed. 525); *New Orleans Gas L. Co. v. Louisiana Light etc. Co.* 115 U. S. 680 (Bk. 29, L. ed. 516); *Spring Valley Water Works v. Schottler*, 110 U. S. 847 (Bk. 28, L. ed. 178).

The weight and price of bread have been fixed.

Mobile v. Yuille, 8 Ala. N. S. 140; approved in *Munn v. Illinois*, *supra*.

The intermarriage of white and colored people has been forbidden.

State v. Jackson, 80 Mo. 177; *Pace v. Alabama*, 106 U. S. 585 (Bk. 27, L. ed. 207).

The observance of the Sabbath has been compelled.

Neuendorff v. Duryea, 69 N. Y. 563.

Police laws are not unconstitutional because they impair property or interfere with its full enjoyment or individual rights.

Thorpe v. Rulland & B. R. R. Co. 24 Vt. 149; *Watertown v. Mayo*, 109 Mass. 815; *Hill v. Thompson*, 16 Jones & S. 481; *Phelps v. Racey*, 60 N. Y. 14; *Bertholf v. O'Reilly*, 74 N. Y. 521.

The Legislature may pass police laws which incidentally regulate interstate commerce. Property within a State wheresoever made must be subject to this power. It also has the right to control all manufacturing within its limits properly subject to the police power. Laws could not be enforced at all if they could be avoided by claiming that articles prohibited or regulated thereby were made

out of the State or manufactured within its limits for the purpose of exportation.

Phelps v. Racey, 60 N. Y. 15; *Munn v. Illinois*, 94 U. S. 135 (Bk. 24, L. ed. 77); *State v. Addington*, 77 Mo. 110; *Re Brosnahan*, 18 Fed. Rep. 62.

Prohibitions and regulations applicable to all classes of citizens are not violations of the Thirteenth or Fourteenth Amendments to the Constitution of the United States.

Munn v. Illinois, 94 U. S. 125 (Bk. 24, L. ed. 77); *Slaughter House Cases*, 16 Wall. 37 (83 U. S. bk. 21, L. ed. 394); *Bartemeyer v. Iowa*, 18 Wall. 133 (85 U. S. bk. 21, L. ed. 929); *Soon Hing v. Crowley*, 118 U. S. 707 (Bk. 28, L. ed. 1145); *Barbier v. Connolly*, 118 U. S. 27 (Bk. 28 L. ed. 928).

Such laws do not violate section 1 of article 1 of the State Constitution when within proper limits. It is not "any of the rights or privileges secured to any citizen thereof" to continue acts which can be prohibited by police statutes. They constitute, within the meaning of this section, "the law of the land."

Cases above cited.

They do not deprive citizens of "liberty or property without due process of law," within the meaning of section 6 of such article.

Metropolitan Bd. Excise v. Barrie, 84 N. Y. 667.

The Constitution of the United States and of New York State constitute the only restriction or limitation of the legislative power. It is, aside from these limitations, supreme, uncontrollable and omnipotent in respect to all other matters and subjects.

Clarke v. Rochester, 5 Abb. Pr. 123; *Phelps v. Racey*, 60 N. Y. 14; *Heyward v. New York*, 7 N. Y. 324; *Re Townsend*, 39 N. Y. 174; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 244; *Re Deansville Cemetery Assn.* 66 N. Y. 572; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 520 (Bk. 29, L. ed. 468); *Davidson v. New Orleans*, 96 U. S. 104 (Bk. 24, L. ed. 616); *Bertholf v. O'Reilly*, 74 N. Y. 516; *Cooley*, Const. Lim. pp. 197, 198, pp. 86, 87.

The courts deem this police power so essential to the State as to hold that the Legislature cannot dispossess itself thereof.

Boyd v. Ala. 94 U. S. 650 (Bk. 24, L. ed. 802); *Beer Co. v. Mass.* 97 U. S. 25, 33 (Bk. 24, L. ed. 989); *Metropolitan Bd. Excise v. Barrie*, 84 N. Y. 667-668.

The courts are bound to accept as final the declaration of the Legislature contained in the title to the Act in question and expressly made in section 20 thereof.

People v. Albertson, 55 N. Y. 50; *People v. Draper*, 15 N. Y. 532, 545, 555.

It is not to be presumed or inferred that the Legislature intended to violate or evade the constitutional restraints.

Re Elevated R. R. Co. 70 N. Y. 851; *People v. Schuyler*, 79 N. Y. 201; *Soon Hing v. Crowley*, 118 U. S. 710 (Bk. 28, L. ed. 1145).

The courts "do not recognize the right to assail the validity of the Act, on the theory that it was adopted from motives in hostility to the public good or to the general policy of the State * * * the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones."

People v. Shepard, 36 N. Y. 289.

An improper motive in doing a lawful act is immaterial. "The motive, be it what it may in such a case, can have no effect and does not prevent the assertion of the right."

Pelphs v. Nowlen, 72 N. Y. 45; *Whele v. Conner*, 88 N. Y. 238.

If the Act can be upheld upon any views of necessity or public expediency which the Legislature may have entertained, the law cannot be challenged in the courts.

15 N. Y. 545; *People v. Shepard*, 36 N. Y. 289.

The power of the Legislature to prohibit the sale of impure and unwholesome articles of food and to provide for the confiscation and destruction of such articles on their being offered for sale in open market, cannot be questioned.

Blazier v. Miller, 10 Hun, 486; *Polinsky v. People*, 73 N. Y. 70; *People v. Cyperty*, 1 Cent. Rep. 804; *Bartemeyer v. Iowa*, 18 Wall. 136 (85 U. S. bk. 21, L. ed. 929); *Commonwealth v. Holbrook*, 92 Mass. 200; *Commonwealth v. Waite*, 93 Mass. 264; *Commonwealth v. Carter*, 182 Mass. 12; *State v. Addington*, 77 Mo. 117; *Re Bromnahan*, 18 Fed. Rep. 63; *State v. Ah Chew*, 40 Am. Rep. 489; *Commonwealth v. Powell*, MS. Op. of Judge Simonton of Pa.

By section 20 it is declared that "The public health * * * is endangered by the manufacture, sale or use of the articles or substances herein regulated or prohibited." This would have been implied from the enactment of such a statute.

Cronin v. People, 82 N. Y. 323, and cases cited.

Finch, J., delivered the opinion of the court: This record discloses an error in the charge of the trial judge to the jury. He submitted to them the bare question whether the defendant had manufactured or sold oleomargarine not made from milk or cream, and charged that if he did, he was guilty under the law. The language of the court was especially clear and decisive. The jury were told: "If you believe that the defendant did sell this article called oleomargarine, and that it was not a production of pure unadulterated milk or cream of the same, then he committed an offense under the law. The simple question for you to decide is, Did this defendant or did he not sell an article known as oleomargarine, and was that article made of pure unadulterated milk and cream? If he did so sell that article and if it was not so made, he is guilty of a violation of this statute."

It would be difficult to make the direction plainer. But the guilt of the prisoner did not and could not lie in the simple manufacture and sale of the article, and depended upon the further inquiry whether it was manufactured in imitation or semblance of butter; whether, by the use of ingredients not necessary or essential to the article itself, it was sought to accomplish such imitation or resemblance.

The proof showed that when oleomargarine was put upon the market in its normal condition and before the addition of ingredients designed to modify its natural taste and color, it was of a pearly white hue resembling tallow, but that coloring matter was sometimes added.

It was to prevent such or similar imitations that the Act of 1885 was framed. Section 7 forbids two things: the manufacture not from milk or cream of an article or product in imitation or semblance of butter, or designed to take the place of butter. The latter clause is ineffectual as we held in the *Marx Case*, 99 N. Y. 877.

It was under the first alone that the defendant could be convicted, and yet the charge of the court ignored this element of offense entirely, and missed the precise point of the accusation.

Whether the oleomargarine manufactured by the defendant was or was not an imitation or semblance of butter became the material inquiry, but was withheld from the jury; and they were instructed to convict upon proof of the manufacture and sale of the article known as oleomargarine. Practically that was a ruling as matter of law that the article thus known is an imitation of butter; whereas, it may or may not be, and the question whether in a given case it is or not is one for the jury. A sample of the product manufactured by the defendant was produced before them and open to their observation. The vital point of the alleged crime is the manufacture and sale of an article which is an imitation and semblance of butter and so is calculated to deceive, and indicates a deceptive purpose immediate or ultimate; and that is a question of fact which the court was not authorized to determine as a matter of law, but upon the evidence produced should have submitted it to the jury.

It is said that the imitation was admitted and the case tried on that assumption. I am unable to agree in that proposition. I do not think the imitation was conceded, and a distinct exception was taken to the charge, which ignored the fact of imitation as essential to the crime, and argued before us on the appeal.

For this error, without considering the constitutional question, the judgment should be reversed and a new trial ordered.

Ruger, Ch. J., Rapallo and Danforth, JJ. concur; **Earl, J.**, reads dissenting opinion; **Andrews, J.**, for affirmance, on the ground that it was proved and assumed on the trial that coloring matter had been added to the substance called oleomargarine to give it a yellow color resembling natural butter, and that the sale of oleomargarine so colored constitutes an offense under the Act, within the competency of the Legislature to declare; **Miller, J.**, not voting.

Earl, J., dissenting, after stating the case as above:

Besides the general statutes prohibiting the adulteration of food, there have been in this State for several years stringent special enactments prohibiting the sale of unwholesome and deceptive dairy products. The Legislature has attempted to keep pace with the devices of men to circumvent its policy.

By the Act, chap. 415 of the Laws of 1877, it first undertook to deal with oleomargarine, which a short time before had first made its appearance in this country. By section 1 it was provided that every person who should manufacture for sale, or offer or expose for sale, any article in semblance of butter not the legitimate product of the dairy, and not made exclusively of milk

or cream, but with which the oil or fat of animals entered as a component part, should distinctly and durably stamp or brand upon every tub or package of such article the word "Oleomargarine"; and that in case of retail sale of such article in parcels, the seller should in all cases deliver therewith to the purchaser a written or printed label bearing the plainly written or printed word "Oleomargarine"; and it was declared that every sale of such article or substance not so stamped or branded should be unlawful, and that no action should be maintained to recover the price thereof. Sections 2 and 3 provided that every person who should knowingly sell or offer to sell any of such articles required by the first section to be stamped or branded, not so stamped or branded, should for each and every offense forfeit and pay a fine of \$100, and be guilty of a misdemeanor. All the sections of that Act were amended by the Act, chap. 439 of the Laws of 1880, making them more explicit and stringent, particularly as to stamping and branding the packages, and the notification of the character of the substance sold.

In 1882 the Legislature, finding the previous legislation not sufficient to regulate the manufacture and sale of oleomargarine, and to protect the public against deception, again dealt with the matter in four Acts: chapter 214, "An Act to prohibit the coloring of oleomargarine, butterine, and adulterating cheese"; chapter 215, "An Act to regulate the manufacture and sale of oleomargarine or any form of imitation butter and lard, or any form of imitation cheese, for the prevention of fraud and the better protection of the public health"; chapter 238, "An Act for the protection of dairymen and to prevent deception in the sales of butter and cheese"; and chapter 246, "An Act to prevent fraud in the sale of oleomargarine, butterine, suine, or other substances not butter."

These Acts among other things prohibited the coloring of oleomargarine in semblance of butter, the introduction therein of any substance for the purpose of causing it to resemble butter, the sale thereof representing it to be butter, and required the packages containing it to be plainly marked "oleomargarine butter," and were plainly intended to protect the People against fraud and imposition.

After two years' experience these stringent Acts were not deemed sufficient to accomplish their purpose, and in 1884, the Legislature again had the subject under consideration and passed the Act, chapter 202, "An Act to Prevent Deception in Sales of Dairy Products." In that Act the Legislature recognized the difficulty of preventing the sale of impure and unwholesome milk and imitation butter, and of discovering and detecting such milk and butter, and therefore created the office of state dairy commissioner, the incumbent of which was authorized to employ experts and chemists, and was armed with power to detect frauds and impositions and to enforce the provisions of the Act.

That Act repealed chapter 415 of the Laws of 1877, chapter 439 of the Laws of 1880 and chapter 214 of the Laws of 1882, and left the other Acts above mentioned in force; and in section 6 it provided that "No person shall manufacture out of any oleaginous substance or

any compound of the same, other than that produced from unadulterated milk or cream of the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer for sale the same as an article of food," and imposed severe penalties for violations of the section. That section was under consideration in this court in the case of *People v. Marx*, 99 N. Y. 377, which was decided June 16, 1885.

The Legislature of 1885, evidently being of opinion that the prior legislation was still inadequate to guard the public health and protect the People against fraud and deception in the sale of dairy products and simulated butter, on the 30th of April passed the Act under which the defendant was convicted, entitled "An Act to Prevent Deception in the Sale of Dairy Products and to Preserve the Public Health, Being Supplementary to and in Aid of Chapter 202 of the Laws of 1884." This Act did not repeal any of the prior Acts, and in section 20 each section thereof is declared to be enacted "to prevent deception in the sale of dairy products, and to preserve the public health," which is said to be endangered by the manufacture, sale or use of the article or substances regulated or prohibited. It prohibits the sale of impure, unhealthy, adulterated or unwholesome milk, and has many provisions to prevent and detect fraud and deception in the sale of dairy products. It enlarges the powers of the dairy commissioner and imposes more and severer penalties. Section 6 of the Act of 1884 is re-enacted, and section 7 is as follows: "No person by himself or his agents or servants shall make or manufacture out of any animal fat, or animal or vegetable oils not produced from unadulterated milk or cream from the same, any article or product in imitation or semblance of or designed to take the place of natural butter or cheese produced from unadulterated milk or cream of the same; nor shall he or they mix, compound with or add to milk, cream or butter, any oils or other deleterious substance or any animal fats, or animal or vegetable oils not produced from milk or cream, with design or intent to render, make or produce any article or substance or any human food in imitation or semblance of natural butter or cheese; nor shall he sell, keep for sale or offer for sale any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this State or in any other State or country." The amendments made by chapter 458 are not now material.

The crime of which the defendant was convicted is plainly described in this section. He did sell an article manufactured out of animal fat or oil "not produced from unadulterated milk or cream from the same;" and it was sufficiently shown and indeed not disputed upon the trial that the article was manufactured "in imitation or semblance of natural butter." An article must be in imitation or semblance of butter when to the senses it appears like butter or to be butter; and that was true of this oleomargarine. It was not incumbent upon the People to show that the defendant made the sale with intent to defraud or deceive anyone.

The statute imposes upon the seller the duty of knowing the nature of the article in which he deals, and absolutely prohibits the sale of the prohibited article.

The defendant was therefore legally convicted, if the particular provision of law under which he was indicted was constitutional and therefore valid; and whether it was or not is the main inquiry in this case.

In approaching this inquiry, we should not be unmindful of the important and wholesome rule laid down by many eminent judges and enforced by a proper respect for the legislative department of the government, that courts will not hold a statutory provision to be unconstitutional unless a clear and substantial conflict exists between it and the Constitution, and that every presumption is in favor of the constitutionality of legislative Acts.

Butter is one of the most common articles of human food, used by nearly all the People of our State at every regular meal. Either from prejudice, or education, or habit, or because of the conviction that it is best and most wholesome, the consumers want butter made from pure milk or cream, and almost unanimously will use no other unless imposed upon.

The manufacturers of oleomargarine aim to make their product like butter, and their success is measured by the closeness of their imitation. The final process is to add butterine and color to give it the flavor and external appearance of butter. The manufacturer who sells to the wholesale dealer, like the manufacturer of counterfeit coin, may not himself deceive or intend to deceive anyone; and the same may be true of the wholesale dealer who sells in large unbroken packages to persons who buy to sell. But we may from our general knowledge and observation, assume to know, or we may at least assume, that the Legislature had information that the consumers are nearly always deceived when they purchase oleomargarine. They rarely, if ever, seek and buy it as such, and to them it is rarely if ever sold as such. They seek butter, and, in its place, are unwittingly deceived into the purchase of oleomargarine.

The President in his message accompanying his approval of the recent congressional Oleomargarine Bill said: "Notwithstanding the immense quantities of the article described in this bill which is sold to the people for their consumption as food, and notwithstanding the claim made that its manufacture supplies a cheap substitute for butter, I venture to say that hardly a pound ever entered a poor man's house under its real name and in its true character." And a United States Senator in his speech before the Senate in advocacy of the bill said: "Although it may be sold to the dealer upon its own merits and under its own name, yet the statement which I now make can be verified to the fullest extent, and that is, that not less than nine tenths of all the imitation butter made in this country is sold to the consumer as butter, bought as butter, and used by the consumer believing it to be butter." If these facts are not so notorious, in view of the many Acts of the Legislature, of the action of Congress, the debates in public bodies, and of the discussion in the public prints and in other places, that we may assume

judicially to know them, we cannot assume that they are not true or that the legislators did not know them when they framed this legislation to protect the People against the deception.

That the Legislature has the right to pass appropriate laws to protect the People against fraud and imposition is not disputed. The right was most emphatically affirmed in the case of *People v. Marr*. There is the same foundation for legislative authority to enact laws to protect against fraud as there is to protect against crime. One who is deprived of his property by theft is no more wronged or outraged than he who is deprived of it by fraud.

However, under the mere guise of Acts to protect against fraud, the Legislature cannot arbitrarily strike down private rights, invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods. But laws enacted in the exercise of the police power may be unwise, arbitrary and unjust, and yet be unassailable in the courts. The sole remedy for them may be an appeal to the People by those who complain of them. As was said in the *Jacobs' Case*, 98 N. Y. 98: "Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts."

This Act absolutely prohibits the manufacture and sale of oleomargarine "in imitation or semblance of" natural butter. Did the Legislature not have constitutional power to do this? It may absolutely prohibit the sale of adulterated or simulated substances, and has frequently done so. It may punish as a criminal the ignorant seller of an adulterated or forbidden article. *U. S. v. Bayaud*, 16 Fed. Rep. 384; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Wentworth*, 118 Mass. 441; *Commonwealth v. Smith*, 103 Mass. 444; *People v. Cipperly*, 37 Hun, 320, aff'd. in this court 101 N. Y. 684 [S. C. 1 Cent. Rep. 804].

Oleomargarine is well calculated to deceive. It is a close imitation of butter which cannot be detected by ordinary observation, or the skill and experience which the great bulk of consumers possess. The Legislature had, during several years, tried by many enactments, various expedients to protect the public against the deception and to compel the sale of oleomargarine to consumers in its real character. We may assume that these enactments proved to be inefficient and failed completely to accomplish their purpose, and that finally the Legislature concluded that it could not effectually protect the People against the deception, except by entirely suppressing the manufacture and sale of oleomargarine made "in imitation or semblance of butter." Who shall say that this was not an appropriate means to accomplish the end? The means may be harsh and rigorous, but we must assume that the Legislature in the exercise of its discretion, after full examination and information, found the exigencies of the case to be such as to require such a measure. It does not prohibit the manufacture and sale of oleomargarine when so made (as it can be) as not to

*See *State v. Addington*, 12 Mo. App. 214. [Ed.]

resemble or imitate butter. The color and but-terine, added to give it the semblance of butter, contribute nothing to its wholesomeness and usefulness as food. They may be omitted, and if consumers desire it as a cheap food, they will still purchase it. This is not, therefore, a case where a useful branch of industry is stricken down, but is one where it is simply regulated so as to give protection against fraud and deception.

The Act, chapter 721 of the Laws of 1871, was in the same line as this legislation. There it was provided that no person should kill, or expose for sale, or have in his possession after the same had been killed, any of the game birds mentioned, between the first day of January and the 20th day of October in any year, under the penalty of \$25, except that a person selling or in possession of the game should not be liable to the penalty up to the first day of March, provided he proved that it was killed before the prohibited time or outside of the limits of the State, where the killing was not prohibited. In that case the Legislature concluded that it would not be effectual simply to prohibit the killing of the game during the months mentioned; but to accomplish the purpose of protecting the game it absolutely prohibited the having in possession or selling the same during the prohibited time.

The constitutionality of that Act was challenged in *Phelps v. Racey*, 60 N. Y. 10, and *Church, C. J.*, writing the opinion of the court, used language quite applicable to this case: "The measures best adapted to this end are for the Legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body. Some of the provisions of the Act in question might seem to one unversed in the mysteries of the subject, to be unnecessarily stringent and severe; but we cannot say that those involved in this action are foreign to the objects sought to be attained, or outside of the wide discretion vested in the Legislature."

While the legislation we are considering is appropriate and well adapted to protect the public against fraud and deception, we cannot assume that it was adopted for the purpose of suppressing one branch of industry for the mere purpose of fostering and promoting another. *Soon Hing v. Crowley*, 118 U. S. 703 [Bk. 28, L. ed. 1145].

We reach the conclusion that the provision of the law under which the defendant was convicted was constitutional and valid, whether oleomargarine is a wholesome or unwholesome product. We do not deem it important to go any further and determine whether this provision could also be upheld as enacted to preserve the public health.

The conclusion which we have reached is in no way in conflict with any thing decided in the case of *People v. Marx*. There we condemned the provision in the Act of 1884, which absolutely prohibited the manufacture or sale, as an article of food, of any substitute for butter.

The provision we declared to be unconstitutional, because the prohibition was not limited to unwholesome or simulated substitutes, but absolutely forbade the manufacture or sale of any compound designed to be used as a substitute

for butter, however wholesome, valuable or cheap it may be, and however openly and fairly the character of the substitute might be avowed and published. The power of the Legislature by appropriate legislation to protect the People against fraud and deception in the sale of imitation butter was fully recognized.

The provision of the Law of 1884 condemned by that decision was carried into the law of 1885, enacted before the decision was announced, but the defendant's conviction was in no way based thereon. That provision was eliminated by the amendment of the Act of 1885, by the Act, chapter 577 of the Laws of 1886.

It follows from these views that there was no error in the rulings of the trial judge, and that the judgment of the General Term should be affirmed.

DECISIONS IN CASES IN WHICH NO OPINIONS WERE WRITTEN.

(October 19, 1886.)

PEOPLE, *ex rel.* John J. DONOVAN, *Appt.*,

v.
COMMISSIONERS of Department of Fire and Buildings of BROOKLYN, *Respts.*

Mr. Edward F. O'Dwyer, for appellant.
Mr. Almet F. Jenks, for respondents.
Order affirmed with costs. All concur.

STAMFORD WATER CO., *Respt.*,

v.
Herbert STANLEY *et al.*, *Appts.*

Mr. S. L. Mayham, for appellants.
Mr. J. H. Maynard, for respondent.
Order affirmed with costs on opinion below. All concur.

PEOPLE, *ex rel.* John T. CUMING, *Appt.*,

v.
Joseph KOCH *et al.*, Commissioners Board of Docks of New York, *Respts.*

Mr. Henry Thompson, for appellant.
Mr. D. J. Dean, for respondents.
Order affirmed with costs. All concur.

(October 26, 1886.)

Robert WILLETTTS *et al.*, Exrs., etc., *Respts.*,

v.
Sarah N. WILLETTTS *et al.*, *Appts.*

Mr. George H. Forster, for appellants.
Messrs. Wilson M. Powell and William M. Hoes, for respondents.
Judgment of General Term reversed and that of Special Term affirmed, with costs, on opinion of Andrews, J., in court below.

PEOPLE, *ex rel.* L. S. & M. S. R. R. CO. *et al.*, *Appts.*,

v.
Common Council of the CITY OF DUNKIRK, *Respt.*

Mr. Charles A. Pooley, for appellants.
Mr. Walter D. Holt, for respondent.
Order affirmed, with costs.

PEOPLE, *ex rel.* N. Y. L. E. & W. R. R. CO.,
Appts.,

v.
Common Council of the CITY OF DUN-
KIRK, *Respt.*

Mr. George F. Brownell, for appellants.
Mr. Walter D. Holt, for respondent.
Order affirmed, with costs.

PEOPLE, *ex rel.* Cornelia E. ROSA, *Appt.*,

v.
John C. STREETER *et al.*, Assessors of
Watertown, *et al.*, *Respts.*

Mr. C. D. Adams, for appellant.
Mr. J. Atwell, Jr., for respondents.
Order affirmed, with costs.

Re Proving Last WILL, etc., OF Stephen F.
BEEKMAN, Deceased.

Messrs. James S. Stearns and Francis
Larkin, for appellants.

Messrs. E. Countryman and Wm. F.
Purdy, for respondents.
Judgment affirmed, with costs.

Thomas FOX, *Respt.*,

v.

Matthew BYRNES, *Appt.*

Mr. Stewart L. Woodford, for appellant.
Mr. S. A. Noyes, for respondent.
Judgment affirmed, with costs.

Fannie S. PETRIE, Admr., etc., *Respt.*,

v.

OGDENSBURG & LAKE CHAMPLAIN
R. R. CO., *Appt.*

Mr. Louis Hasbrouck, for appellant.
Mr. Edward C. James, for respondent.
Judgment affirmed, with costs.

Miles B. RIGGS, *Respt.*,

v.

AMERICAN HOME MISSIONARY SOCI-
ETY, *Appt.*

Mr. Howard Payson Wilds, for appel-
lant.

Mr. H. V. Howland, for respondent.
Judgment affirmed on opinion below, with costs.
[See 35 Hun, 656.]

Jared WEBSTER, *Respt.*,

v.

Seth W. NICHOLS, Exr., etc., *Appt.*

Mr. Richard L. Hand, for appellant.
Mr. M. D. Grover, for respondent.
Judgment affirmed, with costs.

Re ESTATE OF Jesse S. HULSE, Deceased.

Mr. Henry Bacon, for appellant.
Mr. B. R. Champion, for respondent.
Judgment affirmed, with costs.

Mary McCALL, Admr., etc., *Respt.*,

v.

Silas H. WITHERBEE *et al.*, *Appts.*

Mr. M. D. Grover, for appellants.
Mr. Richard L. Hand, for respondent.
Judgment affirmed, with costs.

N. Y.

Dayton HILLYER, as Ancillary Admr., etc.,
Appt.,

v.

U. S. TRUST COMPANY OF N. Y., *Respt.*

Mr. William G. Peckham, for appellant.
Mr. Edward Sheldon, for respondent.
Judgment affirmed, with costs.

Michael TRACY, Admr., etc., *Appt.*,

v.

N. Y. C. & H. R. R. R. CO., *Respt.*

Mr. Amasa J. Parker, for appellant.
Mr. Hamilton Harris, for respondent.
Judgment affirmed, with costs.

PEOPLE of State of New York, *Appts.*,

v.

John O'BRIEN, Receiver, etc., *Respt.*

Mr. D. O'Brien, Atty-Gen., for the People.
Mr. D. J. Dean, for respondent.

Order of General Term reversed and order of
Special Term affirmed, on opinion there pro-
nounced, with costs.

Joseph COMER, *Appt.*,

v.

Frank WRISLEY, *Respt.*

Mr. Joseph A. Shoudy, for appellant.
Mr. A. Walker Otis, for respondent.
Appeal dismissed, with costs.

PEOPLE, *ex rel.* Richard W. RYAN, *Respts.*,

v.

CIVIL SERVICE Supervisory and Examin-
ing BOARDS OF the City of NEW YORK
et al., *Appts.*

Mr. E. Henry Lacombe, for appellants.
Messrs. Cary & Whitridge, for respond-
ents.

Orders affirmed on opinions below, with costs.

Willis McDONALD *et al.*, *Respts.*,

v.

DEPARTMENT OF NEW YORK GRAND
ARMY OF THE REPUBLIC, *Appt.*

Motion to restore cause granted on payment
by appellant to respondents' attorney of \$10,
costs of motion and service of three printed copies
of case.

Walter S. PECK *et al.*, *Respts.*,

v.

Isaac B. POWERS, *Appt.*

Mr. Hannibal Smith, for appellant.
Motion to dismiss appeal granted, with costs.

Margaret E. RICHARDSON *et al.*, *Appts.*,

v.

Henry R. JACKSON *et al.*, *Respts.*

Mr. A. P. Whitehead, for appellants.
Mr. John E. Ward, for respondents.
Motion to advance cause denied, without costs.

Hester J. TODD *et al.*, *Appts.*,

v.

Isaac NELSON, *Respt.*

Messrs. Close & Robertson, for appel-
lants.

Mr. Henry C. Nelson, for respondent.
Motion to advance cause denied, without costs.

Perrin H. SUMNER, *Respt.*,
v.

Hannah ALEXANDER, Admr., etc., *Appt.*

1, Motion to substitute; 2, motion to discontinue.

Mr. George V. Brower, for appellant.
Mr. W. W. Badger, for respondent.

Order of substitution granted. Motion to withdraw granted, upon payment of costs of appeal to this court, and \$10 costs of motion.

Re ACCOUNTING OF John C. CONNER,
assignee of John F. Smyth, an Insolvent Debtor.

Motion to vacate order dismissing appeal granted, on payment of \$10, costs of motion.

John D. McINTYRE *et al.*, *Appts.*,
v.

McINTYRE COAL CO., *Respt.*

1, Motion for substitution; 2, motion to advance.

Messrs. Stedman, Thompson & Andrews, for appellants.

Messrs. Diven & Redfield, for respondent.
Motions granted, without costs.

THROOP GRAIN CLEANER CO., *Respt.*,
v.

H. Cordenio SMITH, *Appt.*

Messrs. Walters & McLean, for appellant.

Mr. Rollin Tracy, for respondent
Motion to prefer and advance denied, without costs.

Re Settlement of ACCOUNTS OF Asa B. KELLOGG, *Exr.*, etc.

Motion to dismiss.

Ordered that the executor appellant serve upon the attorney for Aletta A. Akin three copies of the return now on file with the clerk of this court, embracing her notice of appeal, within ten days after the notice of this order, and in default thereof, that this appeal be dismissed, with costs.

(October 29, 1886.)

Re PETITION OF Cyrus H. SWAN *et al.*,
for drainage, etc.

Mr. John T. Murray, for appellant.
196

Mr. A. K. Potter, for respondent.
Judgment affirmed on opinion below, with costs.
[See 35 Hun, 625.]

Rose F. LANGLOIS, Admr., etc., *Respt.*,
v.

DELAWARE & HUDSON CANAL CO.,
Appt.

Mr. Edwin Young, for appellant.
Mr. E. Countryman, for respondent.
Judgment affirmed, with costs.

Mary J. DEWEY, *Respt.*,
v.

DELAWARE & HUDSON CANAL CO.,
Appt.

Mr. Edwin Young, for appellant.
Mr. E. Countryman, for respondent.
Judgment affirmed, with costs.

John A. DERAISMES, *Exr.*, etc., *Respt.*,
v.

Laurence ENNIS, *Appt.*

Mr. Robert S. Johnstone, for appellant.
Mr. E. S. Cowles, for respondent.
Judgment affirmed, with costs.

John HONE, *Exr.*, etc., *Respt.*,
v.

John Watts DePEYSTER, Individually and
as Executor, etc., *Appt.*

Mr. James C. Carter, for appellant.
Messrs. John E. Ward and G. H. Crawford, for respondent.

Judgment of Supreme Court reversed and that entered on report of Hornblower, Referee, adopted by Davis, J., in dissenting opinion in court below, affirmed, with costs.

Henry A. WEEKS, Individually, and as
Administrator, etc., *Respt.*,
v.

Charles H. OSTRANDER *et al.*, *Exrs.*, etc.
Appts.

Mr. Flamen B. Candler, for appellants.
Mr. Frederick H. Man, for respondent.
Judgment affirmed, with costs.

John S. STUBBS *et al.*, *Exrs.*, etc., *Respts.*,
v.

Edward C. RIPLEY, Impleaded, etc., *Appt.*

Mr. Nathaniel O. Moak, for appellant.
Mr. Nelson J. Waterbury, for respondents.

Order affirmed, with costs.

NEW JERSEY.

COURT OF CHANCERY.

David C. ENGLISH, Admr. of William A. Van Deursen, Deceased,

v.

William A. NEWELL *et al.*

An executor who had taken no part in the administration of the estate held, under the circumstances of the case, not to be liable for a waste or misappropriation committed by his coexecutor who had assumed all the active duties of the administration; such waste or misappropriation having been committed without the knowledge of the nonacting executor and without suspicion on his part that it would be committed, and it appearing that an account which purported to be a joint executors' account was, in fact, the separate account of the acting executor only.*

(Decided November 3, 1896.)

BILL for relief. On final hearing upon pleadings and proofs.

The facts appear in the opinion.

Messrs. J. Kearney Rice and A. H. Strong, for complainant.

Mr. A. V. Schenck, for defendant Hendrickson.

Runyon, Chancellor, delivered the following opinion:

William A. Deursen, late of New Brunswick, deceased, died on or about February 13, 1873. By his will, after ordering payment of his debts and funeral expenses, he gave to his wife \$5,000 and certain household furniture absolutely, and the interest of \$2,000, for life. He then gave to his son William an annuity of \$600 for life, and gave to his grandson John H. Van Deursen a specific legacy. He then directed that after paying his debts and the \$5,000, his executors should invest a sum sufficient to produce the annuity to William, and that they should also invest the \$2,000. He gave to his daughter Joanna, wife of William A. Newell, one half of all the residue of his estate, including in that half, after the death of William, one half of the fund to be invested to produce William's annuity, and after the death of his wife, one half of the \$2,000. The other half of the residue he gave to the children of his deceased son John and their heirs in equal proportions, to be paid to them at the death of the mother of the children; and he gave to her the interest thereof for life. He appointed his son-in-law William A. Newell, and his brother-in-law Charles I. Hendrickson, executors, authorizing and directing them to sell his real estate at their discretion.

The will was proved by both executors, February 27, 1873, and they together filed an inventory of the estate on the 27th of March following.

The bill is filed by the administrator *de bonis non cum testamento annexo*, the executors having been removed from office. It states that Newell took upon himself the execution of the

will and the administration of the estate and received and took into his hands the assets to a large amount; that Hendrickson never took into his custody any of the assets and never, so far as the complainant is informed and as he believes, took any active part in the management of the estate; that the executors on the 14th of July, 1874, filed a joint partial account; that on or about the first day of September, 1879, in pursuance of citations issued to them by the Orphans' Court of Middlesex County, at the instance of certain persons interested in the estate under the will, they filed another account to which some of the children of John Van Deursen, deceased, filed exceptions, but the exceptions were never brought to a hearing because a compromise was made between the exceptants and Newell, in pursuance of which, each of the children of John Van Deursen, deceased, except Charles A. Van Deursen, who has been absent and has not been heard from for many years and is believed to be dead, in consideration of certain moneys paid to them by Newell, released and discharged the executors from all claim for moneys then distributable; and it was admitted that there remained in Newell's hands after such payment, \$14,635.41, which amount was made up of the following sums: \$11,000 invested to produce the annuity for William Van Deursen, \$2,000 invested for the widow, and \$1,635.41, the share of the before mentioned Charles A. Van Deursen, of the money which was distributable when the compromise was effected; that by the compromise it was agreed that the account should be restated so as to show a balance of the above mentioned sum of \$14,635.41; that a restatement of the account was prepared accordingly but, it was never filed, and the bill alleges that it remains in Newell's hands; that on or about the 10th of January, 1881, two of the children of John Van Deursen, deceased, filed a petition in the orphans' court, setting forth that Newell had wasted the money of the estate, and that he refused and neglected to pay the interest due the widow and the annuity due to William Van Deursen, and that Hendrickson refused to have anything to do with the estate, and praying that the letters testamentary granted to the executors might be revoked; that under that petition the complainant was appointed administrator *pendente lite* and that subsequently, the executors having been removed, he was appointed administrator *de bonis non cum testamento annexo*; that under the first appointment he received from Newell's attorney certain securities amounting in the aggregate to \$3,773.60 of principal, but has never received any more of the assets, and that on a just accounting it would appear that there was at the time of the compromise a larger balance than \$14,635.41 in Newell's hands.

The bill further states that among the credits claimed by Newell in the account then made was one of \$9,664.40, which he claimed to have paid to his wife; but the complainant says he is informed and believes that Newell has never paid it and that he has no receipt or voucher for it nor any release from it, and the complainant insists that the executors are accountable for it, with interest from July 1, 1874.

The bill further states that Newell claimed credit for money paid William Van Deursen

*See *Wilmerding v. McKesson* (N. Y.) *ante*, 525.

which he had not in fact paid; that the complainant believes that the assets not accounted for have been employed by Newell in his own business and diverted to his own use; and the complainant insists that if that is the case, Newell should be held accountable therefor.

The bill also states that Newell resides out of this State but that at the time of filing the bill he was temporarily here, but intended soon to leave the State. It prays that the defendants (Newell and Hendrickson) may answer; that Newell may make discovery as to the assets; that Newell and Hendrickson may state and settle the account of their executorship in this court, and that Newell may be decreed to pay over the balance which may be found due upon such settlement, and that in default of such payment by him, Hendrickson may be decreed to pay it; and it prays a writ of *ne exeat* against Newell.

It appears very clearly from the evidence that, although both executors proved the will and joined in the inventory, Newell alone had possession of the assets and that he alone took the entire management of the estate. He even made leases of the real estate although the executors had only a power of sale, and made them in his own name and received the rents. Although a sheriff's deed upon sale under foreclosure was taken in the names of both executors, it was so taken by Newell without Hendrickson's knowledge. The bill states that Newell took upon himself the execution of the will and the administration of the estate and received and took into his hands the assets; and that Hendrickson never took into his custody any of the assets nor, so far as the complainant is informed and as he believes, took any active part in the management of the estate.

The same facts are stated also in the petition in the orphans' court for the removal of the executors and in the petition for the appointment of an administrator *pendente lite*. It is urged that the executors filed two joint accounts and that their joint liability is thereby established.

It is true that where executors jointly settle their final account they are jointly liable for the balance in their hands as ascertained by the account and the decree of the court thereon. *Laroe v. Douglass*, 2 Beas. 308.

But while an account may purport to be a joint account, it may in fact be only a separate one. If so it does not create a joint liability in equity. *Fennimore v. Fennimore*, 2 Green, Ch. 292; *Beatty v. Cory Universalist Society*, 14 Stew. 585; [*S. C. post*, —].

There is no evidence in this case that any joint final account was in fact ever made, nor that any account was filed which of itself, because it was joint, should impose any liability whatever upon Hendrickson to answer for any of the assets or for the management of the estate or any part of it in any way. The account of 1874 was not a final account but an intermediate one only. It purports to be joint but it was not such in fact. It was the account of Newell only. It was sworn to by him alone and it was filed by him alone. It may be true that Hendrickson was present when it was drawn up or when instructions were given by Newell for drawing it, but it was not his account. He had had none of the assets and had taken no part in the management of the estate. The bill says so.

He had no account to make, and did not intend to make any, whether joint or several.

The account filed in September, 1879, under the citation, also purports to be a joint account; but it is also sworn to by Newell alone and was prepared and filed by him. It is in fact entirely an account of his receipts, disbursements and transactions, and in no way an account of any receipts, disbursements or transactions of Hendrickson. There were none such. The attorney by whom the account was drawn up says that Hendrickson had nothing whatever to do with the making, preparing or stating of that account or the supplement thereto. When Hendrickson proved the will he declared to those interested that on account of his age he would take no part in the settlement of the estate, but would leave it to Newell; and it was understood by them from the beginning that such was his determination. Not only does he testify to this but he is corroborated by the testimony of John H. Van Deursen who is a principal witness for the complainant.

Hendrickson says in his answer, and he supports the statement by his testimony, that the persons interested in the estate acquiesced in his determination to have nothing to do with the settlement, and that they consented that Newell should alone take the assets and administer them; and he is corroborated by the conduct of those persons. They at all times recognized the fact that Newell had all the assets and was administering them alone, and that Hendrickson had neither had any of them nor taken any part in the management of the estate. This appears, as before stated, in the proceedings in the orphans' court and in the statements of the bill in this suit.

It is true John H. Van Deursen says that what Hendrickson said was that he "could not act as acting executor but would keep Newell straight." To which the witness says he replied that if he, Hendrickson, left it all to Newell they (the legatees) would not get a cent, because Newell did not attend to anything. He says that his reason for saying this was that he had always understood in the family that Newell did not keep his business appointments and (he adds) he was away too much at Washington, and besides was engaged in politics. He does not say that he questioned the pecuniary responsibility or integrity of Newell. Nor does it appear that there was any reason for doubting either his solvency or his probity. He was at that time reputed to be wealthy.

It is urged that under the circumstances it was the duty of Hendrickson to protect the estate against loss by the misconduct or mismanagement of his coexecutor. Executors are not necessarily liable for each other's acts, or responsible for the property which comes to each other's hands. As a general rule they are answerable for no more than they receive; but they may by their own conduct make themselves answerable. *Fennimore v. Fennimore*, *supra*.

The rule in regard to the liability of an executor for money not received by him, but received and wasted or misapplied by his coexecutor, is that if he knows that the assets received by his coexecutor are not applied according to the trusts of the will or in a due course of administration, and he stands by and acquiesces in it, or suffers the assets to be wasted by his

coexecutor without any effort to require or compel a due execution of the trusts and a due application of the assets in the course of the administration thereof, he will be held liable for any waste or misapplication of such assets. But it will be otherwise if he has no knowledge of such misapplication or waste. Story, Eq. Jur. § 1280 a.

In *Hovey v. Blakeman*, 4 Ves. 596, it was held that one executor in trust is not answerable for the receipts of the other, merely by taking probate, permitting the other to possess the assets and joining in acts necessary to enable him to administer; and that he is only answerable by concurring in the application of the assets. See also *Monell v. Monell*, 5 Johns. Ch. 283; *Sutherland v. Brush*, 7 Johns. Ch. 17; and *Ormiston v. Olcott*, 84 N. Y. 839.

In *Williams v. Nizon*, 2 Beav. 472, where two executors were directed after making some annual payments to invest and accumulate the surplus, one of them received the dividends of stock for several years and misapplied them; it did not appear that the other had any knowledge of such misapplication. It was held that he was not answerable for the breach of trust.

In that case Lord Langdale, M. R. said that there can be no doubt that if an executor knows that the moneys received by his coexecutor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trusts, he will, in respect of that negligence, be himself charged with the loss; but that in cases of that kind it is always to be observed that the testator himself having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors, and in that character each has a separate right of receiving and giving discharges for the property of the testator; that if in the case before him the defendant knew that his coexecutor was misapplying the moneys received and acquiesced in it, he himself became liable, because he was a witness and an acquiescing party to the misapplication or breach of trust; but that if he was not aware of the misapplication, he, Lord Langdale, knew of no case in which the court had gone the length of saying that an executor shall be held personally answerable for standing by and permitting his coexecutor to do that which for anything he knows to the contrary was a performance of the trusts of the will. He further said that if he were to charge the defendant in that case generally with all the assets received by his coexecutor, he must in every other case say that an executor who does not personally act and who, having no reason to suspect any misapplication by his coexecutor, permits him to act alone, is liable for every misapplication committed by his coexecutor; and he adds that he does not think that he can lay down any such rule.

In the case before me the persons to whom the declaration of Hendrickson, that he would not and could not act as executor, etc., were made, were not creditors but were persons who were interested in the estate as legatees; and it is in their behalf that this suit is brought. Under the circumstances it would seem that they themselves were bound to take action against Newell, for the preservation of the assets in his

hands, if they supposed that there was danger that the assets would be wasted or misappropriated. The fact that Hendrickson made the declaration and that he swears that they acquiesced in his determination is a very important circumstance.

According to the evidence, the complaints which were made to Hendrickson were in reference to Newell's delay in paying William Van Deursen's annuity and the interest of the \$2,000. John H. Van Deursen says that he expressed to Hendrickson a wish that the estate might be taken out of Newell's hands, and he says that he was quieted by what Hendrickson said in reply; that Hendrickson's conversation led him to believe that the estate would come out all right and that he, Hendrickson, would see that it should come out all right; that Hendrickson said that the witness had no reason to complain; that Newell was well off and would not use the estate's money.

He says that at that time Newell, so far as he knew, was reputed to be wealthy; that he lived in good style and had the appearance of being rich; that Newell about that time had bought another farm. So that it appears from the testimony of this witness that there was no reason to suspect that Newell had wasted or misappropriated the estate, or to apprehend that he would do so. Hendrickson evidently did not suppose that the estate was in any danger in Newell's hands. Nor did anyone suppose that there had been any waste or misappropriation.

On the 9th of September, 1879, it was agreed, between the proctor of the petitioners (in the proceedings for the removal of the executors) and the proctor of Newell, that the application in those proceedings should be continued for two weeks from that time, upon Newell's agreement to assign securities to the amount of \$6,500 to Hendrickson, to be held by him as the principal, to produce the annuity of William Van Deursen and the interest payable to the widow. Hendrickson was not a party to this agreement. In pursuance of it Newell sent to him an order upon his attorney for certain securities.

Hendrickson, being unable to get the money upon the order as he had expected to do, refused to assume the trust and at once gave notice of his refusal to those interested. He says that Newell spoke to him about accepting the order; and he told Newell that he would accept the money, that he would take care of the money for the trust fund if it were paid into his hands. He says he did not want to take the trust. He also says that he demanded the money from the attorney because the order was for money; that he accepted the order only to have the money; that he thought that if he had the money he could take care of it for the children. As before stated, when he found he could not get the money he refused to take the trust.

In November, 1879, all of the children of John Van Deursen, deceased, except Charles A. Van Deursen (who, as before stated, had long been absent and had not been heard from for many years and was supposed to be dead), settled with Newell for their interest in the estate, except their interest in the fund to produce the annuity for William Van Deursen, and the \$2,000 invested for the benefit of the widow for life and the share of Charles A.

Van Deursen in the money which was at that time distributable; and they released him accordingly.

It may be added that while there is no proof that the money credited in the account made at or about that time (and upon which that settlement was made) as having been paid by Newell to his wife has been in fact paid, there is no evidence upon the subject. It does not appear that Newell has wasted the estate or misappropriated any part of it, except as it is to be presumed from the fact that he has not turned over all of the assets pursuant to the order of the orphans' court made in July, 1881, requiring him to pay, deliver over and transfer to the complainant as administrator *de bonis non cum testamento annexo*, all the assets which were in hand on the 21st of March, 1881, the date of the decree removing him from the office of executor.

There is no evidence upon which Hendrickson can be equitably held liable to make up the deficiency. The persons interested in the estate might themselves have taken measures to bring Newell to an account years before they did so. They might have done so when the payment of interest was delayed. They knew that Hendrickson had declared in the outset that he would not be responsible for the assets or for the management thereof. If he said in connection with such declaration that he would "keep his coexecutor straight" he certainly did not intend to promise to stand surety for Newell or to assume any responsibility for his acts. There was no occasion for doing so; for, as before remarked, none of the persons interested had any doubt about Newell's responsibility or his integrity.

What Hendrickson meant by saying that he would keep Newell straight, if he used the expression, was that he would give Newell the benefit of his advice; that although he would not and could not, on account of his age, undertake the duties of executor and would not consent to take any responsibility, he would give the estate the benefit of his judgment in the management, if occasion should require. It is by no means probable, to say the least of it, that he meant that he would commit the assets and the management thereof wholly to his coexecutor and be responsible for him.

When in 1879 Newell gave to Hendrickson the order for the funds, to secure the annuity to William and the interest to the widow, it was not supposed that there was or would be any deficiency. No demand was then made upon Hendrickson to protect the estate. It was not supposed that it needed protection, but it was supposed that the funds were in existence and would be handed over by Newell or by his attorney, in pursuance of his order. The waste or misappropriation was committed without Hendrickson's knowledge and without any suspicion on his part that it would be committed. He neither knew nor suspected it until after it was done. Under such circumstances he is not answerable.

Nor is this conclusion in conflict with or in contrariety to the doctrine of the cases cited by the complainants' counsel. In *Laroe v. Douglass*, 2 Beas. 308, a surviving executor, Douglass, was held liable for the waste of his coexecutor, Laroe. Not only had the executors in

that case settled a joint final account, but Laroe had canceled a mortgage which was given to the executors to secure the payment of legacies which the bill was filed to recover. The mortgage was upon the real estate of the testator, which was sold by the executors; and they took the mortgage for part of the purchase money. Laroe became the owner of the property subject to the mortgage. He sold the property and improperly canceled the mortgage. Douglass knew he was about to sell and notified the purchaser of the existence of the incumbrance. Laroe then called upon Douglass and told him that he, Laroe, could not make the sale except by canceling the mortgage, and said that he would pay the *cestui que trust*. Douglass was held liable because he did not prevent, as he might have done, the meditated wrong of which he was fully apprised.

In *Schenck v. Schenck*, 1 C. E. Green, 174, the suit was against the executors of an executor. They had received a trust fund held by their testator at the time of his death in his character of executor and not as trustee. They had settled a joint final account on which they claimed and obtained credit for the fund in question. They were consequently both held liable.

In *Fisher v. Skillman*, 3 C. E. Green, 229, an executor was held liable for funds which his coexecutor had wasted, but he had voluntarily placed the funds in the hands of his coexecutor.

In *Suydam v. Bastedo*, 13 Stew. 433, the liability of an executor for funds of the estate which had been wasted by his coexecutor was based upon the fact that the executors had settled a joint final account.

Hendrickson has acted in good faith. He supposed and had reason to be believe that those interested in the estate acquiesced in his openly declared determination not to act in the settlement of the estate, and consequently he did not act therein. If there was waste or misappropriation of the estate by his coexecutor he was not aware that it was about to take place.

The bill should be dismissed as to him, but without costs.

Charles T. B. KEEP *et al.*, Admrs.,
v.

David L. MILLER *et al.*

1. A valid and binding contract for the sale of realty, such as equity will specifically enforce against an unwilling purchaser, operates in equity as a conversion of the land into money.
2. Where a contract for the sale of realty is one which could, at the time fixed by it for completing the purchase, have been enforced against the purchaser by the vendor, if he had then been living, the rights of the next of kin of the vendor thereunder, after his decease, can not be defeated by the unwillingness of his heir to perform the contract.
3. Hence, where a decedent had entered into a contract for the sale of realty such as worked an equitable conversion of the land into money at his death, and

his widow was willing to have the contract performed but his heir was unwilling, and the administrator of the deceased vendor brought suit to compel specific performance, which failed as against the vendee because of the time which, without fault of the widow and by fault of the heir, had elapsed since the time fixed by the contract for its completion,—held, that the widow of the vendor was entitled to recover from his heir a distributive share of the purchase money as part of the personal estate of her husband.

(Decided November 6, 1886.)

BILL for relief. On final hearing upon pleadings and proofs.

The facts appear in the opinion.

Mr. Alfred Mills, for complainants.

Messrs. S. D. Haines and S. B. Ransom, for defendant Faulka, cited *Leigh & Dalz. Equit. Conv. 98; Hawley v. James*, 5 Paige, 318.

Runyon, Chancellor, delivered the following opinion:

The bill states that John B. Miller, deceased, late of Madison in the County of Morris, made and entered into a valid contract in writing with Jehiel K. Hoyt upon the 25th of April, 1872, for the sale and conveyance by him to the latter or to such company of individuals as might be named by him, Hoyt, certain land therein mentioned, for the price of \$800 an acre; and that on or about the 10th of June following he made another like agreement in writing with Hoyt for the conveyance to him, his heirs and assigns, or to such person or persons as he might designate, of the same property on or before the first day of September then next, for the price of \$39,392, to be paid, and which Hoyt thereby stipulated to pay, as follows: \$100 upon the execution of the agreement and \$4,900 on the delivery of the deed; the balance \$34,392, to be secured by the bond of the grantee or grantees and his or their mortgage of the property; that the time for the delivery of the deed was by another agreement in writing made on the 20th of August, 1872, between Miller and Hoyt, extended to the first day of October then next; that Miller died September 5, 1872, intestate, leaving a widow and a son, the defendant David L. Miller, who was his only heir at law; that letters of administration of his estate were granted to Theodore Little, October 1, 1872; that after the death of John B. Miller and on or about the 28th of September, 1872, Hoyt notified David L. Miller that he would be ready to take the deed and carry out the agreement on his part on the first of October then next, and requested Miller as heir at law to deliver at that date a deed for the property in conformity with the contract, to Henry E. Reddish and Henry C. Ohlen, whom he designated as grantees; that David L. Miller did not and never would convey the property, except upon condition that he should receive the purchase money for his own use; that the complainants are informed that Reddish and Ohlen on or about the first of October, 1872, demanded of David L. Miller that he convey the property to them by warranty deed, free from any dower of his wife and from the dower of the widow

of his father and from the lien of certain judgments which were of record against him, David L. Miller, and tendered the money and bond and mortgage, but he would not comply with the request; that neither David L. Miller nor Hoyt, Reddish or Ohlen ever requested the widow to release her dower to Reddish and Ohlen; that she never refused to release it to them, but was at all times ready to release it upon condition that the purchase money should be paid and secured to be paid to the administrator of John B. Miller, and that David L. Miller was aware of her readiness to release upon that condition; that on or about the 18th of December, 1872, the widow wrote a letter to her late husband's administrator, in which she said that she had expected to join with her husband in the conveyance to the purchaser, but he died before any conveyance was made; that she was still ready to do all that she could to perform the agreement and was ready to release her dower, on condition that the purchase money should be paid or secured to be paid to the administrator, and she offered to release her dower upon those terms, in case the administrator should take judicial proceedings to compel specific performance of the agreement; that he did bring suit to that end in this court, in December, 1872; that in January following the widow died and the complainants in this suit were appointed administrators of her estate; that in the suit brought by the administrator of John B. Miller specific performance was decreed, but the decree was, upon appeal, reversed so far as Hoyt and Reddish and Ohlen and the performance of the agreement by them were concerned.

By the decree of the court of errors and appeals the bill was dismissed as to those defendants but was retained as to the others, in order that the legal representatives of the widow might have an opportunity of raising, by cross bill, the question whether they have any remedy against David L. Miller.

This suit is brought accordingly by the administrators of Mrs. Miller against David L. Miller and his wife and his assignee in bankruptcy (he filed his petition in bankruptcy after the decree for specific performance was entered), the administrator of John B. Miller (he refused to bring the suit or to join in it or to permit the complainants to bring it in his name), and the administrators of a judgment creditor of David L. Miller.

The prayer of the bill is that the land may be decreed to be personal property and may be sold under the order of this court; that the proceeds of the sale may go into the hands of the administrator of John B. Miller as personal property to be administered and distributed by him accordingly; that it may be decreed that the complainants as the legal representatives of the widow shall have her share thereof according to law, and that, if necessary, it may be decreed that David L. Miller's wife has no dower in the property and that the judgment above mentioned is no lien upon the premises. None of the defendants have answered except the assignee in bankruptcy.

By the decree in the above mentioned suit brought by John B. Miller's administrator (*Miller's Admr. v. Miller*, 10 C. E. Green, 855; *S. C.* on appeal; *Reddish v. Miller's Admr.* 12

C. E. Green, 514), in addition to decreeing specific performance, it was decreed that David L. Miller at and ever since the death of his father had been and at the date of the decree was seised of the property as a trustee to and for the use of Reddish and Ohlen and not otherwise, and that David L. Miller's wife was not and had not been entitled to any dower or right of dower in or to the land, and that the judgment creditors of David L. Miller were not entitled to any lien to or claim upon or against the property by virtue of their judgments; and also that the moneys decreed to be paid and the bond and mortgage, decreed to be given on account of purchase money, were and should be personal assets in the hands of the administrator of John B. Miller, and should be by him administered as personal property in due and legal course of administration, and that he should pay to the administrators of the widow her distributive share thereof. That decree (it was made over ten years ago) was not appealed from by David L. Miller.

The only question presented for decision is whether, under the circumstances of the case, the contract of sale worked an equitable conversion of the land into money at the death of John B. Miller. That it would have done so had the contract been enforced against the vendee is indisputable and is not denied. But the answering defendant insists that the failure to compel specific performance prevents such result. That failure, however, was due, not to the invalidity of the contract but to the fact that because of the length of time which had elapsed between the time fixed by the contract, as extended, for the completion of the purchase, and the making of the decree for specific performance, it was inequitable to require the vendee to complete the purchase, seeing that he had tendered himself ready to comply with the requirements of the contract on his part at the time fixed and that in the meantime the property had fallen in value.

It may be remarked that the noncompliance upon the part of the heir was not due to the widow. She did not refuse to release. She was never asked to release. On the 13th of December, 1872, she stated to her late husband's administrator by letter that she was willing to release in case he should take judicial proceedings to compel specific performance of the contract.

It is proved that on the very day on which, under the contract, as extended, the deed was to be delivered, her attorney stated to the attorney of Reddish and Ohlen that she was willing to release upon such a payment as would secure her rights, by which was meant payment to her husband's administrator and not to David L. Miller.

A valid and binding contract of sale, such as a court of equity will specifically enforce against an unwilling purchaser, operates as a conversion. The cases in which the court has refused to decree that a contract for sale works equitable conversion are those in which the contract was such as equity would not enforce.

The counsel of the answering defendant insists that the decision in the case of *Teneick v. Flagg*, 5 Dutch, 25, is decisive of the question under consideration and is adverse to the claim of the complainants. But it is to be observed

that that was an action at law. Mrs. Attie Teneick had agreed to convey land to James Buckalew and had received part of the purchase money. He refused to accept the deed because of the pendency of an action of ejectment brought against Mrs. Teneick by other parties, to obtain possession of the land. She delivered a deed for the property to her agent, to be delivered by him to Buckalew upon the favorable termination of the action of ejectment. She died before that termination was reached. By her death the action of ejectment abated and it was not renewed. After her death her heirs conveyed the property to Buckalew in pursuance of her agreement; and the purchase money was paid to her administrators. The husband of one of the heirs brought suit against the administrators, to recover a share of the money. The court held that he was entitled to recover, upon the ground that on the death of Mrs. Teneick the title descended to her heirs, the deed held in escrow passing no title, since the event on which it was to be delivered to Buckalew did not happen in the lifetime of the grantor; and at her death the deed ceased to have any validity. In the decision of the case the difference between the equitable rule and the legal rule was distinctly recognized by Justice Haines in his opinion. The cause was of course decided in the court of law upon the legal rule. Upon a full and careful consideration of the matter I reached the conclusion in the suit for specific performance that the contract worked a conversion. See *Miller's Admr. v. Miller, supra*.

The only new feature now presented is the fact that the appellate court has decided that specific performance ought not to have been decreed. The reason for that conclusion has already been stated. It was not the invalidity of the contract nor any consideration which rendered the contract unenforceable in equity at the death of John B. Miller or at the time fixed by the contract for completing the purchase. The contract was one which at the time fixed by it for completing the purchase could have been enforced against the purchaser in equity and it would have been enforced at that time on the application of the heir, with the consent of the widow; and she was willing to join him in enforcing it if he had been willing to secure to her her right in the purchase money. In equity he ought to have enforced it.

Equity regards that as done which ought to have been done. The doctrine of conversion is a reasonable one. In this case John B. Miller had made a sale of the property which, had he lived, he would have been able to enforce in equity and which it is to be presumed he would have enforced. He had sold the property at a high price. It should not be and it is not in the power of the heir to defeat the right of the next of kin by his own unwillingness to carry out the contract. By force of the contract the vendor became in equity trustee of the property for the vendee and the latter became trustee of the purchase money for the former. It has been held that the equitable rights of the next of kin of the vendor are not defeated where the vendee, by his laches after the death of the vendor, loses his right to specific performance, provided the contract was enforceable in equity at the death of the vendor. *Curre v. Bowyer*,

reported in a note to *Farrar v. Earl of Winter-ton*, 5 Beav. 1.

Where there is a contract for the sale of an estate, the estate is in equity considered as converted into personality from the time of the contract, although the purchaser has an election to purchase or not as he shall see fit. *Laves v. Bennett*, 1 Cox. Eng. Ch. 167; Sugd. Vend. 8th Am. ed. 187, and cases cited.

The sale in this case worked an equitable conversion of the land into money, and the widow was entitled accordingly to a distributive share of the purchase money as part of the personal property of her husband.

SUPREME COURT.

Dennis CONDON

v.

Margaret A. BARR.

- *1. It is essential to recovery against a married woman, in an action at law, by force of the Statute of 1862, that she be shown to have a separate estate chargeable in equity with the debt contracted by her.
2. A mere moral obligation or duty is not a sufficient consideration to support a subsequent express promise to pay.
3. An obligation enforceable in equity will support an express promise to pay, and make it suable at law.
4. At common law the promise of a feme covert could not be enforced against her, unless she had a separate estate. No personal decree could be made against her, but her contract operated as an appointment out of her separate estate.
5. Where the feme covert has no separate estate her contract does not create an obligation which is enforceable in equity, and therefore is not such a consideration as will support her express promise to pay, made after the death of her husband.

(Decided November 10, 1886.)

RULE to show cause why a verdict in favor of plaintiff should not be set aside and a new trial granted, in an action to recover for money loaned defendant during coverture. *Rule made absolute.*

Argued before Beasley, Ch. J., Depue, Van Syckel and Knapp, JJ.

The facts are stated in the opinion.

Mr A. V. Schenck, for defendant:

The contract was made between March 24, 1866, and May 14, 1870. It is, therefore, governed entirely, in regard to its legal effect, by the Act of the Legislature of this State, entitled "An Act to Prevent the Fraudulent Transfer of Property and to Facilitate the Collection of Just Claims," approved March 24, 1862.

Laws 1862, p. 271; *Wilson v. Herbert*, 12 Vroom, 454.

*Head notes by VAN SYCKEL, J.

N. J.

The Act of March 24, 1862, has been repeatedly construed by this court, and consistently with that construction this action can not be maintained.

Eckert v. Reuter, 4 Vroom, 266; *Vankirk v. Skillman*, 5 Vroom, 109; *Lewis v. Perkins*, 7 Vroom, 139; *Wilson v. Herbert*, 12 Vroom, 454; *Mather v. Brokaw*, 14 Vroom, 587; *Heywood v. Shreve*, 15 Vroom, 94; *Morris v. Lindsley*, 16 Vroom, 485.

The promise alleged by plaintiff to have been made by the defendant, after the death of her husband, was without consideration and void.

A moral obligation alone is not a sufficient consideration to support either an express or implied promise.

1 Story, Cont. § 590; *Nixon v. Vanhise*, 2 South. 492; *Updike v. Titus*, 2 Beas. 151; *Freeman v. Robinson*, 9 Vroom, 883.

The distinction is between void and voidable contracts. Where the promise is void, *ab initio*, it is not capable of ratification.

1 Story, Cont. § 593.

Thus where a married woman gave a promissory note and after her husband's death promised, in consideration of the forbearance of the payee, to pay it, it was held that the note was absolutely void, and that forbearance, where there was no cause of action originally, is not a sufficient consideration to raise a promise.

Loyd v. Lee, 1 Str. 94; *Watkins v. Halstead*, 2 Sandf. 811.

Messrs. W. Strong & Sons, for plaintiff.

Van Syckel, J., delivered the opinion of the court:

This suit was brought to recover money alleged to have been loaned by the plaintiff to the defendant during her coverture, between the years 1866 and 1870. To support his case the plaintiff produced evidence to show that the money was loaned to the defendant in the lifetime of her husband, and that after his death the defendant promised to pay the plaintiff. Under the instructions of the trial court a verdict was rendered for the plaintiff. The questions to be disposed of arise on an application for a new trial, and are:

First, whether, under the Act of March 24, 1862, a married woman who lives with and is supported by her husband, and who has not any separate estate of her own nor any separate trade or business, is liable at law for money loaned or advanced to her during her coverture.

Second, whether, under the facts stated, any legal liability exists on the part of the defendant to pay the plaintiff.

The Act of 1862 has been so repeatedly construed by this court that a brief reference to the cases will dispose of the first question.

In *Eckert v. Reuter*, 4 Vroom, 268, this court declared that "This Act of 1862 should be strictly construed, and not held to endow the wife with any new power to contract. As a feme covert she could only contract in reference to an equitable liability against her separate estate, for such debts and claims as could be charged against it. This Act merely recognizes that power; it does not extend it, and only gives a remedy in the courts of law for the collection of such equitable debts or claims. Whenever her separate estate could be reached in the court of chancery for such debts or

claims, a suit at law could be maintained therefor."

And again: "The remedy given by the Act is personal and by a personal judgment; but that remedy can be adopted only when the debt or claim would be equitably chargeable against any separate estate she may have had when her equitable liability was created."

This construction of the Act of 1862 has been rigidly adhered to in every instance in which it has been since presented for adjudication.

In *Vankirk v. Skillman*, 5 Vroom, 109, the Chief Justice in adverting to the case of *Eckert v. Reuter*, says:

"The principle of that construction was this: that the Act did not attempt to confer upon a *feme covert* any new power to contract; that the only instance known to the law in which a *feme covert* could, in her own right, bind herself by agreement, was where she had property of her own, with respect to which her agreements would be good in equity; and that consequently if a *feme covert*, having no separate estate, did contract, such an act being wholly void, no debt or claim could thereby remain unsatisfied."

To this interpretation and limitation of the Act of 1862 this court has committed itself in all subsequent decisions. *Lewis v. Perkins*, 7 Vroom, 138; *Wilson v. Herbert*, 12 Vroom, 454; *Mather v. Brokaw*, 14 Vroom, 587; *Heywood v. Shreeve*, 15 Vroom, 94; *Morris v. Lindsley* and *Bradley v. Johnson*, 16 Vroom, 435, 487; *Bradley v. Johnson*, 17 Vroom, 271.

It is essential therefore to recovery in an action at law, by force of the Statute of 1862, that the wife shall be shown to have a separate estate chargeable in equity with the debt contracted by her.

The absence of that element in this case precludes the plaintiff from invoking the support of that statute.

The question remains whether an action can be maintained upon the promise made by the defendant, after the death of her husband.

That a mere moral obligation or duty, as an executed consideration, is not a sufficient consideration to support a subsequent express promise to pay is shown by *Mr. Justice Depue* in *Freeman v. Robinson*, 9 Vroom, 383, to be well settled in the adjudications both in England and in this country.

The verdict, therefore, in this case rests upon no stable foundation, unless some consideration can be found to support the defendant's promise, which in legal aspect is of higher quality than a mere moral obligation.

In *Rusling v. Rusling*, 18 Vroom, 8, the Chief Justice says that an equitable obligation will support a promise to pay; and that by force of such promise, what was before an equitable obligation is transformed into an obligation enforceable at law.

This discussion turns upon the question whether, prior to the express promise, a duty rested upon the defendant to pay the plaintiff's claim, which could have been enforced in a court of equity.

In *Pentz v. Simonson*, 2 Beas. 232, Chancellor Green says that a married woman may incur liabilities which will be charged upon her separate estate; but that no doctrine of

the common law is better settled than that a married woman can enter into no contract or covenant, by which she will be personally bound.

In equity a liability assumed by a married woman will be charged upon her separate estate; but she cannot in the absence of statutory enactment be made personally liable. *Bradley v. Johnson*, 17 Vroom, 271.

The authorities are collected in *Francis v. Wigzell*, 1 Madd. 145.

Lord Cottenham in *Aylett v. Ashton*, 1 Mylne & C. 105, in commenting on *Francis v. Wigzell*, says: "It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a *feme covert*, in *personam*; but that if she has separate property, the court has control over that separate property; in all cases, however, the court must proceed *in rem*, against the property. A *feme covert* is not competent to enter into contracts, so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which she labors. *Sir Thomas Plumer* says: 'There is no case in which this court has made a personal decree against a *feme covert*.'"

Mr. Justice Story, in his *Equity Jurisprudence*, Vol. 2, § 1399, expresses the same view: "She may charge her separate estate; her agreement however, creating the charge, is not (it has been said) properly speaking, an obligatory contract, for as a *feme covert* she is incapable of contracting, but is rather an appointment out of her separate estate."

I think search will be made in vain to find in the history of equity jurisprudence a case in which a *feme covert* has been charged with an obligation, unless it appeared that she had a separate estate.

The immunity of the wife at common law did not rest upon the fact that her husband would be held for her contracts. The husband's liability for the wife's engagements made without his authority during coverture was circumscribed within very narrow bounds.

The disability of the wife to incur personal obligations was an incident of the marriage relation, supposed to be dictated by a wise public policy.

The rule that her separate existence was merged by coverture in that of her husband was relaxed in equity, and her separate existence recognized for the sole purpose of dealing with her separate estate. The power to charge her in a court of equity was coextensive with and inseparable from the separate estate, and expired with its appropriation.

An interesting and instructive review of this doctrine will be found in *Perkins v. Elliott*, 8 C. E. Green, 526.

The legislation in force when the alleged loans were made to the defendant furnishes no reason in public policy for amplifying the scope of this equitable rule.

The defendant in this case being without a separate estate, there was, at the time of the new promise, no enforceable equitable obligation resting upon her, which could in law support such promise and transmute an equitable into a legal obligation. The promise to pay

was without valid consideration, and therefore *nudum pactum*.

Such is the view taken in the elaborate note to *Wennall v. Adney*, 8 Bos. & Pul. 247, in which the English cases are reviewed. It is there said that "An express promise, as it should seem, can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

Under this rule a promise to pay a debt barred by the Statute of Limitations, a promise by a man after he becomes of age to pay a debt contracted during minority, a promise by a bankrupt after his certificate to pay his debts in full, and other like promises, may be enforced.

But a promise by a *feme covert* is not merely voidable but absolutely void at common law. Therefore in *Loyd v. Lee*, 1 Strange, 94, the promise of the defendant, after her husband's death, to pay a promissory note given by her during coverture was held to be void.

Lee v. Mugeridge, 5 Taunt. 86, is cited as a case holding the contrary rule; but in that case the married woman, when she executed the bond during coverture, had a separate estate and thus incurred an obligation which equity would have enforced.

Littlefield v. Shee, 2 Barn. & Adol. 811, and *Meyer v. Haworth*, 8 Adol. & Ell. 467, are in line with *Loyd v. Lee*.

The doctrine upon which these cases rest was adhered to by Lord Denman, *C. J.*, in *Beaumont v. Reece*, 8 Adol. & Ell. 483, and was approved in this court in *Freeman v. Robinson*, 9 Vroom, 833, before cited.

In New Hampshire it is well settled that the promise of a married woman, made when the common-law disability of coverture existed, does not furnish a consideration upon which her promise to pay the same debt, made after the death of her husband, can be sustained.

In the recent New Hampshire case of *Kent v. Rand*, the authorities are collected. East. Rep. October 30, 1886, p. 174 [*S. C. 2 New Eng. Rep. 858*].

In my judgment the rule to show cause should be made absolute.

STATE, Samuel EVANS, *Prosecutor*,
v.

John McDERMOTT.

*1. A person bitten by a dog may recover damages from the owner, where a previous propensity to bite mankind is shown, if it also be shown that the owner knew of such propensity.

2. An action can be maintained against the owner, by the party injured, upon evidence that the dog, with the knowledge of the owner, had a mischievous propensity to bite, whether in anger or not.

3. A mischievous propensity in an ani-

*Head notes by PARKER, J.

N. J.

mal is a propensity from which injury is the natural result.

(Decided November 10, 1886.)

CERTIORARI to review a judgment of the Hoboken District Court, in favor of plaintiff in an action to recover damages resulting from the bite of a dog. *Affirmed*.

Argued before Dixon, Reed and Parker, JJ. The facts are stated in the opinion.

Messrs. Niven & Minturn, for prosecutor:

The plaintiff below should have been nonsuited, because he failed to prove that the dog had a vicious disposition and that defendant had notice of it. *Scienter* is the gist of the action.

1 Add. Torts, 283; *Van Luven v. Lyke*, 1 N. Y. 515.

It is not enough, to maintain the action, that the dog evinced a vicious disposition, under extraordinary circumstances and great provocation; such was the extent of the *scienter* proven by plaintiff. His natural and ordinary disposition must be shown to be vicious.

Tupper v. Clark, 43 Vt. 200; *Shearm. & Redf. Neg. 8d ed. 191*.

Bounding on people in play, though in so doing he might frighten them or annoy them, does not evince a vicious disposition, and is not notice to the owner sufficient to sustain the action.

Line v. Taylor, 3 Fost. & Fin. 781.

Messrs. Daly & Fleming, *contra*.

Parker, J., delivered the opinion of the court:

An action was brought in the Hoboken District Court, by John McDermott against Samuel Evans the prosecutor, to recover damages occasioned by the bite of a dog.

It was proved that McDermott, at the time he was bitten, was in the saloon kept by the prosecutor as a place of public resort; that the prosecutor was the owner and possessor of the dog; that in going from the billiard room to the bar room of the saloon, McDermott met the dog in the passage way; that he put out his hand to motion the dog out of the passage way he was obstructing, when the dog growled and bit him on the hand.

McDermott swore that about a month after he was bitten his hand broke out from the effect of the bite; that he became nervous, lost sleep and suffered pain; that he employed a physician, paid for medicines, lost two or three weeks' wages and was out of pocket in money about \$25.

Dr. Pinder, a practicing physician, swore that about the time McDermott's hand broke out, he was consulted professionally; that he made an examination of the hand and prescribed for the injury. He said that he found the skin broken, the hand considerably inflamed and swollen, and that it appeared to him to be a pretty bad hand. The witness added that hydrophobia might possibly result from such a wound, but that he did not apprehend such result in this case.

At the close of the plaintiff's evidence, the counsel for the defendant moved to nonsuit, on the ground that it did not appear that the dog had bitten McDermott maliciously, and also on

the ground that there was no proof that the dog had bitten other persons except in play, or that the defendant had knowledge of the propensity of the dog to bite.

The judge refused to nonsuit. In charging the jury, the judge said: "Some time ago a girl was bitten by a dog in this State. The case was carried to the supreme court and a judge there held the owner of the dog liable for an injury committed by the dog, if he had notice of his mischievous propensity; and this is the law which applies to this case."

Upon request to charge, the judge held, in substance, as he had ruled on the motion to nonsuit. The jury found for McDermott in the sum of \$300 damages.

When the plaintiff rested there was evidence of the propensity of the dog to bite, and that the defendant knew of it before McDermott was bitten.

But it is said, on the part of the prosecutor, that although several persons had been bitten by the dog, of which he had information, yet it appeared that in every instance, the biting occurred while the dog was in a playful mood; and it is argued that damages cannot be recovered where it is shown that the dog had a propensity to bite only in play; but that, to justify a recovery, it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit.

This is not the law. An action can be maintained against the owner, by a party injured, upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not. In either case the persons bitten would suffer injury. A mischievous propensity is a propensity from which injury is the natural result.

In the case of *Hudson v. Roberts*, reported in 6 Exch. [Welsb. H. & G.] 699, it appears that the plaintiff was walking in the street wearing a red handkerchief. The bull of defendant, ordinarily gentle and quiet and not known to have gored any person previously, was being driven along the street, when he attacked and gored the plaintiff. The defendant said that the red handkerchief caused it, and that he knew the bull would run at anything red. The plaintiff recovered. The bull had no hostile feeling against the man he injured, and no disposition to gore mankind, yet because of his mischievous propensity to rush at a red object, of which his owner knew, it was held that when he caused injury to the plaintiff through that propensity his owner should pay damages.

A domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection; yet if he had on other occasions previously, shown his affection in that way, causing injury, and his owner knew of such propensity, the owner would have to pay damages caused by breaking the man's ribs. It is true that the bear is classed with animals *feræ naturæ* and the presumption in such case would be that, although domesticated, the animal had relapsed into his wild habits; yet although the presumption on the question of *scienter* would be against the owner, he might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear,

but under the influence of civilization, from a cultivated affection. But this proof would not avail the owner, in a suit by a party embraced. Such a propensity would be held to be mischievous, because hurtful to those who were the object of the bear's affection.

In the case of *Oaks v. Spaulding*, reported in 40 Vt. 347, it appeared that Mrs. Oaks was driving cows home from pasture, when the ram of Spaulding attacked and injured her. It was shown that the ram had a propensity to butt mankind and that the defendant knew it; but it did not appear whether the previous buttings by the ram proceeded from an ugly disposition, or from the exuberance of a playful spirit; yet it was held that the defendant was liable. It did not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oaks. It was a mischievous propensity, whether proceeding from ugliness of temper or from good nature which if known to the owner of the ram, made him liable for damages resulting from such propensity.

There is no doubt that in cases of animals not naturally inclined to do mischief, a previous mischievous propensity must be shown and the *scienter* clearly established. The gist of the action is, not the keeping of the animal but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not.

The conclusion is that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature but was the result of a mischievous propensity.

In this instance, whatever may have been the circumstances attending the previous bitings of the dog, the bite was accompanied by a growl, while McDermott was in a place where he had a right to be and when he was doing nothing except to motion the animal out of the passage way which the dog was obstructing.

The damages found by the jury are not excessive. In such cases they cannot be measured by mere expenditure of money to cure from the effects of the bite. Compensation should be made for the pain and the anxiety of mind which must necessarily follow the bite of a dog.

The judgment of the District Court is affirmed

STATE, *ex rel.* ESSEX PUBLIC ROAD BOARD,

v.

Jacob SKINKLE.

*1. Under the Act to authorize the compromising or settling by arbitration of any tax or assessment laid by any public road board in this State passed in 1832, the only parties to the proceeding are the road board and the applicant

*Head note by VAN STOKER, J.

under the Act. The only taxes, assessments and impositions to be considered are those against the applicant; and the value of his lands in proportion to the burdens laid upon them is to be estimated, and then the arbitrators are to fix the sum the applicant is to pay in discharge of such burdens.

2. The object of said Act is to relieve lands when the assessments against them are greater than the accruing benefit. The relief is limited to the party applicant; and to bring himself within the Act, he must show such excess of burden.

(Decided November 9, 1886.)

CERTIORARI to review a report of arbitrators, in proceedings by defendant for re-assessment of damages and benefits on improvement of a public road. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. Taylor, for relator.

Mr. J. Frank Fort, for defendant.

Van Syckel, J., delivered the opinion of the court:

The subject matter for review in this case is the report of arbitrators appointed on the application of Jacob Skinkle, the defendant, under the provisions of the Act entitled "An Act to Authorize the Compromising or Settling by Arbitration of any Tax or Assessment Laid by any Public Road Board in this State." Laws 1882, p. 256.

The relator insists in the first place that the arbitrators should have taken into consideration, not only the assessments against the defendant who alone petitioned for the benefit of said Act but also all other assessments for the same improvements imposed by the Road Board on all the lands assessed therefor. Does the failure to pursue such a course render the proceedings abortive?

The proceeding under the Act was instituted by Skinkle for his own benefit. No other land owner is interested in it. Every land owner affected by like assessments may at his option institute proceedings under the Act for his own exclusive benefit.

The estimate and assessment of the arbitrators, in each case in which the benefit of the Act is invoked, is conclusive only as to the petitioner under the Act, and has no effect whatever upon the assessments of other parties. The judgment of arbitrators appointed in one case could not guide or control those appointed in any other case. With the diversity of opinion which would naturally be entertained by different boards of arbitrators, the review in each case of the entire assessment could have but little tendency to preserve the principle of equality and proportion which should mark the original assessment. The magnitude of the labor which would be involved in reviewing and considering each assignment in its entirety would be appalling. There is nothing in the Act which indicates a purpose to establish such a scheme.

The third section of the Act provides that after the arbitrators are sworn, they shall view the land and real estate upon which the tax or

taxes, assessment or assessments is laid or imposed, and after such view shall notify all parties in interest of the time and place when they will hear the parties and their witnesses, and shall after hearing the parties and taking into consideration all taxes, assessments and impositions of every nature whatsoever, and of the value of the land and real estate in proportion to the taxes and assessments against the same, proceed to fix and adjust the sum to be paid by the owner or owners so petitioning, in full settlement of the tax or taxes, assessment or assessments levied or imposed by the road board.

The only parties to this proceeding are the Road Board and Skinkle. The taxes, assessments and impositions to be considered are those against Skinkle; and the value of his lands and real estate in proportion to the taxes and assessments against them is to be estimated, and then the arbitrators are to proceed to fix the sum he is to pay in discharge of such taxes and assessments.

The object of the Act of 1882 is to relieve lands when the assessment against them is greater than the accruing benefit. The relief is limited to the party applying for the protection of the Act; and to bring himself within it, he must show such excess of burden. Such was the view taken by this court in a cause between the same parties reported in 18 Vroom, 93. The court there said:

"The object of the Act is to give relief to the petitioner from an assessment in excess of the benefits conferred upon him. The review which he institutes by his application is for his exclusive benefit and does not affect the prior proceedings, so far as they relate to others. The sole question is whether he is burdened in excess of his benefits. To entitle him to a review he must make a *prima facie* case to that effect."

If the assessments have been fixed by the arbitrators at a sum equal to the full benefit conferred upon Skinkle's lands the Road Board cannot complain that due proportion between the various land owners assessed has not been preserved. The consideration of proportion might ease one land owner and burden another; but in no event could it lead to the laying of an assessment in excess of the benefit conferred. Does the report of the arbitrators show that they have imposed upon Skinkle's lands a burden equal to the benefit? The language of the report is this:

"We fix the specific sum to be paid by the petitioner at the sum of \$840; and we do hereby certify that we have so fixed said sum after a careful examination of said land and said public improvements for which said assessments were laid, with a view to charge said property with and to make said assessments conform in amount to the benefits conferred, and do hereby determine that the benefits conferred upon said property by said improvements amount to the said sum of \$840."

This language leaves no room to doubt that the assessment fixed by the arbitrators is equal to the entire benefit conferred by the improvements.

In these respects there is no error in the proceedings, nor does any error appear in the order of the judge in regard to costs.

The proceedings below should be approved.

STATE, William HILLMAN, *Prosecutor*,
v.
Isabella STANGER.

*Where a judgment has been rendered in a justice's court, in favor of plaintiff in an action of trespass *quare clausum fregit*, and it is made to appear that title to lands came in question before the justice, a *certiorari* will lie to review the judgment as one rendered without jurisdiction.

(Decided November 5, 1886.)

CERTIORARI to review a judgment of a justice of the peace, in favor of plaintiff in an action of trespass on land. *Reversed*.

Argued before Scudder and Magie, JJ.

The facts are stated in the opinion.

Mr. Crandall, for prosecutor.

Mr. Howard J. Stanger, for defendant.

Unless the title to lands, tenements, hereditaments or other real estate came in question, the jurisdiction of the justice admits of no debate.

R. S. p. 539, § 1.

To oust the justice of jurisdiction, the possession must be merely constructive, such as can only be shown by proof of title.

Jeffrey v. Owen, 12 Vroom, 260-262.

When the plaintiff can maintain his right to sue in trespass, by proof of actual possession, which the justice may determine upon evidence of facts, without any inquiry into title, the action is cognizable in a justice court. *Id*.

The supreme court on *certiorari* will not go into the trial of the case on its merits or determine disputed questions of fact.

Beach v. Mullin, 5 Vroom, 346; *Jeffrey v. Owen*, *supra*.

If the defendant below thought himself aggrieved by the court below in its finding of the facts, he should have appealed. If the justice had jurisdiction he was confined to the appeal.

R. S. p. 556, § 96.

Magie, J., delivered the opinion of the court:

The judgment of a justice of the peace in favor of the plaintiff in an action of trespass *quare clausum fregit* has been removed here by this writ, and is attacked upon the ground that the justice had no jurisdiction to render the judgment.

What occurred before the justice appears by a state of the case agreed on by the attorneys of the respective parties.

It thus appears that there was no evidence that the plaintiff was in actual possession of the *locus in quo*. The sole evidence of possession was the inference derived from a deed conveying the land to plaintiff, which deed she put in evidence.

At the close of the plaintiff's case, defendant asked for the dismissal of the action for want of jurisdiction, upon the ground that the title came in question. The motion was denied and judgment rendered for plaintiff.

In this course the justice was clearly wrong. The use made of the deed in evidence involved

*Head note by MAGIE, J.

a question of title. The justice was thus ousted of jurisdiction and had no authority to render the judgment. *Messler v. Flemming*, 12 Vroom, 108; *Jeffrey v. Owen*, 12 Vroom, 260.

The only question of importance raised is whether the remedy for this error is not by appeal rather than by *certiorari*. That an appeal would lie is beyond doubt. *Messler v. Flemming*, *supra*; *Jeffrey v. Owen*, *supra*. But this fact does not exclude the resort to a writ of *certiorari*. Such a writ is expressly permitted in all cases where the justice has no jurisdiction; and this has been construed to mean, not only merely jurisdiction to entertain the action below, but jurisdiction to render the judgment. The remedies by appeal and by *certiorari* are therefore concurrent. *Ritter v. Kunkle*, 10 Vroom, 259.

For the lack of jurisdiction to render this judgment, it must be reversed.

STATE, Jane W. BERRYMAN, *Prosecutrix*,
v.

Julia W. LITTLE.

*1. In proceedings to drain lands, under the statute, where a married woman's land has been sold under foreclosure, and conveyed, without change of possession,—notice to the owner and to the husband who occupies the land with his wife under arrangement for reconveyance is sufficient.

2. The prosecutrix, having no legal title or exclusive possession of the land, is not entitled to a writ to question the legality of the proceedings to drain lands.

3. Delay and acquiescence, inducing expenditure of moneys by others, in works of a quasi public nature waive irregularities.

(Decided November 13, 1886.)

CERTIORARI in matter of drainage of lands in the County of Bergen. *Writ dismissed*.

The facts are stated in the opinion.

Mr. Chas. H. Voorhis, for prosecutor.

Mr. W. M. Johnson, for defendant.

Scudder, J., delivered the opinion of the court:

Proceedings were taken by the defendant Julia W. Little, under the "Act to enable the owners of swamp or meadow ground, to drain the same, etc." (Rev. 652), to cut, make, clear out and keep open sufficient ditches or drains in and through lands adjoining or near to her lands in Midland Township, Bergen County. The certificate and return made by the surveyors of highways and chosen freeholders show that a portion of the ditch or drain in controversy was allotted to the Mutual Life Insurance Company of New York, being the part of ditch or drain which is embraced within the limits of the property of the company.

These lands formerly belonged to the prosecutrix Jane W. Berryman, and were occupied by her and her husband William H. Berryman.

* Head notes by SCUDDER, J.

Prior to these proceedings for drainage, the Mutual Life Insurance Company of New York, holding a mortgage on said lands, foreclosed the same and, at the sale under execution, became the purchasers and owners. There was no change of possession after the sale; and the prosecutrix claims that she remained on the property, under some verbal arrangement for a repurchase and reconveyance of the property. Her first reason assigned for setting aside the return and proceedings is that she was not given notice as required by law. It appears in the return and proofs that legal notice was served on the Mutual Life Insurance Company of New York and William H. Berryman, who is described as being in possession of the lands of said company.

The evidence taken under this writ also shows that the husband appeared in answer to such notice and contested the proceedings before the surveyors and freeholders, and that the prosecutrix had knowledge of his acts in the attempt to prevent the charge upon the lands. She was not injured in fact by want of notice, nor has she been injured in law; for notice to the husband who was actually in possession of the property, without anything appearing of record or by other notification that she had any separate or exclusive interest in the land, was sufficient for the purpose of this statute, and between these parties.

The other reasons relate merely to the form of the return and will not be considered, because the prosecutrix has not shown that she is entitled to this writ. Her alleged verbal agreement with the company was, as her husband testifies, made with an agent of the company whose authority to make such arrangement, if it were otherwise available in these proceedings at law, does not appear. As she has shown no ownership in the lands through which the ditch or drain runs, or possession, separate from her husband therein, she has no right to the writ to contest the return in dispute.

There is another sufficient reason for dismissing the writ, in the delay and acquiescence of the prosecutrix and her husband. The return of the surveyors and freeholders is dated June 25, 1883, and this writ is tested March 31, 1886. Since the date of the return Mr. Berryman, by agreement with the Mutual Life Insurance Company, has undertaken to make the ditch through their land, according to the map and profile furnished to him by the surveyors employed by the surveyors and freeholders; and his wife and the company have paid part of the expenses thus incurred.

The ditching under the return was begun in February, 1884, and was completed, excepting through the land of the insurance company, where it was delayed by the act of Mr. Berryman. In the latter part of December, 1884, or the first of 1885, the ditch was dug from the road by the bridge through the Berryman property down to Voorhis' line. If these facts had appeared in the application for this writ, the allowance would not have been made, because of the delay in prosecution; for where delay has permitted the expenditure of money in the furtherance of enterprises of a quasi public nature, or when, under cover of a proceeding of a public nature, individuals have been induced by the delay to expend their own money or labor, the writ will

be dismissed. There must be reasonable diligence shown in the prosecution where other interests are involved in the delay; and this principle has been applied to proceedings under the Drainage Act. *Haines v. Campion*, 8 Harr. 49; *State, Britton, v. Blake*, 6 Vroom, 208; *Bowne v. Logan*, 14 Vroom, 421.

The writ will be dismissed, with costs.

STATE, James BRANDS, *Prosecutor*,

v.

John J. CRAIG *et al.*

***A return of the laying out of a public road by surveyors of the highways was amended by striking out an award of damages for lands taken to "the heirs of A. B.," and inserting in lieu thereof a specific award to each individual owner. Held, that such owners had a right to caveat and procure a review of the necessity and utility of the road by chosen freeholders after the original return was received by the county clerk, by taking the steps required by the statute within the time prescribed; and that such right was not revived or renewed by such an amendment to the return.**

(Decided November 5, 1886.)

CERTIORARI to review proceedings to lay out a public road in Warren County. *Proceedings set aside.*

Argued before Scudder and Magie, JJ.

The facts are stated in the opinion.

Mr. Angle, for prosecutor.

Messrs. L. D. W. Taylor and N. Harris, for defendants.

Magie, J., delivered the opinion of the court:

Proceedings to lay out a public road in the County of Warren (a branch of which proceedings is now brought before us), have already been twice before this court. In *State, Oxford, v. Brands*, 16 Vroom, 332, the return of the road by surveyors of the highways was considered and found to be erroneous in only one particular, viz., in awarding damages for some land taken to "the heirs of Thomas Craig, deceased", instead of to the owners thereof by name. In accordance with a well settled practice under the present Road Acts, the error was held not to invalidate the whole proceedings, but the record was remitted to the court below, to enable it to make proper amendments. In *Craig v. Brands*, 17 Vroom, 522, the amended return was brought here, and the action of the court below, which resulted in the amendment, was set aside and the record again remitted to be proceeded on according to law.

The present writ brings before us a caveat against recording the return of the road, filed September 15, 1885; an application to the common pleas for the appointment of chosen freeholders to review the road, filed the same day; an order of that court appointing freeholders,

*Head note by MAGIE, J.

made November 24, 1885, and the return of the freeholders, dated December 18, 1885. The original return was filed August 18, 1880. It was amended after the proceedings were last remitted from this court, and the return as so amended was filed September 4, 1885.

By section 7 of the Road Act (Rev. 995) the time for filing a caveat is limited to the fifteen days next succeeding the time when the clerk receives the return. The caveat before us was filed within fifteen days from the time the amended return appears to have been filed, but more than five years after the original return was received by the clerk. If the Road Act permits the interposition of the caveat, under the circumstances of this case, the proceedings before us are unassailable; but if not they are without jurisdiction and void.

When the matter was last before the court, the question now presented was anticipated; and it was declared that by the true construction of the Road Act an amended return was to be considered as a new return only with respect to new matter inserted as an amendment and not as respects matter remaining unamended. Upon that construction the court held that relief by caveat or appeal after the amendment of a return could only be accorded to such persons as were, in regard to such relief, affected by the new matter inserted in the return by the amendment, and that an amendment would not operate to revive the right of caveat or appeal, by persons who had once had that right.

It has not been contended on this argument that these conclusions were erroneous. Upon reconsideration of them, I do not perceive that, with respect to their bearing on the case before us, their correctness can be questioned.

But it is now contended that upon the construction thus given to the Road Act the proceedings before us must be sustained. The insistence is that the caveators, who were in fact the heirs of Thomas Craig, became parties to the proceeding only by the amendment of the return awarding damages to them individually for their land taken for the road. They urge that until such an award was made there was no condemnation of their lands.

Admitting the force of this contention, the conclusion sought to be drawn by defendants does not follow. The proceeding in road cases, initiated by a caveat, is designed to obtain a review of the surveyors' determination as to the necessity of the road. The freeholders, who are the reviewing officers, are to adjudge, not the regularity of the proceedings nor the propriety or justice of the awards for damages, but only the necessity and usefulness of the road. If they adjudge it to be necessary and useful, their adjudication affirms the proceedings; if they adjudge it to be unnecessary or injurious, their adjudication annuls the proceedings.

The power to caveat and apply for this review is given every person who shall think himself injured or aggrieved. Rev. 996, § 8.

It is not restricted to persons to whom awards for damages were properly made. The defendants therefore clearly had a perfect right to avail themselves of this proceeding when the original return was filed. The admitted facts show that some of them did avail themselves of the right to review the necessity and usefulness

of the road. The amended return introduced no new matter affecting that subject. Whatever was new in it was only a correct award of damages to them. With respect to the *quantum* of such damages, the defendants may have a right to an appeal. According to the conclusions reached in the previous case, they would have such a right. But whether that be so or not, I am very clear that an amended return, amended only with respect to the assessment of damages, will not revive the right to caveat and review the utility of the road, which right every person aggrieved had for the statutory period following the reception by the clerk of the original return.

The proceedings brought up by this certiorari must therefore be set aside, with costs.

STATE, Adrian S. APPLEGET, *Prosecutor*,

Frank H. POWNELL, Collector, etc.

*1. On *certiorari*, the court will not consider evidence as to **value of the property assessed** for taxation, except by way of appeal from the decision of commissioners of appeal.

2. If a party assessed has **opportunity to appeal** to the board of commissioners and fail to do so, he can **not have relief on certiorari** on the question of **valuation**.

(Decided November 10, 1886.)

CERTIORARI to review an assessment of taxes. *Writ dismissed.*

Argued before Dixon, Reed and Parker, JJ.

The facts are stated in the opinion.

Mr. A. S. Appleget, prosecutor, *pro se*.

Parker, J., delivered the opinion of the court:

This *certiorari* brings before the court the assessment of taxes for the year 1885, on property of Adrian S. Appleget in the Township of Monroe in the County of Middlesex.

The only reason for setting aside the assessment, urged by the prosecutor, is the alleged erroneous valuation by the assessor, of his farm. It is said by prosecutor that his farm is rated higher than similar farm land, of equal or greater value, in the same township. An effort was made to prove this, but the evidence is not satisfactory. Even if the testimony proved that the farm was rated too high, in comparison with other lands in the vicinity, it would not avail the prosecutor in this proceeding. He had legal notice of the tax levied, in time to apply to the commissioners of appeal. He did not apply to the commissioners for a reduction. He says he had applied for reduction before other boards of commissioners in former years, and had been refused. This is not a good reason for not applying to the board of 1885.

The prosecutor has no legal right to have the

*Head notes by PARKER, J.

court order a reduction of the tax, or to set aside the assessment. On a question of value, depending on evidence, the court will not, on *certiorari*, entertain it, except by way of appeal, after the commissioners have acted. *State, Young, v. Parker*, 5 Vroom, 49.

Whether an assessment is excessive is within the province of the commissioners of appeal to determine, and application should first be made to them. 8 Zab. 553; 5 Vroom, 58.

If a party assessed has opportunity to make appeal before the board of commissioners and fails to do so, he cannot have relief on *certiorari*. *State, Hall, v. Snedeker*, 13 Vroom, 76.

In *State, Conover, v. Davis*, 19 Vroom, 112 [S. C. 2 Cent. Rep. 260], it is held that on *certiorari* the court cannot determine disputes as to value of rates.

The certiorari in this case is dismissed, with costs.

Carl POLAK

v.

Caroline HUDSON *et al.*

1. A plea bad for duplicity is properly taken advantage of by motion to strike out.
2. The rule that upon demurrer judgment shall go against the party whose pleading is first defective does not prevail on motion to strike out a plea.

(Decided November 13, 1886.)

ON motion to strike out plea. *Granted.*
Argued before Scudder and Magie, JJ.
The case is stated in the opinion.
Mr. Craig A. Marsh, for plaintiff.
Messrs. Gaston & Bergen, for defendants.

Scudder, J., delivered the opinion of the court:

This action on the case is brought by the plaintiff to recover damages from the defendants for causing the death of a horse of the plaintiff, while pasturing in a field adjoining land of the defendant Caroline Hudson, by erecting and maintaining a barbed wire fence, dangerous to cattle, by which the horse was fatally torn, and from which injury he died. Several counts vary the statement.

To this declaration the defendant pleaded: first, the general issue, which is admitted to be a good plea; second, that the fence complained of was a partition fence, between the land of said Caroline Hudson and the land of one Charles Hyde, on which the plaintiff's horse was pasturing; that it was lawfully constructed of posts and rails, with a fence wire strung along the top thereof, and such as was in common use, not calculated to do injury, and was kept with due care and repair. And further, that it was erected and maintained by the leave and license of said Charles Hyde, the owner of the close in which the plaintiff's horse was depasturing.

This plea is embarrassing, and bad for duplicity, in presenting several distinct defenses. As the plaintiff could only take advantage of the defect by special demurrer, and special demurrers are now abolished by statute (Practice

Act, § 189), the motion is properly made to strike out the plea. *Salt Lake City Bank v. Hendrickson*, 11 Vroom, 52; Practice Act, § 132.

The suggestion is made that the declaration is also irregular and defective, and framed so as to embarrass the trial of the action. The rule upon demurrer, that judgment shall be against the party whose pleadings are first defective in substance, does not prevail on motion to strike out the plea. *Hogencamp v. Ackerman*, 4 Zab. 183.

The plea will be stricken out, but with leave to amend on payment of costs.

Anna M. VAN BLARCOM *et al.*, Admsrs.,
of Garret S. Van Blarcom, Deceased,

v.

DELAWARE, LACKAWANNA & WEST-ERN R. R. CO.

- *1. An action to recover damages for causing death by negligence is not within Rule 16 of the supreme court requiring certain actions to be styled, in the process and pleadings, actions of tort.
2. The objection may be raised by a general demurrer.

(Decided November 13, 1886.)

ON demurrer to declaration. *Demurrer allowed.*

Argued before Scudder and Magie, JJ.

The nature of the case, and facts and questions raised are set out in the opinion.

Mr. M. Rosenkrans, for plaintiff.

Mr. F. J. McGee, for defendant.

Scudder, J., delivered the opinion of the court:

The plaintiffs brought this action against the defendant under the "Act to provide for the recovery of damages, in cases where the death of a person is caused by wrongful act, neglect or default." Rev. 294.

In the declaration the cause is styled an action of tort; and to this form of pleading a general demurrer has been filed. This objection is not a matter of form, but of substance, and may be raised by a general demurrer. *Flanagan v. Camden Mut. Ins. Co.* 1 Dutch. 506; *Gregory v. Thompson*, 2 Vroom, 166.

Prior to Rule 16 of the supreme court, of June Term, 1885, this action for causing the death of the intestate by the alleged neglect of the defendant's agents, in running its engine and cars, would have been brought in the form of an action on the case, as has been the usual practice in our courts; but if the pleader supposed that this rule has made a change in the form of action as applicable to this case, he has failed carefully to examine its terms.

Actions of trespass for injuries to property, real or personal, actions of trover and of trespass on the case for injuries to property, real or personal, shall be hereafter styled, in the process and pleadings, actions of tort. These are the words of the rule. Injuries to property, not injuries to the person, are included in the

*Head notes by SCUDDER, J.

form of action prescribed. If the person had not been killed but merely wounded, by the collision set out in the declaration, he, in bringing his action charging negligence and consequent injury to his person, would not be within the terms of the rule, and could not sue in tort. The administrator who stands in his place since his death, to keep the cause of action alive for the benefit of the widow and next of kin, is suing for the injury to the person and not to the property of the decedent, and must bring his action as if the rule had not been made.

The demurrer is allowed, but the plaintiffs may amend, within this term, on payment of costs, and service of a rule to plead on the defendants.

Mary A. MOWERY, *Plff. in Certiorari*,
v.
City of CAMDEN.

- *1. A **complaint**, designed to form the basis on which to try and convict a person for an offense, **must aver the facts** which constitute guilt, not merely the complainant's suspicion or belief as to the facts.
2. Such a **complaint** must **aver the facts** which constitute guilt of a **specific offense**, not merely facts that show the accused to be guilty of one or the other of two distinct offenses, but leave it uncertain which of the two is charged.
3. When a **special tribunal** is proceeding summarily in a matter over which it has not legally acquired jurisdiction, it is within the discretion of this court to allow a **certiorari** to review its action, **before the final determination** of the matter.

(Decided November 8, 1885.)

CERTIORARI to review proceedings before an alderman of the City of Camden, to punish plaintiff in *certiorari* for a violation of a city ordinance, in regard to the sale of liquor. *Reversed.*

Argued before Reed and Dixon, JJ.

The facts are stated in the opinion.

Mr. M. B. Taylor, for plaintiff in *certiorari*.

The writ in this case raises the question of entire absence of jurisdiction to issue a warrant under the 18th section of an ordinance of the City of Camden, entitled "An Ordinance Regulating the Licensing of Persons to Keep Inns, and Taverns, etc.," passed June 12, 1884.

The only questions involved are: 1, whether there was any jurisdiction; and 2, whether the *certiorari* was granted prematurely.

1. In order to support jurisdiction to issue a warrant it must appear by proof:

1. That the person so charged is regularly licensed, and licensed under the ordinance in question.

Act June 12, 1884, § 12.

2. That such person so holding such license has actually violated the provisions of the ordinance. *Id.*

*Head notes by DIXON, J.

II. The writ of *certiorari* is a discretionary writ, in the absence of any statute requiring it to be granted; and the time of its allowance, as well as all other circumstances, is subject to legal discretion.

State, Hozsey, v. City of Paterson, 10 Vroom, 498.

It is not necessary for a person to wait until his liability is fixed, before he can have redress. "It is enough that he may be affected by an illegal ordinance to entitle him to a hearing, before any attempt has been made to enforce it."

State, Danforth, v. City of Paterson, 5 Vroom, 163.

The writ may be invoked previous to the exercise of a final power, if the proceedings already show such final exercise of the power must be illegal.

State, Jersey City Gaslight Co. v. Jersey City, 16 Vroom, 480.

Mr. J. Willard Morgan, for defendant in *certiorari*.

Dixon, J., delivered the opinion of the court:

This *certiorari* brings up proceedings before an alderman of the City of Camden designed to punish the prosecutrix for violation of a city ordinance passed June 12, 1884, in regard to the sale of liquor.

The ordinance (§ 18) authorizes any person to be proceeded against before an alderman, upon proof being made by affidavit of the violation of any of its provisions; whereupon the alderman is by his warrant to require the person accused to be brought before him, and is to hear and determine in a summary way the guilt or innocence of the person so charged.

One of the provisions of the ordinance (§ 10) is that whosoever shall sell any spirituous, vinous or malt liquors, in less quantity than a quart, without having first obtained a license therefor, shall be punished by a fine of \$50, or, in default of payment, by ten days' imprisonment.

Another provision (§ 12) is that if any person licensed under the ordinance shall sell to a minor any spirituous, vinous or malt liquors, he shall pay a fine of \$100, or in default of payment, be imprisoned ten days.

In the present case, the affidavit filed with the alderman was as follows:

"Camden City and County, ss: John Wood upon his oath complains that he has good reason to believe and does verily believe that on March 10, 1885, at said City, one Mary Mowery did knowingly and unlawfully sell and offer for sale spirituous, vinous and malt liquors, to wit: one gill of brandy to one James Thomas, a minor under the age of twenty-one years, contrary to and in violation of the before mentioned ordinance."

On this affidavit, the magistrate issued his warrant, the prosecutrix was arrested and a day was set for her trial; thereupon, she obtained this *certiorari*.

Under our prior adjudications it is plain that this affidavit furnished no legal support to the proceedings of the magistrate. The ordinance requires, as preliminary to a warrant, proof by affidavit of some violation of its provisions; while the affidavit tendered proof only of the

affiant's belief and his opinion of its reasonableness. This was fatally insufficient, since the affidavit was to constitute a charge whereupon to base a conviction. *Roberson v. Lambertville*, 9 Vroom, 69.

Moreover, if the affidavit was designed to formulate a complaint for violating the tenth section of the ordinance, it should have averred that the accused had sold without having first obtained a license to sell; *State, Greely, v. Passaic*, 13 Vroom, 87; *Fleming v. New Brunswick*, 18 Vroom, 231; while if a violation of the twelfth section was in view, an averment that she had been licensed under the provisions of the ordinance was requisite, according to the words of the section.

It must indeed be admitted that if the matters believed by the affiant were true, the person charged was guilty of an offense, for the sale of a gill of brandy to a minor in the City of Camden was a prohibited act; but it is not enough for a criminal complaint to aver mere guiltiness in the accused; it must allege a specific offense, so that the accused may know how to prepare his defense, if he have any, and so that the court may be able to render the legal judgment on conviction. This charge would answer neither purpose.

If the accused was to be tried for violating the tenth section, proof by her of the majority of the vendee would be of no avail, but proof of a license would be a complete defense. If she was to be tried under the twelfth section, then proof by her of a license would be of no avail, but proof of the majority of the vendee would be a complete defense. If the accused had come before the alderman and confessed the truth of the affiant's belief, the magistrate could not have judicially decided whether to impose the fine of \$50 under the tenth section, or the fine of \$100 under the twelfth section. If she was licensed, the latter penalty was the legal punishment, if she was unlicensed, the former penalty was prescribed; but whether she was licensed or not, neither the charge nor her confession would indicate. Such a complaint was fatally defective.

The insufficiency of the complaint being thus manifest, the defendant nevertheless contends that the *certiorari* was premature, because allowed before conviction, and for that reason should now be dismissed.

The rule on this subject is stated by Chief Justice Hornblower, in *Hinchman v. Cook*, Spen. 272, to be that "A *certiorari*, at the common law, goes to special and summary tribunals and brings up the whole or any part of their proceedings according to the command and exigency of the writ; and such writ may be issued before the inferior jurisdiction has consummated its authority. But a writ of error, or a *certiorari* substituted by statute for that writ, cannot go for part only of the record, nor before final judgment." The same rule was enunciated by the court of errors in *State, Hozzey, v. City of Paterson*, 10 Vroom, 489, and is therefore settled.

The theory adopted in this State, as I understand it, is that when a *certiorari* is used as a statutory substitute for a writ of error, it cannot legally issue until after final judgment below; when the object is to remove a cause to be continued in this court, a *certiorari* in criminal

matters, and a *habeas corpus cum causa* in civil matters, is the appropriate writ, although sometimes in the latter class *certiorari* has been used. *Chandler v. Monmouth Bank*, 4 Halst. 101.

When the purpose is to review the proceedings of a special tribunal on complaint of irregular procedure in matters legally brought within its jurisdiction, a *certiorari* may legally issue before final decision, but ordinarily should not be allowed until then, for haply the tribunal may correct its own error in time. When the design is to reverse proceedings of special tribunals in matters not legally brought within their jurisdiction, then the writ of *certiorari* may legally, and ordinarily should, be allowed when asked for, either before or after final decision, because each step in such proceedings is an unlawful vexation of the party prosecuted, against which this writ is his sole protection. The discretion of this court in the allowance and dismissal of the writ, and now also with regard to costs on final judgment, affords an adequate safeguard against any abuse.

Under the rule laid down in *Hinchman v. Cook*, and *State, Hozzey, v. City of Paterson*, *supra*, the legality of the issuance of the present writ is clear. It was allowed, not as a statutory writ of error, but by the common law power of the court, to inquire into the acts of a special and summary tribunal, which was proceeding against the prosecutrix upon a complaint that gave it and could give it no legal authority to proceed.

In a proper sense it may be said that the magistrate had not acquired legal jurisdiction over the cause; the case was only colorably, not really, under his jurisdiction. In view of the fact that the proceedings, if carried on to a conviction, threatened an immediate and unlawful imprisonment of the prosecutrix, for which however the law, according to *Grove v. Van Duyne*, 15 Vroom, 654, would give her no redress, I do not think discretion was improvidently exercised in allowing the writ at the threshold. Certainly no useful result can be attained by now dismissing it.

The proceedings below should be reversed, but since no application was made to the magistrate to dismiss the complaint before suing out this writ, no costs will be awarded.

STATE, Daniel L. SAVAGE, *Prosecutor*,
v.
George L. COLLINS.

- *1. If, in the court for the trial of small causes, a party files a legal affidavit of the absence of a material witness out of the State, the justice may postpone the trial to a time not exceeding three months from the return day.
2. If, upon filing such affidavit, the justice adjourns to a time less than thirty days from the return day, a second adjournment cannot be legally granted the party, to a time exceeding thirty days from the return day, a further affidavit of the continuing absence of the witness not being filed.

*Head notes by PARKER, J.

3. In this case, the justice proceeded with the trial and rendered judgment after he had lost jurisdiction of the cause.

(Decided November 10, 1886.)

CERTIORARI to review a judgment of a justice of the peace in favor of plaintiff. *Reversed.*

Argued before Dixon, Knapp and Parker, JJ. The facts are stated in the opinion.

Mr. Barton B. Hutchinson, for prosecutor:

"The party applying for a second adjournment must make affidavit of the want of a material witness, whom he shall name, and that he thinks he can produce at a future period.

Midler v. Lazadder, 2 Green, Law, 84.

Chief Justice Kirkpatrick says, in *Bisham v. Tucker*, 1 Penning, 255: "They (the Legislature) intended to provide tribunals which, in these small causes, should render speedy justice, justice without procrastination or delay; and for this purpose they introduced this section" the section relating to adjournments in justice courts. The language of the statute is "to any time," not "from time to time."

Plaintiff was not obliged to obey the grand jury subpoena in derogation of his own suit and at the possible risk of losing his jurisdiction over the defendant. He would have had "a lawful and reasonable excuse" for not obeying it and could have readily purged himself from any allegation of contempt for the grand jury process.

Hurst's Case, 4 Dall. 387 (4 U. S. bk. 1, L. ed. 878), opinion by Justice Washington; *Halsey v. Stewart*, 1 South. *367; *Miles v. McCullough*, 1 Binn. (Pa.) 77; *Cole v. Hawkins*, 2 Strange, 1094. See also Revision, "Evidence," p. 379, § 18.

Plaintiff had a right to elect which course to pursue, viz.: to prosecute his suit or obey the subpoena. By obeying the subpoena he elected to abandon his cause to its fate, and should take the consequences.

Icehour v. Martin, Busb. (N. C.), 478.

Parker, J., delivered the opinion of the court:

On August 24, 1885, George L. Collins commenced an action by warrant, in the court for the trial of small causes, against Daniel L. Savage. Mr. Savage, when arrested, entered into recognizance to appear before the justice on the 5th day of September, 1885.

On the day last named, both parties appeared and Collins applied for an adjournment. Upon his making and filing an affidavit of the absence from the State of a material witness, the trial of the cause was postponed to the 21st day of September. On that day both parties again appeared before the justice, and Mr. Collins then applied for a further adjournment, alleging as a reason the continued absence of the witness, but not making further affidavit of the fact. Savage objected to the adjournment, but the justice granted the application and again postponed the trial to the 13th day of October, a date more than thirty days after the time of the first appearance of Savage before the justice, according to the condition of the recognizance.

In this cause, it is not necessary to decide whether the adjournment to the 13th of October would have been legal, if Collins had made an additional affidavit of the continued absence of the witness. Upon filing the affidavit of the 5th of September, the justice had the power to postpone the trial of the cause to a day not exceeding three months; but the adjourned day having been fixed for the 21st of September the justice had no power, on the strength of the original affidavit only, to further postpone the trial to a time more than thirty days from the day of the first appearance.

There was no proof before the justice on the 21st day of September that the witness was then absent from the State; and without such proof, the further postponement, if granted, should have been to a day not exceeding thirty days from the time of the appearance mentioned in the recognizance. Revision, p. 545, § 30.

On the 13th day of October, Savage again appeared before the justice, but Collins did not appear. By his appearance on the 13th of October, Savage did not waive his right to object to the adjournment to that day. If the justice had lost jurisdiction of the cause by an adjournment to a date more than thirty days after the first appearance of Savage, he did not waive any of his rights.

On the 13th of October Collins did not appear, and Savage, who was present, asked that the case be dismissed; but this was refused by the justice, and the trial was further postponed by him to the 27th day of October, on the alleged ground that Collins had informed him that he could not attend on the 13th of October, because he had been subpoenaed to attend on that day before the grand jury of Mercer County as a witness.

On the 27th day of October, Savage did not appear but Collins was present, and a trial was had which resulted in a judgment against Savage.

It is clear that at the time of the trial and the rendering of the judgment the justice had not jurisdiction of the cause.

The judgment is reversed, with costs.

Catharine COLLYER, Admr., etc.,

v.

PENNSYLVANIA R. R. CO.

- *1. A master is bound to take reasonable care and precaution to guard his servants against danger. If he fails to exercise reasonable skill in furnishing machinery or buildings for the use of his servants while in his service, he is responsible for the consequent damage.
2. He cannot claim immunity, upon the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings; but assumes the burden of seeing that such mechanics actually exercised reasonable care and skill in the execution of their work.
3. There can be no recovery by the serv-

*Head notes by VAN SYCKEL, J.

ants against the master, for injury caused by the careless handling of machinery by a fellow servant.

4. If the party injured was lawfully in the building where the injury was received, in the course of his employment, he was a fellow servant with those whose negligence produced the injury.
5. If he was there as a trespasser or by sufferance, no duty with respect to him rested on the master, except to refrain from acts willfully injurious; he assumed all the ordinary risks incident to the character of the place, and is without remedy.

(Decided November 8, 1886.)

RULE to show cause why a verdict in favor of plaintiff should not be set aside and a new trial granted, in an action to recover damages for a personal injury caused by alleged negligence of defendant. *New trial granted.*

Argued before Beasley, Ch. J., and Depue, Van Syckel and Knapp, JJ.

The facts are stated in the opinion.

Messrs. Vredenburg & Garretson, for defendant.

Mr. James Fleming, for plaintiff:

The employer contracts with his employee to use reasonable diligence to protect him from unnecessary risks. The omission is negligence for which employer is liable.

Harrison v. Central R. R. Co. 2 Vroom, 293.

Where plaintiff charges defendant with negligence in introducing a new explosive without informing plaintiff fully of its dangerous character, held, defendant is liable.

Smith v. Oxford Iron Co. 18 Vroom, 467.

If the master knows, or would have known had he used ordinary diligence, that the buildings or materials he provides are unsafe, he is certainly answerable for all injuries caused thereby.

Ryan v. Fowler, 24 N. Y. 410; *Keegan v. W. R. R. Corp.* 8 N. Y. 175; *Cayzer v. Taylor*, 10 Gray, 274; *Shearm. & Redf. Neg.* §§ 93, 95, 97.

This case is within the rule laid down in *Paulmier v. Erie R. R. Co.* 5 Vroom, 153.

When the servant, in obedience to the master, incurs the risk of machinery which, although dangerous, is not so much so as to threaten immediate injury, or if it is reasonably probable that it may be used safely by extraordinary caution, the master is liable for a resulting accident.

Patterson v. Pittsburg etc. R. R. Co. 76 Pa. 389.

Plaintiff will not be nonsuited unless, on his own showing, he has been guilty of negligence.

Bonnell v. Del. Lack. & West. R. R. Co. 10 Vroom, 189.

A master is bound to take ordinary and reasonable care not to subject his servant to unreasonable or extraordinary dangers by sending him to work in dangerous buildings or dangerous premises.

Thomp. Neg. 972, 973.

Generally the servant only takes the risks of what may fairly be denominated seen dangers. *Thomp. Neg.* 980, § 9.

It is but another expression of rules already announced to say that if the negligence of the

master combines with the negligence of the fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master.

Thomp. Neg. 981, § 10.

It is negligence to use cars dangerous in construction, when there are others to be used not dangerous.

St. Louis etc. R. R. Co. v. Valirius, 56 Ind. 511, 512.

It was for the omission to observe the dangerous appearances and to adopt suitable means of protection that defendant is liable. Plaintiff had a right to rely upon the master's adopting suitable means of protection.

Pantzar v. Tilly Foster Iron Min. Co. 99 N. Y. 368.

When a servant receives an injury in part by the negligence of his master and in part by that of a fellow servant, he can maintain an action against the master for such injury.

Paulmier v. Erie R. R. Co. 5 Vroom, 151.

Company held liable to engineer for negligence of the conductor of train.

Chicago etc. R. Co. v. Ross, 112 U. S. 377 (Bk. 28, L. ed. 787).

Stills of insufficient strength constructed under president; company liable.

Ardesco Oil Co. v. Gilson, 63 Pa. 146.

Conductor injured by insufficient side track; company liable.

Patterson v. Pittsburg etc. R. R. Co. 76 Pa. 389.

Teamster injured by negligence of superintendent; company liable.

Cook v. Hannibal & St. Jo. R. R. Co. 63 Mo. 397.

Common laborer injured by negligence of conductor; company liable.

Chicago etc. R. R. Co. v. Bayfield, 37 Mich. 205.

If the defendant has by his own act thrown the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim for damages.

Fowler v. Baltimore etc. R. R. Co. 18 W. Va. 588; *Shearm. & Redf. Neg.* § 28; *Ernst v. Hud. Riv. R. R. Co.* 35 N. Y. 9; *Newson v. New York Cent. R. R. Co.* 29 N. Y. 883.

The negligence of plaintiff which will defeat his recovery must be a proximate cause of the injury; and the act must be one which he could reasonably anticipate would result in his injury.

Fowler v. Baltimore etc. R. R. Co. 18 W. Va. 579.

Contributory negligence is not imputable to a person for failing to look out for danger, when under the surrounding circumstances the person sought to be charged with it had no reason to suspect that danger was to be apprehended.

Langan v. St. Louis etc. R. Co. 72 Mo. 392.

The age, intelligence and experience of one who has suffered from an injury, help to determine whether he has been guilty of contributory negligence, so that the jury may ascertain whether he fully understood and appreciated the danger.

Swoboda v. Ward, 40 Mich. 420.

Notice and warning is necessary to be given to minors engaged about machinery or dangerous structures.

The same remark applies to servants whose grade of intelligence or education is not such as to enable them to detect a defect with which the master, from the fact that he must operate the machinery in which the defect exists, is or ought to be familiar.

Whart. Neg. § 216; *Noyes v. Smith*, 28 Vt. 59.

Whether or not the servant was in the course of his employment is to be inferred from circumstances and is for the jury.

Whart. Neg. § 167; *McKenzie v. McLeod*, 10 Bing. 385; *William v. Jones*, 3 Hurl. & Colt. 256; *Mitchell v. Crasnoweller*, 13 C. B. 237; *Foreman v. Mayor etc.* L. R. 6, Q. B. 214; *Holmes v. Mather*, L. R. 10 Exch. 261; *Stevens v. Armstrong*, 6 N. Y. 485; *Courtney v. Baker*, 60 N. Y. 1.

When there is doubt whether the employee was requested or ought to have made himself acquainted with the risks, the question of his negligence in this respect is for the jury.

Whart. Neg. § 217; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

Plaintiff may recover, not only the amount of damage which he suffered prior to suit but all injury to verdict and what it is reasonably certain he will suffer after.

Shearm. & Redf. Neg. §§ 597, 606.

A widow, although she dies, is entitled to dower according to her expectancy of life and not by actual value as determined by length of life.

McLaughlin v. McLaughlin, 7 C. E. Green, 506.

Van Syckel, J., delivered the opinion of the court:

This action is instituted by the administratrix of George Collyer, deceased, to recover damages for injury inflicted upon the decedent in his lifetime, by the alleged negligence of the defendant. The death of the decedent was not produced by the injury. Our statute has saved the right of action to his personal representative. Collyer was in the employ of the defendant Company and was injured by the falling of a sliding door in the Company's store at the foot of Laight Street in the City of New York.

The plaintiff insists that the injury resulted from the negligent and unskillful manner in which the door was constructed, and from the careless manner in which the door was handled at the time of the accident.

A master is bound to take reasonable care and precaution to guard his servants against danger. If he fails to exercise reasonable skill in furnishing machinery or buildings for the use of his servants while in his service, he is responsible for the consequent damage.

He cannot claim immunity upon the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings, but assumes the burden of seeing that such mechanics actually exercised reasonable care and skill in the execution of their work. The evidence shows that this door was constructed with ordinary skill, and that the injury was caused by the careless and negligent manner in which the door was opened by the man who had charge of it.

The evidence also is that the Company exercised due care in the selection of these servants.

582

If Collyer at the time of the injury was lawfully in the vicinity of the building in the course of his employment, he was a fellow servant with the men whose negligence inflicted the injury upon him; and he therefore cannot recover.

If he was there as a trespasser or by sufferance, no duty with respect to him rested upon the Company, except to refrain from acts willfully injurious. He assumed all the ordinary risk incident to the character of the place, and is without remedy. *Vanderbeck v. Hendry*, 5 Vroom, 467.

The verdict should be set aside, and a new trial granted.

Morris HALLECK, County Collector of Camden County,

vs.
Joseph C. HOLLINGSHEAD.

*The Acts of March 6, 1884, p. 58, and March 11, 1880, p. 247, are special and local, and therefore **unconstitutional**†

(Decided November 9, 1886.)

ON demurrer to declaration in an action of contract, to recover fees and other compensation collected by defendant as county clerk of Camden County. *Demurrer sustained.*

Argued before Beasley, Ch. J., and Depue, Van Syckel and Knapp, JJ.

The question is stated in the opinion.

Messrs. Jonas S. Miller and D. J. Pancoast, for plaintiff.

Messrs. Thos. B. Harned and Garrison & French, for defendant.

*Head note by VAN SYCKEL, J.

†The Act of 1874 is as follows:

Be it enacted, By the Senate and General Assembly of the State of New Jersey, That the clerk of the County of Camden shall receive a salary of \$4,000 per annum for his services as clerk of the criminal and civil courts of said county; which sum is to be paid to him in quarterly payments by the collector of said county, and is to be in lieu of all fees, costs and compensation now allowed him in the said courts, and all fees, costs and compensation that said clerk is now entitled by law to receive shall be taxed in all bills of costs the same as are now taxed, and shall be collected by the sheriff of said County of Camden, and be by him paid over to the collector of said county for the use of the said county.

The Act of 1880 is as follows:

Be it enacted, By the Senate and General Assembly of the State of New Jersey, That in all the counties of this State, as to which it is now or shall hereafter be provided by law that the compensation of the county clerks shall be by annual salary, the said salary shall be in lieu of all fees, costs or other remuneration or compensation whatsoever, for any and all services required to be performed by said clerks, and shall be paid to said clerks in quarterly payments by the collectors of said counties, respectively; and all fees, costs and compensations that are now allowed said clerks for services in the courts of said counties shall be taxed in all bills of costs the same as they are now taxed, and shall be in each county collected by the sheriff, and be by him paid over to the county collector for the use of the county; and the fees now allowed by law for all other services rendered by the said clerks shall be by them collected and paid over to said collectors respectively.

The Act of 1884 is in all matters similar to the Act of 1880 above, save that the words "said clerk" are substituted in place of the word "sheriff" (italicized in that statute.

Van Syckel, J., delivered the opinion of the court:

The right of the plaintiff to maintain this suit rests upon the Act of March 6, 1884, and the Act of March 11, 1890. Laws 1884, p. 58, and Laws 1890, p. 247.

The classification adopted by the Legislature in both these Acts is based upon the Act of March 17, 1874 (p. 280).

In *Gibbs v. Morgan*, and *Ernst v. Morgan*, 12 Stew. 126, 391, such classification was held to be vicious. The view taken by the chancellor was concurred in by the court of errors and appeals in reviewing the case last cited. 18 Stew. 733.

The Act of 1890, to which the Act of 1884 is a supplement, applies only to counties in which the compensation to the clerk is by annual salary. Camden County alone is within the operation of its provisions.

The judgment of the court of last resort in *Ernst v. Morgan* was that the fact that in Camden County the clerk was paid by annual salary did not furnish sufficient ground for the exclusive legislation.

The case under consideration cannot be distinguished.

The plaintiff's action cannot be supported.

STATE, Ichabod AYRES, *Prosecutor*,
v.
Board of POLICE COMMISSIONERS OF
NEWARK *et al.*

- * 1. A charge against a policeman for incapacity, based on the report of the examining physician and made by the direction of the commissioners, is, for good cause and in proper form, within Statutes May 2, 1885 (L. p. 326), March 25, 1885 (L. p. 163), February 23, 1886 (L. p. 48).
2. A reasonable notice and a fair hearing and investigation, without formality in the procedure, are all that is required.
3. The court on certiorari will not weigh the evidence. It is sufficient if there is a legal and substantial basis for removal, on which the commissioners acted, within their authority.
4. Police officers, serving under the appointment and authority of the board of police commissioners, are not in position to question the constitutionality of the Act constituting the board, on certiorari.

(Decided November 13, 1886.)

CERTIORARI to review proceedings of the Board of Police Commissioners of Newark, removing prosecutor from the police force. *Writ dismissed.*

Argued before Magie and Scudder, JJ.

The facts are stated in the opinion of the court.

Mr. J. Frank Fort, for prosecutor:

There are only four grounds of removal of a policeman by the authorities of a municipality: 1, incapacity; 2, misconduct; 3, nonresidence; 4, disobedience of just rules and regulations established.

* Head notes by SCUDDER, J.

N. J.

Laws 1885, p. 163, § 1.

Section 5 of the Act of 1885 (Laws 1885, p. 163) provides that no removals shall occur except for "just cause," as provided in the first section; then only after written charge or charges of the cause or causes of complaint shall have been preferred against any such officer, etc., signed by the person making such charge.

This does not mean that a policeman may be placed on trial in any other way than on a *bona fide* complaint signed, by the voluntary act of some one alleging just cause to place him upon a defense under the grounds enumerated in Act 1885, p. 163, § 1.

The Act under which the respondents were appointed is unconstitutional. It makes eligibility to the office of police commissioner depend upon the political belief of the person appointed.

By our Constitution it is provided in article 1, § 4: "No religious test shall be required as a qualification for any office or public trust."

By article 1, section 2, it is declared: "All political power is inherent in the people."

By article 1, section 19, it is provided: "This enumeration of the rights and privileges shall not be construed to impair or deny others retained by the people."

Again; this Act is unconstitutional in this: that it is in conflict with the Fourteenth Amendment of the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In *Barker v. People*, 3 Cow. 686, it is held that "Eligibility to office belongs equally to all persons whomsoever, not excluded by the Constitution."

"When neither by Constitution nor statute are the qualifications for office prescribed, anyone is eligible who possesses the right of franchise."

Cooley, Const. Lim. p. 748.

"A statute would not be constitutional which should proscribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules or impose upon them special obligations or burdens, from which others in the same locality or class are exempt."

Cooley, Const. Lim. p. 483.

"Courts will take judicial notice of the electors being divided into parties; and if one of them is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems conclusive." *Id.*

Baltimore v. State, 15 Md. 376.

In Michigan an Act on principle a counterpart of the law here questioned was declared unconstitutional.

Atty-Gen. v. Detroit, 58 Mich. 213.

Mr. Joseph Coult, for defendants.

Scudder, J., delivered the opinion of the court:

The state of the case agreed on by counsel

shows these facts: that the Police Commissioners of the City of Newark were appointed by the mayor and their appointment confirmed by the council, under the "Act to remove the fire and police departments in the cities of this State from political control," approved May 2, 1885 (Laws, 326); which Act was adopted by a vote of the city as therein required; that of the four Commissioners two were selected from each of the two political parties which had cast and polled the greatest number of votes at the last preceding municipal election, and had the other qualifications required by the Act; that the prosecutor was appointed a policeman by the common council, prior to the statute; that a charge and specification in writing was made by the Chief of Police, April 29, 1886; that the prosecutor, patrolman Ichabod Ayres, was incapacitated for duty, because on examination by the police surgeon he was found to be almost totally deaf in the left ear, the left eye to have very imperfect vision, and on account of his general physique and age. Upon this charge he was dismissed.

The eighth section, in the second clause, says: "And the said board of police commissioners shall be fully authorized and empowered to designate, appoint or approve all the policemen or other persons employed in the police department of such city; and said respective boards shall have full power and right to suspend and to expel or discharge any person employed in or under the department under the control of such board, provided good cause shall be shown for such suspension, expulsion or discharge after an investigation by such board."

A power to remove an officer "for cause" can be exercised only for good cause, and after the officer has had an opportunity for defense. *State, Haight, v. Love*, 10 Vroom, 14.

What in legislative intention is good cause for such suspension, expulsion or discharge, will be found in a statute, *in pari materia*, passed at the same session of the Legislature (March 25, 1885, Laws, 163, § 1; amended by Act of February 23, 1886, Laws, 48), entitled, "An Act Respecting Police Departments of Cities, and Regulating the Tenure and Terms of Officers and Men Employed in Said Departments."

The amendatory Act does not change the section in this particular; and both say that "No person shall be removed from office or employment in the police department of any city, or from the police force of any city, for political reasons, or for any other cause than incapacity, misconduct, nonresidence, or disobedience of just rules and regulations established or which may be established for the police force or police department of such city."

Within these terms of the law the specific charge against the prosecutor would be incapacity, and no other cause of discharge appears in the facts of the case.

The first reason assigned for reversal is that the charge was not made by the Chief of Police on his own motion, or voluntarily, but by the direction of the Commissioners. This officer in his testimony states his position very distinctly. He says: "I simply acted my part in the law, in formulating the charge. I made the charges on the certificate of the physician and by the direction of the Commissioners."

There is no objection to this action by the Chief of Police and the Board of Commissioners. Their proceeding was a mere form to put the charge in shape for a proper investigation; not voluntarily and without assigning good cause, but in the discharge of their official duty, and for a cause based upon the report of the examining physician of the Board.

Another reason assigned is that the prosecutor was not served with a statement of the grounds of the charges, and no proper notice of the substance thereof. The later Statute of May 2, 1885, is silent as to the procedure for removal or discharge of a policeman from his employment; but section 5 of the Act of March 25, 1885, is particular in the requirement of a written charge of the cause of complaint signed by the person making such charge, filed in the office of the department; a public examination into the charge by the appropriate municipal board; reasonable notice; a fair trial and every reasonable opportunity to make his defense, if he has any or chooses to make one.

A fair trial does not mean that all the formalities shall be observed that are used in the trial of criminals for minor offenses in courts or by magistrates. The policeman under charges is not regarded by this statute as a criminal, but a public agent or servant whose efficiency and fitness for the discharge of his duties may be questioned at any time in the interest of the public; and no mere forms tending to chicanery and delay rather than substantial justice should be regarded. The purpose of the law is to secure the services of reliable men, to preserve the public peace, and not to keep inefficient and litigious men in office until all the forms of criminal cases are observed, and every ingenious objection answered. See *State, Devault, v. Camden* [ante, 82], June Term, 1886.

Notice in writing was given to the prosecutor on May 4, of hearing on May 8, to be present with witnesses, and the charge stated—of being incapacitated for duty. He appeared with counsel at the time and place specified in the notice; made no objection to the notice; the charge with specifications was read to him and he pleaded to it, not guilty; witnesses were produced, examined and cross examined by both parties. At the close of the examination all the Commissioners voted that he be removed, for incapacity. There was a fair trial within the terms of the statute. High, Extr. Rem. § 411; *Rex v. Wilton*, 2 Salk. 428; S. C. 5 Mod. 257.

The testimony showed that he was about sixty years old; that he was partially deaf and had imperfect sight in one eye; and the Chief of Police testified that a man having those infirmities is not a proper person for a police officer. It was, however, also proved that he was a man of good habits; that there were no complaints against him and that he had properly discharged his duties. This court will not weigh the evidence on these facts. It is sufficient that there was a legal and substantial basis shown for his removal, upon which the Commissioners acted within their authority. This disposes of the next reason assigned: that the evidence did not justify the removal.

The other reasons relate to the constitutionality of the Act appointing commissioners of police. The Act respecting police departments of cities and regulating the tenure of office of

officers and men employed in said departments, above cited, has been passed on in *State, Fitzgerald, v. New Brunswick*, 18 Vroom, 479 [S. C. 1 Cent. Rep. 457], affirmed in the Court of Errors and Appeals at June Term, 1886. Its constitutionality was sustained on the exceptions taken.

The other Act, to remove the fire and police departments in the cities of this State from political control, is now challenged. The further question is presented whether the Legislature has the power to say that of the four Commissioners to be nominated by the mayor and confirmed by the council, "two shall be selected from each of the two political parties which shall have cast or polled the greatest number of votes at the last preceding municipal election," and whether it can designate classes of citizens from which public offices shall be filled. But this prosecutor is not in a position to raise this disputed point. As in the *Fitzgerald Case* and others he might contest the authority to remove and retain officers, the formalities to be observed and the constitutionality of the Act under which such authority was given; but the objection here made strikes at the official existence of the Board of Commissioners, and the judgment of this court which is sought against them would in effect be an ouster from their office, by collateral proceeding. It would even go farther and vacate the office which the prosecutor claims that he still holds; for after the enactment of this law he submitted himself to the authority of these Commissioners for one year without objection, and, in the language of the eighth section of the Act, the Commissioners, being fully authorized and empowered, "designated, appointed and approved" him, as one of the policemen or persons employed in the police department of the city.

He was already employed, and they continued his employment as if they had again appointed him.

While, on this statement, he might be a policeman *de facto*, he would not be such *de jure*, if his position that there is not a legal Board of Commissioners is correct. He cannot dispute its legal existence, without determining his own; and the inconsistency of his attempt to annul the law is apparent. The question suggested might be raised as in *Worthley v. Steen*, 14 Vroom, 542, by the Commissioners themselves if, on refusal to act, the attempt were made to compel them by *mandamus*; but if they continue to act under an alleged writ or unconstitutional Act appointing them, the remedy must be by direct proceeding, and *quo warranto*. *State v. Paterson*, 8 Vroom, 177; *State v. Tolan*, 4 Vroom, 195; *State, Hoeg, v. Collector of Ocean Township*, 10 Vroom, 75-79.

The writ will be dismissed, with costs.

STATE, James DEY, *Prosecutor*,
v.

PUBLIC ROAD BOARD of the Township
of Ridgefield.

* Section 8, concerning roads in the Township of Hackensack (Laws 1870, p. 8), applicable to Ridgefield, requires

* Head note by SCUDDER, J.

N. J.

that the road board shall decide and determine upon the necessity of a proposed improvement in roads. Their decision must show that they did so decide and determine in exercising their special statutory authority.

(Decided November 12, 1886.)

CERTIORARI to review proceedings on opening an extension of Central Avenue. *Proceedings vacated.*

Argued before Scudder and Magie, JJ.

The case is stated in the opinion.

Mr. A. T. McGill, for prosecutor.

Mr. C. H. Voorhis, for defendants.

Scudder, J., delivered the opinion of the court:

The proceedings brought up for review in this case were taken on the application of twelve freeholders in the Township of Ridgefield, in the County of Bergen, under section 8 of the Act concerning roads in the Township of Hackensack (Laws 1870, p. 8); § 4, Supplement (Laws 1871, p. 1507); and the further Supplement (Laws 1874, p. 579).

The Public Road Board of the Township of Ridgefield having made their decision, award and assessment for laying out and opening an extension of Central Avenue, through the lands of the prosecutor and others, this *certiorari* is brought to set aside these proceedings, for alleged irregularities.

There are thirty reasons assigned for reversing the action of the Road Board, founded on the complex and difficult provisions of these different statutes. Fortunately, we may stop at the first reason without examining the others which seem to be of minor importance. The section (8) above referred to, in the original Act, which is continued in the supplement, requires that "The said Board shall decide and determine upon the necessity of such proposed improvement, and if the said Board shall decide and determine in favor thereof they shall make their decision in writing, etc."

Section 4 of the Supplement of 1871 adds to the former Act that, after hearing "The commissioners shall appoint a committee of their number to examine the route of the proposed road, and to report upon the feasibility and advisability of the same, and what changes, if any, shall be made therein; and thereupon the said Board shall decide and determine upon the necessity of said proposed improvement, etc.," as in the prior Act.

The Act of 1874 does not change these requirements. In examining the decision in writing returned with the writ, we find that a committee was appointed; that they reported that it was feasible and advisable to lay out and open said road without any changes. "And the said Board did then decide in favor of such improvement of laying out and opening the said road, etc." The important omission is that it does not appear that the Board did decide and determine upon the necessity of such proposed improvement.

The decision and determination by them that the proposed improvement is necessary is made the basis of further proceeding, and it is therefore essential that it should appear on the face

of their decision in writing. The Board having only a special statutory authority for taking land for public roads, and assessing damages and benefits therefor, every essential requirement of the law conferring this extraordinary power must appear to have been observed. *State, Semon, v. Trenton*, 18 Vroom, 489 [*S. C. ante*, 80].

For this reason the proceedings are set aside and vacated, without costs.

STATE, Bernard LYONS, *Prosecutor*,
v.

Common Council of GLOUCESTER CITY.

* Section 8 of the **Charter of Gloucester City** (Laws 1868, p. 106), gives to the Common Council power to pass ordinances for **appointing watchmen, constables and an additional police force**, and prescribing their powers and duties. They have never passed such ordinance. **Held**, that the prosecutor, who was appointed a policeman by resolution, is not entitled to **notice of removal and hearing, under Act of March 25, 1885**, respecting police departments of cities, and regulating the tenure and terms of office.

(Decided November 13, 1886.)

CERTIORARI to review proceedings of the Common Council of Gloucester City, removing prosecutor from the police force. *Writ dismissed.*

Argued before Scudder and Magie, JJ.

The facts are stated in the opinion.

Mr. H. A. Drake, for prosecutor.

Mr. James E. Hays, for defendant.

Scudder, J., delivered the opinion of the court:

At a meeting of the Common Council of Gloucester City, held March 25, 1884, a resolution was passed that the prosecutor and three others be elected policemen for the ensuing year. On March 24, 1885, a like resolution was passed. On August 13, 1885, a resolution was passed changing the police force, and another person was appointed policeman instead of the prosecutor. He had no notice or hearing on such removal.

He claims in this suit that under the "Act respecting police departments of cities, and regulating the tenure and terms of office of officers and men employed in said departments," passed March 25, 1885, he could only be removed for just cause, on notice and hearing as provided in section 5 of that Act. This is undoubtedly his right, if he is within the provisions of this Act. *State, Fitzgerald, v. New Brunswick*, 18 Vroom, 479 [*S. C. 1 Cent. Rep. 457*].

By section 8 of the charter of Gloucester City (Laws 1868, p. 106), among the powers given, it is enacted "That it shall and may be lawful for the Common Council of said City, or a quorum thereof in council convened, to pass all ordinances for appointing watchmen, constables and additional police, and prescribing their powers and duties."

The Common Council never has passed an

*Head note by SCUDDER, J.

ordinance for this purpose. The resolutions, therefore, by which the prosecutor was appointed a policeman were irregular and not within the power granted by the charter. The power is conferred to appoint; but the manner in which that power shall be exercised is prescribed, and the consequence is that such mode must be pursued. *Cross v. Mayor of Morristown*, 3 C. E. Green, 305-309; *Ridgeway v. Michellon*, 18 Vroom, 405.

Being thus appointed without authority and irregularly, he was removable at the discretion of council, unless protected by the Act of March 25, 1885. By the terms of that Act, those within its protection are officers and men employed by municipal authority in the police department of any city. Where there is no municipal authority shown for their employment, and there is no police department legally constituted, the Act does not apply.

There is no remedy given by this statute for the removal of the prosecutor; and the writ will be dismissed, with costs.

STATE, George W. ARNETT *et al.*, *Prosecutors*,
v.

The Mayor and Common Council of the City of LAMBERTVILLE.

1. After the lapse of sixteen years, proceedings to open a street will not be reviewed on *certiorari*, for failure of the return to show notice of the ordinance and an award of damages.

2. The lack of notice will not be presumed from the silence of the return; and if damages have not been paid, the remedy will be, not to set aside the ordinance but to compel the City to take the requisite steps to make compensation.

(Decided November 5, 1886.)

CERTIORARI to bring up the proceedings of the Common Council of the City of Lambertville, in opening Washington Street over and upon lands of Cornelius Arnett, now deceased. *Writ dismissed.*

Argued before Scudder and Magie, JJ.

The return to the writ shows:

1. The ordinance laying out Washington Street, approved January 10, 1870.

2. A petition of citizens presented to the common council May 4, 1884, asking that the street be opened and graded as provided for in the said ordinance. This petition was referred to a committee and no action taken.

3. A petition of citizens interested, presented May 11, 1885, asking that measures be taken to open Washington Street for public travel. This was signed by Cornelius Arnett, and was referred to a committee.

4. The committee, June 8, 1885, reported that they had had the street surveyed; that the distance is 900 feet, and the rise is 95 feet, being 1½ inches to the foot; that the cost of opening would be about \$900; that the principal advantage would be to the Hill School; that it would be an improvement; and recommending that the work be done.

5. At the same meeting the clerk was instructed to give the necessary notice of the intention to make the road as recommended, the said notice to be in accordance with the city charter.

6. A notice was published June 12, 1885, that the common council intended to open Washington Street, in accordance with the ordinance of January 10, 1870, and requiring persons objecting to present their objections in writing in ten days.

7. At a meeting September 21, 1885, the street committee was directed to proceed to open Washington Street or so much of it, this year, as in its judgment it may think best. This discretion was adopted by a vote of five to four.

Mr. Walter F. Hayhurst, for prosecutors:

The prosecutors object to the proceedings for the following reasons:

1. Because no notice was given or published as required by the charter of the City of Lambertville, approved April 13, 1868, before the passage of the ordinance brought up by this writ.

By "An Act to revise and amend the charter of the City of Lambertville" P. L. 1868, p. 951, § 49, subd. 1, the common council was given the power to lay out, accept and open any street, etc. But by section 50 it was provided that no ordinance should be adopted by the common council for making any improvement or performing any work under and by virtue of the last preceding section, until public notice be given of the intention of the common council to cause such work to be done, etc. No such notice was published until long after said ordinance was passed.

2. Because after the passage of said ordinance no effort was made to treat with the owners of land to be taken for the street laid out by the said ordinance, and no conveyance of the said land was taken from the owners thereof, nor were commissioners appointed as required by sections 52 and 53 of the charter.

P. L. 1868, p. 951, *et seq.*

3. Because no compensation whatever was made for the land belonging to these prosecutors, which was to be taken for the use of the said public street.

By the reading of the said charter (P. L. 1868, p. 951, § 52) it is clearly the contemplation of said Act that reasonable compensation be made for lands taken; and if agreement cannot be reached and conveyance obtained, section 53 and following sections indicate the course that must be pursued by the said council.

Section 18 of "an Act concerning roads" (Rev. p. 1000) only applies to "such public roads or highways" as are laid out in accordance with this Act.

4. Because no provision was made for compensation for the damage that would have been done to the adjacent land of these prosecutors by the grading of said street.

5. Because the resolution adopted September 21, 1885, was not a direction that the street be opened in accordance with the ordinance above referred to, in that the ordinance directs the opening of the whole of Washington Street, while the resolution leaves it at the discretion of the street committee to open the whole or a part of said street.

6. Because the proceedings in accordance

with the ordinance and resolutions above referred to would be the taking of private property for public use without any compensation whatever and in violation of the Constitution of the State of New Jersey.

Mr. Skillman, for Lambertville.

Memorandum, per Curiam:

What interest prosecutors have in the proceedings brought up by this writ does not appear. No testimony has been taken and the court is left in ignorance whether they own land taken for or affected by the public street in question, or only have such interest as any citizen may have therein. Indeed there is nothing to show that they are citizens. It may be inferred from an admission made in argument that they represent one Cornelius Arnett, who, in a petition appearing in the return, represented himself to be a citizen of Lambertville.

But assuming that prosecutors have some right to call for a review of these proceedings, they have been examined.

The ordinance attacked was passed nearly sixteen years before this *certiorari* issued.

The contention that it must be set aside because no notice was given of the intention to pass it cannot prevail. Such a notice was required by the charter. In the absence of any requirement, notice to persons interested must have been given. If either the charter notice or personal notice to prosecutors (or those whom they represent) was given, or knowledge of this ordinance was acquired by prosecutors (or those whom they represent) at the time of its passage, this *certiorari* was improvidently issued. The delay would be accounted laches.

Whether prosecutors must excuse this laches by proof that there was no such notice or knowledge acquired, or whether upon such proof a public ordinance may be attacked, after so long a lapse of time, need not be settled. There is no such proof. No evidence having been taken, express proof is wanting. The lack of notice will not be implied because the return is silent on the subject.

If the writ had been directed to the City by its corporate name, the return would be presumed to give the whole record called for, including whatever was in the custody of its officers. *Woodbridge v. State, Allen*, 14 Vroom, 262; *State, Davis, v. Harrison*, 17 Vroom, 79.

It is issued to the Mayor and Common Council. The return is by the Common Council. The presumption only is that it contains their proceedings. But the publication of such notices was required to be made by the city clerk; no record of them is required to be put in the council proceedings. Under such circumstances lack of notice is not to be presumed. Nor, under this writ, is the Corporation representing the public bound to defend public rights by proof of due notice.

The objections, that no proceedings to condemn lands taken or to compensate for injury to be inflicted by grading are shown, are (as applied to the ordinance) simply frivolous. Compensation for lands taken or injuries done is to be made by proceedings subsequent to the ordinance. If not made, the remedy of parties aggrieved is, not to set aside the ordinance but to compel the city to take the requisite steps to make compensation.

The only remaining question is directed to a resolution of the Common Council in respect to opening the street.

In the absence of proof that this Act can do any injury to prosecutors it ought not to be adjudicated upon. It is capable of a construction not inconsistent with the requirements of the charter.

It is proper to add for the information of counsel (who seemed to think that other questions were raised by this record) that an examination of the charter indicates that the right to use the land (covered by the ordinance) as a public street must depend not only on the ordinance but upon the circumstances or the further action of the City. Unless the land has been dedicated to public use as a highway the City must proceed to treat for and purchase the right to use it, or to condemn it in the manner prescribed by the charter.

There is nothing to justify any indication of opinion as to the right to damages for an injury to be done by grading this street.

The writ must be dismissed, with costs.

Re CONTEMPT OF Cumberland County Oyer and Terminer, by John CHEESMAN.

- *1. The superior courts of this State, modeled after the English Courts of Common Law, have authority to punish summarily for any words uttered, by speech, by writing or by printing outside of the regular course of litigation, which are designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert, in a pending cause, the due administration of justice.
2. The jurisdictional facts necessary to legalize a conviction for contempt in the superior courts of law are: first, that matters constituting a contempt should appear to the court to be true; second, that the party charged with contempt should have a fair opportunity to confess or deny those matters; third, that he should confess their truth. Outside of these facts, the steps to be taken are matters of practice only; and although a regular course of procedure has been established, yet strict conformity to it may be waived by the person accused.
3. A conviction for contempt may be sustained, although there was no affidavit preliminary to the rule to show cause, no writ of attachment was issued, and no interrogatories were presented.
4. On appeal from a conviction for contempt under the Statute of 1884, p. 219, this court will not consider the general policy of punishing such contempts as that of which the appellant is guilty. If, according to the law and the facts, the judgment appealed from is lawful and just, it will be affirmed.

(Decided November 6, 1886.)

*Head notes by DIXON, J.

A PPEAL from an order of the Cumberland Oyer and Terminer, adjudging appellant guilty of a contempt in publishing certain articles in his newspaper. *Affirmed.*

Argued before Depue, Reed and Dixon, JJ. The grand jury of Cumberland County, at the January Term, 1884, of the Court of Oyer and Terminer for said county, returned two true bills against John Cheesman, one for a libel upon one James L. Vansyckel, and the other for an assault and battery upon the said Vansyckel. The indictment for assault and battery was moved for trial at the January Term, 1885; but on account of a disagreement of the jury they were discharged, and both indictments being pending undetermined, the said John Cheesman, who was the editor and publisher of "The New Jersey Patriot," a newspaper published in Cumberland County, published in the issue of January 30, 1886, of said paper, an article, the following paragraphs of which are alleged to constitute the contempt with which he is charged:

"On this point we have no hesitation whatever in saying we honestly believe the grand jury, at the term of court in January, 1884, was packed by Sheriff Husted; and we have no hesitation in saying, further, that we believe it was corruptly packed and for a corrupt purpose."

"We say, further, that men were on that jury who were our openly avowed enemies, and have openly expressed a desire to do us harm; we say further that the sheriff knew of these things, and that in at least one instance he was advised by an officer of the court that a certain man should by no means be summoned to serve on the grand jury, and that notwithstanding this, this same man was summoned; another of the grand jurors bore upon him wounds which were yet fresh, received at the hands of an injured husband, while we believe that several more were of such character that even their judicial oath would not prevent their acting unjustly towards us."

"Instead of disarming and beating him, [meaning Vansyckel] Cheesman would have been justified in defending himself and his castle, in killing the intruding assailant through the exercise of the law of self defense, the first law of nature: self preservation. This he had the courage and coolness to refrain from doing, and hence he has been sustained and sympathized with by the community and court, with the sole exception of the judge, who is, we are sorry to say, and with how much reason we cannot say, charged with personal animus in the matter. We are loth to believe this, and in the absence of direct evidence we will not believe it, preferring to believe that an honest and honorable judge would not seek to gratify personal spleen in the discharge of public duty."

"The mistake the armed belligerent made was in visiting the sanctum; the mistake (in the eye of the law it seems) the editor made was in not killing his assailant. His plea of self defense would have saved him from the penalty attached to killing; and a dead man could not have sued him for assault and battery, nor the court charged against him for the limited means of self defense used in simply disarming an infuriated man."

"Judge Alfred Reed may know more law

than Cheesman; and he knows furthermore, by this time, that in trying to secure the conviction of an editor who deserves credit instead of censure for the course he pursued at a critical time, he has placed himself in a position in which he will be and should be criticised, aside from any consideration of whatever motive may have impelled him to do so. It looks too much like 'standing by' one profession to the detriment of another; sustaining a law-violating lawyer, instead of a law-respecting editor."

Mr. William E. Potter, with **Mr. William A. Logue**, for appellant:

This appeal is taken pursuant to the Act of the Legislature entitled, "An Act Providing for the Review of Convictions and Judgments for Contempt of Court," approved April 17, 1884, P. L. 1884, pp. 219-220.

The statute is of recent enactment and novel in its character in respect of the system of jurisprudence in this State. This is the first appeal which has been taken under it. A brief examination of its provisions, therefore, will be perhaps useful.

The statute is in two sections. The first section consists of a mandatory declaration "That hereafter every summary conviction and judgment by any court, inferior in its jurisdiction to the supreme court, except an orphans' court, for a contempt against its own dignity, peace and good, shall be reviewable, both on the law and the facts, by the supreme court; and every such conviction and judgment by the orphans' court shall be reviewable in the same way and manner by the prerogative court."

Section 2 of the statute delineates the method of procedure upon the appeal.

It provides "That every conviction and judgment shall upon the petition prescribed be, by the court wherein such conviction is had, immediately certified and sent to the supreme court or to the prerogative court as the case may require, to which the same shall be certified and sent, together with the petition of appeal and all proceedings touching the conviction and judgment, and which said court shall be invested with jurisdiction and required to rehear the matter of contempt upon which the conviction was founded, both upon the law and upon the facts, which shall be inquired into and ascertained by depositions or in such other way or manner as the court above shall direct; and it shall be required to give such judgment in the premises as to it shall seem to be lawful and just under all the circumstances of the case, to be enforced in such way and manner as it shall order and direct."

There is an additional provision providing for a *supersedeas* of all further proceedings in the court below, pending the appeal.

It is evident that the statute is intended to formulate a method for a trial *de novo* of the subject matter of the contempt both upon the law and the facts. The jurisdiction of the court in this case therefore, upon both of these questions, is substituted for that of the court below, as is also in like manner its discretion.

The provisions of the statute as to inquiry into the facts have in this case been complied with by the certificate of the court below, which certifies the appeal as here presented "to be a full and complete state of the case."

I. I shall endeavor to discuss here two questions:

1. Had the court below, or has this court, under the laws of this State, jurisdiction under any circumstances, to punish by summary conviction as for a constructive contempt, when the subject matter of the alleged contempt is the publication in a newspaper of an article in respect of the court, sheriff or grand jury, critical or contemptuous in matter and style, which publication concerns a judicial proceeding at the time thereof pending and undetermined?

2. Conceding such jurisdiction under some circumstances, are the proceedings of the court appealed from, upon the law and the facts here presented, such as should be reversed upon this appeal?

The first question involves an inquiry into the power of the courts to hear and determine, and therefore to punish, a constructive contempt of the character described; and as it concerns the liberties of the people, and is thus a question of civil liberty of the highest nature, I feel confident that this court will give it the full and careful consideration which its importance demands. I regard it, not as the court below viewed it, nor as the English Courts of Common Law since the beginning of this century have treated it, as a legal question only, but as of much higher import, a *politico-legal* question.

What therefore is the nature, form, method and extent of the jurisdiction of our courts to summarily convict and punish the citizen as for a contempt?

In countries possessed of Anglo-Saxon civil liberty it is the sole surviving remnant of despotic power. All other powers of despotism having their origin in brute force, in the progress of our race, and through our written constitutions and laws framed upon them, have been swept away. Being despotic, this power radically and necessarily is hostile to and conflicts with all the great safeguards of our constitutional freedom.

It dispenses with a grand jury.

It convicts without the intervention of a petit jury.

It violates the fundamental principle that no judge shall try a cause in which he has a personal interest.

It makes the judge, who is the injured and therefore the offended party, at once the person who makes the accusation, defines the crime, furnishes the evidence, decides as to its sufficiency, convicts, and fixes the term and degree of punishment, which is without limit, except in his own discretion, and may extend to entire confiscation of property and imprisonment for life.

Where the jurisdiction exists, its exercise at the common law is not subject to revision or review, except in mere matters of form.

Rhinehart v. Lance, 14 Vroom, 811, 812; *Re Cranford*, 13 Adol. & E.N.S. 618; *First Cong. Church v. Muscatine*, 6 Iowa, 69; *Re v. Clement*, 4 Barn. & Ald. 218.

It is therefore an absolute as well as a despotic power which holds, within its circle, the property and personal liberty of every citizen.

The courts themselves in this country view it with disfavor.

This court, speaking through *Mr. Justice* Depue, in *Rhinehart v. Lance*, above cited, says: "The power to commit, at discretion and for a discretionary term of imprisonment, is a transcendent prerogative power. At best it is an arbitrary power and liable to great abuses."

The Supreme Court of California declares it to be "arbitrary in its nature."

Batchelder v. Moore, 42 Cal. 412.

Other courts declare it to be "an exception to the provisions of the Constitution of the United States, and not to be extended in the least degree beyond the limits imposed by statute."

Rutherford v. Holmes, 5 Hun, 817; *Bergh's Case*, 16 Abb. Pr. N. S. 266; *People v. Jacobs*, 66 N. Y. 8.

Judge Ludlow of Pennsylvania remarks that "History teaches us that the arbitrary conduct of judges protected from just criticism by arbitrary laws, and acting under the control and sanction of the executive power or at the command of the hereditary head of the government, has inflicted serious damage to the cause of liberty."

Grand Jury v. Public Press, 4 Brewster (Pa.) 313.

The Supreme Court of Illinois says: "It is at best an arbitrary power, and should only be exercised on the preservative and not the vindictive principle. It is not a jewel of the court to be admired and prized, but a rod rather, and most potent when rarely used."

The views thus set forth as to judicial power in respect of contempt to us at this day are axiomatic and need no arguments to enforce them. They lead inevitably to the conclusion that none but the most cogent reasons will justify the existence of such a power, under any circumstances, among a free people.

The English Courts have undertaken to sustain the power upon two grounds: first, that the superior courts in that realm are the successors of the court held *In Aula Regis* where originally the King sat in person to administer justice, so that an interference with or insult to the court or its officers was, in fact, an insult to the royal person of the King himself; and that, as by legal fiction he is still potentially present in his superior courts, the ancient reason still remains.

This is the reason given in *Almon's Case*, Wilmot's Opinions, 243, prepared in the last century; and by *Chief Justice* Cockburn in *Reg. v. Lefroy*, L. R. 8 Q. B. 184, in 1873.

But it is clear that this reason is without force here, for there is no personal sovereignty, either actually or potentially present in our courts.

In the ancient sense and as understood in England and by the old writers, there is no such thing in this country as sovereignty. The King was King by the grace of God, and His earthly representative and custodian of dignity and power; and from him as from the source of a river all power was distributed through its various channels.

But here, not even the people are Sovereign, because their sovereignty is limited and hedged about by written constitutions, so that there remains even to them but a residuum of sovereignty; and that has no elements of a personal character

The second reason given, and the only one which can here justify the existence of the despotic judicial power in respect of contempts, is, when reduced to its primal elements, its absolute necessity to preserve the life of the courts. In other words, it consists in the right of self defense, without which all human life and action must succumb when assailed.

The same reason and no other which justifies one citizen to slay another, or a municipality to blow up a burning building, or hostile States to destroy thousands of lives upon a field of battle, the "*ultima ratio regum*," the supreme effort of sovereignty for its life, justifies this form of judicial power.

A court with its various departments and officers is like a piece of machinery which, if tangibly, actually and materially interfered with, must stop; and it must have the power, in order to exist, to punish actual obstructions to its duties and disobedience of its process and decrees. But as matter of argument the principle can go no further, and must fail to justify the power in respect to acts intangible in their character, which can in nowise actually and physically affect the operations of the court, but in their farthest limit have only a moral effect upon them. These can justify the power no more than spoken words, however provoking, can justify a homicide.

It is only by blending these two radically different classes of acts, those which physically and materially interfere with the courts and those which by their essence can no otherwise than intangibly and morally interfere with them, and by assuming that no distinction can be logically drawn between such methods of interference, that those who have written upon this subject can frame an argument. The great storehouse from which the arguments of those favorable to the expansion of the judicial power have been drawn, is the opinion of *Chief Justice* Wilmot of the common pleas, in *Almon's Case* above cited; and there has been no improvement upon it either in matter or style. It is both singular and interesting to note how logical and powerful the argument of that great lawyer is, in support of the power as it had actually existed in England from the earliest times, and how weak and illogical the same argument becomes, when he endeavors to apply it to a condition of affairs in respect to which there was no precedent.

Without pursuing this line of inquiry further I shall assume, for the purposes of this argument, that the power to punish in respect of contempt by summary conviction, cannot be justified, unless its existence is actually necessary to conserve the life and operations of our courts.

And to narrow the line of inquiry and apply it to the case at bar, my first subordinate proposition is: that in respect to constructive contempts by publication in a newspaper, there is no actual necessity nor even any expediency for the existence of this absolute and despotic judicial power.

This position I shall sustain, not by abstract reasoning, which is at best a feeble weapon, but by pointing out the condition of the law in this country upon this subject.

The statement which I now make is not found in any text book or adjudicated case,

but is the result of my own personal examination. It is, that in thirty-three of the thirty-eight States of this country, the power of the courts to summarily convict and punish, as for contempt in respect of a publication, has been, for periods ranging from 1667 until the present time, by positive enactment, either totally forbidden or defined and limited or rendered subject to review.

The Courts of the United States have been in like manner forbidden the power for fifty-five years. By the Act of Congress of March 2, 1831, it is provided that "The power of the Courts of the United States to punish contempt shall not be construed to extend to any cases, except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officers, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

This Act of Congress grew out of the arbitrary action of *Judge Peck* in respect of a contempt similar to the one at bar. He was impeached and barely escaped conviction, but was the agent to put it out of the power of any other United States Judge to repeat his offense. I have not been able to find a copy of *Peck's Trial*, and state the facts only as I have found them referred to in some of the cases.

The laws of the several States upon the subject referred to are as follows:

Alabama. In this State the law is substantially a transcript of the Act of Congress above cited.

Code, Ala. 1876, § 542.

Arkansas. By the new Constitution of this State, adopted in 1874, art. 7, § 26, "The right is reserved to the Legislature to punish all contempts not committed in the presence or hearing of the courts or in disobedience of process."

California. The law is to the same general effect as the Act of Congress above cited.

General Laws, 1850-1864, § 5414. See also Code Civ. Proc. Rev. 1872, § 1209.

Colorado. This State has no statute law upon the subject of contempt.

Connecticut. By the statute of this State first passed in 1667 and re-enacted in the Revision of 1875, it is provided that "Any court may punish by fine and imprisonment any person who shall in its presence behave contemptuously or disorderly." But the punishment is limited to a fine of \$100 and imprisonment for six months.

Rev. Laws, Conn. p 61, § 15.

Delaware. This State has no statute on the subject of contempt.

Florida. The same remark holds good as to this State.

Georgia. The law of this State is substantially a transcript of the Act of Congress above cited.

Code, Ga. 1868, § 4614.

In addition, by the amended Constitution of 1865, art. 1, § 12: "The power of the court to punish for contempts shall be limited by legislative Acts."

Id. p. 968, § 4901.

Illinois. This State has no general law

limiting the power of the courts as to contempt, but has a statute allowing the discharge, upon *habeas corpus*, of a person imprisoned for the nonperformance of any order or decree for the payment of money.

R. S. Ill. 1874, p. 570, § 86.

The decisions of the courts in this State, however, have denied the power to punish for contempts of like character with the one at bar.

Stuart v. People, 3 Scam. 395, 402; *Storey v. People*, 79 Ill. 45.

Indiana. In this State contempts are, by the statute, limited and classified into direct contempts, which are: disturbing the business of the court, and refusing to testify; and indirect contempts, which are: disobeying process, resisting process, and falsely making, uttering or publishing any false or grossly inaccurate report of any case, trial or proceeding, pending and undetermined. The punishment is limited to a fine of \$500 and imprisonment for three months.

Careful statutory proceedings for review are provided.

R. S. Ind. 1881, §§ 1005-1013.

Iowa. In this State, by the statute, the power is limited in effect, as in the Act of Congress above cited.

The punishment is limited to a fine of \$50 and imprisonment not exceeding one day.

Code Iowa, 1873, §§ 3491-3493.

Kansas. The statute in this State limits the power of the district or county court to punish for contempt to a fine not exceeding \$100. The powers of the supreme court are not defined except in general terms.

Compiled Laws, Kansas, 1879, §§ 1665, 1694.

It should be noted that in this State the judges are elected by the people.

Kentucky. The statute provides that "No court or judge shall proceed by process of contempt, or impose a fine against any person who shall by words or writing animadvert upon or examine into the proceedings or conduct of such court or judge by words spoken or writings published not in the presence of such court or judge in the court, during the sitting of court."

Punishment for contempt is limited to a fine of \$30, or an imprisonment of thirty hours, except in cases where the matter of contempt is tried before a jury.

Gen. Stat. Ky. 1873, pp. 356, 357, art. 27, §§ 1, 4.

Louisiana has no statute as to contempts except those committed by attorneys at law. As to them, it provides that "Nothing shall be construed or taken to be a contempt, but what shall be said, done or committed directly in the presence or hearing of the court, during the sitting of the same."

R. S. La. 1870, § 1941.

Maine. The statute enacts that "The supreme judicial court may punish contempts against its authority, by fine or imprisonment, or both."

R. S. Maine, 1883, p. 626, § 2.

Maryland. The statute is in effect a transcript of the Act of Congress above cited.

R. Code, Md. 1878, p. 522, § 8.

Massachusetts. This State has no statute on the subject of contempts of its superior courts.

Michigan. The statute enacts that its courts of record shall have power to punish as for

a criminal contempt certain specified acts and no others. Among these is "The publication of a false and grossly inaccurate report of their proceedings; but no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, procedure or decision in such court." The punishment is limited to a fine of \$250 or imprisonment for thirty days in the jail of the county where the court is sitting, or both; and when the person is committed for the nonpayment of such fine he is to be discharged at the expiration of thirty days."

Howell, Annotated Stat. Mich. 1882, p. 1837, § 7284.

Minnesota. The statute of this State is in effect a transcript of the Act of Congress above cited. Proceedings for any contempt not committed in the immediate view and presence of the court are to be taken only upon affidavit or other evidence of the facts. The punishment in any event is limited to a fine of \$250 and imprisonment for six months.

Stats. Minn. 1878 pp. 861-862, §§ 1-12.

Mississippi. The statute provides that "The supreme court may punish any person for contempt of court by fine or imprisonment, or by both;" but the imprisonment is limited to thirty days.

Rev. Code, 1880, p. 408, § 409.

Missouri. The statute is in effect a transcript of the Act of Congress above cited. The punishment is limited to a fine of \$50 and an imprisonment of ten days; and when the person is committed for nonpayment of the fine such imprisonment is limited to thirty days.

1 R. S. 1879, p. 194, §§ 1055, 1056.

Nebraska. The statute is in effect a transcript of the Act of Congress above cited.

Compiled Stats. Neb. 1881, p. 619, § 669.

Nevada. The statute is in effect a transcript of the Act of Congress above cited. The punishment is limited to a fine of \$500 and imprisonment for five days.

Compiled Laws, Nevada, p. 428, §§ 1521, 1584.

New Hampshire has no statute on the subject of contempt, except those committed by attorneys at law.

Gen. Laws, N. H. 1878.

New Jersey. The only statute in point in this State is the one under which the present appeal is taken.

New York. The statute in this State is in effect the same as the Act of Congress above cited, but its provisions are more elaborate in form. The punishment is limited generally to a fine of \$250 and imprisonment for six months, or until the fine is paid.

3 R. S. N. Y. 1859, pp. 849, 850, § 1; p. 858, §§ 22, 25.

North Carolina. The statute of this State as to constructive contempt by publication is identical with that of Michigan above set forth. The punishment is also the same as therein indicated.

Code, N. C. 1883, p. 255, § 648; subd. 7, § 649.

The statute, out of abundant precaution, however, has this further provision that "The several acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances, which shall be the subject of contempt of court. And if there be any parts of the common law

now in force in this State which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances, beside those specified and described above, the same are hereby repealed and annulled."

Id. p. 255, § 648, subd. 9.

Ohio. The statute is in effect a transcript of the Act of Congress above cited. The punishment is limited to a fine of \$500 and imprisonment for ten days.

R. S. Ohio, 1880, p. 1870, §§ 5639, 5640, 5645.

Oregon. The statute is in effect a transcript of the Act of Congress above cited. The punishment is limited to a fine of \$300 and imprisonment for six months.

Gen. Laws, Oregon pp. 311, 312, §§ 640, 641.

Pennsylvania. The statute is in effect a transcript of the Act of Congress above cited, as to the acts constituting a contempt. Punishment by imprisonment is limited to such contempt as shall be committed in open court. The statute further provides that "No publication out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, in or concerning any cause depending in such court shall be construed into a contempt of the said court so as to render the author, printer or publisher, or either of them, liable to attachment or summary punishment for the same."

1 Brightly, *Purd. Dig.* 1883, pp. 324, 325, §§ 1, 2, 4.

The Act above quoted was passed in 1836, but a statute almost identical was enacted in 1809, limited originally to two years, but made perpetual by the Act of March 31, 1812.

Laws, Pa. 1700-1812, Vol. 5, pp. 55, 384.

In addition to the foregoing precautions the amended Constitution of Pennsylvania 1874, article 1, § 7, in terms prohibits "Convictions for publications as to the official conduct of public officers, and where not made negligently or maliciously."

Rhode Island. The statute gives the supreme court the power to punish, by fine and imprisonment, "All contempts of authority in any cause or hearing before them."

Pub. Stats. R. I. 1882, p. 505, § 7.

South Carolina. The statute is in terms almost precisely like that of Rhode Island.

R. S. S. C. 1878, p. 497, § 4.

But the Constitution of 1868 of this State, art. 1, § 8, has this provision, which is apparently germane to the subject of contempt: "In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence."

Tennessee. The statute is in effect a transcript of the Act of Congress above cited. Punishment is limited to a fine of \$50 and imprisonment for ten days.

Code, Tenn. 1858, pp. 739, 740, §§ 4106, 4107.

Texas. The statute provides that "The supreme court shall have power to punish any person for a contempt of court according to the principles and usages of law in like cases."

The punishment is limited to a fine of \$1,000 and imprisonment for twenty days.

R. S. Texas, 1879, p. 166, § 1015.

Vermont. This State has no statute defining the jurisdiction of the courts as to contempt,

but has a statute giving relief upon *habeas corpus*, returnable to the supreme court in any county.

Rev. Laws, Vt. 1880, p. 801, §§ 1371-1373.

Virginia. The statute in this State is in effect a transcript of the Act of Congress above cited. Code, Va. 1873, p. 1204, § 27.

Without the intervention of a jury the punishment is limited to a fine of \$50 and imprisonment for ten days. In addition, although the Governor is forbidden to remit in whole or in part any fine or imprisonment, imposed by any court of record, court-martial or other proper authority, in respect of contempts, he is empowered to pardon the offense and remit the punishment, in whole or in part, except where such contempt consists in the nonperformance of, or disobedience to, some order, judgment or decree of the court.

Id. p. 202, § 21.

West Virginia. The statute is in terms like that of Virginia.

Code, West Va. 1868, p. 690, § 26.

Wisconsin. The statute of this State, as to constructive contempts by publication, is identical with that of Michigan and North Carolina above cited; so also is the punishment. R. S. Wis. 1878, §§ 2565-2568.

The United States Supreme Court has been frequently spoken of as the most august tribunal in the world; and it and the other Courts of the United States have the power to pass upon the constitutionality of Acts of Congress; by their construction of the Constitution, they have the power to mold, and in fact have molded, the Government of the United States. They consider matters of revenue, commerce and great questions of peace and war, involving the rights, liberties and destinies of more than fifty million freemen. Dealing with the gravest politico-legal questions, they have been time and again bitterly assailed in the public prints, and as well the personal integrity of their judges, as their official acts, have been unsparingly attacked; inasmuch that their decisions have been, not only reversed by popular opinion, but rendered forever nugatory by change in the organic law.

If, as is argued by Chief Justice Wilmot in *Almon's Case*, above cited, and those who follow his line of reasoning, the power to punish publications summarily as for contempt is essential to the dignity and influence of the courts, without which they will be destroyed, it would seem that the Courts of the United States must possess it or fail in their high office. Yet, as we have seen, if it was ever legally inherent in them, they have not possessed it for more than half a century, the greater part of their existence. And in like manner if the courts ever possessed the power to summarily punish for contempt contended for by Chief Justice Wilmot and his followers, they have lost it in thirty-three of the thirty-eight States of the Union; some of them imperial in population and resources, and in the aggregate, to use Webster's brilliant metaphor, in his celebrated Hulsemann letter, spread over a region one of the most fertile on the globe, and of an extent in comparison with which the possessions and area of the State of New Jersey are but as a patch on the earth's surface.

In view of these facts what becomes of the

assertion, for it is really nothing more, that the power to punish publications as contempts is essential to the courts?

II. I pass to the second subordinate proposition of my argument as I have arranged it, but which is really decisive, and contend:

That the courts of common law in New Jersey are without jurisdiction to summarily convict and punish any person as for contempt, in respect of words published in a newspaper.

Aside from the reasoning heretofore made, I support this contention upon two grounds:

1. That the doctrine of constructive contempt in respect of publications is of recent introduction, and was not part of the common law brought with them by our ancestors to this country; nor was it a part of the common law at the time of the beginning of the American Revolution.

2. Whatever may be the truth of the above contention, I affirm that this doctrine is not and never has been the law of this State, in the courts of common law.

It was decided by this court in *Rhinshart v. Lance*, 14 Vroom, 311, 320, that the power to commit for contempt "is not a necessary incident of a court of justice, and therefore is not granted by implication. It can only be derived from the common law or by a legislative grant of such a power;" and this conclusion needs no argument to support it.

There is no statute upon the subject in this State; and therefore if the power exists here, it must be an inheritance from the common law. The term common law as here used, it is well understood, means the common law of England, as it existed at the time of our severance from allegiance to the British Crown; and if in any essential respect the law of England since that period has been changed, it may be construed to be the common law of England, but it is not, in so far as it has been changed, the common law of New Jersey, which still remains as the law of England stood before such change.

The common law in the course of centuries, having been hammered into shape out of the rude customs of barbarous tribes by judicial interpretations and expositions, consists in a body of reported cases called precedents, and has no other legal force and authority than these judicial determinations. Being the creation of precedents whose ultimate force is that they are construed from and founded upon immemorial usage, it is an inevitable conclusion, both logically and legally, that if no precedent can be found to support, either directly or by conclusive legal implication, a doctrine contended for as part of the common law, it must fall; for in such a body of law, the mere fact that no precedent for a particular doctrine or theory is to be found is plenary proof that it does not exist. If this position is not admitted, then the whole body of the common law must be rejected, because it is built up entirely on precedent; and the argument is as potent in one direction as in the other. Assuming that this reasoning is unassailable, I affirm that there is no reported case of the exercise of jurisdiction by a court of common law in the matter of a constructive contempt in respect of a publication prior to the American Revolution.

The art of printing was invented in A. D. 1423, and for a period of more than three centuries and a half thereafter, such jurisdiction was not even so much as hinted at in the decision of any common law court, so far as the reports disclose. Even in the stormy times near the beginning of the reign of George III, when the trenchant pens of Junius and other pamphleteers mercilessly assailed the whole body of the government, from the King to the meanest tide waiter of the custom-house, and in particular the official acts and private reputation of Lord Mansfield, then Chief Justice, no trace of the exercise of this jurisdiction is to be found. The earliest case to which any reference is made in the books is that of *Almon* in Wilmot's Opinions, above cited. This opinion was prepared as is said in 1765, but was, in fact, never delivered, for the proceedings were abandoned by the prosecution; not as is conjectured in a note to the opinion, because of the resignation of the then Attorney-General, Sir Fletcher Norton, but more probably because neither the prosecution nor the opinion was in accordance with the law of England as it then stood. Not only was there never any judgment in the cause, but the opinion was never even printed until 1802.

See original edition Wilmot's Opinions, printed London, 1802, adv. and note to *Almon's Case*, p. 243, in State Library.

The first instance in which an order was ever made in England to prevent the publication of proceedings pending a trial, was on the impeachment of Lord Melville in 1806, stated by Denman and Platt, *arguendo*, in *Rex v. Clement*, 4 Barn. & Ald. 218, 245.

I have not been able to find, in any reported case, any claim of this jurisdiction by any English common-law court before that date. Indeed, the jurisdiction seems to have been exercised in this country before it was in England, for *Respublica v. Oswald*, 1 Dall. 319 (1 U. S. bk. 1, L. ed. 155) was adjudicated in 1788; and although elaborately argued, no authority for the jurisdiction is cited, except the Commentaries of Blackstone.

On the contrary, the only common-law precedents upon the subject, prior to 1800, are decidedly against the exercise of this jurisdiction by the English Courts.

Rex v. Gray, 1 Burr. 510, decided in 1758.

In this case, which was the matter of a libelous publication relative to a question at issue, and in which Lord Mansfield presided, an information was ordered to be filed by the court; an entirely different proceeding from that of contempt.

A similar case was that of *Rex v. Jolliffe*, 4 T. R. 285. An information was also directed to be filed in this case by Chief Justice Kenyon, who in terms expressly states that at that time there was but one precedent in respect of the subject matter of such a publication, namely: *Rex v. Gray*, above cited.

These two cases were cited as against the power of the court, in *Hollingsworth v. Duane*, Wall. C. C. 77.

And Judge Griffith who presided in that case deemed them of such force, that in a foot note, signed with his name and printed with the case, he states that the reason why the court ordered informations to be filed in these

two cases, and did not proceed summarily as for contempt, was that the assizes had no jurisdiction in contempt.

But Judge Griffith, although a jurist and lawyer of ability and acquirements, was clearly in error in this statement, for the English authorities are distinctly to the contrary. They hold that "A court of assize is a superior court; and consequently, in a warrant of commitment by a judge of assize for contempt, the adjudication for contempt may be general, and the particular circumstances need not be set out."

Re Fernandez, 6 Hurlst. & N. 717.

S. P. and S. C. 10 C. B. N. S. 3.

Upon this subject, prior to 1800, save in the two precedents noted, as Buller, J., said in *Le Caux v. Eden*, 18 Howell, St. Tr. 1260, speaking of another matter, there was "A universal silence in Westminster Hall."

Since the beginning of this century, the doctrine of constructive contempt has been greatly expanded in England; and it is beyond doubt, in that country, now fully established in respect of publications, thus making a radical change from the law as it existed before our Revolution.

I have not seen it suggested elsewhere, but my own examination has convinced me that this change in the law of England in the respect noted was due to three principal causes:

First. By the influence of the Commentaries of Blackstone, the last volume of which was published in 1769. On pages 285, 286 of the fourth volume of that work the author has a single clause on the subject of contempts by publication: "By speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment." He gives no authority for this doctrine, but it is evidently borrowed from 2 Hawkins, P. C. book 2, cap. 22, § 36, where it is also stated without citation of authority.

Second. By the elaborate argument of Chief Justice Wilmut in *Almon's Case*, above cited, first published in 1802.

But as the text of law writers and the arguments of a learned jurist, however forcible, could hardly be sufficient to change the law of England, in a matter imperiling civil liberty, the controlling reason in my judgment was,

Third. The change in the law of England, in respect of the issues involved in the trial by jury of an indictment for libel.

It will be remembered that in the trial of the *Dean of St. Asaph*, for criminal libel, in 1784, the jury returned a verdict of "Guilty of publishing only," which after some difficulty with Mr. Justice Buller, Mr. Erskine succeeded in having recorded. Upon the coming in of a rule to show cause, Mr. Erskine (in an argument which has been spoken of by high authority, as "beyond all comparison the most perfect union of argument and eloquence ever exhibited in Westminster Hall") contended that the verdict found was tantamount to a verdict of acquittal. But the court, in discharging the rule, held, with Justice Buller, that the sole question upon which the jury could pass was that of publication, and that it remained for the court to decide, whether or not the pub-

lication was a libel; and this decision was without doubt in accordance with respectable precedent. Such was the influence, however, of popular opinion, that, with the aid of *Lord Camden*, although strenuously opposed by *Lords Thurlow*, *Kenyon*, *Bathurst* and all the Judges of the House of Lords, a bill was finally passed by Parliament, June 1, 1792, declaring the right of the jury "to give their verdict in the whole matter at once." This law is the prototype of the provision of our own Constitution that "In all prosecutions or indictments for libel * * * the jury shall have the right to determine the law and the fact."

The pertinence of this historical review may be easily seen. Before the Act of Parliament of 1792, prosecutions for libelous publications upon the court of judges were by indictment, upon the trial of which the jury passed only upon the question of publication; and the judges retained in their own hands the determination of the essence of the crime, namely: its libelous quality. The prosecution, while retaining a color of ordinary and regular legal inquiry, was in effect as arbitrary and almost as summary as proceedings for contempt. But after the intervention of the Act of 1792, prosecutions by indictment for libel ceased to be certain in their results; and the Courts of England, taking advantage of the undefined power in respect of contempt, and fortified by *Blackstone's* opinion and *Wilmot's* argument, began to expand the law of contempt so as to reach publications.

This change in the law of England, however, can have no force in this State; for our common law upon the subject in hand is the common law of England as it was before the change.

Second. The second branch of my argument in support of the position now in discussion is that whatever may be the force and truth of the foregoing contention, the doctrine of constructive contempt, in respect of publications, is not and never has been the law of this State, in the courts of common law. No court of common law in this State, from its earliest history, has ever summarily convicted and punished a citizen as for contempt in respect of a publication. This is the first case in which it has ever been attempted, so far as any precedents disclose and so far as I have any information.

The following are all the reported cases in the courts of common law in this State, of attachments as for contempts, with a statement of the causes of the proceedings, for disobedience or resistance by officers, parties, jurors, witnesses or other persons, to writs, processes, rules, decrees, etc.

State v. Hunt and *State v. Lee*, *Coxe*, 287, 394; *State v. Trumbull*, 1 South. 189; *State v. Raborg*, 2 South. 645; *Flommerfelt v. Zellers*, 2 Halst. 31; *Crane v. Sayre*, 1 Halst. 111; *Gilliland v. Rappelyea*, 3 J. S. Green, 188; *McClure v. Gulick* and *State v. Gulick*, 2 Harr. (N. J.) 340, 435; *Hendrickson v. Hendrickson*, 3 Harr. (N. J.) 886; *Struggle v. Hayne*, 1 Zab. 245; *State v. Ackerson*, 1 Dutch. 209; *State v. Elkinton*, 1 Vroom, 835; *Smith ads. State*, 2 Vroom, 216; *Wandling v. Thompson*, 12 Vroom, 142; *McQuade v. Emmons*, 9 Vroom, 397; *Cox v. Pascoe Common Pleas*, 16 Vroom, 828.

H. J.

For attempt to communicate with jury, see *State v. Doty*, 3 Vroom, 408.

That inferior courts and justices of the peace have no jurisdiction in contempt for any cause whatever, see

Re Kerrigan, 4 Vroom, 344; *Rhinehart v. Lance*, 14 Vroom, 311.

In none of the above cited cases is there any reference to the jurisdiction of the courts, in respect of contempt by publication, except in *State v. Doty*.

That case was a proceeding against a person not a party, nor interested in the suit, for endeavoring to arrange a signal with one of the jurymen, to inform him how the jury stood with regard to their verdict. *Chief Justice Beasley*, in delivering the opinion of the court says:

"A court would fail of necessity to accomplish the end of its institution, if it could not maintain order and enforce obedience to its precepts. The authority is derived from necessity; and the authority ceases only where such necessity ceases."

This proposition has my full assent, for it is the very principle which I have heretofore stated as the only one upon which the contempt power in any case can be defended. But in giving illustration of the use of this power the *Chief Justice* uses the following language:

"Thus, it is a contempt of court in all persons who resist the execution of its writs, or treat contumeliously its officers in the lawful discharge of their duties; so, to solicit a witness to disobey a subpoena; to offer insult to a judge for his conduct while on the bench; or to publish anything relating to a cause pending in court, which has a tendency to prejudice the public mind upon the subject, or which contains improper strictures on the conduct of counsel, witnesses or parties."

It is manifest, I think, that in giving these illustrations, the *Chief Justice* had in mind but one *differentia* to classify contempts, namely: the inquiry whether they are committed in the face of the court or beyond its precincts and ken; and that he had overlooked the important division of contempts heretofore noted, namely: into those contempts which actually and materially obstruct the operations of the courts, and those which only morally and intangibly interfere with them. It would seem to be easy indeed to bring the case under review, within the limits of the former division, for the complete seclusion of the jury from communication with other persons is, by the common law, of the essence of a jury trial, is guarded by the constable's oath, and is, therefore a standing and uniform and inflexible rule of the court; and any arrangement to communicate with the jury is potentially and *pro tanto* disobedience or resistance to a lawful rule, order or command of the court. It falls easily, therefore, within the first division of contempts heretofore noted, and within all the illustrations exhibited by the *Chief Justice* save that in respect to publications; and his remarks as to these may with propriety be considered as a *dictum* only; and while it is to be treated with respect as the opinion of a jurist of experience, it cannot have the force of a precedent, especially in a case involving personal liberty.

But, assuming that the *Chief Justice* had in mind what has been suggested as the true criterion of jurisdiction in contempt, and that his illustration as to publications was in point in the case discussed and, therefore, not a *dictum* only, but an adjudication, let us examine upon what authority it rests; he cites but five authorities:

Rex v. Clement, 4 Barn. & Ald. 218; *People v. Few*, 2 Johns. 290; *Respublica v. Oswald*, 1 Dall. 319 (1 U. S. bk. 1, L. ed. 155); *Commonwealth v. Dandridge*, 2 Va. Cas. 408; 4 Bl. Com. 258 (285).

I will examine these in the order named:

The first case cited, *Rex v. Clement*, was in 1821, and therefore has no pertinency here, in view of my argument that the power to punish for contempt in respect of publication did not exist at common law before the American Revolution, and the admission that it has become firmly established in England since that time. In addition, in that case, the proceedings were for the disobedience of an order of the court previously made, expressly forbidding any publication of the proceedings of a trial for high treason, pending the trial. The case itself, even if it were of older date, involved the question whether such publication was a disobedience to a lawful order of the court; obviously, a very different question from the one under discussion here.

In *People v. Few*, 2 Johns. decided in 1807, the attachment was discharged. No common-law precedent was cited in support of it.

In *Respublica v. Oswald*, 1 Dall. (1 U. S. bk. 1, L. ed. 155), decided in 1788, there was a conviction. But no authority was cited by either counsel or court, except the commentaries of Blackstone. The action of the court in this case, sustaining the power, led to proceedings looking to the impeachment of the Judges of the Supreme Court, by the General Assembly of the State. The resolution to that end was defeated by a small majority, apparently because of the strenuous efforts of Mr. Lewis, of counsel for the prosecution in the case cited, who was a member of the House.

See note to the case.

Commonwealth v. Dandridge, 2 Va. Cas. was in 1824. In that case, the judge holding the court was charged with corruption and cowardice while he was upon the steps of the court house, after the hour of opening court had arrived, and when he was about to open court. The offense was, in fact, committed in the face of the court. The leading opinion does not put the conviction on that ground, but discusses generally the law of contempt. The other opinions, however, refer to that fact, and the opinion of one of the judges is carefully worded to guard against the expansion of the power.

No precedent is cited, and on page 487 of the report it is substantially admitted that no reported authority can be found for a constructive contempt proceeding of like character, except the case of *Printer of the Champion et al.* 2 Atk. 469, which was in the court of chancery and not at common law; and *Rex v. Barber*, 1 Str. 444, in which there was no conviction, and the proceedings were abandoned.

See note to last named case.

It thus clearly appears that the illustration

in respect of contempt by publication, given by the *Chief Justice*, rests for its sole authority upon the remark in 4 Blackstone's Commentaries, and for this remark, as we have seen, that distinguished author cites no precedent. *Stat v. Doty*, therefore, cannot be regarded as an adjudication to bind this court to assume despotic power over the property and liberty of the citizen.

In the determination of the question of the existence in our courts of the power to punish, as for contempts, in respect of publications, the nonexercise of the power must have much weight.

In respect of executive, legislative or judicial power, especially when personal liberty is involved, the argument of nonuser is always potent.

It was with this argument, as used by Mr. Burke in his speech upon *American Taxation*, that the Colonists met and overthrew what Lord Campbell designates as the "unanswerable argument" of Lord Mansfield in support of the power of Parliament to tax the Colonies, declared in the Preamble to the Act repealing the Stamp Act.

"Leave the Americans," says Mr. Burke, "as they anciently stood, and these distinctions, born of our unhappy contest, will die along with it. They and we, and their and our ancestors, have been happy under that system. Let the memory of all actions, in contradiction to that good old mode, on both sides, be extinguished forever. Be content to bind America by laws of trade; you have always done it. Do not burden them with taxes; you were not used to do so from the beginning. Let this be your reason for not taxing. These are the arguments of States and Kingdoms."

And this court has applied this argument in determining important cases.

In *State v. Kelsey*, 15 Vroom, 1, 18, it permitted usage under a statute to give its terms a meaning which the court would not have given it without such usage; and that, in contravention of a principle which the same court, in the same opinion, designates as "A salutary one, and indeed, indispensable for the protection of the public rights and interests, and as firmly rooted in the judicial decisions of this State as in those of any other jurisdiction."

And in the case of *Re Drainage along Pequett River*, 12 Vroom, 175, 179, this court held that while the Legislature has no inherent or constitutional power to appoint methods for the drainage of meadows, yet the right "has been so frequently exercised and acknowledged that it has become a part of the local common law."

It is true that these cases contain the argument by inversion, but it is none the less the same argument.

How much more forcible does it become when applied to test a despotic power which, if it ever existed, has never been used and, already dust and ashes, has been buried so long that the very forms and method of procedure are unfamiliar to the court which attempts to employ it.

III. My last general proposition is that, conceding, for purposes of argument, the jurisdiction in respect of publication assumed by the court below, the proceedings appealed from

upon the law and the facts here presented, are so defective that they should be reversed.

1. The court had no jurisdiction in respect of a publication touching a grand jury whose functions had previously determined; nor in respect of a publication touching a sheriff who was previously *functus officio*.

There is no precedent in respect of either case.

By the state of the case, page 4, it appears that the publication treating of the grand jury and sheriff was on January 30, 1885. The grand jury spoken of was summoned and acted at the January Term, 1884, of the Cumberland Oyer and Terminer.

Its functions ended with that term, and it had no legal existence as a part of the court or otherwise after the expiration of that term.

The court will take judicial notice of the fact that the term of office of the sheriff, spoken of in the publication, expired in November, 1884; so that he also at the time of the publication was *functus officio*, and was no longer an officer of the court in any proper sense.

The proceedings and conviction therefore, so far as they concern the publication touching the grand jury and sheriff, are clearly erroneous.

2. The court below was without jurisdiction; and its proceedings, conviction and judgment are void, because no affidavit was filed as a condition precedent to its action.

Constructive contempts must be brought before the court by affidavits of persons who witnessed them; and thereupon a rule is made upon the offender to show cause why an attachment should not issue against him.

4 Bl. Com. 287; 2 Hawk. Pl. C. 222; 1 Tidd, Pr. 3, Am. ed. 88; 6 Dane, Abr. chaps. 193, 525; 7 Id. chap. 220, art. 5, 307, 308; *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *State v. Matthews*, 37 N. H. 450; *Crow v. State*, 24 Tex. as. 12; *Rapalje*, Contempt, pp. 121, 122, § 98.

I have found no reported case in the United States where a rule has been granted in a matter of constructive contempt, without an affidavit previously filed.

And this condition precedent is of the essence of the jurisdiction in constructive contempt, and not a method of procedure merely; for while the courts have a general jurisdiction in respect of contempts committed in the face of the court, where the proceeding is entirely summary, and no proof other than the senses of the court is required, yet, in respect of constructive contempt, they have only a particular jurisdiction, which cannot be called into action unless *prima facie* evidence of the commission of the offense is formally presented to the court.

In *Batchelder v. Moore*, 42 Cal. 413, 414, the Supreme Court of California says:

"The power of a court to commit for contempt, though undoubted, is in its nature arbitrary; and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendants are not to be indulged in their support. The statute of this State, regulating contempts and their punishment, provides that

when the alleged contempt is not committed in the presence of the court, an affidavit of the facts constituting the contempt shall be presented. If there be no affidavit, there is nothing to set the power of the court in motion. And there is no distinction between the utter absence of an affidavit and the presentation of one which is defective in substance, in stating the facts constituting the alleged contempts."

It is true that the court in the foregoing opinion is discussing the Statute of California; but that statute in requiring an affidavit in constructive contempt is merely affirmative of the practice at common law; and the reasoning of the court applies with equal force to proceedings under the latter practice as to those under its own Code.

See also *McConnell v. State*, 46 Ind. 298.

That no affidavit, or other *prima facie* proof even, preceded the issue of the rule by the court below in this case conclusively appears by the state of the case, which is certified by the court itself to be full and complete.

The case on page 4 states a representation to the court that the defendant is an editor of a certain newspaper, and that at a certain date he published therein articles which are quoted upon pp. 4 and 5. At the end of the rule to show cause on page 6 of the state of the case "It is ordered that the prosecutor of the pleas present to this court the evidence upon which this rule is issued, upon the return day of this rule."

As no such evidence appears in the state of the case, the conclusion is absolute that none such was presented, either at the return of or upon the issue of the rule. Nor will the recital by the court below, of a representation made to it, supply either to that court or to this court, the absence of a representation *legally made*, namely: by an affidavit. The case, therefore, stood before the court below and it stands here upon the issue of a rule to show cause, reciting material facts essential to jurisdiction, of which there was no legal *prima facie* evidence.

Nor, in view of what has been already stated as to the presence of an affidavit being essential to the jurisdiction of the court below, and here, in proceedings for constructive contempt, does the appearance in person of the defendant upon the return day of the rule, and his filing an affidavit in denial of any intention to commit a contempt, serve to give the court jurisdiction. An appearance may cure a defect in procedure or waive a privilege; but it cannot create jurisdiction where it does not exist. No less an authority than the Supreme Court of the United States has said:

"The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal, to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding."

Kilbourn v. Thompson, 103 U. S. 168, 198. (Bk. 26, L. ed. 377, 389).

In appearing below, the defendant was under the strongest duress in a proceeding, novel as well to the court as to himself. He had the right to suppose and, as his affidavit shows, did suppose that his denial of intentional contempt would end the proceedings. It would be a strained construction of the law to hold that his appearance below, without a formal protest as

to jurisdiction, would conclude him here in a new trial, covering matters of discretion as well of law as of fact.

3. I press as arguments addressed to the discretion of the court, two considerations:

First. That the article in respect of the *animus* of the president judge towards the defendant, upon the trial upon the indictment for assault and battery, is shown, by the state of the case, not to have originated with the defendant, but to have been simply copied into his newspaper from another, to which it was credited without comment; and that the sole object of the defendant in publishing it was an honest endeavor to show the community of his neighborhood what views were entertained on the subject by outside parties, and not with any purpose to injuriously prejudice the public mind against the court below. As to the facts stated in it, the affidavit of the defendant under the cases is conclusive; as to the intention stated, I admit that it is not necessarily and legally conclusive. But the point now is whether this court in its discretion will punish the mere reproducer of a publication. If that ground is taken, and every editor is obliged to closely scrutinize the matter clipped from other newspapers before he can print it in his own, then the long established freedom of the press will be largely circumscribed.

Second. The laches of the court below is a forcible argument against the affirmation of its conviction by this court. The publications complained of were made January 30, 1885. No rule was issued until May 11, 1885. It was made returnable on the 24th day of July, more than two months thereafter. The affidavit of the defendant was filed upon that day, and no further proceedings were taken by the court below until January 13, 1886, when the defendant was convicted.

Arbitrary and summary powers must be swift and instant in their execution, or the reason for their possession and exercise fails.

IV. In view of what has been heretofore stated, I urge further, as worthy of the gravest consideration, that the exercise of the jurisdiction of proceedings as for contempt in respect of publications is against public policy. The history of the country shows that almost every instance of its exercise has run counter to popular opinion.

In conclusion, I urge that, upon all the reasons stated, the conviction and judgment of the court below should be reversed, and the appellant here acquitted.

Dixon, J., delivered the opinion of the court:

The appellant had been indicted at the January Term of 1884, of the Cumberland County Oyer and Terminer, and at the January Term, 1885, had been tried on the indictment, but the jury disagreed. On January 30, 1885, he published in his newspaper an article intended to cast discredit upon the members of the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial and who, in the regular course of official duty, would preside when he should again be tried. For this article the appellant was adjudged by said court to be guilty of contempt and to be fined \$100; whereupon, he appealed to this court.

The appellant's counsel insists that such a publication is not a contempt of court in this State. Fully admitting that it would be regarded as a contempt of court in England, according to the views of the present day, he contends that such views had their origin subsequent to the American Revolution, and are therefore not to be considered as indicating our common law. That this position is, however, false will appear from a reference to many declarations and decisions made before our separation from the mother country, by writers and courts to whom we are wont to look for authoritative evidence of the common law.

As early as the time of *Lord Clarendon*, the first chancellor after the Restoration, prosecutions for contempt by abusive words uttered out of court had become so frequent that a special rule of court was adopted for their regulation. *Comyn, Dig. Chancery, D. 1, note h.*

In 1709 a defendant, on being served with a rule of the Queen's Bench to show cause why an information should not be filed against him, spoke of the rule in a contemptuous manner. The court sent an attachment for contempt against him, without even a rule that he show cause why it should not be issued. *Anon. 1 Salk. 84.*

In 1720 the same practice was pursued in the King's Bench against one Jones, who had treated the process of the court contemptuously. *Rez v. Jones, 1 Str. 185.*

Again, in 1724, against one who had used contemptuous words on the delivery to him of a declaration in ejectment. *Rez v. Unitt, 1 Str. 567.* Again, in 1787, under circumstances like those of *Rez v. Jones, supra; North v. Wiggins, 1 Str. 1068.*

In 1720 Pool was committed for contempt of the court of chancery, in having put an advertisement in the Daily Courant, offering a reward of £100 for legal proof of a certain marriage then in question before the court, *Lord Chancellor Parker* saying: "This tends to the suborning of witnesses, * * * but is a contempt of court, being a means of preventing justice in a cause now depending, * * * and as the court may so in justice it ought to punish this proceeding." *Pool v. Sacherevel, 1 P. Wms. 675.*

It was this jurist whom Hawkins, in the preface to his second book on the Pleas of the Crown, described as possessing the most perfect skill and experience in the common law.

About 1724 Dr. Colbatch was attached for contempt, in the King's Bench, for having written in his *Jus Academicum*, in allusion to the court's granting writs of *mandamus* and prohibition against the University of Cambridge, "that they who intend to subvert the laws and liberties of any nation commonly begin with the privileges and immunities of the Universities." *Chief Justice Pratt* sentenced him to be imprisoned, fined and bound over to good behavior. 3 Camp. Ch. Jus. 70.

Shortly afterwards Dr. Colbatch's adversary Dr. Bentley complained to the Kings Bench that Cambridge had taken away his degree without hearing him, because, on being served with process to appear in an action of debt before the Vice Chancellor of the University, he had said contemptuously to the beadle that the process was illegal and he would not obey it;

that the Vice Chancellor was not his judge and was acting foolishly. The same *Chief Justice*, in reversing the action of the University, remarked: "If Dr. Bentley had said as much of our process, we would have laid him by the heels for it; he is not to arraign the justice of the proceedings out of court, before an officer who has no power to examine it." *Rez v. University of Cambridge*, 1 Str. 557, 565.

In 1744 the Kings Bench granted a rule for an attachment against one Redman, for threatening Murphy (the prosecutor in an information for a misdemeanor) with danger of his life, and saying he would be hanged. *Rez v. Carroll*, 1 Wils. 75.

About the same time Lord Hardwicke committed two printers to prison, for contempt of court in printing reflections on the parties and witnesses in a cause pending in chancery, saying: "There is nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard." "One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of the court in prejudicing mankind against persons before the cause is heard." *Roach v. Garden*, 2 Atk. 469.

About 1720 Hawkins' Pleas of the Crown was issued. In it the learned sergeant enumerates among the most remarkable instances of contempts, for which any person is punishable, "contemptuous words or writing concerning the court," of which kind he says, it seems needless to put any instances, since they are generally so obvious to common understanding." 2 Hawk. P. C. chap. 22, §§ 33, 36.

Before 1740 Comyn's Digest was published, and it is therein asserted that attachment will lie in abusive usage, or words of the process, or officers of the court. Com. Dig. *Chancery*, D. 8.

Between 1740 and 1750 Viner's Abridgment appeared, which, under the title *Contempt*, states: "Sometimes a contempt arises in using words imputing scorn, reproach or domination of the court."

And finally Blackstone, in his fourth book (p. 283), published within a decade before the American Revolution, mentions among the principal instances of contempts of courts punishable summarily by attachment, those committed away from the presence of the court, by parties writing or speaking contemptuously of the court or judges acting in their judicial capacity.

In this array of authorities, running through the two generations next preceding the Declaration of Independence, is not to be forgotten *Chief Justice* Wilmot's opinion in *Almon's Case*, written in 1765, indicating the power to punish this species of contempt as one inherent in the superior courts according to the settled principles of the common law. Wilmot, Ops. 243.

These citations may be fitly closed by the testimony of Lord Erskine, uttered indeed thirty years after New Jersey had ceased to be a Colony of Great Britain, but toward the end of a life made illustrious by such devotion to the liberty of the press as not even its extreme ad-

vocates will question; he said, in *Ex parte Jones*, 18 Ves. 237 (1806): "It never has been or can be denied that a publication not only with an obvious tendency but with the design to obstruct the ordinary course of justice is a very high contempt."

It thus appears beyond dispute, I think, that the Superior Courts of England, before the formation of the United States, had legal power to punish summarily for any words, uttered by speech, by writing or by printing, outside of the regular course of litigation, which were designed to bring contempt upon the courts in the exercise of their judicial functions or to pervert, in a pending cause, the due administration of justice.

The appellant's counsel contends, in the next place, that this power did not pass to the Courts of New Jersey.

So far as our courts are modeled after English Courts of common law, a presumption arises that they possess all the powers which their prototypes lawfully exercised, and the burden of establishing the contrary rests upon him who asserts it. Counsel endeavors to maintain his position, upon the ground that the power now denied is contrary to the spirit of our institutions and so far as our reports show has never been exercised in this State.

The reason for deeming it contrary to the spirit of our institutions that our courts should have the same power as their predecessors, to defend themselves against abusive words, is not apparent. Only two arguments for withdrawing from them this authority can be imagined; one, that abusive words have ceased to be regarded as a means of injury; the other, that such power could no longer be safely intrusted to the courts. But neither argument is well founded, for, by adopting the common law touching slander and libel, our forefathers unequivocally asserted their opinion that injury would still flow from unbridled tongues and pens; and by conceding to the courts the power of punishing contempts generally, they recognized the trustworthiness of the judiciary in vindicating by summary process their own authority and dignity. Why then should this single species of injury be taken from the category in which it has always stood? The importance of the liberty of the press is urged upon us; we do not underestimate it, but after all, the liberty of the press is only the liberty which every man has to utter his sentiments, and can be enjoyed only in subjection to that precept both of law and of morals: *Sic utere tuo ut alienum non ledas*.

In a government where order is secured, not so much by force as by the respect which citizens entertain for the law and those charged with its administration, nothing which tends to preserve that respect from forfeiture on the one hand and detraction on the other can be hostile to the Commonwealth.

It is true, as stated, that there is not, in our reports, any instance of the exercise of the power to punish for mere words as a contempt, but this by no means indicates that the power has not been employed. The occasions on which it might properly be used are most likely to have arisen in those courts that try and decide causes in the immediate presence of interested parties, and therefore under circumstances

more calculated to excite evil dispositions. The proceedings of these courts are not reported, nor until the Statute of 1884, under which the present appeal is taken, were they subject to review in courts whose decisions are reported. The authority of our superior tribunals over this class of contempts has never been questioned, and whenever it has been referred to in our reported cases it has been either declared or assumed to remain with us in its original vigor.

In *Plommerfelt v. Zellers*, 2. Halst. 31 (1838), counsel spoke of it as an undoubted power.

In *State v. Doty*, 8 Vroom, 403 (1868), Chief Justice Beasley mentions it as one repeatedly enforced.

In *Rhinehart v. Lance*, 14 Vroom, 311 (1881), where *Mr. Justice Depue* discussed at large the subject of contempts, there is no intimation that this branch of judicial authority has been lopped off. In our judgment the power exists, notwithstanding the apparent infrequency of its exercise. A large collection of cases on the subject, *Contempt of Court*, will be found in "The American Law Register" February to July, 1881.

Counsel further contends that the proceedings of the court below should be annulled because there does not seem to have been any affidavit of the facts as a foundation for the rule to show cause. This is not now a sufficient reason for reversal. No doubt the ordinary course of practice in such cases in courts of law is that an affidavit of the facts should first be presented; then that a rule should be entered requiring the alleged offender to show cause why he should not be attached for contempt; then, if good cause be not shown, that an attachment should issue, and the accused, on being brought in should be either held to bail or committed to answer interrogatories; then that interrogatories should be exhibited and answered; and thereupon, according as his answers confess or deny his guilt, he should be punished or discharged.

But the practice has not been uniform. Sometimes a rule to show cause has been allowed without an affidavit, on a mere suggestion; sometimes an attachment has issued without a rule to show cause; sometimes a punishment has been inflicted forthwith on the offender's confession when brought in by the writ, without interrogatories; and sometimes, as in *McQuade v. Emmons*, 9 Vroom, 397, the penalty has been imposed on the offender's admissions made under the original rule, without either writ or interrogatories; so that these various steps are manifestly not jurisdictional, except to the extent of laying before the court matters which constitute a contempt, and affording to the party accused a fair opportunity of denying or confessing their truth.

In the present case, the appellant, on the return of the rule to show cause, filed his affidavit declaring the truth of all the matters alleged in the rule as the basis for its allowance, and although the consideration of the cause was then adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have an attachment issue or interrogatories filed, or that the rule should be discharged for want thereof; and even after sentence was pronounced, he ob-

tained leave to amend his affidavit, but did not complain of any irregularity or illegality in the proceedings. Under these circumstances the objection now made cannot be sustained.

Lastly, we are pressed with the impolicy of exercising the power to punish abusive publications as contempts.

We decline to weigh the *pro* and *con* of this argument, in performing our duty as an appellate tribunal. Although by the statute (P. L. 1884, p. 219) we are to rehear the case of the appellant, both upon the law and the facts, to give such judgment as shall seem to be lawful and just, yet we are to do this in review of a judgment already rendered in the court below, for the protection of its own dignity, peace and good order; and if in such judgment there is found, according to the law and the facts, nothing unlawful or unjust, it should be affirmed, whether in our individual opinions it was politic or impolitic to set the machinery of prosecution in motion.

We consider the judgment of the Oyer and Terminer both legal and just, and therefore it is affirmed.

Cornelius A. DURIE, Collector of Harrington Township,

v.

James H. BLAUVELT *et al.*, Admsrs. of Elisha Ruckman, Deceased.

*Foreign administrators are not liable to be sued in their representative character in the courts of this State.

(Decided November 4, 1886.)

RULE to show cause why administrators should not be ordered to pay a tax. *Rule discharged.*

Argued before Reed and Dixon, JJ.

The facts appear in the opinion.

Mr. P. W. Stagg, for the rule.

Mr. Edward Wells, of New York, *contra*.

Dixon, J., delivered the opinion of the court:

The tax assessed against Elisha Ruckman for the year 1864, in the Township of Harrington, Bergen County, having been removed to this court by *certiorari* allowed to him in 1865, was affirmed by the judgment of this court.

In 1882, Elisha Ruckman died in Rockland County, New York, of which county he was then a resident; and subsequently his will was there proved, and James H. Blauvelt and Sarah M. Dorn were appointed by the surrogate of Rockland County his administrators *cum testamento annexo*.

The Collector of Harrington Township, having obtained a rule that these administrators *cum testamento annexo* show cause why they as such administrators should not be ordered to pay the tax, now moves that it be made absolute.

The motion must be denied, for the reason that foreign administrators are not liable to be sued in their representative capacity in the courts of this State. *Banta v. Moore*, 2 McCart. 97; *Normand's Admr. v. Groggnard*, 2 C. E.

*Head note by Dixon, J.

Green, 425; *Brownlee v. Lockwood*, 5 C. E. Green, 39; *Porter v. Trall*, 3 Stew. 106; 1 Wms. Exec. 14th Am. ed. 362, note u.; 3 Wms. Exec. 2041; Story, Conf. Laws, § 518.

It is unnecessary to consider the suggestion that these respondents might be held as executors *de son tort*, further than to say that the evidence does not show that they have committed any act in this State which would impose that character upon them; nor are they now prosecuted in that character, as they must be if such be the ground of responsibility. *Ditts v. Parke*, 1 South. 219; *Parker v. Thompson*, 1 Vroom, 311.

Let the rule be discharged with costs.

COURT OF CHANCERY.

Maria Louisa MULFORD *et al.*,
v.

Horatio J. MULFORD.

1. A will gave testator's widow certain real estate in fee, and gave the residue of the estate to the executors in trust, one half of the income to go to the widow for life and the other half to testator's son "until he should become thirty years of age." It then gave to the widow and son the use and occupation of certain specified property "during the years above limited." Held, that the widow's use and occupation was not limited to the time when the son should become thirty years of age, but was intended to be for her life; that the devisees of the income of the residuary estate are entitled thereto from the death of the testator; and that proceeds of stone taken by the executors from quarries upon testator's land, opened before his death and never abandoned, are part of such income.
2. The will provided that if the son should die before reaching the age of thirty and the widow survive him, his half of the income should go to the executors, to be disposed of as they should see fit, but made no disposition in that case of the half of the corpus, the income of which was given to the widow. Held, that as the legal title to that half was in the trustees in trust only and not beneficially, it will go to those who, at the testator's death, were his next of kin or heirs at law, according as the property is personal or real.
3. The will provided that the executors might sell any of the property, except that the use of which was given to the widow and son, and in case it could not be advantageously sold, might mortgage it so far as necessary to pay borrowed money or to keep it in repair. Held, that the power to mortgage must be confined to the contingency of the inability to sell to advantage, and then exercised only so far as necessary; and that interest on such mortgages should be paid out of the income.

4. The will gave the widow's income, after her death; the estate in the event of the son's death before reaching thirty and after the death of the widow; and half of the estate upon the death of the widow in case the son reached thirty,—to the executors, to be disposed of as they might choose. Held, that these were absolute gifts, to take effect in the respective contingencies.
5. The will requested and empowered the survivor or survivors, in case of the death of any of the executors, to appoint other executors. Held, that a person so appointed takes the trust estate, as well as the duties of executorship, in place of his predecessor.

(Decided November 4, 1886.)

BILL for construction of will and instructions to executors. On final hearing. The facts are stated in the opinion. *Messrs. Potter & Nixon*, for complainants.

Runyon, Chancellor, delivered the following opinion;

Horatio J. Mulford, late of Bridgeton in this State, died July 16, 1885. By his will dated March 8, 1884, he first directed that his executors pay all his just debts and funeral expenses. By the second section he gave to his wife in fee, in lieu of dower, a house and lot in Wenonah in this State, and a house and lot in Bridgeton, together with certain other interests, thereafter particularly specified, in his personal and real estate. By the third he devised and bequeathed, gave, granted and conveyed unto his executors all the residue and remainder of his estate real and personal, of which he should die seized and possessed, for the following uses, viz.: one half of the income of it for the use of his wife, for life, and the other half for the use of his son Horatio J. Mulford, until he should become thirty years of age, the testator's wife and son "during the years above limited" to have the use and occupation of the house and lot where the testator resided, on the northeast corner of Atlantic and Vine Streets, in Bridgeton, together with the household furniture contained therein, and also to have the use and occupation of his horses, carriages and riding equipments, and his stable and lawn at the southeast corner of those streets to within 100 feet of the line of Ludy's lot.

He directed that after the death of his wife, the income of one half of his estate should be used as his executors might choose to dispose of it; that in the event of his son's death before attaining the age of thirty years, and before the death of his wife, the income of one half of the estate should be used as his executors might choose to dispose of it; and that in the event of his son's death before arriving at the age of thirty years and after his, the testator's, wife's death, all of the estate be disposed of as his executors might choose. And he directed his executors, when his son should have attained the age of thirty years, to set off according to the best of their judgment one half of his estate, and assign, set over, grant and convey it to his son, to the sole use of his son, his heirs and assigns forever; and that should his son desire

to have the house, lot, stable and lawn, which at the time of making the will were occupied by the testator, included in his half of the estate, they might be so set off to him, subject to the before mentioned privilege of the testator's wife in those premises; the remaining half of the estate after the wife's decease to be disposed of as the executors might choose.

He also provided that his executors might in their discretion sell any of his real or personal estate except that part, the occupation whereof he had given to his wife and son, either at public or private sale and invest the proceeds for the benefit of his estate, and that if for any reason the property could not be sold advantageously, they might mortgage it, so far as necessary to pay borrowed money, or to keep it in good condition and repair. He appointed his wife and his sisters his executors to carry out the provisions of the will, and added that after the death of any of his executors the survivors or survivor were requested and empowered to appoint other executors to fill any such places as might be thus made vacant by death until the will should have been wholly executed.

The bill is filed to obtain a construction of the will and instructions and directions to the executors in the discharge of their duties under it. Numerous questions are presented for decision. Such of them as it is necessary or proper to decide, in order to enable the executors understandingly and correctly to perform their duties and discharge their trusts, will be answered. The others, which are based upon a hypothetical state of facts which may never exist, it is not necessary and it would not be proper to pass upon at this time.

The gift of use and occupation to the wife in the third section is a gift for life. The will by the first section directs that all the testator's just debts and funeral expenses be paid by the executors, and then gives to the testator's wife certain real property in fee. It then gives all the residue and remainder of the estate to the executors in trust for certain uses, viz.: one half of the income of it is to go to his wife for life and the other half to the use of his son until he shall become thirty years old. He then gives to his wife and son, "during the years above limited," the use and occupation of certain specified real and personal property.

The doubt as to the extent of the duration of the wife's estate has arisen from the words just quoted, "during the years above limited." That the testator did not intend to limit the wife's use and occupation to the time when his son should attain to the age of thirty years is evident from the fact that he provides that if at that time his son shall desire that that particular real property shall be set off to him as part of his half of the estate, it shall be done not absolutely, but "subject to the privilege of the wife therein above described," referring to the gift of use and occupation to her. From that provision it is entirely clear that the testator did not intend to limit the wife's use and occupation to the time when his son should attain to the age of thirty years, but meant that she should have such use and occupation for life.

The taxes upon that property and the cost of ordinary repairs thereto should be paid by the trustees, out of the income of the estate. There is nothing in the will to indicate an intention on

the part of the testator that those expenses should be paid out of the *corpus* of the estate. So long as, under the will, the wife and son are entitled to joint occupation of the property, each is also entitled to one half of the income of the estate. The trustees should retain and pay out of the income, before dividing it, the taxes and cost of ordinary repairs upon that property up to the time when the property is to be divided.

The widow is entitled to one half of the income of the estate for life, and she is entitled to nothing except what is given to her by the will. The \$200 exemption as it is called would be in conflict with the terms and provisions of the will.

In case the widow should die before the son reached the age of thirty years, her half of the income will go to the trustees to be disposed of as they shall see fit.

If the son survive the widow and attain to the age of thirty years, one half of the *corpus* of the estate will go to him under the provisions of the will. The *corpus* of the other half will, in case the widow should predecease the son, go upon her death to the trustees, to be disposed of as they may choose.

If the son die before reaching the age of thirty years and the widow survive him, by the terms of the will his half of the income is to go to the executors to be disposed of as they shall see fit. But the testator makes no disposition in that case of the *corpus* of the half, the income of which is given to her. Although the legal title to that half of the *corpus* is in the trustees, yet it is not in them beneficially but only in trust. The general rule is that whenever it appears upon a conveyance, devise or bequest, that it was intended that the grantee, devisee or legatee, should take the legal estate only, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heirs; if out of his personal estate, to himself, his executors or administrators. Perry, Tr. § 150.

That share of the *corpus* will therefore, under those circumstances, go to those who at the testator's death were his next of kin or heirs at law, according as the property is personal or real.

The income given by the will to the widow and the son is the income of the residuary estate; they are entitled to it from the death of the testator. *Green v. Green*, 30 N. J. Eq. 451.

The proceeds of the sale of building stone, taken by the executors from quarries upon the testator's land which were opened before his death and never abandoned, are part of such income. *Gaines v. Green Pond Iron Mining Co.* 33 N. J. Eq. 608.

The provision that if for any reason such of the testator's real estate as he has given the executors power to sell cannot be sold advantageously, the executors may mortgage it, so far as necessary to pay borrowed money or to keep the property in good condition and repair, has no reference to the payment of money borrowed by the testator himself, but refers to such money as the executors may find it necessary to borrow for the preservation of the estate. They are empowered to borrow money upon mortgage of the property to pay borrowed money,

or to keep the property in good condition and repair.

The will provides in the first section that all of the testator's just debts and funeral expenses shall be paid by the executors; and after the specific gift to his wife he gives all the residue to the executors. He does not charge his debts or any of them upon his real property, in exoneration or in relief of his personal estate. The power to mortgage is not given in connection with any provision for or any reference to the payment of his debts, but in connection with the sale of his real estate. In view of the fact that the executors may not be able to sell advantageously the real estate which he has empowered them to sell, and hence may be compelled in order to keep it up to expend money upon it, he authorizes them to borrow such money, if necessary, and secure the payment thereof by mortgage upon the property; or to secure the payment of the expenses of keeping the property in good condition and repair by such mortgage. The provision authorizes them to raise or secure the payment of such money by mortgage of the property instead of taking it from the income of the estate as otherwise they would have been bound to do. *Combes v. Cadmus*, 86 N. J. Eq. 382.

It is the duty of the executors to sell that part of the real estate which they are empowered to sell, if they can do so advantageously, rather than to hold it and make expenditures upon it which are to be paid for by money borrowed upon mortgage of it, or to mortgage it to pay the expenses of keeping it in good condition and repair. The power to mortgage is not a general one but one which is to be exercised in a certain contingency, that of the inability of the executors to sell the property to good advantage; and then it is to be exercised only so far as necessary.

The interest upon such mortgages should be paid out of the income of the estate. The object in providing that the money may be raised upon mortgage is to relieve the income for the time being of the burden of large expenditures for repairs, etc., which otherwise it would have to bear. There is no evidence that the testator intended that the interest should be paid out of the *corpus* of the estate. The testator's indebtedness for borrowed money is to be paid in the same way as his other debts. The executors should use their discretion as to the selling that part of the real estate which they are empowered to sell. There is no absolute direction to convert the property into money, but merely authority to them to sell it if they see fit.

The gift of income, after the death of the widow, to the executors, to be used as they may choose to dispose of it, and the gift of the estate to them in the event of the son's death before he is thirty years old and after the death of the widow to be disposed of as they may choose, and the gift of half of the *corpus* of the estate after the death of the widow in case the son reaches the age of thirty years to be disposed of as they may choose, are all absolute gifts to take effect in the respective contingencies mentioned.

The testator requests and impowers the survivor or survivors in case of the death of any of the executors, to appoint other executors to fill
N. J.

any such places as may be thus made vacant by death, until the will shall have been wholly executed. The person or persons who may be thus appointed will not only take the place of the deceased executor or executors so far as the duties of executorship are concerned, but will be clothed with the trust estate in the place of his, her or their predecessor or predecessors.

FIRST NATIONAL BANK of Jersey City
et al.,
v.

Charles W. KIMBALL *et al.*

The Wallis Iron Works, being indebted to the Phoenix Iron Company and to the First National Bank, assigned certain claims in its favor to a trustee, to collect the same and apply so much of the proceeds as might be necessary on its debt to the iron company and to pay over the balance to the Bank. The person appointed trustee, selected by the mutual consent of all parties, was, when the assignment was made, acting as attorney for the iron company in a suit by it against the iron works, for the debt on account of which the assignment was given, which suit was settled by giving the assignment. Thereafter a bill was filed by the Bank and the Iron Works, seeking to have the amount of one of the assigned claims, which the trustee was charged with having negligently failed to collect, credited on the debt to the iron company, upon the ground that on account of the relations between the trustee and the iron company, that company was liable for the loss occasioned by the trustee's negligence. Held, that the fact that the trustee was at the time of the assignment acting as attorney for the iron company imposed no obligation or liability upon it beyond what would have rested upon it had a stranger been appointed; and that, under the facts of the case, that company is no more responsible to the other parties for any negligence or default on the part of the trustee than those parties are responsible to it therefor.

(Decided November 2, 1886.)

BILL for relief. Upon order to show cause why preliminary injunction should not be issued. On bill and answer (of Kimball) and affidavits on both sides. Order and stay discharged.

The facts are stated in the opinion.

Messrs. Wallis & Edwards, for complainants.

Mr. Charles W. Kimball, defendant, *pro se*.

Runyon, Chancellor, delivered the following opinion:

The bill is filed by the First National Bank of Jersey City and the Wallis Iron Works, a corporation of this State, against Charles W. Kimball and the Phoenix Iron Company, a

Pennsylvania corporation. The facts stated by the bill are as follows:

In September, 1884, the Wallis Iron Works was indebted to the Phoenix Iron Company to the amount of \$12,641.52, to recover which the latter had brought suits which were then pending against the former in New York and in this State. The Wallis Iron Works had on or about the 17th of June, 1884 (in order to secure to the First National Bank of Jersey City a payment of about \$18,000 which it owed to the Bank), assigned to the latter certain claims in its favor, one against John Lee of Brooklyn, N. Y., for \$18,191.48, and another against Moore & Carr of Syracuse, N. Y., for \$880, to be collected so far as necessary to the payment of its claim against the iron works.

By an instrument dated September 22, 1884 (it is said that it was not executed and delivered until on or about November 12, 1884) made in pursuance of an arrangement between the Bank, and the iron works and the iron company, the Bank and the iron works sold, assigned, transferred and set over to Charles W. Kimball all claims and demands of every nature and description held or owned by them against the above mentioned John Lee and Moore & Carr, and all claims and demands against W. R. & H. Haven, D. Van Orden & Co., and Austin Gibbons, together with all liens and securities held or owned by them therefor and all moneys due or to grow due thereon, in trust to collect, receive and receipt for all the moneys due or to grow due thereon, or with the assent of the iron works to compromise the claims and upon receipt of payment thereof to release and discharge the liens or other securities; he to take all lawful means for the collection of the claims; and out of the moneys received, first to pay all reasonable costs and expenses actually incurred in the collection, and then to pay in full all existing claims of the iron company against the iron works, the amount of which was thereby fixed at \$12,641.52, on the 10th of September, 1883, and pay over the balance to the Bank.

Mr. Kimball, the trustee, was the attorney of the iron company in the suit brought against the iron works in this State and was nominated by Isaac L. Miller, the New York attorney of the iron company, as a proper person to be trustee, and the nomination was agreed to.

The bill states that the iron company and Kimball might, with proper diligence, have collected the entire claim against Lee (which was a debt due him from the North River Construction Company, an insolvent corporation of this State) but that by their negligence they failed to do so. When the assignment to Kimball was made a receiver of the construction company had been appointed by this court. About two months after the assignment was made Lee made, in the State of New York, where he lived, an assignment of his property for the benefit of his creditors, with preferences; but the claim of the iron works was not among those which were preferred. After that assignment had been made, Kimball, having first obtained leave of this court so to do, issued an attachment against Lee in this State, upon that claim, in order thus to reach the debt due from the construction company to Lee by attaching it, notwithstanding the assignment, in the hands

of the receiver who resided in this State; the intention being to maintain, under the attachment, that the assignment was, on account of the fact that it made preferences, against the policy of our laws, and therefore passed no title to the debt due from the construction company as against New Jersey creditors.

The attachment was levied, but it was discontinued because the sheriff had, without authority, altered the return to a date exceeding thirty days from the time of filing the affidavit upon which the writ was issued and had not executed the writ within the thirty days; and it was apprehended that the fact that the writ was not returned and was not executed within the thirty days would render the attachment under it void. When it was placed in the sheriff's hands the writ was returnable within the thirty days. Another writ was then issued and delivered to the sheriff who, without any directions so to do, returned it unexecuted. A third writ was issued and under it the claim was attached; but the writ was not issued until after the receiver had made a compromise with Lee's assignee, by which the latter, acting under the order of the court in New York, agreed to receive and the former agreed to pay him, fifty cents upon the dollar of the claim, in full of the demand. This court held that that agreement was a novation of the debt, and that by it the receiver had become bound to the assignee to pay the amount agreed upon, and that therefore the attachment was of no avail. *Kimball v. Lee*, 18 Stew. 408 [ante, 832].

The bill states that the amount collectible from Lee was \$11,795, with interest from January 1, 1884, altogether, at the date of filing the bill, \$13,885 or thereabouts; that Kimball has collected from Holmes Brothers, under the assignment in trust, \$5,820 or thereabouts, and that those amounts are together more than enough to pay the claim of the iron company against the iron works, including the compensation of the trustee. It prays that Kimball may be decreed to account for the claims assigned to him in trust and the proceeds thereof, and that upon such accounting the Lee claim may be applied at its full face value with interest, towards the satisfaction of the debt of the iron company, and that he may be decreed to account for and transfer to the Bank all the claims assigned to him which remain uncollected, and all moneys in his hands, realized from the claims assigned to him, in excess of the amount which, with the full amount of the Lee claim and interest thereon, will pay and discharge the debt of the iron company, together with the reasonable expenses of the trust; and that he may be enjoined from paying over, assigning or making any disposition of any of the moneys or claims in his hands except to pay or deliver them to the Bank.

Kimball has answered. There are numerous affidavits appended to the bill and answer respectively in support of the allegations in each. In the very full briefs put in on each side several questions are discussed; but it is only necessary to consider one of them, and that is whether the relation which Kimball as trustee held to the iron company was such as to make the company responsible for his negligences and defaults, if there were any.

The bill alleges that the iron company,

through Kimball as its attorney and trustee, undertook the sole and exclusive charge of the collection of the claims assigned to him and of each and all of them, and that neither the Bank nor the iron works had any control or voice in the matter from the time of making the assignment.

According to the answer, the iron works through its president and counsel assumed and exercised in fact more control over the proceedings in this State to enforce payment of the Lee claim than did the iron company or any person in its behalf; and Kimball swears that two suits were commenced by attachment in December, 1885, or January following, by the law firm of which the president of the iron works was a member, as attorneys, upon claims assigned to him, Kimball, by the assignment in trust; that one was the claim against W. R. & W. Haven, and the other the claim against Moore & Carr; that the before mentioned law firm have had entire control over those suits and that those suits were not begun at his request but were commenced without asking his consent. He also says that that firm were the solicitors of record in the before mentioned suit of *Kimball v. Lee* in this court; that the president of the iron works drew the bill and argued the motion for an injunction, and advised the appeal which was taken and which is still pending.

It appears that when the arrangement which resulted in the assignment in trust was made, Mr. Miller, who as before stated was the New York attorney for the iron company in the collection of its claim against the iron works, suggested (he swears that it was merely a suggestion) Mr. Kimball as a proper person for trustee, and that the suggestion was accepted promptly by the counsel of the Bank and the iron works. Mr. Kimball swears that after the assignment in trust was made, he could not properly have, and in fact did not have, the relation of attorney to the iron company, nor any other relation except that of trustee as clearly defined in the assignment.

The fact that the person who was appointed trustee was, when the assignment was made, the attorney at law of the iron company in the suit for the settlement whereof the arrangement which resulted in the assignment was entered into imposed no obligation or liability upon that company, beyond what would have rested upon it had one who was an entire stranger been appointed such trustee.

The theory of the bill is manifestly that the iron company is to be held to precisely the same accountability as it would have been if the assignment had been made to it. This claim is based wholly upon the proposition that the assignment to Kimball was an assignment to the iron company because when it was made he was acting for that company as its attorney at law in the collection of the debt due to it from the iron works.

The proposition cannot be maintained. Mr. Kimball was selected by mutual consent of the parties to the assignment, to be the trustee. He was trustee for all according to their interests in the subject of the trust; and he is responsible to all accordingly. He did not represent the iron company in any different way from that in which he represented the other parties;

and that company is no more responsible to the other parties for his malfeasances, misfeasances, neglects or defaults, if any there were, than those parties are responsible to the iron company therefor.

The order to show cause and the ad interim stay will be discharged, with costs.

HUBBARD'S ADMR.

v.

B. G. CLARK, Assignee of Selden T. Scranton & Co. and of Selden T. Scranton.

1. A bill to enforce the vendor's lien for the purchase money of land conveyed by one since deceased is properly brought by the vendor's administrator, and the heirs at law need not be joined; and this, although the heirs had dealt with the vendee directly in reference to the purchase money.
2. Neither the widow of the vendor nor her representatives, if she be dead, although interested in the demand, need be made parties to such suit.
3. The establishment of a vendor's lien for purchase money is an equitable and not a legal remedy.
4. A vendor's lien, or lien by way of equitable mortgage because of a promise to give a mortgage to secure purchase money, held superior to the claim of an assignee representing judgment creditors of a firm of which the vendee was a member.
5. A vendor's lien for purchase money extends, on his death, to his personal representatives.

(Filed November 15, 1886.)

BILL in equity to recover a balance of purchase money on the sale of a farm. *Decree for complainant advised.*

The facts are stated in the conclusions of the Vice Chancellor.

Mr. Rosenkrans, for complainant.

Mr. McGee, for defendants.

Bird, V. C., filed the following conclusions: The bill in this cause was filed in August, 1884, to recover \$2,063.33, a balance of purchase money on the sale of a farm by H., the intestate, to S. T. S. in April, 1865, under an agreement made in May, 1864. The consideration was \$8,000, of which \$2,000 was paid at the execution of the agreement; and a mortgage was to have been given to secure the balance, with interest payable in installments of \$2,000 each, on April 1, 1865, 1866 and 1867. But no mortgage was given. S. T. S. went into possession as owner and made an agreement with H., his vendor, that he should continue to occupy the farm for a fixed money rent. S. T. S. did not pay the installment of \$2,000 April 1, 1865; nor did he make any payment until May, 1866, when he paid \$184. In June, 1866, he paid \$1,000.

H. died July 6, 1867, and July 15, letters of administration were issued to the complainant.

H. was in possession at the time of his death. He left a widow and six children, who continued in possession. With these S. T. S. made an agreement by which they were to pay a certain rent, but which rent was to be applied in payment to them of the purchase money still due. With this the administrator had nothing to do. The widow and children continued in such possession, making appropriation of the rent as indicated, until September 5, 1878, when Selden T. Scranton & Co. made an assignment under the Act for the benefit of creditors, to B. G. Clark, one of the defendants.

On the 10th of same month S. T. S. made an assignment of his own personal assets for the benefit of his creditors. The farm conveyed by H. to S. T. S. is named in both assignments among the list of assets. It is admitted that while said farm was purchased by S. T. S. and the deed taken in his own name he, in fact, purchased it for the firm and the payments made were made with the firm's money. After these assignments the widow and one or more of the children of H. continued in possession, until August, 1884, when the assignee had advertised the farm for sale. He advertised both as assignee of S. T. S. & Co. and as assignee of S. T. S.

The complainant, as administrator of H., filed his bill to restrain this sale and, as stated, to have the amount still due declared to be a lien and to compel its payment. The claims proved against S. T. S. & Co. were over \$400,000 and antedated the assignment, and there is not sufficient assets to pay them. The claims proved against S. T. S. personally will more than swallow up all his personal assets.

First, it is said that the bill is defective because the children of H., as heirs at law, are not parties. This view is pressed on the ground that the administrator did not claim the consideration money as personal estate, but allowed the children to treat with the vendee in reference thereto directly. This view cannot be sustained. The land was not only agreed to be conveyed, which of itself works a conversion, but was actually conveyed, so that at law an action could have been maintained for the consideration. The fact that a mortgage was to have been given to secure the balance cannot work a reconversion. Had such mortgage been executed and delivered, it would have been a personal asset and gone to the administrator.

Second, it is urged that the widow of H. having died before the filing of the bill, and having been entitled to one third of the amount of the purchase money, still unpaid at the time of her husband's death and which at her death was still unpaid, the amount, so due to her, devolves upon her next of kin, whom the complainant has brought no one in to represent. This is true as to her rights and death, but not as to legal consequences.

The death of Mrs. H. worked no change as to the method of devolution. After her death, as well as before, the administrator was entitled to all the personal estate of the decedent. When he brings his suit to recover a demand, whatever its character, he never makes any of the next of kin parties. The death of one who survives the first decedent does not confer any

greater right on his or her next of kin; so that if a child of H. dies leaving children, such children would not be made a party by the administrator of B. in a suit to foreclose a mortgage, or to recover on a bond or note or book account. I believe this is without exception. This being so, had the widow of H. been living at the time of filing the bill, she would not have been either a necessary or a proper party; and, as a consequence, neither her representative nor her next of kin need be brought in.

Third, it is urged that the claim of the next of kin of H. and of his widow, since deceased, is barred by the Statute of Limitations. This cannot be, since S. T. S. treated with the next of kin and widow, respecting this unpaid purchase money until the year 1878 when the assignments were made, and from time to time made payments to said next of kin as they came of age. The assignments were made in September, 1878, and the bill was filed in August, 1884: Independently of the vendor's lien, therefore, the statute had not begun to run. The bill was filed within twenty years from the time of the execution and delivery of the deed.

Fourth, the claim that the complainant has an adequate remedy at law is quite untenable. The object of this suit is to preserve and establish the vendor's lien for unpaid purchase money. I believe that this is always done in equity, and this seems to be the spirit of the cases. *Payne v. Wilson*, 74 N. Y. 348; *Re Howe*, 1 Paige, 125; *Jones*, Mort. § 163.

Fifth, while it is admitted that as between the assignee of S. T. S. and the next of kin the lien may be good unless barred by laches, it is insisted that it is different as between the assignee of S. T. S. & Co. and the next of kin. It is said that as such assignee he represents judgment creditors and that they are entitled to priority. But it will be noticed that in this case they are judgment creditors of the company and that the title to the land was in S. T. S. Another consideration of great weight is that the assignee and all who claim under him had ample notice; for all the facts necessary to perfect such notice were set forth in the deeds of assignment. Besides, the counsel of the respective parties seem to have had full information on the subject. I think the vendor's lien, or lien by way of equitable mortgage because of the agreement to give one, is still entitled to its superiority. See the cases above cited and *Jones*, Mort. § 202.

Sixth, I can find no fact or circumstance in the case to justify the defendants in pressing the doctrine of laches. Time was given for the benefit of the vendee alone, and for the court to charge the other party with laches would indeed be uprooting everything.

Seventh, learned counsel pressed with apparent confidence, as good law, the assertion that the lien died with the vendor. It extends to his personal representatives. *Story*, Eq. § 1227.

I think these considerations show that the bill is well filed; that the proper parties are before the court, and that the balance due is a lien on the land. I believe there is no dispute as to the amount. *I will advise a decree to the effect that if the amount due and the taxed costs be not paid within thirty days after a*

service of a copy of the decree, in that case an execution shall issue.

Elizabeth M. LA FOY

v.

Pauline C. CAMPBELL et al.

1. A will gave a life estate to testator's wife, and then provided that at her death and after his son A. attained majority, the property should be divided between testator's children E., T. and A., equally. A subsequent clause provided that in case testator's wife died, and A. did not live to majority, the whole estate should be held in trust for E. and T. until a certain date, and then be divided between them. The next clause provided that in case either of testator's children should die leaving issue, such issue should receive the share devised to the child so dying. The will also provided that T. should have use of testator's interest in business, so long as the estate was undivided; and should pay interest on the appraised value thereof. T. died before testator's wife, leaving issue. Held,

(a) That the word "either" was used in the sense of "any"; that testator's children took a contingent and not a vested interest, and that therefore T. having died before the period fixed for division of the estate arrived, his share belonged to his children.

(b) That, under the circumstances, T.'s children are subject to the same equities to which he would have been had he lived to the time fixed for division, and that therefore their share is to be charged with interest on the value of testator's interest in business.

(Decided October 26, 1886.)

BILL for partition. On final hearing upon pleadings and stipulation of counsel.

The facts and questions raised are set out in the opinion.

Mr. C. T. Glen, for complainant.

Mr. P. W. Cross, for heirs of Theodore R.

LaFoy:

The interest of Theodore R. LaFoy in the estate of J. B. M. LaFoy did not vest in him until after the death of his mother Helena LaFoy.

Baldwin v. Taylor, 10 Stew. 78.

If a legacy given to one at the death of a person named is given to another in case such legatee should die, this is held to refer to death in the life of the person at whose death it is given. Such legacy is held to vest at the death of the testator, subject to be divested on the happening of the event, that is, dying in the life of the person named.

Beatty's Admr. v. Montgomery's Exrs. 6 C. E. Green, 324-327; *Hawk. Wills*, 254; *Williamson v. Chamberlain*, 2 Stock. 873.

Mr. Howard W. Hayes, for the widow and heirs of David A. Hayes, deceased:

The sixth clause is substitutionary; and the rule is that a clause of substitution is to be referred to the death of the testator.

N. J.

3 Jarm. Wills (R. & T. ed.), 640; *Goodall v. McLean*, 2 Bradf. 809.

It is a rule that when death is treated as a contingent event, and the context shows nothing, the time of death is to be regarded as the contingent event, and the contingency in time is made to be the death of the testator.

Barrell v. Barrell, 11 Stew. 60.

If, however, the contingent estate is limited after a life estate, the English rule is that the contingency is death during the lifetime of the life tenant. In the present case there is no need of the court supplying a contingency, as "die leaving issue" is a contingency in itself.

Being substitutionary takes the clause out of the English rule. The English rule does not apply here.

Barker's App. 2 Cent. Rep. 282. See also *Gibbens v. Gibbens*, 1 New Eng. Rep. 98.

Runyon, Chancellor, delivered the following opinion:

Jean B. Manzagot dit LaFoy, late of Newark, deceased, by his will made in 1848, after directing that his debts and funeral charges be paid, devised and bequeathed to his wife the use of all of his estate, real and personal, for life. He then provided that in case his wife should die before his son Adolphus should arrive at the age of twenty-one years, his executors should appropriate all income arising from his estate, or so much thereof as might be necessary for the purpose, to the support and education of Adolphus until he should attain to his majority. He then, by the fourth section of the will, provided that after the death of his wife, and after Adolphus should have attained to the age of twenty-one years, all his estate should be equally divided between his, the testator's three children, Evelina, Theodore and Adolphus.

By the fifth section he provided that in case his wife should die and Adolphus should not live until he should be twenty-one years of age, all his estate should go to his executors (to whom he thereby gave it accordingly) in trust for Evelina and Theodore, to be held by them undivided and unappropriated until the 4th of March, 1858, when they were to divide it between those two children.

By the sixth section he provided that in case either of his children should die leaving lawful issue, such issue should receive the share of his estate devised to such child so dying.

By the seventh section he ordered that after his decease his interest in the business carried on by Theodore should be appraised by one or more independent persons, and that Theodore should have the use of it so long as the testator's estate should remain undivided between his children, on Theodore's paying to the testator's wife during her life, and after her decease to his executors, the lawful interest on the amount of the appraised value of such interest in the business; and he also provided that in case Theodore should at any time wish to pay all or any part of that appraised value, such payments should be appropriated to pay off the mortgages upon the testator's houses in Fair Street, in Newark, the property of which partition is sought in this suit.

The testator died in 1848. His widow died in 1863. Theodore died in or about 1859, leaving a widow and children, Evelina, who mar-

ried Peter Paul N. D'Alvigny, died in 1849. She left two children. Adolphus is still living. The complainant is his wife and owns his share of the real property. It was conveyed to her in 1876. In or about 1856 David A. Hayes (now deceased) bought the interest of Theodore in that property at sheriff's sale, under judgments and executions against the latter; and it was conveyed to him accordingly in that year. The interest of the testator in the business before referred to was appraised at \$411.99. Theodore had the use of it and paid interest upon it up to May 9, 1856, but no interest has been paid thereon since then. The principal has not been paid nor has any part of it.

Two questions are presented for decision: first, whether the estate of Theodore in the property was vested or contingent; and second, whether the value of the testator's before mentioned interest in Theodore's business and the interest thereon since May 9, 1856, are a charge upon the share of the testator's estate given by the will to Theodore.

If Theodore had a vested indefeasible interest in the property of the testator, his children have now no interest in the property of which partition is sought in this suit; for his interest therein was sold under judgments against him and executions thereon; and it is now owned by the widow and heirs at law of Mr. Hayes, who died intestate. By the will the testator gives a life estate to his widow, and then provides that at her death and after his son Adolphus shall have attained to his majority, the property shall be divided between his, the testator's three children, Evelina, Theodore and Adolphus, share and share alike. It is obvious that standing alone, this latter provision is a gift of a remainder in fee to the children in the real property, and an absolute gift in remainder of the personal estate.

But the provision of the sixth section affects and qualifies the gift. By that provision the children of any child dying before the period of distribution are substituted for the parent; so that the gift to the parents in the fourth section is made defeasible by the sixth.

It is urged that the use of the word "either" in the sixth section indicates that the testator intended that the provisions of that section should have reference to those of the fifth only, and that he intended that there should be substitution of children for parents only under the circumstances mentioned in the fifth section. But such a construction would be too narrow and restricted. The word "either" is used in the sense of "any." The object of the testator was to keep his estate undivided, for the bene-

fit of his family, until his wife's death; and beyond that period until March 4, 1858, if she and Adolphus should both die before the latter should have attained to the age of twenty-one years; and in case the widow should die before Adolphus should have attained to his majority, and he should live to attain to it, then the estate was to remain undivided until he should have become of age.

The testator's intention was that the estate should be preserved as a whole until the time fixed for division, and that when division should take place it should go to his family, to his children; but if they or any of them should be dead, leaving children, their children should take in their stead, and that so the property should be kept for the family until the time of division. The provisions under consideration are similar to those which were construed in *Baldwin v. Taylor*, 10 Stew. 78; *S. C.* 11 Stew. 687. The share in question belongs to Theodore's children.

As to the second question: the money which the testator directed his executors to leave in the hands of Theodore was not indeed charged by the will upon the share given to the latter; but had Theodore lived to participate in the division, his share would have been chargeable with the debt and the interest thereon from the time of the death of the widow. And although his interest in the testator's estate was defeasible upon his dying, leaving children, before the period of distribution, and although he did not live until that time and his children take by virtue of the provisions of the will, the share is in equity chargeable with the debt. The testator gives the shares of his children to their children in case of the death of the former, by way of substitution, merely; his object being, as before stated, to make sure that the property could go to his family at the time of division. Under the circumstances, Theodore's children are subject to the same equities to which he would have been subject had he lived to the time of division. *Denise v. Denise*, 10 Stew. 163.

As in justice and equity the \$411.99 and the unpaid interest thereon since the death of the widow would have been chargeable against the share if it were coming to him, and he would have been required to take the share subject to the payment thereof, so they taking the share in his stead must in like manner take it upon the same equitable condition. The share is not subject to the payment of the interest which was given by the will to the widow; for that interest belonged to her and not to the estate and if it was not collected the loss was hers.

DISTRICT OF COLUMBIA.

SUPREME COURT.

Columbus THAW, *Appl.*,

v.

Maria RITCHIE.

1. By virtue of the Act of Maryland of 1798, chap. 101, subchap. 12, § 10, the Orphans' Court of this District was empowered in 1848 to order a sale by a guardian of a part of his ward's real estate for the latter's maintenance and education.
2. The above mentioned Act was not repealed by the Act of Congress of March 3, 1843.
3. When there is no moment that the remainderman in fee would not have an immediate right to the estate on the death of the life tenant, it is a vested remainder.
4. A devise of a life estate and then a devise over in fee to two persons in equal parts, with a devise of the share of him dying first to the survivor, creates a vested remainder in fee; the devise to the survivor being simply an executory devise over of a fee after a fee.
5. A devise over in fee to the life tenant in case she survives the two remaindermen is also such an executory devise.
6. The objection to the sale of an infant's estate in remainder, because of the uncertainty of its value, is removed when the life tenant joins in the sale.
7. There is nothing in the Act of 1798 which excludes future interests from being sold equally with estates in possession.
8. Nor does it exclude the sale of trust estates where the trust is purely personal to the infant; for the trust would cease at the moment of the transfer of their title, and the purchaser would take the legal title by operation of the Statute of Uses.
9. No particular form of application, or allegation, or proof, is prescribed as necessary to give the court jurisdiction under the Act of 1798. It is sufficient that it is satisfied, in however informal a manner, that the sale is advantageous to the ward, with reference to his maintenance and education; and there need be no record entered of the evidence upon which it decides that fact.
10. A purchaser under such a decree is not bound to look beyond the decree.
11. The "approval" of the decree of the orphans' court, provided by the Act of 1798, to be made by the chancellor, is a revisory and not an appellate proceeding; and as the statute provides no formalities by which the chancellor is to take cognizance of the proceedings in the orphans' court, that is to be adjusted by the practice of the court.
12. One not a party to a deed and who does not claim under it is not estopped by its recitals.

18. Where a bill of exceptions sets out two rulings of the court, but the exception taken is so ambiguous that it cannot be ascertained which of the rulings was excepted to, the court will disregard the bill altogether.

(Decided October 11, 1886.)

APPEAL from a judgment in favor of defendant in an action of ejectment. *Affirmed.* On rehearing. *The former decision, reported 1 Cent. Rep. 838, reversed.*

The action was brought to recover an undivided moiety in two lots of ground which the plaintiff claimed in fee simple under the will of his father. The defendant claimed title under a sale of the plaintiff's interest by his guardian, which sale was made by virtue of an order of the orphans' court January 21, 1848, and approval thereof by the equity court. Defendant claimed that this order and sale passed a valid title under the Act of Maryland of 1798, chap. 101, subchap. 12, § 10, giving jurisdiction to the orphans' court in certain cases. The jurisdiction of that court to entertain the application of the guardian and to order the sale was the principal point in dispute.

The case was originally heard by two justices and a decision rendered, holding that the orphans' court was without jurisdiction to order the sale. See 1 Cent. Rep. 838.

Afterwards this motion for a rehearing before a full bench was granted.

Further facts are set forth in the opinion.

Messrs. F. P. Stanton and S. R. Bond, for appellant.

Messrs. Appleby & Edmonston, for respondent.

Mr. Justice Cox delivered the opinion of the court:

The question of paramount importance in the case is how far the orphans' court is empowered, by the Act of Assembly of Maryland of 1798, chap. 101, subchap. 12, § 10, to order a sale by a guardian, of his ward's real estate, on account of the ward's maintenance and education.

This statute was continued in force as the law of this District by the Act of Congress entitled "An Act Concerning the District of Columbia, Approved February 27, 1801."

It will assist us in the interpretation of the Act to consider the state of the law of Maryland on this subject at the date of its passage.

There were, at that time, several Acts in force, under which proceedings could be instituted affecting the title of infants to their real estate.

By the Act of Assembly of 1785, chap. 72, § 12, the chancellor was empowered to direct a sale of lands in which an infant had a joint interest or interest in common with any other person or persons, on its appearing that it would be for the advantage of the infant as well as of the others, he taking care that the infant's share in the proceeds be paid over to him.

But the object of this Act was simply partition. It was as much in the interest of the adult co-owner as of the minor, and enabled the former to sell his property, which he could not do without the aid of the law, on account

of the disability of his cotenant. But it contained no provision as to the management and application of the minor's share, and did not apply at all to property held by him in severalty. Indeed, on the next day after this Act was passed, the Act known as chapter 80 of the same session was passed, which did undertake to direct the application of the minor's estate, and which limited the consumption of the principal to the personal estate.

So, under the Act of Descents of 1786, chap. 45, if descended lands could not be partitioned between the heirs, they might be sold by commissioners under an order of the county court, if the land all lay in the same county; from which order an appeal might be taken to the chancellor. If the lands lay in different counties, the chancellor might directly decree the sale. In this case, the sale was ordered without reference to the interests of any infant heir, but because of the impossibility of partition.

In virtue of its inherent jurisdiction over the subject of partition, the court of chancery has exercised original concurrent jurisdiction with the county courts, in the cases provided for by this statute.

There were other Acts providing for the sale or conveyance of property in which infants were interested, for the benefit of creditors of the ancestor, or in pursuance of contracts made by him.

But the above mentioned statutes constitute all the legislation of Maryland before the Act of 1798, which authorized the sale of infants' property, in the interests of the parties entitled.

It will be seen that it is limited to cases of ownership by the infant jointly or in common with others, and that it does not contemplate any disposition of the minor's estate beyond its conversion into money. Certainly, no authority could be claimed, under the Acts referred to, to apply the principal of the estate to maintenance or education.

The Court of Appeals of Maryland, in several cases of comparatively recent date, have expressed the opinion that the court of chancery had an inherent power to decree the sale of an infant's real estate, independently of statutes authorizing it.

The first case in which this occurred was that of *Dorsey v. Gilbert*, 11 Gill & J. 87, decided in 1839. A private Act had been passed authorizing the chancellor to decree the sale of an infant's realty. The chancellor held the law to be unconstitutional. The court of appeals reversed his decision and sustained the law. In the course of the opinion it says: "It was an undoubted power of the court of chancery, before any of our legislative Acts authorizing the sale of infant's estates, to convert the real estate of an infant into money; and many cases may be found where the guardians of infants, under particular circumstances, have been authorized to make this conversion. 2 Story, Eq. 585, 586, 587. The court of chancery, in the exercise of this jurisdiction, acted under a delegated authority from the King, who, as *parens patriæ*, had jurisdiction over the persons and estates of infants."

The court of appeals did not assume to act under this extraordinary power in that particular case, because there was a special statute to authorize the sale; and its decision was simply

to uphold that statute as valid. The proposition above announced was not necessary to the decision of the case, and may be considered a *dictum* merely; yet it was followed by similar *dicta* in *Downin v. Sprecher*, 35 Md. 474; *Long v. Long*, 62 Md. 38; and a still more recent case of *Taylor v. Peabody Heights Co.*, reported in the Central Reporter, vol. 8, No. 18, p. 867.

These expressions of opinion are not authoritative for us; and in passing I take occasion to say that in my judgment they are clearly erroneous.

The power seems to be asserted for the chancellor, on the ground that it had been exercised by the Court of Chancery of England; and the only authority cited for this is Story's Equity Jurisprudence.

The court was evidently misled by the general language of Story, asserting that a guardian will sometimes be allowed to convert personalty into realty and realty into personalty. Upon an examination of the cases referred to by Story, it will be found that they are principally cases in which the money of a ward was laid out in the purchase of land. In some of them it appeared that timber had been sold and the proceeds invested for the ward or applied to incumbrances. And these last are the only illustrations given of the conversion of realty into personalty. The guardian has also been allowed to lease his ward's land. But not a case is cited in which the chancellor decreed a sale of the infant's freehold estate. On the contrary, Lord Hardwicke said, in *Taylor v. Philips*, 2 Ves. 23:

"There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done, but never as to the inheritance, for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill."

It would seem, then, that the only ground for the proposition of the court of appeals fails. But it is not so important what may have been thought by that learned court at the late dates of the cases referred to. The important question is: What was understood to be the law at the time when the Act of 1798 was passed? because we are to read that statute in the light of existing law.

At that time, no court in Maryland had asserted this power of sale; and there is no reported case either before or after that date in which either the chancellor or any county court, sitting as a court of equity, has ever decreed the sale of an infant's freehold in virtue of this extraordinary power of the *parens patriæ*, or in other cases than those provided for by statute.

On the contrary, as late as 1828 Chancellor Bland, in the *Williams Case*, 3 Bland, 186, reviewed this whole subject and examined all the English authorities at length, and said: "Nor have I been able to find any case in the English books in which the court has undertaken to change the nature of an infant's inheritance by selling the land itself and investing the proceeds for his benefit; or in which the court has sanctioned any such sale made by the guardian or trustee of an infant."

And again; after referring to sales made for partition or for payment of mortgage debts, he

says: "And therefore it is that the English Court of Chancery has never, except in the cases above mentioned, undertaken to dispose of an infant's land or inheritance in real estate, and that, although many cases have arisen in which the income of an infant's estate has been found to be entirely insufficient for his support, yet it has rarely occurred that the court has broken in upon the capital of even his personal estate for the purpose of maintenance, though it has frequently done so for his education and putting him out in life."

If any Maryland authority existed before this date, for the power more recently asserted by the court of appeals, *Chancellor Bland* would surely have known it and referred to it.

It could hardly be, then, that any such opinion prevailed in Maryland thirty years before the date of his opinion.

But even were it otherwise, it is to be observed that the proposition asserted by the court of appeals does not go far enough to be available for this discussion. It declares the power of chancery to decree a conversion, but no more. It does not assert the power to do that on account of the maintenance and education of the ward, and to apply the proceeds to those objects. And the very ground on which the special Act on which the case of *Dorsey v. Gilbert* was based was justified as constitutional, was that while it was only an enlargement of the existing power of the court of chancery "The property of the infant is not (by it) in any manner impaired or lessened, but a change in its character alone effected."

We may safely assume, then, that before the Act of 1798 there was no authority in any court in Maryland to decree a sale of an infant's realty for maintenance or education, or for any object except those provided for in the statutes referred to.

If he possessed personality, the orphans' court might allow his guardian to apply a tenth part of it annually for his education, under authority of the Act of 1785, chap. 80.

But if he was an orphan, having no legal claim for support upon anyone, and his whole patrimony consisted of unproductive realty, his condition was lamentable. However refined his associations may have been, and however capable he might be of receiving a liberal and professional education, his only recourse for a support was to be bound out as an apprentice, under the Act of 1715, chap. 89, unless some charitable person would assume his maintenance and education. His real estate, however ample, was unavailable for those objects, unless, indeed, he would go in debt for necessities, and leave his creditors to their common-law remedies against his property.

In this condition of affairs, the Act of 1798, chap. 101, was enacted "for amending and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons," the twelfth subchapter, section 10 of which says:

"And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans' court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal and to sell part of the same, under its order; *Provided*, Nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery, or general court, as well as of the orphans' court."

It will be observed that the power conferred is not, in terms, limited to personal estate. The income of the estate may be exceeded and part of the principal may be sold.

It will not be disputed that the terms "estate" and "principal" are comprehensive enough to embrace everything, real and personal owned by the infant. Is there anything in the context or in the subject matter to limit their sense, in connection with the power of sale conferred?

Section 5 provides that on the guardian's executing his bond, the court shall have power to order the land, distributive share or other property of the ward, to be delivered to the guardian.

Section 6 directs the guardian to have the real estate appraised and the annual value thereof estimated.

Section 7 forbids waste but allows the wood to be cut down under order of the court, for the ward's education and maintenance.

Section 8 directs the guardian to lease out the real estate, or allows him to undertake it on his own account and be answerable for the annual value, to be every third year ascertained.

Section 9 directs the guardian to account for the profit and increase of the estate or annual value as aforesaid.

Thus the first of these sections grouped together the real and personal estate. Sections 6, 7, 8 and 9 refer entirely to the real estate. Section 9 speaks of it as the estate and then follows immediately section 10, the one under consideration, in which permission is given to exceed the income of the estate (the precise word which in the preceding section referred to realty) and to sell part of the principal. As the preceding four sections had reference solely to real estate and the last described it generally as the estate, it is difficult to understand why the same word in this section should not embrace the realty.

The power to sell the personality (10 per cent of it annually) already existed under the Act of 1785, chap. 80. If it was intended by the Act of 1798 merely to re-enact this, or to extend it to all the personality, why was the phraseology changed and the word *personal* omitted?

If it does not appear from the foregoing considerations that it was omitted *de industria*, and the power of sale was extended to the realty as an amendment to the existing law, it is made demonstrably clear by the proviso to section 10.

The function of a proviso in a statute is to qualify or restrain the enacting clause.

The enacting clause here confers a power to order sale of part of the principal of the infant's estate, on account of his maintenance or education. The qualification is that the real estate shall not be diminished on account of the maintenance or education, without the approbation of the court of chancery, etc. Dimin-

ished how? Clearly, it means by the exercise of the power of sale conferred in the preceding clause, *i. e.*, the realty shall not be diminished by such sale without, etc. Why add this qualification unless without it the orphans' court would have the unrestrained power of selling, by virtue of the enacting clause.

Again; what do the words "as well as of the orphans' court" at the close of the section mean, if not that the orphans' court is to allow a diminution of the realty by its order of sale, first; and that the approbation of the other court is to be had as well?

The proviso then clearly assumes that the previous clause conferred the power to order a sale of the realty, and was designed as a check upon its exercise.

There is no question of implied or incidental powers.

The question is whether the power to allow the guardian to exceed the income of the *estate* and to sell a part of the principal does not mean, if the estate consists of realty, as in this case, a power to exceed the income of the realty and to sell part of that for the maintenance and education of the ward. The context is resorted to, not to infer powers not expressed but to throw light on the express grant, if it needs any elucidation.

More properly, it may be said that the proviso is referred to as irreconcilable with the position that the expressed grant means less than its terms naturally import and ought to be narrowed and restrained by construction.

The conclusion seems to me inevitable that the statute conferred upon the court the power to order a sale of part of the minor's real estate, for his education and maintenance.

Allusion has been made to the nonexistence of any practice under this section of the statute in Maryland, and to the absence of any adjudicated case sanctioning such a practice.

The Act of Assembly of Maryland of May 8, 1816, would account for the nonexistence of the practice in that State since that date. The Act provides for sales of infant's property by decree of the chancellor, or of the several county courts of the State sitting as courts of equity. The eighth section enacts that "No part of the principal arising from the sale of any real estate by virtue of the law shall be applied toward the maintenance or education of any infant, unless the chancellor or the county court, as the case may be, shall consider it necessary for the education or maintenance of the minors."

This, by implication, gives to the chancellor or county court the power to order the application of the principal to the minor's maintenance or education. As this Act was very comprehensive in its provisions, and could be administered by any of the county courts sitting in equity, it is quite likely that it superseded the antecedent legislation, in the practice of the courts, and occasion did not arise for direct judicial decision of the question now before us.

But whatever expression of opinion we find in the Maryland courts or other authorities is in favor of the interpretation we have given to the statute.

In the *Williams Case*, decided in 1828, which was a case under the Act of Maryland of 1816, *Chancellor Bland*, as already stated, discussed the whole subject of the power of the court of chancery to decree the sale of realty owned by

infants. He also reviewed the legislation of Maryland on the subject, including the Act of 1798 now under consideration. In his report of the case, published in 1841, he adds, in a note to this part of his opinion [3 Bland, 200] a reference to the *Goltier Case*, decided by *Chancellor Kilty* in 1810.

In that case, the father of certain minors petitioned the orphans' court, setting forth that his children had inherited an undivided interest in certain real estate; that the other heirs had contracted to sell the property; that he believed it would enable him to educate and support the children more advantageously if he should sell and convey on behalf of the children also, and asked that he be authorized to make the conveyance. The orphans' court passed an order authorizing it, and *Chancellor Kilty* afterwards approved it, expressly, under the power vested in him by the Act of 1798, chap. 101, etc.

This case is extracted from the chancery proceedings. It shows that before 1816, the Act of 1798 was understood by at least one orphans' court and the then chancellor, as we have heretofore understood it, and it may be considered as evidence that our practice existed in Maryland at that time. It is a circumstance, too, not without interest, that *Chancellor Kilty* had been the *Chief Justice* of the Circuit Court of the District up to the year 1806, about five years before the *Goltier Case* was decided.

This case is cited by *Chancellor Bland* as already stated, in a note to his review of the Maryland Statutes, without comment, and it is to be assumed that he refers to it as an authoritative exposition of the law.

In the same note, he refers to the case of *Brodeur v. Thompson*, 2 Harris & G. 120, decided in 1828 also.

That was an action for the value of certain improvements constructed on the defendant's real estate by authority of his guardian, who had contracted to apply part of the ward's principal to payment for them, and that with the sanction of the orphans' court.

The question was whether the orphans' court had authority to allow the guardian to exceed the income and apply part of the principal to any other object than the maintenance and education of the ward.

The court of appeals held not, and said: "By the ninth section of that law (the Act of 1785) the orphans' courts are invested with the authority to allow the guardian to apply a part of the personal estate, not exceeding a tenth part thereof, to the education of his ward. The Act of 1798 only enlarged this authority by extending the expenditure to any part or the whole of the personal estate, if necessary. The better education of the ward is the object of both laws, and the general expressions used in the tenth section are to be construed with reference to this object. * * * That the Legislature did not mean to extend the expenditure of the principal to any other objects than those personal to the ward is plain from the language of the tenth section, in the closing part of it: 'No part of the real estate shall, on account of such maintenance or education' be diminished without, etc. * * * Clearly indicating, by the relative terms, such maintenance or education, the object of expenditure authorized in the first part of the same section. Should an application of

the personal estate not suffice to maintain and educate suitably to the future destination of the ward, then such maintenance and education may also induce an application of a part of the real estate, with the approbation of the court of chancery, or general court, as well as the orphans' court."

This seems to be a clear recognition of the powers of the orphans' court to decree the sale of the realty, and it was evidently so understood by Chancellor Bland when he cited this case in the same note with the *Goltier Case* before referred to.

So, in the case of *Hatton v. Weems*, 12 Gill & J. 88, decided in 1841, which was a suit brought by a *cestui que trust* against the trustee of an estate, for an account, the court referred to the analogous case of a guardian, and said: "According to our laws, a guardian cannot encroach on the capital of his ward's estate without the order of the orphans' court; nor can the real estate be diminished but by the approbation of the court of chancery."

Although not so pointed as the other case, this seems also to recognize the order of the orphans' court, with the approbation of the court of chancery, as competent to transfer the realty of the ward.

Mr. Alexander, in his well known and authoritative work on the Chancery Practice of Maryland, published in 1839 or 1840, says: "The court of chancery has a general control over the persons of infants in regard to their guardianship, maintenance and marriage. But it is seldom that an occasion is presented for the exercise of these powers. The orphans' court may appoint a guardian to an infant who has acquired an estate in any manner and who is destitute of a testamentary or natural guardian. The power to appoint a guardian with authority to take possession of the estate has very naturally drawn to itself the power of appropriating the estate to the maintenance of the infant. The only case in which the interposition of chancery seems to be necessary is where a sale of a part of the infant's real estate is required for the purposes of maintenance and education." For this, he refers to section 10 of the Act of 1798, subchap. 12.

He, then, clearly understood the diminution of the ward's real estate, referred to in the Act of 1798, to mean a sale of it, through the concurrent action of the orphans' court and chancery court.

We have, then, the chancellor, the court of appeals and the text writers of Maryland, down to a late date, recognizing, as a thing of course, the authority of the orphans' court to decree a sale of realty, and not an intimation of opinion against it from any quarter.

But if it had been otherwise, since the cession of the District of Columbia, it must be remembered that this statute came to us about two years after its enactment, as the law of this jurisdiction, without any interpretation by the highest court of Maryland, and the Circuit Court of this District had as complete authority to interpret it for this District as the Court of Appeals of Maryland had for that State; indeed, as much so as if it had been, originally, an Act passed by Congress for this District.

In the exercise of this authority, the circuit court, and, since its abolition, this court, its successor, have always interpreted the Act of D. C.

1798 as conferring a power on the orphans' court to decree the sale of an infant's realty under the circumstances mentioned in section 10, subchapter 12 of the Act; and it was assumed without discussion, in the general term, as late as 1874, in the case of *Manell's Appeal*.

The practice of decreeing such sales has prevailed through a period sixty or seventy years in extent; large amounts of property have changed hands through such sales, and many titles depend upon their validity. If anything can be said to be a rule of property in this District, our interpretation of the statute must be so considered.

This being the case, even if we doubted its propriety, would we be justified in reversing it, with the effect of unsettling titles and affecting values to an extent that cannot now be appreciated?

In the case of *Doolittle's Lessee v. Bryan*, 14 How. 568 [55 U. S. bk. 14, L. ed. 543], the court said: "In the present case it is said the land was sold in 1829; the purchaser paid his money and obtained his deed on the faith of a judgment of the court that the sale was regular, and has held the land under this title ever since. Hundreds of similar cases may probably be found where the same objections to the sale exist. Under such circumstances, a court should be even astute in avoiding a construction which may be productive of much litigation and insecurity of titles."

In the case of *Smith v. Black*, 115 U. S. 808 [Bk. 29, L. ed. 398], the mere probability that a decision of the old circuit court as to the power of a trustee to sell through an agent had been followed as a rule of property, was persuasive with the supreme court against sanctioning a departure from it. How much stronger the present case, where we know that many titles rest upon the rule of property which is now assailed.

An important feature of the present case is that we are not sitting on appeal from an orphans' court decree of sale, in which case, even, we ought to hesitate to pronounce an opinion subversive of the *past* and settled rule of title; but we are called upon, in a collateral proceeding, to overthrow rights acquired over forty years ago, under a decree never reversed or even appealed from, but passed at a time when its legality was assumed in the prevailing construction of the law.

The language of the supreme court in *Douglas v. Pike Co.* 101 U. S. 677 [Bk. 25, L. ed. 968], is quite pertinent to such a case. It was an action on certain county bonds, issued and bought after their legality had been affirmed by the state court, but which subsequently the same court held to be illegal. The court says: "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment

of the law by means of a legislative enactment."

Therefore, although they ordinarily followed the interpretation of its statute by the highest court of a State, they refused in that case to give it the effect of overthrowing a former rule of decision under which rights had been acquired.

If this District were a State, no doubt the supreme court would apply this rule by upholding our former construction of the statute as far as it affected the present case, however we might have changed our views of the law since.

And although in the exercise of its appellate power in this District, the supreme court would act upon its own judgment and not feel bound to follow ours, in the interpretation of our local statutes it can hardly be doubted that the sentiments above expressed would lead to the same results.

The next question is whether the Act of 1798, subchap. 12, § 10, is repealed by the Act of Congress of March 3, 1843, entitled, "An Act to Provide in Certain Cases for the Sale of the Real Estate of Infants within the District of Columbia."

There is no such repeal, unless by implication. Repeals by implication are not favored by the courts.

In the absence of any repealing clause, it is necessary to the implication of a repeal that the objects of the two statutes are the same. If they are not, both statutes will stand, though they refer to the same subject.

And it is further necessary to such repeal that there be a repugnancy between the statutes, or that one be plainly intended as a substitute for the other. *U. S. v. Tynen*, 11 Wall, 88 [78 U. S. bk. 20, L. ed. 153]; *U. S. v. Claflin*, 97 U. S. 546 [Bk. 24, L. ed. 1082].

The Act of 1843 provides for the sale of the whole or any part of the infant's real estate, whenever it appears that the interest of the infant manifestly requires it. The object, therefore, is to promote the infant's interest generally. When the sale is made the proceeds are to be *vested and applied* (i. e., invested and applied) in the purchase of other real property, or invested and applied in such other manner as the court may think best. And these proceeds, if the infant dies under age, are to be considered real estate, and pass, as such, to the person who would have been entitled if no such sale had been made.

The prominent object of the Act evidently is a change of investment for the infant's benefit.

And another object seems to be to preserve the fund for his heir at law, in case of his death under age. As the infant could not make a valid devise, the property, then, upon his death under age, would necessarily descend to his heir. But a conversion of it into personality would deprive the heir of it, but for the particular provision of the Act. There is no express authority to apply the proceeds otherwise than by vesting or investing them. They are to be vested and applied in a purchase of other realty, or in some other manner.

There is no authority to consume the principal. It is argued that such authority is implied by the words "so much thereof (i. e., of the proceeds of sale) as may remain at his death,

shall be considered real estate," etc., etc. But this evidently means so much thereof as may remain in the shape of personality because it was needless to say that of real estate; and that would apply to what was not reinvested in other real estate. It is not necessary to read it as of what remains after a part of the principal has been consumed. After directing that the proceeds might be reinvested in realty, this clause had, for its object, to impress the character of realty on all that might remain in the form of personality for the benefit of the heir. It would be singular if a power to consume the principal was left to be inferred from a clause like this, which has manifestly a different object in view, and does not necessarily convey such implication.

Somewhat singular consequences would follow such a construction. Whether a ward's realty shall be sold for his maintenance and education must depend upon his needs in those respects. It is natural to expect that the court charged with the duty of determining that question should also have authority to decree the sale.

The Act of 1798 expressly directs the orphans' court to ascertain the amount to be annually expended in the maintenance and education of the orphan, and authorizes it to apply a part of the principal of the estate to those objects. If this authority, as to the sale of the real estate, is cut off by the Act of 1843, the power of the court to fix the allowance at anything beyond the personality and the income is necessarily destroyed, because it is in the discretion of the equity court whether the realty shall be sold or not. The power would then have to be devolved on the equity court to determine the allowance of the ward. Could it have been intended to transfer to it this duty which is so exclusively appropriate to the orphans' court? Or could it have been intended to leave with the orphans' court the power to determine the ward's allowance for maintenance and education, beyond the income of the estate, and yet require a separate and original, instead of an appellate and revisory proceeding, in the equity court, to give the orders of the former effect?

All this difficulty makes it very improbable that Congress intended to transfer the administration of the ward's property (in other words, the wardship of the infant) to the equity court, by the Act of 1843.

In the case of an exactly similar Act in Virginia, we have the authority of *Rinker v. Streit*, 38 Gratt. 637, that it conveys no authority to apply the principal of the ward's estate to his maintenance and education. If this be correct, as we are inclined to think it is, then the object contemplated by the Act of 1798 could not be attained under the Act of 1843; and the two Acts must be held to have entirely different objects, and to be entirely incompatible with each other; and, therefore, both must stand, according to the rule before stated.

But even if we can find, in the Act of 1843, an implied power to sell for the express purpose of applying the proceeds to the maintenance and education of the ward, under the general authority to vest and apply for his benefit, it would not follow that the Act is inconsistent with the Act of 1798, and therefore repeals it. It would only follow that while the orphans

court could only direct a sale of part of the realty for the single object of maintaining and educating, the equity court could decree a sale of the whole of it for the promotion of the ward's interest in any way. There is no inconsistency in conferring on one court a jurisdiction which may include what already exists in another, without intending to disturb the latter, but leaving their jurisdiction, to a limited extent, concurrent.

The later law may be intended as a substitute for the former, although not positively inconsistent with it. But it must appear *plainly* to be so intended. And how can that be predicated of the Act of 1843, when the supposed power to the equity court, intended to supersede that of the orphans' court, is *not expressed*, and can only be made out at all by doubtful implication?

We have seen that the Court of Appeals of Maryland, long after the Act of Maryland of 1816 was passed, recognized this power of selling a ward's realty as still residing in the orphans' court, although by the effect of that Act the proceeds of sale might be applied to maintenance and education, and although, too, the more usual practice in that State probably was to proceed under that Act to secure such application.

If the Act of 1816 in Maryland did not work a repeal of the Act of 1798, *a fortiori* did not our Act of 1843.

In the case of *U. S. v. Tynen*, 11 Wall. [78 U. S. bk. 20, L. ed. 153] cited on the part of the plaintiff, the supreme court found an absolute contradiction and repugnance between the two Acts under consideration, so that they could not stand together.

In the case of *U. S. v. Claffin*, 97 U. S. 546 [Bk. 24, L. ed. 1082], the second Act expressly repealed all Acts which either conflicted with or were supplied by the provisions of that Act, and the supreme court held that the second Act did supply the provisions of the first, and was plainly intended as a substitute for it.

We do not think, then, that the Act of 1843 repealed that of 1798.

Such are the general considerations which lead us to hold that at the time of the proceeding in the orphans' court which was offered in evidence at the trial, that court had jurisdiction, on a proper showing, to order the sale of a part of the real estate of a ward for his maintenance and education.

Another question, however, is made, going to the jurisdiction in this particular case, which grows out of the nature of the estate owned by the wards.

It is said that they owned only a remainder, and that a contingent one; and the jurisdiction is denied in such a case, though it may exist as to estates in possession.

What estate, then, had the Thaw children under the will of their father?

After giving a life estate to the wife, he devised as follows, viz.: "I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole.

"Item. If both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description."

A remainder is vested "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

"It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder." 4 Kent, Com. 194, 195.

But there was no moment after the death of Thaw when each of his children would not have had an immediate right to the possession of a moiety of the property, upon the death of their mother. The remainder of each had always a present capacity of taking effect in possession if the possession became vacant by the mother's death. It was therefore a vested remainder. Inasmuch as the devise to each child in remainder was in fee, the devise over of his or her share in case of his or her death before the mother, to the surviving child, was simply an executory devise over of a fee after a fee. Such also was the devise to the mother and her heirs in case she survived both children.

But the children had more than a vested remainder.

The first devise is to the mother, "to hold and enjoy during her natural life, in trust for the equal benefit and maintenance of herself and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property as above for the equal benefit of herself and the survivor of the two above named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall hold the said property during her natural life for her own sole use and benefit; and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life for the maintenance of herself and the two children aforesaid, while they or either of them shall live, or of herself, if she shall survive them both."

It will be observed that no active duties are required of the trustee, unless that is implied in the use of the word "maintenance."

But in a case where a tract of land was conveyed to a father in fee, to hold in trust for children then alive, and to be born of his wife, to be equally divided, etc., and until the division to be occupied and used entirely and specially for the maintenance and support of the children, it was held that the legal estate vested in the children. *McNish v. Guerard*, 4 Strob. Eq. 66.

The court said: "I do not perceive in these words evidence that it must have been the intention of the grantor that the land was to be occupied or the rents received and disbursed by the trustee for the maintenance of the children. * * * A very strong persuasion certainly arises, from the fact that the children were infants and that the deed was made to their father with a direction for their support, that it was

meant this support should be administered through him. But on the other hand, if the statute carried the legal estate to the children, all this could be and must necessarily be attended to by guardians, etc."

So that it is at least doubtful whether the children did not take a joint legal estate with their mother during her life.

But whether this be so or not, it is certain that they had the entire beneficial interest in the property, present and future, subject to their mother's equal participation with them during her life.

There might be serious objections to the sale of a mere remainder, because of the uncertainty of its value and the risk of sacrifice; but such objection would not apply to an estate like the above, where the mother unites in the sale of her interest, and thus the whole title passes and the full value is realized.

But there is nothing in the Act of 1798 to limit the terms *real estate* or *principal* to estates in possession, or to exclude future interests from being sold equally with those in possession; and in the case of statutes of other States resembling ours, the contrary has been expressly decided. *Baxter v. Baxter*, 62 Maine, 548; *Cooper v. Hepburn*, 15 Gratt. 568.

It has been argued that the Act of Congress of 1856, R. S. D. C. § 969, *et seq.*, provides for the sale of remainders and reversions in real estate, and thereby assumes that there was no existing provision on the subject.

The Act in question provides for a sale of property limited for life, with contingent remainder over to issue of the tenant for life, who may be living at his death. It is the case of contingent remainders to uncertain persons who cannot be known until the expiration of the life estate. Of course, no such person could be before the orphans' court asking, through a guardian, for the sale of his interest, during the continuance of the life estate, an entirely different case from the present.

It is supposed that section 10 of subchapter 12 of the Act of 1798 prohibits the sale of trust estates. But we do not understand it as having any such meaning. The clause relied on is the last of the subchapter, and it is: "That nothing in this Act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trusts."

There are five sections between this and the one giving the power of sale, so that it cannot have any special reference to the latter. It is a proviso relating to everything in the Act. It qualifies all of it. If it prevents a sale of equitable estates, it equally prevents the appointment of a guardian or the control of the natural or testamentary guardian wherever the ward's estate consists of equitable property. Such certainly could not have been the intention. The idea could only have been to reserve to the chancery court its usual power of calling a trustee to account and enforcing the performance of his duties, which could be done in concurrence with the special powers of the orphans' court with respect to guardians.

Apart from the statute, however, a question may be made as to the power of the orphans' court to decree a sale of an equitable estate, when it cannot decree a conveyance by the

trustee, so as to give a complete title to the purchaser.

I see no more reason to doubt the power of the court in this respect than to doubt its power to sell a remainder because it cannot compel the life tenant to join in the sale, or its power to decree a sale of an undivided interest, as was done in the *Gottier Case*, because the cotenants could not be compelled to join in the sale or in a partition. In the last case, the purchaser could not get the full benefit of his purchase without a partition, voluntary or enforced by suit in equity. And so, the purchaser of an equitable estate would be entitled to demand a deed from the trustee and to enforce compliance by a suit in equity.

But no such question can arise in the present case, in which the guardian is the trustee and the very party seeking a sale.

Indeed, as it is clear that the trust in this case was purely personal to the children, it would cease, of itself, as an active trust, at the moment of the transfer of their title; and the legal title would be transferred to the purchaser, by operation of the Statute of Uses.

We think there was nothing in the nature of the estate to exclude the jurisdiction of the court to decree a sale.

The next question will be: What facts were necessary to give the court jurisdiction for this purpose?

Upon examining the statute, we find no other jurisdictional facts necessary than the ownership of the property by a minor and the existence of a guardian.

"Whenever land shall descend on or be devised to a male under the age of twenty-one years, or to a female under sixteen * * * and such male or female shall not have a natural guardian or guardian appointed by last will, agreeably to the statute, the orphans' court of the county where the land lies, etc., shall have power to appoint a guardian, etc. And the court shall also have power, on the application of any friend of the infant, etc., to call on any guardian under the statute aforesaid, or natural guardian, to give bond, etc."

On the execution of the bond, the court may require the land, etc., of the ward to be delivered to him; may exact certain duties of him as to management and accounting; may, at its discretion, fix the yearly allowance of the ward for maintenance and education, and *if it shall deem it advantageous to the ward* may allow the income to be exceeded, and order a sale of part of the principal.

It is not even made necessary to allege that the income is insufficient for his support. It may be sufficient to maintain and educate according to a certain scale of living; and yet the court may, in its discretion, make a larger allowance and authorize a sale. The insufficiency of the income is an argument addressed to the sound discretion of the court. But if such insufficiency be a necessary fact, it appeared very explicitly in this case.

No particular form of application or allegation or proof is prescribed as necessary to give the court jurisdiction.

The reference to the general court, too, excludes the idea of an original proceeding in the higher court, because that court, having only common-law jurisdiction had no form of pro-

ceeding for the sale of realty, except the sale under common-law execution.

If it be true that the action of the chancellor is revisory only, then the ordinary formalities of an original suit in equity are not required.

The common law of the courts only knows of the removal of proceedings from inferior to higher courts, by appeal, writ of error or *certiorari*, for the purpose of reversal, but nothing of a removal for approval, and supplies no formula for the latter, which is a statutory proceeding.

The statute prescribes no formalities by which the chancellor is to take cognizance of the proceedings in the orphans' court, but it leaves that to be adjusted by the rules or practice of the courts.

And now as to the facts:

However imperfect the files and records of the orphans' and circuit courts were, we have no doubt that the evidence supplied from them was properly admitted at the trial. The evidence in the record shows that the two infants before mentioned, Columbus and Columbia Thaw, derived title to the property in controversy under the will of their father; that Eliza V. Thaw, their mother, bonded as their guardian on the 22d of March, 1844; that on the 29th of that month she filed her petition, showing that she had paid all the debts of her husband; that the property left by him was insufficient to support her and the children; that a part of it consisted of two vacant lots (the property in controversy), and praying that it be sold to relieve the immediate wants of the petitioner and for the support and education of the children; that a decree for such sale was passed on the same day, which was afterwards approved in the circuit court on the 12th of October following; that a sale was made which was approved by the circuit court on the 21st day of January, 1848, and a conveyance made by Mrs. Thaw in pursuance of it on the 17th of March, 1848.

As far as concerns the interest of the infants in the property, the court had before it everything which was necessary to give it jurisdiction to decree a sale.

It is true that the guardian, in her application, confused somewhat her own interests with those of the wards, and alleged the insufficiency of the property to support *herself* and the children as a ground for selling, and asked the sale as well to relieve *her own immediate wants* as for the support of the children.

But it is fair to read this part of the application as referring to her own undivided interest for life in the property. It is not to be read as an application to sell the estate of the children for her support. It is also true that the court had no jurisdiction over the wife's interest in the property and could not pass title to it by its decree. But if the wife chose to unite in the sale and convey her interest, which she must be held to have done, we see no reason why the court could not decree a sale of the share of the infants, as was done in the case of *Baxter v. Baxter*, 62 Maine, 540, in which the court said: "As after the decease of the father the whole estate is in the children, a sale of the right of the children, with a conveyance from the father, would vest the whole estate in the purchaser."

D. C.

And if there was error in the form of the decree because it embraced the widow's interest also, it did not affect its efficacy as to the interest of the infants but was a harmless and inoperative error, not to be noticed collaterally.

The only question that could arise would be as to the proper apportionment of the proceeds between the mother and the wards. But this question could only arise after the sale and would not affect the transfer of title.

Holding these views, it follows that one must hold that the court below correctly admitted the evidence as to the sale and conveyance under the authority of the orphans' court, which is the evidence set out in the first three bills of exceptions.

The fourth bill of exceptions related to the admission in evidence of a deed of partition between the plaintiff and his sister, in which he recites that his mother, *after disposing of the real estate acquired by his father's will and investing the proceeds in other real estate*, died intestate, etc.

Prima facie this would seem to be an admission of the sale of the property in controversy by the mother, and an investment of the proceeds in property then to be divided. As such, we see no error in receiving it; but it was in no sense an estoppel and was open to explanation, which was given in the rebutting evidence.

The fifth bill of exceptions relates to the refusal of the court to grant five instructions, all of which, according to the views before expressed, were erroneous and were rightly refused.

The last bill of exceptions is peculiar. It shows that two instructions were asked on behalf of the defendant, both of which were granted against the plaintiff's objection; and at the same time the justice stated that there was no substantial disagreement between the parties as to the facts, and that he held that the plaintiff could not prevail against the title which the defendant furnished, and instructed the jury to find for the defendant, to which the plaintiff excepted. It does not appear whether the exception was to the granting of the instructions prayed, or to the statement that there was no disagreement as to facts, or the instruction that the plaintiff could not prevail against the title furnished by the defendant, or the final peremptory instruction to find for defendant.

We are not bound to notice this exception, and there is less occasion for it because after the previous ruling below, which we have sustained, it could do no harm if technically erroneous.

The motion for a new trial is overruled.

Hagner, J., dissenting.

Re ESTATE OF David McINTIRE, Deceased.

1. The Supreme Court of the District of Columbia, in special term, sitting as an orphans' court, has all the jurisdiction that the orphans' court at any time possessed by virtue of the statutes

existing anterior to the adoption of the Revised Statutes of the District.

2. Lapse of time and laches (in the case at bar a delay of fourteen months) are not a bar to the filing of a caveat to test the validity of a will.

(Decided November 8, 1886.)

A PPEAL from an order of the Orphans' Court. *Affirmed.*

The facts are stated in the opinion.

Mr. James M. Johnston, for petitioner:

As to the objection that the alleged order of probate is *res judicata*: it is positively denied by the petitioner that he had notice, actual or otherwise, of the proceedings instituted for the purpose of probating said will, until after the probate thereof.

Even if the legal notice had been given, the order admitting the will to probate was void, because the register of wills who signed it had no power to do so. He can only admit a will to probate during the recess of the court.

Act 1798, chap. 101, subchap. 2, § 6; Dennis, Pr. 28, § 6.

As to what constitutes a recess of the court, see Dorsey, Test. Law, p. 44, § 14. Also R. S. D. C. §§ 755, 757, 980; and 16 Stat. at L. § 4, p. 160; Act 1777, chap. 8, § 2; and chap. 9, §§ 4, 5.

Even admitting notice, such notice, whether by publication, personal citation or otherwise, will not bar petitioner of his right to contest the validity of said alleged will, even assuming the probate thereof to have been regular and legal. It is not *res judicata* and binds no one, unless such probate be had after contest. An order for probate, when without contest, is in effect only an interlocutory order.

See Act 1798, chap. 101, subchap. 2, § 18; *Price v. Moore*, 21 Md. 373, 374; *Mason v. Poulson*, 40 Md. 361, 362, 363; *Lery v. Lery*, 28 Md. 25, 30, 31; *Compton v. Barnes*, 4 Gill, 56, 57; *Pegg v. Warford*, 4 Md. 393, 394.

It is admitted by respondent's answer that such probate was taken without contest. The record of this case distinctly shows that there has been no contest, within the meaning of the statute.

Price v. Moore and other cases, *supra*.

When it is desired to attack a will which has been admitted to probate without contest, the course is by a "plenary proceeding" under the statute. This proceeding is a plenary proceeding under the Act of 1798, chap. 101, subchap. 15, §§ 16, 17; the same having been required by the petitioner, the regular citation issued and served upon the parties, and a consent order having been passed requiring them to answer, as shown by the proceedings in this case, in pursuance of which respondents all appeared and answered.

These Acts are more than sufficient to satisfy the requirements of the Act referred to.

Pegg v. Warford, 4 Md. 396; *Peters v. Peters*, 20 Md. 178; *Barroll v. Reading*, 5 Harr. & J. 175.

Being a plenary proceeding, the issues are demandable as a matter of right, and the court is not at liberty to refuse them.

Pegg v. Warford, *Peters v. Peters* and *Barroll v. Reading*, *supra*.

The second reason set up by respondents why

the issues should not be granted is that petitioner is estopped by his knowledge of the proceedings in equity cause No. 9380, and in the orphans' court, and by his laches.

A mere knowledge of the proceedings on the part of the petitioner, together with his silence and nonaction, can create no estoppel against his right to contest the matter subsequently.

Ketchum v. Duncan, 96 U. S. 666 (Bk. 24, L. ed. 869); *Philadelphia, W. & B. R. R. Co. v. DuBois*, 12 Wall. 64 (79 U. S. bk. 20, L. ed. 265).

Not even an express ratification of the genuineness of a will and the acceptance of legacies thereunder will bar a contest of such will by the one so ratifying the same, or accepting legacies thereunder, if the probate thereof was without contest.

Clagett v. Hawkins, 11 Md. 388.

Although no sufficient excuse was made for the delay in instituting his proceeding, no lapse of time can bar petitioner's rights in the premises.

Clagett v. Hawkins, 11 Md. 387; *O'Neill v. Smith*, 83 Md. 574.

The testamentary laws of this District clearly require the court to direct issues, if it has jurisdiction of the case for any purpose. The proposition of appellant is that this court, holding a special term for orphans' court business, has no jurisdiction of the case, and no power to hold such a special term. The jurisdiction in such cases was formerly exercised by the Orphans' Court for the County of Washington, but that court was abolished by Act of Congress of June 21, 1870.

Sec. 5, 16 Stat. at L. p. 161.

All the jurisdiction of that court was, by the same Act, conferred upon this court, holding a special term for orphans' court business.

Id. § 4; *Keyser v. Breitbarth*, 2 Mackey, 332.

It is contended by appellant that section 4 of that Act is not now in force, because, by section 1296, R. S. D. C. p. 140, it is provided that all the Acts of Congress, passed prior to December 1, 1873, any part of which is embraced in the revision, are repealed, and that parts of said Act of June 21, 1870, are embraced in said revision, but not the said section 4 of said Act.

Whether section 1296, R. S. D. C. repealed section 4 of the Act of June 21, 1870, is a judicial and not a legislative question. The language of the Act is not conclusive; and whether it really operates as a repeal is to be determined by judicial interpretation, under the ordinary rules of construction.

U. S. v. Claffin, 97 U. S. 548, 549 (Bk. 24, L. ed. 1032).

It is submitted that, by a proper construction of the statutes, it will appear, 1, that there has been no repeal of the law giving jurisdiction to this court; 2, that there is express enactment sustaining it.

Section 1296, R. S. D. C. provides that the revision "shall be subject to and governed by the provisions of chapter 74 of the Revised Statutes, U. S. entitled *Repeal Provisions*."

That chapter provides, *inter alia*, that the incorporation into the revision of a part of any Act containing provisions of a private, temporary or local character, shall not repeal or in any way affect such private, temporary or local provisions in such Act, but that such provisions shall remain in full force.

R. S. U. S. § 5596, p. 1085.

It is manifest that section 4 of the Act of June 21, 1870, was of a local character, and it is within the protection of the section of the Revised Statute above referred to.

Further, section 980 of the Revised Statutes of the District of Columbia recognizes the jurisdiction by providing for the record of the decrees and orders of the court holding this special term.

But assuming the revision to have the effect of a repeal, there is express legislation sustaining the jurisdiction. Section 89 of the Revised Statutes of the District of Columbia provides that the Judicial Courts of the District remain as organized on the 21st day of February, 1871. The organization then existing, so far as orphans' court business is concerned, was under the Act of June 21, 1870. In addition to this, the legislative recognition of the jurisdiction of the court in section 980 would suffice to sustain it,—as a legislative recognition, under such circumstances, is equivalent to express enactment.

Pease v. Peck, 18 How. 596, 597 (59 U. S. bk. 15, L. ed. 518).

Mr. S. S. Henkle, for respondent, appellant:

The will was probated April 12, 1884. Decrees of probate as to wills of personalty are final decrees and can only be reviewed on appeal.

See *Dennis*, Pr. p. 28, § 4; *Warford v. Colvin*, 14 Md. 532; *Negro John v. Morton*, 8 Gill & J. 391; *Raborg v. Hammond*, 2 Harr. & G. 50; *Barroll v. Reading*, 5 Harr. & J. 175; *Harris v. Pue*, 39 Md. 538; *Offutt v. Gott*, 2 Gill & J. 385; *Cecil v. Cecil*, 19 Md. 78.

The petition in this case was filed under the thirteenth section of subchapter 2 of the Act of 1798, chap. 101, on pp. 29, 30, *Dennis*, which relates to probate made under the twelfth section, and does not apply to this case. In this case the will was fully proven and five out of the six next of kin were present and they all had notice.

The decree of probate was a final decree and could only be revoked for fraud or deceit in obtaining it.

Munnikhuyzen v. Magraw, 57 Md. 172; *Raborg v. Hammond*, 2 Harr. & G. 51; *Montgomery v. Williamson*, 37 Md. 429; *Edwards v. Bruce*, 8 Md. 387.

The court erred in ordering issues without first passing upon the questions made in the answer showing cause, thereby ignoring the preliminary questions made in the answer.

Rielly v. Dougherty, 60 Md. 276; *Brewer v. Barrett*, 58 Md. 587.

In *Cain v. Warford*, 8 Md. 454, the court decided that the object of the sixteenth section is to advise the court of the real facts in the case; and where there is no dispute, but simply a question of law, the court is not bound to order plenary proceedings.

See also *Smith v. Young*, 5 Gill, 204.

The petitioner is concluded by laches. The will was probated April 12, 1884. The account was filed by the admr. c. t. a. for final settlement in May, 1885; during all this time petitioner had full opportunity for knowledge, and had knowledge.

Munnikhuyzen v. Magraw, 57 Md. 172; *Wood v. Carpenter*, 101 U. S. 148 (Bk. 25, L. ed. 809); *Carr v. Hilton*, 1 Curt. C. C. 390.

D. C.

A petition to set aside an order of the orphans' court must be made within the time in which an appeal can be taken.

Redmon v. Chance, 82 Md. 42; *Hoffar v. Stonestreet*, 6 Md. 308; *Cecil v. Cecil*, 19 Md. 72; *Munnikhuyzen v. Magraw*, 57 Md. 172; *Edwards v. Bruce*, 8 Md. 387; *Pollard v. Mohler*, 55 Md. 284; *First Nat. Bank v. Eccleston*, 48 Md. 156.

The probate of a will is a proceeding *in rem* and is notice to all the world and all the world is bound by it.

Bigelow, Estop. 145; *Lawrence v. Englesby*, 24 Vt. 42; *Farrar v. Olmstead*, Id. 123; *Steen v. Bennett*, Id. 308; *Loring v. Steineman*, 1 Met. 204; *McArthur v. Allen*, 3 Fed. Rep. 319; *Singleton v. Singleton*, 8 B. Mon. 340; *Hunt v. Acre*, 28 Ala. 590; *Scott v. Calvit*, 3 How. (Miss.) 148; *Jacobs v. Pulliam*, 8 J. J. Marsh. 200; *Hodges v. Buchman*, 8 Yerg. 186; *Wells v. Wells*, 5 Littell, 273; *Cecil v. Cecil*, 19 Md. 78, 79, 80.

This court has no jurisdiction in orphans' court business, save where it has been conferred by the Revised Statutes of 1873.

The jurisdiction of this court was derived solely from the fourth section of the Act of Congress of June 21, 1870, 16 Stat. at L. 161.

Both in England and Maryland the jurisdiction has always been distinct and separate from the courts of general jurisdiction.

The fourth section is wholly omitted from the revision. Section 1296, p. 149, Revised Statutes, repeals all laws passed prior to 1873, any portion of which is contained in the revision; and the section applicable thereto shall be in force in lieu thereof. Section 1 of the Act of 1870 is section 758 of the Revised Statutes, p. 90.

The orphans' court can exercise no jurisdiction not expressly conferred.

Dennis, Pr. § 20, p. 107.

There is no jurisdiction to contest wills. That is purely statutory. The Act of February 27, 1801, 2 Stat. at L. 108, § 12, p. 107, provided for appointment of judge of orphans' court and appeal to the circuit court.

Mr. Justice Merrick delivered the opinion of the court:

This was an appeal from an order of the orphans' court, directing issues upon a *caveat* to the will of David McIntire, deceased.

McIntire had died early in April, 1884, and on the 8th of April, a few days after his death, a will was propounded in the orphans' court and was admitted to probate in common form.

Letters of administration were granted and certain proceedings taken, for the purpose of settling up the estate. At the end of about fifteen months the sole surviving brother of the decedent filed his petition in the orphans' court caveating the will and asking for plenary proceedings for the purpose of testing the validity of the will.

In that state of case the administrator of the decedent filed his answer, setting up that the brother had been guilty of laches, by allowing the administration to proceed for fourteen months after full knowledge on his part and that those laches were a complete bar to the application for a *caveat* and the determination of the question of the will in solemn form.

The probate court took a different view and

ordered issues to go for the purpose of establishing whether or not the supposed paper was in truth the will of the decedent. From that order the administrator appeals, and he raises two questions in this court, very momentous indeed if there were any substance in either of them.

The first question he raises is that by reason of the terms of the codification or revision of the laws of the District, the probate court was shorn of the vast mass of its powers, because in the revision, at section 980, chapter 27 of the Revised Statutes of the District, the section providing for the register of wills leaves out all that part of the Act of the 21st of June, 1870, which added the Probate Court to the Supreme Court of the District of Columbia, except certain provisions with regard to the register of wills and certain other provisions specially provided in other parts of the Code touching the proceedings of executors, and touching the proceedings of guardian and ward.

Now it would be a very serious thing, if there were any foundation to it, to have the probate court entirely stricken down and to have no tribunal vested with the particular functions which belong to the administration of the affairs of decedents.

The vice of the argument of the counsel consists in reasoning from the particular up to the general, instead of reasoning from the general down to the particular. If we look at section 89, every possible difficulty will be removed, which would enter the mind of a lawyer by reason of the omission from sections 929 and 980 of the entire provisions of the Act of June 1, 1870, which had brought the orphans' court into and made it a part of the Supreme Court of the District of Columbia.

Section 89 is in these words:

"The Judicial Courts of the District shall remain as organized on the 21st day of February, 1871, until abolished or changed by Congress."

On the 21st day of February, 1871, the Act of June 21, 1870, in its entirety, was in force with all its provisions, giving all the antecedent jurisdiction of the orphans' court to the Supreme Court of the District of Columbia. When in that state of the case, in 1874 the new revision or enactment is "That the Judicial Courts of the District shall remain as organized on the 21st day of February, 1871," that is an adoption into the revision of 1874, of all the faculties which belong to the court as of that time; and it dispensed therefore with the necessity of repeating at sections 929 and 980 the detail of the jurisdiction which had been conferred by the Act of June 21, 1870, and the only object which the reviser could have had in repeating in section 929 and 980 any part of the Act of June, 1870, after that sweeping provision was this: that if it had stopped with the terms I have used, "The judicial courts shall remain as organized on the 21st day of February, 1871," it might have been inferred that there was some purpose to abolish the special powers of the register of wills, and they might have been considered as absorbed in the functions belonging to the Clerk of the Supreme Court of the District of Columbia; and it was for the purpose of keeping alive and removing all doubt as to the integrity of the office of register of wills that sections 929

and 980 were put in the Revised Statutes as they appear now, but not with any view at all of taking away any of the powers of the orphans' court exerted by the Supreme Court of the District of Columbia at one of its special terms on February 21, 1871.

The objection therefore to the jurisdiction must fall entirely, and we must consider the question as settled and fully at rest, that the Supreme Court of the District of Columbia, in special term, has all the powers and all the faculties that the orphans' court at any time possessed by virtue of the statutes existing anterior to this codification.

The second objection is that the party has lost his remedy by laches. That is equally as untenable as the first. The thirteenth section of the second subchapter of the Act of 1798 provides that where a will has been admitted to probate in common form it may be open to contest by any party interested; and it gives in that section no limitation of time to the contest. It leaves the law upon that subject and as to limitation, as it stood before.

In point of fact there was no occasion for putting that provision into the statute at all, except out of the abundant caution taken by the draftsman of that law, to exclude any possible conclusion which might have been drawn from the other section of the law which says that the orphans' court shall exercise no incidental power and which is not expressly given by the statute itself; and inasmuch as the power to take probate in common form had been previously given, if the statute had remained silent about the power to review it upon a *caveat* in solemn form, the argument might have been drawn that the orphans' court had not that power which previously had belonged to all the civil and ecclesiastical courts having jurisdiction over the subject of wills. It was for this purpose alone that expression was given in that form to the power of the orphans' court to review a common probate by having a proper plenary proceeding for the purpose.

The capacity to review a probate was never limited in the ecclesiastical courts at any time. It has always been the doctrine of the ecclesiastical courts that a will was so sacred, a thing so touching the consciences of men, that it was to be carefully guarded; and whenever it appeared, under any circumstances, that a particular matter had been the object of testamentary disposition, the ecclesiastical courts took care to see that testamentary disposition fully carried out and preserved. Hence, there was no such thing known in the ecclesiastical courts as the Statute of Limitations, touching the establishment of a will or the revision of a supposed will which had once been in part established or adopted by the ecclesiastical court. To show that this has been the recognized law and the uniform practice, both in this District and in the State of Maryland, it is only necessary to refer to two decisions of the court of appeals.

I refer to the case of *Clagett v. Hawkins*, to be found in 11 Md. 381; I read a single passage:

"The proposition that no lapse of time will exclude the inquiry as to whether certain papers constitute the will of a party is supported by almost any number of authorities; that of

Finucane v. Gayfere, 1 Eccl. Rep. 425 [8 Phill. 405] will suffice for this case."

And in 83 Maryland, 569, the case of *O'Neill v. Smith*, which, by the way, was a case where there had been a nuncupative will established and probated by the orphans' court and full administration had occurred and the estate had been settled under that nuncupative will after the end of nearly two years, the nuncupative will was assailed by *caveat* and it was overthrown. Now if there were any case where laches ought to have been applicable it would be in the case of a nuncupative will which rests, as we know, only in the memory of witnesses and never is put in writing, except after death, by the orphans' court, upon the statement of witnesses; and if they should happen to die there would be no possible means of determining whether or not that were the true will of the party.

But even in a case of that sort the courts have held that lapse of time was not an impediment to the revocation and overthrow of a will. At page 574, the court says:

"The only remaining question is whether the appellants, by reason of any delay or laches on their part, have lost their right to assail this will, without intending to admit that mere lapse of time would operate as a bar in any case, we are of opinion that the appellants are not precluded by any supposed delay from contesting the validity of this will."

In the light of these authorities and the reasonings which I have given, it appears to the court that the plea of laches cannot prevail in this or in any similar case. This disposes of all the questions.

The appeal is therefore not sustained, and the case is sent back to the orphans' court for further proceedings in conformity to the action already taken in that tribunal.

John GLENN, Trustee.

v.

Elizabeth BUSEY, Exrx. *

A number of persons desiring to form a stock company signed a subscription list, headed as follows: "We, the undersigned, hereby subscribe the amount and the number of shares opposite our names, to the stock of the National Express Co., and bind ourselves, our heirs, etc., to pay said amount in such installments as may be called for by said company, and to pay 1 per cent at the time of subscription. **Held,**

(a.) That the company was not the promisee, it not being in existence at the time of the subscription;

(b.) That the subscriptions were mutual promises by the subscribers to each other to pay to the corporation when it should come into existence, the amounts subscribed, and each subscription was a consideration for the others;

(c.) That while a promise cannot be made to a person not in existence, it may be made to a living person, to pay money to another person, natural or

*See *Glenn v. Howard*, 2 Cent. Rep. (Md.) 643.

artificial, when he or it comes into existence, and is within that class of cases in which a promise made to one for the benefit of another can be enforced by the latter;

(d.) That in this case the corporation is the payee, or third party, and the subscriptions are choses in action due to it and may be enforced by suit;

(e.) That such a suit, if brought in this District, should be in the name of the corporation, or, if the debt has been assigned, in its name to the use of the assignee;

(f.) That whether a suit is to be brought in the name of the assignor to the use of the assignee or in the name of the assignee alone is a question of process to be controlled solely by the *lex fori*, whatever may be the *lex loci* in that respect.

(Decided October 25, 1886.)

ACTION to recover an assessment made upon stock subscription. Submitted on agreed statement of facts, and certified to be heard in the General Term in the first instance. *Judgment for defendant.*

The facts are stated in the opinion.

Messrs. H. W. Garnett and Leigh Robinson, for plaintiff.

Mr. C. M. Mathews, for defendant:

The plaintiff cannot sue within the District of Columbia. His cause of action is a chose in action of which he is assignee and for which he cannot sue at law in his own name. The individual liability of a stockholder is the result of an agreement or contractual relation formed between the shareholders and creditors of a corporation, and like all other claims founded on contract is a chose in action and not a chose in possession.

2 Wait, Act. 230, 250; *Sheldon v. Sill*, 8 How. 441 (49 U. S. bk. 12, L. ed. 1147); *Ogilvie v. Knox Ins. Co.* 22 How. 387 (63 U. S. bk. 16, L. ed. 351); 2 Wall. 10, 22 (69 U. S. bk. 17, L. ed. 776, 779); *Carroll v. Green*, 92 U. S. 509 (Bk. 23, L. ed. 788); *Terry v. Anderson*, 95 U. S. 636 (Bk. 24, L. ed. 867); *Hatch v. Dana*, 101 U. S. 211 (Bk. 25, L. ed. 886); *Flash v. Conn*, 109 U. S. 877 (Bk. 27, L. ed. 969); *Norris v. Wrenschall*, 34 Md. 500; *Corning v. McCullough*, 1 N. Y. 55.

Such chose, being only a right to receive or recover a debt or money or damages for breach of contract, cannot be recovered without action, and assignment does not give an assignee the right to sue in his own name in a forum where the common law prevails.

1 Bouv. 311; *Blane v. Drummond*, 1 Brock. 63; *Pritchard v. Norton and Hayward v. Andrews*, 106 U. S. 180, 875 (Bk. 27, L. ed. 106, 272); *N. Y. Guaranty etc. Co. v. Memphis Water Co.* 107 U. S. 214 (Bk. 27, L. ed. 487); *Tiernan v. Jackson*, 5 Pet. 597 (30 U. S. bk. 8, L. ed. 241).

The common-law restriction as to assignments of choses in action and suits in the name of the assignee, obtains in this jurisdiction.

Ferry v. Barry, 1 Cranch, C. C. 205.

In this case, Glenn, by the decree of December 14, 1880, claims to sue, as substituted

trustee, in the place of the trustee under the deed of trust of September 20, 1866, under which the sums due for unpaid stock had been assigned, but cannot sue in his own name.

Ingersoll v. Cooper, 5 Blackf. 427.

Glenn has recovered only in jurisdictions where the right of an assignee to sue in his own name is accorded by statute. This could only have been avoided by a promise of the debtor subsequent to the assignment.

Tiernan v. Jackson, 5 Pet. 597 (30 U. S. bk. 8, L. ed. 241).

No such promise is shown in this case. If Glenn be not a substituted trustee or assignee of a chose in action, but a receiver of the Richmond Court, he cannot sue in this District. The *lex fori* must in such cases prevail; not to interfere with the rights of property, but to regulate remedies.

Morawetz, Private Corp. § 611; *Bank of Augusta v. Earle*, 13 Pet. 519 (38 U. S. bk. 10, L. ed. 274); *Blane v. Drummond*, 1 Brock. 62; *Harper v. Butler*, 2 Pet. 239 (27 U. S. bk. 7, L. ed. 410); *Davis v. Duncan*, 19 Fed. Rep. 477; *Olney v. Tanner*, 10 Fed. Rep. 104; *Taylor v. Holmes*, 14 Fed. Rep. 505; *Holmes v. Sherwood*, 8 McCrary, 405.

In *Booth v. Clark*, 17 How. 334 (58 U. S. bk. 15, L. ed. 164) the court says: "Our industry has been tasked unsuccessfully, to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor."

This case went up on appeal from the late circuit court of the District of Columbia and is a leading case.

See also *Relf v. Rundle*, 108 U. S. 225 (Bk. 26, L. ed. 339).

Mr. Justice Cox delivered the opinion of the court:

The opinion of the court in this case will apply in a number of other cases in which the same party is plaintiff.

The facts appear to be about these: On the 12th of December, 1865, the National Express and Transportation Company was chartered under the laws of Virginia, and organized and went into operation. It made some assessments upon its stockholders, amounting altogether to 20 per cent of their subscriptions. It was, however, unsuccessful in business, and in August, 1866, the following year, a bill was filed in the Circuit Court of the United States at Richmond, by Josiah Reynolds, a stockholder, alleging fraud and mismanagement, and praying that the company be enjoined from a further prosecution of its business, and asking for a receiver, etc.

Nothing seems to have been done under this bill until after a long delay. But the next month, September 20, 1866, the company executed a deed of assignment, conveying to three trustees all its property of every description, including moneys payable to the company, whether on calls or assessments on stock of the company, notes, bills, etc.

The following month, October 4, 1866, there was a petition filed in the Circuit Court of the United States, in the cause already referred to, for the appointment of a receiver; and on the 31st of December 1866, a receiver was appointed.

The deed of assignment from the Express Company undertook to transfer all its assets, including the subscriptions of stockholders, but it did not undertake to give the trustees any authority to make calls upon the stockholders, and it has been held that this was a franchise and authority specially vested in the president and directors of the company, not capable of being assigned to trustees, so that the trustees were not able to derive any assets from that source. The small amount of property owned by the company was seized upon by creditors, so that the trustees found nothing really available towards the discharge of the debts.

So the matter stood for five years, when, on the 4th of December, 1871, a general creditors' bill was filed in the Chancery Court of the City of Richmond, against the company and the trustees, under the deed of assignment, setting forth that the trustees had done nothing in the execution of the trust, that the unpaid subscriptions were included in the assignment, but were not payable until a call should be made by the president and directors, and these had omitted to make such call, and praying that the court would appoint a new trustee, and would itself call on the stockholders to pay, etc.

To this bill the trustees named in the deed of assignment, the company itself and its president and directors were made parties. But service of process was not made upon the defendants and nothing was done under this bill for a period of nine years.

On the 14th of August, 1879, an amended bill was filed and then for the first time, as it is claimed, service of process was had upon the company. Some of the parties voluntarily appeared; some answers were filed and some defaults taken.

This bill gave a history of the company and it alleged among other things that, by the true construction of the deed of trust, 80 per cent of the subscriptions to the capital stock which had not been called for by the company passed to the said trustees but without any power to sue for or collect such subscriptions so uncalled for; and it further charges that even if said company were now to levy additional assessments upon its stock it is doubtful whether suit could be brought for them by the trustees under said deed.

The bill prays for an account, that the court will decree the assignment by the company to be valid and will itself make a call or assessment upon its stockholders and appoint a proper person charged with the duty of collecting and disbursing the proceeds of such assessments.

The case was referred to the auditor and he reported a very large amount of indebtedness to a great number of persons.

On the 10th of December, 1880, upon a motion made in the United States Circuit Court, the receiver appointed in the *Reynolds Case* was discharged, and the bill in that case was finally dismissed. Four days afterwards, that is on the 14th of December, a decree was rendered by the Chancery Court of Richmond. That court sustained the validity of the assignment by the company to the trustees; it removed those trustees from their trust and substituted this plaintiff, John Glenn, in their place and ordered the original trustees to con-

vey and assign to him all property of every description that had been vested in them by deed of assignment. The decree then went on further and ordered that a call or assessment be made on the stockholders, of 30 per cent of their subscriptions, and directed them to pay the amount to the plaintiff, who was also directed to receive and collect the same by suit or otherwise. In pursuance of that decree, the trustee proceeded to institute a large number of suits in different jurisdictions, and among them were the suits which we are now disposing of.

In the declaration in this suit, the averment is that the defendant's testator was a subscriber to the capital stock and undertook and promised to pay the said company, for each and every share so subscribed, the sum of \$100, etc. Then it goes on to set up the assignment made by the express company to the trustees, and avers that the defendant's testator assented and agreed to said deed of trust and thereby became bound, and undertook and promised to pay said trustees for each and every share of stock above stated subscribed for by him, a balance of over \$100 on each share of stock, etc. Then it goes on to recite also the decree in the Richmond Court and the substitution of the plaintiff for the original trustees.

The declaration was demurred to. Of course this admitted all the facts stated in it, and the demurrer was overruled. The cause was then brought to issue by filing a general issue and several other special pleas, and comes here to be decided in the first instance upon an agreed statement of facts. The ground of the defendant's alleged liability is a stock subscription signed by her testator in the following form, viz.:

"We, the undersigned, hereby subscribe the amount and the number of shares opposite our names to the stock of the National Express Company, and bind ourselves, our heirs, etc., to pay said amount in such installments as may be called for by said company, and to pay 1 per cent at the time of subscription."

It will be observed that no promisee is named in the instrument. The corporation is not in existence at the time of the subscription. It is only after this is complete that the subscribers become a corporation. A promise cannot be made directly to a person, natural or artificial, not in existence; and therefore the corporation cannot be considered the promisee.

The nature of these subscriptions may be said to be that they are mutual promises by the subscribers to each other, to pay the amounts subscribed; and each subscription is the consideration for the others. But to whom is the payment to be made? The payee is not expressed and the payment is certainly not to be made to the other subscribers.

In the absence of any designation the payee must be understood to be the corporation when it comes into existence. Although a promise cannot be made to a person not in existence, there is no reason why a promise may not be made to a living person to pay money to another person, natural or artificial, when he or it comes into existence. This is one of those cases in which a promise made to one person for the benefit of a third can be enforced by suit by the latter. In fact in the case of a stock

subscription it would be impracticable to enforce it in any other way.

The Statutes of Virginia evidently contemplate the subscription as a debt due to the company. It is provided that on every subscription for shares in any joint stock company (not otherwise provided for) there shall be paid at the time of subscribing, to the commissioners appointed to receive subscriptions, \$2 on each share, and the residue thereof as required by the president and directors. See 2 R. C. p. 212, § 1.

And immediately after the election of president and directors, the money so paid is to be paid by the commissioners who may have received the same, to such person or in such manner as they may require, that is the president and directors; and in case of failure so to pay, the company may recover the same against the commissioners by warrant or action or motion in lieu of an action. And if the money which the stockholder has to pay on his shares be not paid as required by the president and directors "it may be recovered by warrant, action or motion as aforesaid," that is by the company, in the same way in which the money is to be recovered from the commissioners; or, the shares may be sold at auction, etc., and if the sale does not produce enough "the company may recover against such stockholder whatever may remain unpaid," etc. The declaration in in this case also avers that this was a promise to pay to the company; and the agreed statement of facts also makes the company the payee.

In some jurisdictions it is held that a subscription does not give a cause of action, but that a default simply involves a forfeiture of the stock. This legislation makes the subscription an actionable agreement and gives the right of action exclusively to the company.

Views as to the nature of a stock subscription somewhat variant from the foregoing, but leading to the same result, have been expressed in the Massachusetts Supreme Court.

In the cases of *Thompson v. Page*, 1 Met. 565, and *Ives v. Sterling*, 6 Met. 310, the subscriptions were in terms made payable to such persons as might be thereafter authorized by the corporation to receive them; and the persons so authorized were sustained in actions brought by them.

In *Athol Music Hall Co. v. Carey*, 116 Mass. 471, the subscription contract was by the subscribers to and with each other, to associate themselves into a corporation and to pay to the treasurer of said corporation the amount set against their respective names, etc. The action for the unpaid subscription was brought by the corporation. The court said:

"In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively

as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit: as a contract with the common representative of the several associates * * *

"In this agreement the treasurer of the corporation to be established is expressly made payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement. The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, * * * yet having been accepted and acted on by the party authorized so to do before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation."

We may assume, then, that although the subscribers are the promisees, the payee is the corporation, and it has the same relation to the subscriber as if the promise had been made to the corporation after its legal existence was complete.

This then is simply a debt to the corporation, a chose in action. And the plaintiff, Glenn, is confronted at the outset by the defendant's objection that his debt could not be assigned by the corporation so as to give to any assignee the right to sue the defendant in his own name.

Undoubtedly the common law is so.

The express company could not have made a specific assignment of this subscription with that effect; nor is the legal result changed by embracing this unpaid subscription in a general assignment of all the assets of the company. It is still, *quoad* this debt, simply an assignment of a chose in action. Whatever effect is given by statute to an assignment by operation of law, as in bankruptcy, it still remains true that a voluntary assignment, whether general or specific, of a chose in action, can transfer only the equitable interest in it, so as to enable the assignee to sue in the name of the assignor for his use.

How the force of this objection is felt by the plaintiff's counsel is indicated by the ingenious reasoning employed to obviate it.

It is said that this undertaking of the stockholder is not a consummated contract until a certain condition happens, viz.: the call on him for payment by the president and directors; that when that call took place in the present case the debt had become the property of another, to wit: the trustee; and therefore when it became a complete indebtedness it was due to the trustee.

But this assumes the whole question. Whether complete or incomplete, the indebtedness was nothing more than a chose in action; and the very question is how and to what extent it became the property of the assignee, and to this question apply all the considerations just enunciated.

But besides it is an error to speak of the contract as not consummated and complete before the money was payable. At least from the moment when the corporation came into being, the subscription was a complete contract. The payment, it is true, was not to be made until called for, but it was none the less a promise to pay to the company when called upon; and the call for payment could make no change in the parties to the contract.

Perhaps the most ingenious argument is derived from the admitted rule that an assignment of a chose in action, with the right of action on it, may be made if the debtor assents to it and promises to pay to the assignee.

It is attempted to apply this rule to the present case by arguing that every stockholder is presumed to assent to every disposition of the corporate property made by the corporation.

It is not pretended that the defendant's testator ever specifically assented to the assignment of his indebtedness; but reliance is placed only on the general authority which the law implies from the stockholders to their common agent, the corporation, to use the property of the concern in the conduct and settlement of its business, which, it is claimed, would include the power to assign it in payment of debts.

But this does not advance us a step. Whether the power thus to deal with the property be said to be given by the law or to rest upon an implied assent or authority of the stockholders, it cannot amount to more than an authority to deal with the property in such manner as the subject matter will admit of; in other words, to make such assignments as the nature of the property will allow, which, in the case of choses in action, would be merely equitable.

In the case of choses in action, consisting of debts due by strangers, the stockholders could not authorize any other assignment of them than the law permits, as before explained. In the case of debts due by the stockholders themselves, why should a different presumption exist or a different rule apply?

The stockholder occupies a double relation to the company. *Qua* debtor, he has not promised to pay to the company's order or to its assignee, but to the company only. *Qua* stockholder, he cannot be held to have given more than the general authority to the corporation to deal with its property, which I have already mentioned and which is consistent with the rules of law as to choses in action.

If we go further than this, we must hold that the mere fact of being a stockholder in a corporation makes his indebtedness a negotiable one, even against the terms of his agreement with the company and the intention of the parties. Thus, if a stockholder borrowed money from the company on his sealed bond, the argument would be that as his bond is a part of the assets of the company and he has generally and impliedly assented to the assignment or negotiation of its property, as it may

think best, *ergo* his bond may be negotiated like a promissory note.

But this reasoning would not stop at corporations. It would apply equally to partnerships. Each member of a partnership is the agent of all, and all the others are the agents of each, and all or each would have authority to settle debts by the assignment of property of the firm.

If, then, one becomes indebted to the firm on an open account, the firm, on the principles before mentioned, could assign or negotiate the debt, and so give the assignee a right of action in his own name. In such action the plaintiff, after stating the original indebtedness and its assignment, which would make a demurrable case, would only have to supplement it by an averment that the debtor was a member of the firm who made the assignment, and his case would be complete. It is hardly necessary to say that this would be a novelty in the law of contracts and actions and pleadings, for which not a semblance of authority could be found.

The decree in the Chancery Court of Richmond cannot affect the question. We have no doubt of the right of the corporation to make a general assignment of all its assets, which would include an equitable assignment of its choses in action, to trustees, for the benefit of creditors, without the concurrence of the stockholders. Nor do we doubt the authority of any court, having obtained jurisdiction over the corporation, to require it to do what it might do voluntarily, to decree a transfer of its assets to a trustee or to remove a trustee and appoint a new one and vest in him all the title which the corporation may have given to a former one, without having the stockholders before them. Nor do we doubt the power of the court to do what the president and directors omitted to do, to wit: to make a formal call and assessment on the stockholders on account of their unpaid subscriptions for the benefit of creditors, the result of all which would be that the substituted trustee would have the right and it would be his duty to call on the stockholders for the assessment and, on their refusal to pay, to institute suit against them in the name of the corporation.

This was, substantially, what the Chancery Court of Richmond ordered the plaintiff to do, that is: "To collect and receive the said call and assessment and to take such prompt steps to that end, by suit or otherwise, and in such jurisdictions, as he may be advised."

It is not altogether clear that the court meant to decree that he was entitled to sue in his own name, or to order him to do so.

If the court is to be so understood, we do not hesitate to say that the decree is void, as to the stockholders, in this respect, for want of jurisdiction, because they were not parties to the suit.

Undoubtedly in its relations to third persons, the corporation represents the stockholders; and it is not necessary to make the latter parties to a suit, in order to obtain a decree or judgment against the corporation which may be enforced against the tangible corporate property.

But where rights are to be determined as between the corporation and the stockholder, where the latter may have an adversary interest, and his property may be affected, it is evident.

dent that no decree can bind him in a suit to which he is not personally, instead of by representation, made a party.

For example: his indebtedness to the corporation could not be garnished by a creditor, by a proceeding in the common-law courts or its equivalent in an equity court, without serving process on him.

And, while a court might compel the corporation to make such a transfer of his debt as it might make voluntarily without his concurrence, no court could, by force of its own decree alone, convert his indebtedness to the corporation into an indebtedness to someone else, without even notifying him. If it could do this, it would have little difficulty in going a step further and making a money decree against him, without giving him his day in court.

We have been referred to a number of cases in which suits similar to the present have been sustained in the state and federal courts.

But the present question does not seem to be discussed in any of the opinions rendered except in *Glenn v. Scott*, in the Circuit Court for the Western District of Virginia. In that case the declaration averred the assignment of the subscriptions of the defendant stockholder to the trustees, and that the defendant had assented to it; just as in this case.

The case came before the court on a demurrer to the declaration which admitted the plaintiff's case, as the present case did in the the court below; and the court could do nothing else than render judgment against the defendant. Judge Bond also held the case to be within the Code of Virginia of 1873, which, in this respect, only repeats the Code of 1849, and provides that:

"The assignee of any bond, note or writing not negotiable, may maintain an action thereon in his own name which the original obligee or payee might have brought."

If, however, it is attempted to apply that law to the present case, it is seen that a conflict of laws arises. By our law, which is the common law, no such action can be maintained, and the question is whether the Virginia Code or our common law is to determine the right to sue.

If the Code determines the contract right of the parties and operates upon the title, it must prevail if this is to be considered a Virginia contract. If it goes only to the remedy, the *lex fori* must prevail. We are relieved from any trouble upon this question by the decisions of the court of last resort of Virginia upon the effect of her Code.

The following cases were decided in 1857, when the Code of 1849 was still in force and was the law governing the subscriptions in this case.

In *Davis v. Miller*, 14 Gratt. 13, the court said:

"The Code declares that 'The assignee of any bond, note or writing not negotiable may maintain any action thereon in his own name which the original obligee or payee might have brought.' This section is the same in effect with 1 Revised Code, chap. 126, § 5. It applies only to writings not negotiable, and its only effect is to authorize the assignee of such writings to sue at law in his own name. The legal title still remains in the assignor, in whose name the suit at law may be brought."

The case of *Clarksons v. Doddridge*, 14 Gratt. 42, was an action by certain commissioners in chancery on a bond for purchase money for property sold by them. The plea was that by a subsequent decree other commissioners had been appointed in their place, so that the bond had been, by the action of the court, assigned to the latter, and the question was whether the action ought not to be brought by them. The court said:

"Was the action properly brought in the names of the commissioners to whom the bonds were payable? Or ought it to have been brought in the names of the new and substituted commissioners?"

"It is a general rule that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The Legislature alone has power to make an exception to this rule. An exception is made by the Code, chap. 144, § 14, par. 583, which authorizes the assignee of any bond, note or writing not negotiable to maintain thereupon any action in his own name which the original obligee or payee might have brought. The assignee acquires only an equitable right with a capacity expressly given him by statute to assert it at law in his own name. But the legal title still remaining in the obligee or payee, a right of action is incident thereto; and the assignee may, at his election, sue at law in his own name or in that of the obligee or payee for his benefit. *Garland v. Richeson*, 4 Rand. 266.

"Another exception seems to be made by the Code, chap. 116, § 2, par. 500.

"It is also a general rule that the legal interest in an obligation for the payment of money is vested in the obligee or his personal representative. The exceptions to this rule also must be derived from the statute law, and are few in number. An exception arises in England under the Statute of Bankruptcy, which expressly vests the bankrupt's right of property and of action in his assignees, who may therefore maintain in their own name an action on a bond payable to the bankrupt. A bond payable to a corporation aggregate is not an exception to the rule, though an action thereon must be brought in the name of the corporation, and not of the persons composing it when the bond is executed, or their personal representatives. The corporation itself, and not the persons composing it, is the obligee; and the case therefore falls within the rule, and not the exceptions. A different rule is said to be applicable to a bond payable to a person, who is a corporation sole; in which case an action at law upon the bond must after his death be brought in the name of his personal representative, and not of his successor. There is a strong instance of this kind in a case very recently decided by the Court of Queen's Bench, in which it was held that a bond given to the ordinary by an administrator, under the Statute of Distributions, passes, on the ordinary's death, to his personal representative, and not to his successor. *Howley v. Knight*, 14 Adolph. & Ell. 240; 68 Eng. C. L. 238.

"In the case under consideration the bonds are payable to Miller and Doddridge, the old commissioners, in whom, therefore, by the very terms of the bonds, and according to the gen-

eral rule of law before stated, the legal interest in and right of action on the bonds were vested. There is no law in existence which divests this legal interest and right of action. The court of chancery, it is true, was authorized by law to substitute new in place of old commissioners. But the effect of such substitution was not to transfer the legal interest in the bonds from the old to the new commissioners. It only authorized the new commissioners, upon giving the security required by law, to collect the bonds, and to bring suit, if necessary, for the recovery thereof in the names of the old commissioners. The right of the new commissioners to receive the money does not imply a right to bring an action therefor in their own names. A person may have a right to receive money, without any corresponding right to bring an action for it in his own name. This happens whenever a chose in action (not negotiable by the law merchant, and not coming under the provisions in the Code, chap. 144, § 14) is assigned. The assignee has a right to receive the money but not to bring an action therefor in his own name. He has, however, an ample remedy.

"He has a right to bring an action at law in the name of his assignor; and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights and will not permit the nominal plaintiff to receive the money, nor to release the debt, nor to dismiss the action. The same principle applies to this case.

"The circuit court was, therefore, right in saying that the present commissioners have a right to sue upon the bonds in the name of Miller and Doddridge, the obligees."

Judge Bond must have taken the same view, since he rests his opinion on the Code of 1873, which was adopted seven years after these subscriptions were made. He could hardly have held that to operate retrospectively on the contract, while it clearly could on the remedy.

Apart from the Code of Virginia, it is admitted that the equitable title to a chose in action can be assigned so that the assignee may institute a suit at common law in the assignor's name for his use. According to the decisions just referred to, the Code makes no change in the title, but superadds to the remedy just mentioned a right of action by the assignee, in his own name.

This, then, clearly relates to the remedy only; and the rule applies which Dr. Wharton lays down in his Conflict of Laws, § 785, as follows, viz.:

"Whether an assignee can sue in his own name is sometimes a technical question and sometimes one that is essential. When it is technical (*i. e.* when the point is merely whether the suit is to be brought by A to the use of B, or by B immediately, there being no dispute that the title as between the two is virtually in B) then the *lex fori* is to decide. It is a mere matter of process. If allowed by the *lex fori* the assignee may sue in his own name although forbidden by the foreign law to which the obligation is subject. If forbidden by the *lex fori*, the assignee cannot sue in his own name, though permitted to do so by the foreign law to which the obligation is subject. See also,

to the same effect, Story, Conf. L. §§ 298, 332, 473."

And so here we assume that the plaintiff is entitled to sue for the unpaid subscriptions to the extent called for, and the question is whether he shall sue in his own name or in that of the corporation to his use. By the law of this District he must do the latter, and that is the law of this case.

We have not deemed it necessary to express an opinion upon any of the other questions in the case, but *judgment must be entered for the defendant.*

Christian RUPPERT

v.

George A. HASKE *et al.*

A mistake in the description of a recorded deed will not be corrected by a court of equity, to the prejudice of the rights of bona fide judgment creditors of the grantee having a lien upon the property.

(Decided November 1, 1886.)

CASE certified from the Court of Equity to be heard at General Term in the first instance.

This was a proceeding upon a bill by the assignee of certain notes secured by deed of trust, to reform and correct a deed of trust for error alleged to have been made therein through the mutual mistake of the grantor and grantee.

The bill was filed January 6, 1885; and after setting out the several judgments obtained by several of the codefendants against the defendant, George A. Haske, it alleged that on September 6, 1871, one Nancy Kilafoyle was seised of the west thirty feet front by the depth thereof of lot four in square 844, and being so seised contracted to sell and did sell to one Bedelia Haske, now deceased, the east fourteen feet eight and one half inches front of the said thirty feet front of said lot; but that by deed dated on said day and duly recorded January 30, 1872, she conveyed to said Bedelia Haske the west fourteen feet, eight and one half inches front of said thirty feet, and that at the same time she delivered to the said Bedelia Haske, and the said Bedelia Haske accepted possession of the said east fourteen feet, eight and one half inches of said thirty feet and the house and improvements thereon.

It also alleges that prior to the first of May, 1873, the said Bedelia Haske applied to the German American Savings Bank for a loan upon said eastern portion of said thirty feet, and an examination of the title then made revealed the fact that the conveyance to Mrs. Haske embraced the western instead of the eastern portion thereof; that for the purpose of correcting this mistake the said Kilafoyle and Haske on or about the 17th of May, 1873, exchanged deeds of conveyance with each other, whereby the said Kilafoyle conveyed to said Haske the said eastern portion of said land, and the said Haske reconveyed to the said Kilafoyle the said western portion thereof, and the said deeds were duly recorded; that having corrected said error the said Bedelia Haske and her husband, the judgment defendant, George A. Haske, ob-

tained from said bank the sum of \$1,500 upon a note dated May 5, 1873, and executed a deed of trust to secure the said note; that it was agreed between all the parties to said transaction that the said eastern portion of said thirty feet of said lot should be included in said deed, but that by error of the scrivener the said western portion was described in said deed of trust; the said trust being recorded in liber, etc.

The bill further alleged that at that time the said Kilafoyle owned and had possession of, and claimed as sole owner, the said western portion of said land, and the said Haske the said eastern portion; that the error was due to the commencement at the wrong point of beginning, the rest of the description being correct; that the said eastern portion was then in the possession of said Haske and claimed solely by her, and that the said money was actually advanced upon the faith that said eastern portion was embraced in the deed of trust.

It also alleges that subsequently the complainant, at the request of Bedelia Haske and George A. Haske, purchased the said note from the receiver of said bank, the then owner thereof, for its full face value and interest to date, without any knowledge or notice of any misdescription in the deed of trust, and after the said eastern portion of said property had been pointed out to him by said Haske as the property actually embraced in said deed of trust; and that at the same time complainant entered into an agreement with the said Bedelia and George A. Haske, extending the time of payment of said note for two years, with the privilege of a further extension for an additional two years and a reduction of interest from 10 to 8 per cent.

That on May 22, 1880, Bedelia Haske, by deed duly recorded, conveyed all her estate to Bernard A. Haske, in trust for the defendant George A. Haske, without any valuable consideration. Shortly thereafter Bedelia Haske died intestate.

That on April 8, 1879, the defendants Selzer and Miller secured a judgment against the defendant George A. Haske, and on February 23, 1884, they filed a bill against said George and others, to subject the said western portion of said lot to sale to satisfy their judgment; and obtained a decree for the sale of the same; that on December 2, 1884, the trustee under the decree in said cause undertook to sell said western portion of said lot, and only discovered, at the sale, the error in the deed of trust; that neither the complainant nor any of the other parties in interest had, until that time, any knowledge of the error; that thereupon, on December 12, 1884, the said defendants Selzer and Miller filed another bill against said George A. Haske, alleging that he was the equitable owner of the said eastern part of said lot, and praying for a sale of the same to satisfy their judgment.

That said judgment creditors had, prior to the institution of said suit, full notice of the errors thereinbefore referred to, and that complainant had an equitable mortgage on the said eastern portion of said lot, and a paramount right to the same over those of said judgment creditors and all other persons. The bill then prayed that the deed of trust be reformed so as to include the east fourteen feet eight and one half inches of said west thirty feet of

said lot, instead of said west fourteen feet, eight and one half inches thereof, or that complainant be decreed to have an equitable mortgage on the same; that a trustee might be appointed to sell the same in satisfaction of complainant's debt; that the defendants be enjoined from proceeding against the same, and that the defendants Selzer and Miller might be enjoined from prosecuting their suit in equity, or in any way endeavoring to assert a lien, by reason of their judgment, upon said land prior to the equitable claim and equitable mortgage of the complainant.

Decrees *pro confesso* were taken against all the defendants except Selzer and Miller, who filed their joint answer, in which they substantially denied all the material averments of the bill, and claimed the right, as judgment creditors, to subject the said lot to the satisfaction of their judgment.

Testimony being taken the cause was calendared for hearing, and was then by the justice holding the special term, certified to the general term, to be there heard in the first instance.

Mr. James M. Johnston, for complainant:

It is submitted that the evidence shows distinctly and indisputably that the intention of the contracting parties was to convey the eastern portion of lot 4, instead of the western portion. The evidence clearly establishes a mistake of fact which is one to be relieved in equity.

Snell v. Ins. Co. 98 U. S. 88, 89 (Bk. 25, L. ed. 52); *Elliot v. Sackett*, 108 U. S. 142 (Bk. 27, L. ed. 878).

The only opposition to the reformation of the deed comes from judgment creditors. The claims of a judgment creditor do not rise as high as those of a purchaser. The lien of the judgment creditor is subject to every lien that could have been maintained against the judgment defendant.

2 White & T. L. Cas. pp. 44, 89-92, and cases cited; *Brown v. Pierce*, 7 Wall. 217, 218 (74 U. S. bk. 19, L. ed. 134); *Skidmore v. Pittsburg*, etc. R. R. Co. 112 U. S. 38, 86 (Bk. 28, L. ed. 626); *Baker v. Morton*, 12 Wall. 150, 158 (79 U. S. bk. 20, L. ed. 262).

The only remaining question is whether the complainant's right to reform his deed is affected by the Act of April 29, 1878 (20 Stat. at L. p. 40), which provides that deeds of trust, etc., shall take effect and be valid as to creditors, from the date of record only.

Whatever effect may be given to that Act, in a proper case, it is submitted that the "creditors" protected by the Act are the creditors of a grantor and not those of a grantee. Such was the construction given the Kentucky Statute, which uses the broad term "any creditors," by the Supreme Court.

Sicard's Lessee v. Davis, 6 Pet. 139 (31 U. S. bk. 8, L. ed. 347).

Messrs. Charles A. Walter and W. K. Du Hamel, for defendants:

The plaintiff must show a superior equity.

Brashear v. West, 7 Pet. 616 (32 U. S. bk. 8, L. ed. 801); *Roundtree v. McLain*, Hempst. C. C. 248; 1 Story, Eq. § 64, c.

Here we have obtained a lien.

Morsell v. Bank, 91 U. S. 361 (Bk. 23, L. ed. 436); *Boone v. Chiles*, 10 Pet. 210 (35 U. S. bk. 9, L. ed. 888).

196

Would the court reverse all its rules and give plaintiff priority over our lien? He is but a creditor. Courts will not reform as for accident among creditors.

Kurtz v. Hollingshead, 3 Cranch, C. C. 69; 4 Cranch, C. C. 183.

Nor for mistake.

Smith v. Turrentine, 2 Jones, Eq. 255; *Knight v. Bunn*, 7 Ired. Eq. 79; *Hunt v. Rousmaniere*, 1 Pet. 17 (26 U. S. bk. 7, L. ed. 27); *Anderson v. Tydings*, 8 Md. 440-443.

Mr. Justice Merrick delivered the opinion of the court:

The object of this proceeding is to rectify a mistake in a certain deed of trust made by George A. Haske and wife, to secure a certain debt, which by assignment came afterwards into the ownership of Christian Ruppert, the complainant.

After the deed of trust had been made and had thus rested for several years, it appeared that there had been a mistake made in the description of the property. By an error in the recitals of the scrivener he had conveyed the west half of a certain lot instead of the east half of it. Subsequently the deed of conveyance of the property was corrected as between the original parties, but the deed of trust was not corrected; and afterwards (after the correction) the grantee in it, Bedelia Haske, conveyed the property in trust for the benefit of her husband, George A. Haske.

While the property was thus in the possession of George A. Haske as *cestui que trust* under a complete and vested title, certain judgments were obtained against George A. Haske, and afterwards, the judgment creditors, for the purpose of perfecting the lien upon the equitable estate, filed their bill in equity to subject that real estate to the payment of the judgments; and in that state of case the beneficiaries under the deed of trust filed their bill to correct the description in the deed, so as to override the perfected, equitable lien which had been obtained in the manner I have indicated by the judgment creditors of the *cestui que trust* and grantee in the corrected deed.

The question now before the court therefore is whether under these circumstances a correction can be made in the deed, as between grantor and grantee, so as to oust the perfected equitable lien obtained by the judgment creditors of the *cestui que trust*, the grantee or beneficiary under the deed of trust.

Notwithstanding the provisions of the Recording Acts of the States, it at one time had come to be a pervading idea that an equitable title in a party who had had a mistake made in his legal rights would override the lien of a judgment creditor. But of recent years a more correct view has been taken of the obligation resting upon all parties to take notice of and be bound by the record titles of the country. And courts the most eminent have regretted that there has ever been a departure from the requirements of the record law so as to let in an equity of an unwritten kind to oust the title and deprive parties who have given credit to others upon the faith of the record titles.

But however that may be, we have recently had legislation which explicitly declares that the record title as it stands shall be binding in

in favor of the creditors and subsequent purchasers of notes so as to exclude these latent equities in behalf of the party, which of course would be perfect as between the original parties. And such has been the special provision of the Act of 1878 in this District, and upon that Act this court has explicitly decided in the case of *Bank v. Hitz*, reported in 1 Mackey, 125, that the rights of creditors are saved and they cannot be invaded by virtue of the provision of that law which says that an unrecorded title shall not prevail against the creditors or bona fide purchasers.

To the same effect have been the statutory provisions in several of the States and the judgments of the highest courts of the land in conformity with those statutes, upholding the policy and maintaining the integrity of the terms of the statute. Amongst others may be mentioned the case in 11 How. 140 [52 U. S. bk. 13, L. ed. 684], of *McCoy v. Rhodes*, and the other case of *Taylor v. Doe*, in 13 How. 298 [54 U. S. bk. 14, L. ed. 149].

These decisions render it, in our judgment, no longer an open question in this court, and make it imperative upon us to say that the equity to reform a deed under these circumstances cannot prevail against a bona fide judgment creditor who has a legal lien, or in case of an equitable estate has taken the necessary steps to perfect his equitable lien on such estate.

"Against any creditor" is the language of the Statute of 1878; and being bound by that decision and that recognized policy, we are constrained to say that the application to reform the deed as against the present judgment creditors cannot prevail in this court. So far as the rights, if there be any, the legitimate rights, of the grantee are concerned, after the satisfaction of the judgment creditors, of course the reformation will be granted to that extent.

The decree will be made in conformity with this opinion.

UNITED STATES

v.

William A. PHILLIPS *et al.*

On a judgment of the criminal court sustaining a demurrer to an indictment, the United States has no right of appeal to the general term.

(Decided October 26, 1886.)

MOTION to dismiss an appeal taken by the United States from a judgment of the Criminal Court, sustaining a demurrer to an indictment for conspiracy. *Granted.*

The facts are stated in the opinion.

Mr. H. H. Wells, for defendants, for the motion:

The jurisdiction of this court on appeal is purely statutory. Section 772 defines the extent thereof:

"Any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal."

This court has repeatedly construed the meaning of that statute, and has uniformly held that no order was appealable which merely affected

the merits, "but it must be a judgment determining the controversy."

Phillips v. Negley, 2 Mackey, 236.

No order, judgment or decree is appealable which, if not set aside or reversed, will not put an end to the suit or controversy.

Id. 254, citing: *Parsons v. Parker*, 3 McCa. 9; *Adams v. Adams*, 2 McCa. 276; *Bryan v. Sanderson*, 3 McCa. 402; *Philp v. Gardner* and *U. S. v. Wood*, 1 McCa. 185, 241; *Connor v. Peugh's Lessee*, 18 How. 895 (59 U. S. bk. 15, L. ed. 432); *Wyle v. Coze*, 14 How. 1 (55 U. S. bk. 14, L. ed. 301).

Parsons v. Parker, cited above, held that the overruling or sustaining a demurrer was not a final, appealable judgment, especially if the right to amend was given.

The decisions of the Supreme Court of the United States on the same subject are equally uniform and emphatic.

See *Mayberry v. Thompson*, 5 How. 121 (46 U. S. bk. 12, L. ed. 78); *Mordecai v. Lindsay*, *Beebe v. Russell* and *Furrelly v. Woodfolk*, 19 How. 199, 283, 288 (60 U. S. bk. 15, L. ed. 624, 668, 670); *U. S. v. Fossett*, 2 How. 445 (62 U. S. bk. 16, L. ed. 185); *Barton v. Forsyth*, 5 Wall. 190 (72 U. S. bk. 18, L. ed. 545).

A decree is final which leaves "nothing to be litigated between the parties."

Withenbury v. U. S. 5 Wall. 819 (72 U. S. bk. 18, L. ed. 613).

In *Butterfield v. Usher*, 91 U. S. 246 (Bk. 23, L. ed. 818), the court said: "Our jurisdiction upon appeal is statutory only. If some Act of Congress does not authorize a case to be brought here, we cannot take jurisdiction of it. The decree (of the Supreme Court, D. C.) here appealed from, disposed finally of a motion made in the case, but not of the case itself." It was therefore held not appealable.

In *Harrington v. Holler*, 111 U. S. 796 (See Bk. 28, L. ed. 602), it was held that the dismissal of an appeal was not a final decision. "The use of the term 'final decision' does not enlarge the scope of the jurisdiction of this court (on appeal). It is a substitute for the words 'final judgments and decrees,' and means the same thing."

Bostwick v. Brinkerhoff, 106 U. S. 3 (Bk. 27, L. ed. 73), was the case of a demurrer sustained below and overruled in the court of appeals. The supreme court said: "The rule is well settled and of long standing that a judgment or decree to be final (under the appeal statutes) must terminate the litigation between the parties on the merits of the case." "If the judgment is not one which disposes of the whole case on its merits, it is not final."

De Armas' Heirs v. U. S. 6 How. 103 (47 U. S. bk. 12, L. ed. 861), decides that a judgment sustaining a demurrer to a petition for the confirmation of a land claim, but taking no further order on the petition, is not a final judgment from which an appeal will lie.

A judgment sustaining a demurrer to an indictment is not a bar to a new indictment or a trial thereon.

1 Whart. Cr. Law. § 528; *U. S. v. Watkins*, 8 Cranch. C. C. 441; *State v. Dresser*, 54 Maine 569; *U. S. v. Neversen*, 1 Mackey, 152; *Commonwealth v. Cook*, 6 Serg. & R. 577; 1 Bish Cr. Law. § 856; *U. S. v. Bigelow*, 3 Mackey, 393; *People v. Goodwin*, 18 Johns. 188; 4 Wash.

C. C. 402; *U. S. v. Perce*, 9 Wheat. 579 (22 U. S. bk. 6, L. ed. 185).

Color for a claim to the right of appeal on the part of the Government is given by the decision in *State v. Buchanan*, 5 Har. & J. 329, decided in 1821. That case decided that a writ of error would lie to the judgment of a court sustaining a demurrer to an indictment; but the decision was rested on the authority of Hale's Pleas of the Crown, which in turn founded that supposed right on the assumption that a judgment or demurrer put the party in jeopardy, so that if again indicted he could plead that judgment as a former acquittal. Such, however, as we have already seen, is not and has not been the law for the last century at least.

It will be found that in almost all of the States the right of appeal is denied to the State in criminal cases, except where granted by special statute. It is denied in the following and other States:

New York: *People v. Adams*, 8 Denio, 190, 191; *People v. Corning*, 2 N. Y. 9; Illinois: *People v. Dill*, 1 Scam. 257; *People v. Glodo*, 12 Ill. App. 848; Virginia: *Commonwealth v. Harrison*, 2 Va. Cas. 202; Georgia: *State v. Jones*, 7 Ga. 422; Iowa: *State v. Johnson*, 2 Clarke, 549; Florida: *Sargeant v. Russ*, 20 Fla. 438; *State v. Burns*, 18 Fla. 185; Kansas: *State v. Phillips*, 38 Kans. 100.

Statutes now exist giving the right of appeal to the State, under varying circumstances, in New York, Arkansas, Tennessee, Alabama, North Carolina, Missouri, Louisiana, California, Nebraska, Kentucky, Maryland and other States, but I have not found that it has been held in any State, except Maryland, that this right of appeal exists in behalf of the State independent of statute.

See 3 Whart. Cr. L. § 3215.

Mr. A. S. Worthington, for the United States, *contra*:

The right to this appeal is given by statute. The whole law regulating appeals to this court in general term is contained in section 772, R. S. D. C.

This section is brought from section 5 of the Act of March 3, 1863, 12 Stat. at L. 763.

It will be remembered that in *Ex parte Bradley*, 7 Wall. 364 (74 U. S. bk. 19, L. ed. 214), it was in 1869 held that the Criminal Court of this District was a different court from the Supreme Court of the District, and not a special term of that court; and that to meet the difficulty thus created Congress enacted in 1870 that which is now section 753, R. S. D. C.

And section 759 provides that "the special term held as the criminal court, shall be holden," etc.

It is clear, therefore, that the right of appeal given by section 772 to any party aggrieved by any order or judgment made or pronounced at any special term, applies to the orders and judgments of the special term holding a criminal court.

It is not a matter of doubt that the United States is a party to the proceeding; and it would seem to be obvious that it is aggrieved when it is denied the right to be heard in its own tribunal.

198

Analogous to this question is that as to the right of appeal in *habeas corpus* proceedings.

Section 763, R. S. U. S. provides that from the final decision upon an application for a writ of *habeas corpus* "an appeal may be taken to the circuit court." In the case of *Taylor*, 3 Mac Arthur, 426, this court sustained the Government's right of appeal, the court saying:

"The language giving appeal is general, and we think it would be straining the meaning of the legislation to confine it to one side."

Clearly, section 772 must be held to mean that the United States shall have the right of appeal as well as the defendant; and if that right is to be denied, it must be because Congress had no power to confer it.

Is the statute constitutional? The only clause of the Constitution that can affect this question is that part of article 5 of the Amendments, providing:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It seems idle to cite authorities to show that jeopardy does not begin until a jury has been charged with the case; but see,

Whart. Cr. Pl. & Pr. 517; 1 Bish. Cr. Law, 1014.

The Maryland case of *State v. Buchanan*, 5 Harris & J. 817, was an indictment for conspiracy. A demurrer to the indictment had been sustained by the county court and the defendants discharged. The State had obtained a writ of error. After a very thorough discussion the court of appeals sustained the right of the State to the writ of error, reversed the judgment of the county court, and awarded a writ of *procedendo* directing "a new trial of the prosecution."

At that time, in Maryland, even the defendant was not entitled to a bill of exceptions in a criminal case.

See *Queen v. State*, 5 Harris & J. 282.

The decision in *State v. Buchanan*, therefore, put the State on an equality with the defendant in the matter of the right of appeal.

In this District, almost immediately after the session, Congress created a court called the "Circuit Court of the District of Columbia," which had all the powers vested in the Circuit Courts of the United States.

Act of February 27, 1801, 2 Stat. at L. 105.

From that time until 1838 the circuit court had exclusive jurisdiction in both civil and criminal cases in the District.

Id. p. 106, § 5.

There was no appeal or writ of error in any case, except to or from the Supreme Court of the United States. The right of appeal exercised as a matter of course in criminal cases by the State of Maryland about this time, the United States appears to have continued to avail itself of, after the passage of the Act of 1801 above cited.

In 1 Cranch, 252 (5 U. S. bk. 2, L. ed. 98), will be found the case of *U. S. v. Simms*, a criminal case, in which the Government, in 1803, sued out a writ of error to obtain a revision of a judgment in favor of the defendant in the Circuit Court of the District, and which was argued and decided (against the United States) without any question being made by

counsel or the court as to the right of the Government to take up the case.

Again; in 1805 the United States, in a case in which the Circuit Court of the District had sustained a demurrer to an indictment, sued out a writ of error to the supreme court.

U. S. v. More, 3 Cranch, 159 (7 U. S. bk. 2, L. ed. 397).

In that case neither the court nor counsel suggested any distinction between the right of the government and of the defendant to have a criminal case reviewed in the supreme court; but the court, *sua sponte*, suggested a doubt as to whether its appellate jurisdiction extended to criminal cases at all. The point having been argued the court held that it had no appellate jurisdiction whatever in criminal cases.

In consequence of this ruling, from 1805 to 1838 there was no appeal in this District in a criminal case by either party. Before 1805 both parties appealed; from 1805 to 1838 neither party could appeal; all the time there was perfect equality.

By the Act of July 7, 1838, the "Criminal Court of the District of Columbia" was created. 5 Stat. at L. 306.

That Act provided for a writ of error to the circuit court in any criminal case wherein final judgment shall have been pronounced "convicting any person of any crime or misdemeanor." Thus the statute by its very terms prevented the Government from appealing, because appeals were not to be allowed when the judgment was in favor of the defendant.

This continued to be the state of the law until March 3, 1863, when this court was created. 12 Stat. at L. 762.

The fifth section of that Act, as already stated, contained the provision as to appeals which is now incorporated in section 772 of the Revised Statutes of the District. It gave any person aggrieved by a judgment at any special term the right to appeal to the general term.

But, as already stated, the supreme court decided in *Ex parte Bradley* that the criminal court, although held by a Judge of the Supreme Court of the District, was not a special term. Hence the Act of 1838 still regulated appeals from the criminal court, and the United States could not appeal, because no statute authorized it to do so.

Finally, by the Act of June 21, 1870, 16 Stat. at L. 160, the criminal court was declared to be a special term of this court; and thereafter the law on this subject remained as it is now.

It is said that no appeal has been taken by the United States in a criminal case in this District since the Act of 1870. This may be the case. It is a right not to be exercised merely because it exists. In *State v. Buchanan*, *supra*, the court, while deciding in favor of the right of the State to appeal, says: "It is, perhaps, a right that should be seldom exercised."

Suppose the case to be, then, that the United States has not attempted to appeal in a criminal case in this District for sixteen years. On what ground and by what analogy can that fact be said to control the construction of the statute giving it the right to appeal? I leave it to the defendant's counsel to answer the question. In the *habeas corpus* case of *Taylor*, already cited, the Act giving the right of appeal was ended. C.

acted in 1842, and the United States in fact take an appeal until 1870.

The rule in other courts of the United States. The decision in *U. S. v. More*, upon the ground that the Act gave a writ of error to the Circuit Court limited it to cases "where in dispute" should exceed the value which did not, as the court says, in all cases, because in these cases is the guilt or innocence of the defendant, the law granting appeals and writs arising in the Circuit Court of the United States, now and ever since 1789, is a general provision.

The right to a review in the United States in cases in which the value of the property in dispute exceeds the value of the lars.

Judiciary Act, § 22, 1 Stat. at L. 692.

There are a few exceptions to the rule that none of them applies to criminal cases. R. S. 699.

And so it has always been held that a criminal case cannot be taken to the circuit court by either party.

Ex parte Kearney, 7 Wheat. 15, L. ed. 391; *Forsythe v. U. S.*, 5 U. S. bk. 13, L. ed. 262; *Ex parte Taylor*, 110 U. S. 651 (Bk. 28, L. ed. 27).

Such cases occasionally go to the circuit court on a certificate of division below; but they can get there in no other way.

Ex parte Gordon, 1 Black, 50, L. ed. 134.

The only exception to this is in *U. S. v. More*, which was taken to the circuit court by the defendant upon a writ of error to a special class of cases, and in general words that writs of error might be taken to the supreme court.

Act of February 22, 1847, § 129.

In *Forsythe's Case* the appeal was taken by the defendant. His right to appeal, the court said:

"Congress * * * intended to give the parties to the suit or process a right to a revision by this court of the judgments or decrees rendered by judges therein * * * whether in criminal or civil jurisdiction."

In all the other courts of the United States, in respect of the rights of the parties in criminal cases reviewed, and there always has been a right to appeal between the defendant and the government.

The rule in the state courts. The rule in the state courts is the same. It is proposed to go at length into the question on this subject. Enough to demonstrate that there is no suggestion of the Government from a judgment putting an end to the case.

Of course the Fifth Amendment to the Constitution of the United States has in its Constitution against double jeopardy; and this under consideration is precisely the States that it is in the United States.

The law of Maryland has already been considered.

In New York, as in Maryland, the State for many years took appeals in criminal cases (when there had not been an acquittal by a jury) without its right to do so being doubted. And in New York, as in Maryland, the question was finally made; but in New York it was held that the practice was wrong.

People v. Corning, 2 N. Y. 9.

This decision was made by the court of appeals in 1848. It was based upon the fact that by the New York Statute the right to bring a writ of error in a criminal case was given to the accused, and was not given to the people. About the same time the same question was before the "Court for the Correction of Errors" in New York, and was decided the other way.

DeBov v. People, 2 N. Y. 10, note a.

In 1852 the Legislature of New York amended the law so as to give the State the right to have judgments in criminal cases reviewed, except when the defendant had been acquitted by a jury.

Laws of 1852, p. 76. See *People v. Comstock*, 8 Wend. 549.

And this continues to be the law of New York to the present day.

In Indiana the State for many years had appealed at its pleasure in criminal cases; but the decision in New York in *People v. Corning* induced lawyers in Indiana to endeavor to put a stop to the practice. The effort was unsuccessful. A comparison of the New York case and the Indiana decisions is instructive.

State v. Daily, 6 Ind. 9. See also *State v. Bartlett*, 9 Ind. 569.

In Pennsylvania the State seems to have exercised the right of appeal in criminal cases from the beginning without question.

Commonwealth v. Taylor, 5 Binn. 277; *Commonwealth v. McKisson*, 8 Serg. & R. 420. See *Commonwealth v. Capp*, 48 Pa. 53.

In 1828 the Legislature in Virginia empowered the State to bring a writ of error in a certain class of criminal cases; and this right it continued to avail itself of down at least to 1858.

Scott's Case, 10 Gratt. 754.

In North Carolina, without any statute, but under a constitutional provision giving the supreme court of the State "jurisdiction to review on appeal any decision of the courts below, upon any matter of law or legal inference," it has been settled by a long line of decisions that the State may not appeal in a criminal case when the defendant has been acquitted by a jury; but that it shall have that right where judgment has been given for the defendant: 1, upon a special verdict; 2, upon a demurrer; 3, upon a motion to quash; and 4, upon a motion in arrest.

State v. Lane, 78 N. C. 547; *State v. Padgett*, 82 N. C. 544; *State v. Moore*, 84 N. C. 724.

In Missouri by statute the State has the right of appeal in criminal cases 1, where the indictment is quashed; 2, where it is held insufficient on demurrer; and 3, where the judgment thereon is arrested.

State v. Copeland, 65 Mo. 497.

In Kentucky in 1839, the State appealed from a judgment sustaining a demurrer to an indictment, and had the judgment reversed. In

1879 it again appealed from a similar judgment. In neither case did it occur to anyone that the State had not the right to appeal.

Commonwealth v. Anthony, 2 Met. 399; *Commonwealth v. Cain*, 14 Bush. 529.

In Tennessee the State, without objection, appealed from a judgment quashing a presentment, and had the judgment reversed.

State v. Tolls, 13 Tenn. 363.

In Wisconsin it was held in 1848 that the statutes of that State allowed the State an appeal in criminal cases where there had been no verdict.

U. S. v. Satter, 1 Pinney, 278.

In 1864, however, it was decided that the right did not exist; but the court expressed the opinion that the Legislature should amend the law so as to confer the power of appeal upon the State in such cases.

State v. Kemp, 17 Wis. 690.

Mr. Chief Justice Carter delivered the opinion of the court:

This case while one of importance is confined within very brief limits. The question is whether the United States has the right of appeal to this court when a judgment has been rendered by the criminal court sustaining a demurrer to an indictment.

The Constitution provides that no man shall be twice put in jeopardy for the same offense. In the case of *U. S. v. Bigelow* [3 Mackey, 898], we held, after a deliberate and exhaustive discussion, that a man has only been in jeopardy when he has had a trial and verdict in his case.

The question, therefore, whether the defendant has been put in jeopardy by the hearing of this demurrer in the court below has been practically determined by us in the negative, and we are left disembarassed upon that point to discuss and consider the question of the Government's right of appeal from a judgment against it on the demurrer.

This question is to be determined solely by an interpretation of the statute; for it is a settled doctrine that the right of appeal rests with the Legislature alone. If the statute is silent on the subject, it leaves the complaining party unrelieved, since the grant of appeal in terms to one party necessarily by the expression of that grant confers no such right upon the other.

Counsel for the United States accept this proposition and very frankly say that if the right does not exist by statute, it does not exist at all. But it is insisted that the statute gives that right, although, acting under a misconception of its meaning, the right has never been exercised heretofore.

The statute under which this right of appeal is claimed is section 772 of the Revised Statutes of this District, and is a part of the Act organizing this court. It reads as follows:

"Any party aggrieved by any order, judgment or decree made or pronounced at any special term, may, if the same involves the merits of the action or proceeding, appeal therefrom to the general term of the supreme court; and upon such appeal the general term shall review such order, judgment or decree, and affirm, reverse or modify the same as shall be just."

"Any party" of course means all parties; which includes, if it refers to criminal cases,

not only the defendant but the United States; for the United States is as much a party as the accused. If, therefore, this section applies to the Criminal Court of this District, there can be no doubt of the Government's right of appeal.

Unfortunately, however, for this argument, the Supreme Court of the United States has held that the criminal court formed no part of this court at the time of the enactment of this statute, but was a distinct and independent court. That being the case it cannot be considered to have been included by the legislative language or intention when the statute organizing this court and regulating appeals from its several special terms to the general term was enacted.

And this will more plainly appear by reference to a statute enacted at a subsequent period, by which the criminal court was made a co-ordinate branch of this court. That Act, which was passed June 21, 1870, and is embodied in section 758 of the Revised Statutes of the District, declares:

"The several general terms and special terms of the circuit court, district courts and criminal courts, authorized by law, are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments * * * of the * * * criminal courts * * * shall be deemed judgments * * * of the Supreme Court; but nothing contained in this section shall affect the right of appeal as provided by law."

It is argued by the Government that these words refer to the right of appeal as declared by section 772 of the Organic Act.

That is quite true, as far as it goes; but it refers to more. The difficulty lies in a misconception of the purview of that section. There was not, as we have seen, and there could not have been, any intention to include the Criminal Court in this provision of the Organic Act. As the law then stood the defendant in the criminal court was given the right of appeal, a right which was denied to the prosecution. Congress by the Act of 1870 merely left the right of appeal as it found it; and in our opinion we would not be leaving the law where it has been left by Congress, if we applied the provisions of section 772 to the criminal court, and thereby gave the right of appeal to the United States. That is all there is to this question.

The appeal must be dismissed, and it is so ordered.

John H. BREWER

v.

DISTRICT OF COLUMBIA *et al.*

1. As a general rule a **tax deed is not even prima facie evidence of title.** It is incumbent upon whoever asserts title under it to prove affirmatively that all the preliminaries to the sale which the law prescribes were complied with.
2. But when this is done, the **title passed by the deed expunges all previous titles** and puts in the grantee an absolute, complete and perfect title in fee simple to the property, discharged of

D. C.

all preexisting equities and by whomsoever only such limited right as may be specially by statute.

3. Hence, a **tax deed made of a sale, for the unpaid tax of a certain year, passes the property to the purchaser discharged of all taxes remaining due at the time of the sale.**

(Decided November 1,

BILL in equity to restrain the tax, certified to be heard in Term in the first instance. *Injunctio.*

The facts are stated in the opinion of **Mr. A. L. Merriman**, for the plaintiff. The conveyance by tax deed enacted conveys a fee simple § 165.

It consequently conveys to title or interest which the grantor had at the time of sale. A deed is a species of conveyance of comprehensive character, and preclusion in the grantor of any interest. Kent says, in speaking of conveyance (4 Kent, Com. 48) cleared away all defeasible estates, destroyed contingent and barred powers, and barred all future right and possibility of land and vested an estate of feeoffee."

The District of Columbia has the land in question by deed deeded a fee, cannot set up in opposition interest by way of taxes, or other at the date of sale, for "No man is allowed to dispute his own solemn deed." *Goodtitle v. Bailey*, 2 Cowper 1. In *State v. Cole*, Cam. & No. court held that a sale of land for one year released the land from at the date of sale.

See also *Preston v. Van Gosen*, 250; 22 Wis. 225-229, 75.

The doctrine of estoppel applies to all corporations, equally with individuals. *Pendleton Co. v. Amy*, 13 W. S. Bk. 20, L. ed. 579) and case *Mr. Henry E. Davis*, for the plaintiff.

The tax deed by its very terms is to satisfaction of a specific lien for taxes, which lien was held, not by a purchaser of the whole tenor of the deed and the of the Act under which it was clusive of the absence of all other land from all taxes due at the time of sale. The tax deed, in any event, releases the land from the particular count of default of the particular count of which the sale was made.

This court has already disposition in the case of *Wall v. District of Columbia*, No. —, and until reversed by the Court of the United States the case will obtain in this jurisdiction.

In *State v. Cole*, Cam. & No. the provisions of the law governing the sale of land was to be resorted to for title.

taxes, only when there was no visible personal property of the person liable on which to distraint. The liability for taxes was personal, and the resort to the land was in the nature of an execution for an unpaid debt.

In *Preston v. Van Gorder*, 31 Iowa, 250, the court emphasizes the following provisions of the Iowa law: "On the first Monday of October in each year the county treasurer is required to offer at public sale * * * all lands, etc., on which taxes of any description for the preceding year or years shall have been delinquent and remain due and unpaid; and such sale shall be made for and in payment of the total amount of taxes, interest, and costs due and unpaid on such real property."

(Rev. 1860, § 763).

By section 784 the deed to be given on such sale "shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the State and county thereto."

In Wisconsin the law (Laws of 1859, chap. 22) distinctly provides that the sale shall be of so much of the land "as shall be sufficient to pay the taxes, interest and charges thereon" (§ 6); and inasmuch as this clearly contemplates a clearing of all taxes due to the time of sale, the Supreme Court of that State (in *Sayles v. Davis*, 22 Wis. 230) very properly says of the section (25) providing that the deed of sale "shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all unpaid taxes and charges," that the words "subject, however, to all unpaid taxes and charges" "have reference only to such unpaid taxes and charges as may have accrued subsequently to the sale on which the deed is issued."

Mr. Justice Cox delivered the opinion of the court:

I am requested to announce the opinion of the court in the case of *John Brewer* against *District of Columbia, M. J. Laughlin* and *Wm. H. Thumbert*.

An Act of the Legislative Assembly of the District of Columbia of June 25, 1873, relating to the collection of arrearages of taxes, contained among others the following provisions, stated in brief:

"That it shall be the duty of the Collector of Taxes of the District of Columbia, on or about the first day of July, 1873, to issue certificates of all taxes on real estate which shall then be unpaid and in arrears, and in like manner, on or about the first day of July in each succeeding year * * * which shall be a preferred lien * * * ; that in all cases of the issue of certificates, as herein provided, it shall be the privilege of the owners of any certificates, from and after the expiration of one year from the date thereof, to demand, in writing, by indorsement on the same, that the collector shall enforce the payment of the lien; and it shall be the duty of said officer to advertise for ten days in some one daily newspaper in the District of Columbia, and sell at public auction," etc.

In pursuance of that authority, a certificate of taxes due upon square 98 was issued, for the taxes due for the year ending June 30, 1872, which was transferred to a third person,

whether by way of collateral or by way of absolute sale does not appear, so far as I remember. At all events, in 1876, at the instance, as it is presumed, of the holder of the certificate, the property was exposed to sale, and was sold, on the third of January, 1876, to Albert G. Hall, and a deed passed to him; and this title, by sundry mesne conveyances, came to the complainant in 1884.

On the second of September, 1884, the property was again advertised for sale by the collector of taxes, to satisfy a number of taxes due before the first sale. One of these was a special tax levied under the late Corporation of Washington for a foot way laid in front of the pavement, and the other taxes consisted of the annual taxes for 1873, 1874 and 1875. So that after selling once, in 1876, for one year's tax, that is to say, for 1872, the collector undertook to sell again for the taxes for 1873, 1874 and 1875, which had already accrued at the time of the first sale.

The plaintiff prayed an injunction against these subsequent proceedings, claiming that by the first sale the existing liens for taxes were extinguished. The District, on the other hand, claimed, as does also the holder of one of the tax certificates, that the sale was made simply to satisfy a single tax, *i. e.* for the year 1872, leaving all others unsettled and all other liens unaffected.

If the tax collector had a right to sell for all taxes in arrears before the last sale, then the complainant claims that one of those taxes, being the special tax for the footway laid in front of the property, was illegal on other grounds, namely: because of a failure to comply with sundry requirements of the law.

Now, as a general rule, we all understand that a tax deed is not even *prima facie* evidence of title. It is incumbent on the holder who asserts title under it to prove affirmatively that all the preliminaries to the sale which the law prescribes were complied with.

But supposing this has been done, and the law to have been complied with, then the general theory of the tax title is well expressed in the opinion of *Judge Caldwell* of the Supreme Court of Ohio, at page 621 of *Blackwell on Tax Titles*, which reads as follows:

"A tax title, from its very nature, has nothing to do with the previous chain of title; does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deeds; the former title can be of no service to him, nor can it prejudice him. It was well said by counsel in argument on this point, that a tax sale operated on the property, not on the title. In an ordinary case, it matters not how many different interests may be connected with the title, what may be the particular interest of the party in whose name the property may be listed for taxation, it may be a mere equitable right; if the land be regularly sold for taxes, the property, accompanied with a legal title, goes to the purchaser, no matter how many estates, legal or equitable, may be connected with it. And in case the person in whose name it was listed, who had but an equitable title to the land at the time of the tax sale, gets a conveyance from the person

holding the legal title, he cannot avail himself of it. The land has gone, and another title has intervened."

All the legislation of Congress in this District on the subject of tax sales seems to be entirely in conformity with this general theory. Going back to the Charter of 1820, of the City of Washington, we find that after providing for a sale for taxes in arrears, it contains this proviso:

"That minors, mortgagees, or others having equitable interests in real property, which property shall be sold for taxes as aforesaid, shall be allowed one year after such minor's coming to or being of full age, or after such mortgagees or others having equitable interests obtaining possession of or a decree for the sale of such property, to redeem the property so sold from the purchaser or purchasers, his, her or their heirs or assigns, on paying the amount of purchase money so paid therefor, with 10 per centum interest thereon as aforesaid, and all the taxes that have been paid thereon by the purchaser or his assigns between the day of sale and the period of such redemption, with 10 per centum interest on the amount of such taxes, and also the full value of the improvements which may have been made or erected on such property by the purchaser or his assigns while the same was in his, her or their possession."

There is also a general provision that the owner of the property sold may, within two years after the sale, redeem the title by paying the purchase money, etc.

Now, of course if such sale passed nothing but the owner's title to the lot and did not affect any incumbrances, liens or collateral interests in the property, it would not be necessary to reserve any right of redemption to parties holding interests of that kind.

The very fact of reserving this right of redemption implies that without it the tax title would be a complete extinction and expunging of all pre-existing titles, and would pass the property as from an original source of title. And the terms of the reservation, being limited to a certain time, exclude any further indulgence than is expressed in the reservation itself. If any of these parties provided for fail to redeem within the time expressed in the law, it is too late; too late because the law manifestly was intended to have the operation which I have described, that is, of passing an absolute, complete and perfect title, subject only to a limited right of redemption as expressed in the law.

This charter was amended in particulars that are entirely unrelated to the present question, by the Acts both of 1824 and 1848. With that exception things remained in this condition until the charter of the city was abolished and the District Government was established in 1871. Then in pursuance of its general power of legislation, the Legislative Assembly of this District passed a general law called: "An Act prescribing the duties of certain officers for the District of Columbia, and fixing their compensation," directing that upon the failure of parties to pay the taxes, the collector shall institute proceedings for their collection, and directing that, after the sale, if the property shall not be redeemed by the owner thereof within one year from the day of sale by the payment of the amount, etc., a deed therefor,

countersigned by the Secretary of the District of Columbia, and having affixed the seal of the District, shall be given by the Governor to the purchaser at the tax sale, *which deed shall be deemed and held to be a good and perfect title in fee simple to any property bought at any such sale.* The old Act of 1820 described the title of 1820 as "a good and valid title," and we see what that good and valid title meant, by referring to the proviso which followed. It meant a perfect title subject to the right of redemption given by the law.

This goes even further. It gives "a good and perfect title in fee simple." It is difficult to see how a title can be a perfect title in fee simple, when it is subject to pre-existing liens, or is liable at any time to be displaced by their enforcement.

But it is made plainer what the meaning of the Act of 1820 is, by the proviso in favor of minors, mortgagees or others having equitable interests, and the same considerations heretofore noticed will apply to this Act, viz.: that the land sold is subject to redemption only within a limited time by those having a right to redeem as they are enumerated in the proviso.

In neither Act was any right given to the District of Columbia or to the old Corporation of Washington, to make any correction of the tax list after the sale had been made, or to reassess upon the property taxes omitted by accident or design from its original list—the list before the sale, and it never occurred to anybody that such a right existed.

A title once passed was held to be a perfect title, as against the District and against all the world, with the exception that I have mentioned: the limited right to redeem.

Then in 1873 there was passed this Act which is the subject of our special consideration. In order to save time in the collection of taxes, instead of imposing a duty upon the collector, of selling property for the purpose of realizing taxes for the District, the Governor was authorized to raise money upon them immediately; the cost of the delay in the collection to fall upon the purchaser of the certificates or the lender of money upon the certificates as collateral. And after providing, as I have already stated, that the Governor might, by a sale of the taxes, or a temporary loan based upon them, anticipate the collection of the taxes, it goes on and provides what I have already stated: that the holder of the certificates may demand, and the collector shall enforce, the payment of the lien, and then it shall be the duty of the officer to advertise for ten days in some one daily newspaper, and to sell at public auction, for cash, to the highest bidder, any and all pieces of property against which certificates may have been issued and for the sale of which demand shall have been made, and out of the proceeds of sale pay, first, the expenses of the sale and then the commission, and second, the amount of the tax certificates with interest thereon, and third, the remainder, if any, to be deposited in the Treasury of the District and held subject to the draft of the owner, etc.

Now it is claimed that under this law the collector is called upon to sell for the satisfaction of this lien, because the holder of the lien demands that the collector shall enforce the payment of the lien; and it is inferred from

that that it is not intended that any other lien, or any lien for additional taxes, shall be enforced.

But that really is not the question. The question is: In the enforcement of the lien what title passes by the sale? If this lien only is enforced and none other disturbed or any other interests affected by the sale, of course it is unnecessary to provide any right of redemption in favor of parties having other interests in the property, for they would remain unimpaired and could be asserted at any time.

But this law contained the same right of redemption, only in a more limited degree, as the other Acts. It provides "That minors and mortgagees shall have the right to redeem the property for a period of six months after obtaining majority, or maturity of mortgage, by payment of purchase money, cost of improvements," etc.

The same considerations I have already adduced will apply to this. This limited right to redeem excludes any idea of a further right, any right to interfere with the integrity of the tax title; and it assumes that without this equity of redemption the tax title will be a perfect title and will prevail against all existing interests of that kind; that they are expunged and cut up by the roots.

As it originally was expressed, this Act was more forcible than any of the others. It provides that the deed "shall convey a good and perfect title to the property sold, and shall be conclusive evidence of the same in any court of law or equity in the District of Columbia."

That was a very harsh provision, because it not only relieved the holder of the tax title from affirmatively proving the preliminary steps necessary to the validity of his title, but actually precluded the owner of the lot from disputing the validity of the sale. Therefore, the next day an Act was passed amending that provision in this particular. It provided that in place of the words "good and perfect title" there should be substituted the words "*prima facie* title," and in place of the words "conclusive evidence" there should be substituted the words "*prima facie* evidence."

But the object of this, evidently, was simply to give back to the owner of the lot the privilege of contesting the validity of the deed to the property of which he was deprived by the sale. It was not a change in the character of the title when conveyed, provided the title was conveyed strictly in accordance with the law.

But it is said, if that is the construction of this Act, we must necessarily impute to the Legislative Assembly of the District a kind of legislation which almost necessarily results in a loss of part of the public taxes. For instance, it is said that under the Act of 1871 the collector of taxes is obliged to sell for taxes due to the District at a certain time of the year; but a holder of one of these certificates can demand payment at any time of the year and can call on the collector to sell in ten days. So that the periods fixed for the sale of taxes due to the District and those fixed by the certificate holder may be different periods, and therefore, as the two kinds of taxes cannot be embraced in the same sale, there can be but one sale, and the other tax is gone.

This difficulty seems to us more imaginary

than real. The law does not authorize the holder of the certificate to require a sale in ten days. He is entitled, by indorsement on the certificate, to claim or demand that the collector shall enforce the payment of the lien, and it shall be the duty of the officer to *advertise for ten days*.

The ten days refers to the length of time of advertising, but no time is fixed for the commencement of the advertising at all; so that it must be left to some extent to his reasonable discretion. And that is further proved from the closing part of the paragraph, which directs him to include as many lots in the same sale as may be subject to similar liens, on the demand of different parties.

Of course those demands may be made at different times and he must necessarily delay as to one more than the other; and therefore there is no time fixed by law within which he is required to commence to advertise. He is simply to advertise for ten days, and I presume would be at liberty to advertise for a longer period; there is nothing to prevent that.

Now, if at the time of the demand made by the holder of a certificate there is no tax due to the District, no difficulty arises in the enforcement of the lien. And even if a tax is due to the District, practically no inconvenience would follow. The collector is authorized almost immediately after the tax falls due to collect it. He must require the owner of the property to pay within ninety days; and if he fails, then on one month's notice he can collect the tax; so that only a moderate delay in a compliance with the demands of the certificate holder would bring the period of sale for the two taxes together, and it would hardly happen that the right of the collector to sell for general taxes due to the District would not be synchronous with the right of the certificate holder to demand the enforcement of his lien.

After this there were several Acts of Congress passed which seem to reach a case of this kind and which would relieve it of even the supposed difficulty I have spoken of. In 1874, on the 20th of June, the law which was passed abolishing the District Government entirely contained this enactment:

"It shall be the duty of the collector of taxes to prepare a complete list of all taxes and property upon which the same are assessed in arrears on the first day of March, *i. e.* the first of March, 1875, and then ten days afterwards publish them and proceed to collect," etc. It is claimed that this does not refer to any taxes except those directly due to the District. And yet it is comprehensive enough to embrace all taxes covered by these certificates.

The indebtedness which these certificates cover does not cease to be an indebtedness for taxes. It is quite different from the consequences of a sale for taxes. If a sale once takes place, the tax is extinguished; the owner of the property owes nothing but has a right to pay redemption money to the holder of the tax certificate to redeem the property. But these certificates are given for taxes. They do not cease to be taxes because the certificates are assigned absolutely or by way of sale. On the contrary, they are expressly for annual taxes which are to be collected, as taxes, by the collector of taxes; and they are just as much arrears of taxes

as those that remain unpaid to the District Government itself. I am not able to see why they are not included in the general provision that all taxes which are in arrears shall be listed and the property advertised for sale and the property sold with that exception.

Now these Acts comprehend all the tax that was covered by this certificate. It was the duty of the collector to sell for that and the other taxes due to the District at the period mentioned in this Act, which was before the date of the actual sale, to satisfy this one certificate.

That Act was repeated in 1875. That would bring the sale to March, 1876. Some time in the end of December, 1875, probably, the collector received notice to sell for satisfaction of this lien, and he might have postponed it until March and embraced both of the taxes within the same sale.

Several other complications have been suggested as the probable consequences of this interpretation. They do not grow out of the present case and we are hardly called upon to solve them. For instance, it is said that he might issue his certificates for one year's taxes, which the holder could not call upon him to enforce for one year, and then at the end of that year he might issue a certificate for another tax which would run a year. Then the first holder might call for a sale, and the collector would have to sell for his tax and could not sell for the other and must necessarily lose it.

Taking the laws all together, it seems to us that whenever a collector was called upon to sell it became his duty to sell for taxes; and this complication would not really result.

But even if these consequences would follow, it is not the fault of the parties who bought at this sale. It is the fault of the Legislature which enacted this inconsiderate legislation; but at the same time, the very language of the law gave to the purchaser a good and valid title, which seems to us to extinguish all pre-existing liens or titles of every description.

It is unnecessary, in this review of the case, to consider the question of how far the special tax of 1870 was a legal one or not.

We think the claimant is entitled to the relief prayed for.

George E. KIRK

v.

COMMISSIONER OF PATENTS and Secretary of the Interior.

It appearing from the bill that an application for a patent was filed in the Patent Office, in 1874, and definitively refused by decision of the Commissioner in 1875; that no appeal therefrom to the Supreme Court of the District was taken, but that various efforts for the review and reversal of said decision were made from time to time; that in 1885 another application was filed in the Patent Office, which was again rejected for the same cause; that from this last refusal no appeal was taken, but in 1886 a bill in equity under section 4915, R. S. was filed in the Supreme Court of the District of Columbia, the Secretary of the Interior being joined with the

Commissioner of Patents as a party defendant—on demurrer to the bill it was held:

(a) That an applicant for patent is not, in an *ex parte* case, entitled to redress by bill in equity, until he has exhausted the remedy by appeal provided in section 4911, R. S.;

(b) That this application for patent was constructively abandoned in 1877, under section 4895, R. S., because the various efforts to procure a reversal of the decision of 1875, and the application filed in 1885, were irregular and illegal proceedings, not contemplated by said section;

(c) That the Secretary of the Interior may not be made a party defendant to the bill.

(Decided October 18, 1886.)

ON demurrer to bill in equity under Revised Statutes, § 4915. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. Ellis & Johns and R. H. Steele, for complainant.

Mr. D. A. McKnight, for defendants.

Mr. Justice Merrick delivered the opinion of the court:

The case of *Kirk v. Commissioner of Patents et al.* has been submitted upon briefs upon a demurrer to the bill, certified from the special term to be heard here in the first instance.

The bill was filed against the Commissioner of Patents and the Secretary of the Interior, for the purpose of obtaining a patent for certain claimed improvements in an invention alleged to have been made by one Samuel Strong, the complainant's assignor, which patent had been refused by the Commissioner of Patents in the year 1874, and finally refused, as it appears, in the year 1875.

It was an *ex parte* application; and at various intervals from that time down to the year 1885 there were irregular applications to successive commissioners to review the action of the preceding commissioner; and finally there was another application of the same sort made by Samuel Strong in the year 1885, which application is upon its face said to be made "continuous." What the meaning of that is it is difficult to understand. But however that may be, the impediments that are in the way of the complainant, for relief in the mode he has chosen, are insurmountable.

In the first place it is quite apparent that according to the scheme of the patent law there are two classes of cases to which different remedies are applicable, so far as the final action of the commissioner is concerned: there are, first, the cases called "cases of interference," where the action of the Commissioner is final; and, second, the cases of *ex parte* applications, where his action is not final, but where an appeal lies to the Supreme Bench of the District of Columbia by virtue of section 4911, Revised Statutes.

After these respective remedies have been exhausted, the patent law, in its supreme indulgence to the claims of inventors, by section 4915 of the Revised Statutes, allows a further proceeding by way of bill in equity.

Now it is manifest upon the reading of the entire statute (and especially section 4915, which thus gives the further redress) that the party must have exhausted, before he applies for that ultimate redress, each of the successive stages for the perfection of his application which are provided by law. So far as the interference is concerned, the previous stages have been exhausted by the final refusal of the Commissioner; but so far as the *ex parte* application is concerned, his redress is not exhausted until after he has taken an appeal from the decision of the Commissioner. Then only arises to him the right which has arisen already in the interference case upon the decision of the Commissioner to apply to a court of equity for relief by an original bill, according to the terms of the said section.

Now in this particular case, Strong's application, which was filed in 1874, was refused as far back as 1875—definitively refused. He did not appeal to the Supreme Court of the District of Columbia sitting in banc; neither has he appealed to that tribunal from any of the successive refusals of the disconnected applications which he afterwards made. His assignee, therefore, stands without remedy for the grievance of which he complains by his bill in equity.

But further than this, he is entirely without any claim of redress, for the reason that there was a definitive refusal of the application by the Commissioner of Patents as far back as 1875. It was clearly his duty, or that of his assignor, within the terms of the patent law, to have taken some one of those steps which the law provides for him to take within two years thereafter; otherwise his application must be construed to have been abandoned under section 4894, R. S. which is in these words:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application; and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Now, we construe the definitive refusal of the Commissioner of Patents as far back as 1874 or 1875 to be the final action of the Patent Office; and these subsequent irregular proceedings

which have been taken from time to time, crowned by the application of 1885, which is said in the peculiar phraseology of the bill to be a "continuous" application, are not actions taken in the Patent Office or in the court, in the sense of the section to which I have adverted. The action designated there must be some legal action, some proper and appropriate action within the terms of the law for the preservation, maintenance and obtention of the right.

Now here, after the definitive action of 1875, there have been from time to time certain irregular, illegal and unlicensed forms of application for the reversal of that action before the Commissioner of Patents, bringing the matter down to the year 1885 (almost the entire period for which the party would have been entitled to a patent exhausted), and yet the assignee wants now, by application of the remedy by bill in equity, to revive and have efficacy given to this patent application as far back as the year 1877. The court is of opinion that there is nothing in the law, there is nothing in the policy of the law, there is nothing in the principles of justice which would justify any such application of the provisions of section 4915.

There are other objections to the bill raised by the demurrer, concerning certain matters of form, which need not be adverted to further than to notice one: that is, that in no predicament (were the complainant properly in the court, by bill in equity, to press his demand) would it be proper to make the Secretary of the Interior a party to such a bill.

It has long since been adjudicated, and the recent decision in *Hoe v. Butterworth*, 3 Mackey, 229, touched emphatically on that subject, that the Secretary of the Interior has nothing whatsoever to do with the granting or refusal of a patent. While he is the presiding officer over the discipline of the Patent Office, he has no judicial function, so to speak, with regard to the granting of a patent. That belongs to the Commissioner of Patents. There is no appeal to the Secretary of the Interior in that regard; and therefore, he having no control over the granting of a patent, further than to have his name affixed to the letters patent as a matter of form, he is in no sense by proper form of proceeding a party to such a bill in equity.

The demurrer must be sustained and the bill dismissed, with costs.

PENNSYLVANIA.
SUPREME COURT.

Margaret E. MOSEBY'S APPEAL.

Under the facts of this case, held, that a judgment, which was marked satisfied on the record, was not entitled to participate in the distribution of a fund produced by a sheriff's sale, notwithstanding the parol evidence in the case.

(Decided October 4, 1886.)

APPPEAL from a definitive decree of the Common Pleas of Fulton County, distributing the proceeds of a sheriff's sale of real estate. *Affirmed.*

The following facts appeared before John P. Sipes, auditor to distribute the fund:

On June 6, 1886, the Sheriff of Fulton County sold at public sale a tract of land as the real estate of W. L. Moseby, for \$2,000, which is the fund in court for distribution. This tract was conveyed December 3, 1883, by W. L. Moseby and wife to Mrs. Sarah J. Fillman, wife of Jacob Fillman, and was reconveyed by the said Sarah J. Fillman and Jacob Fillman to the said W. L. Moseby, by deed dated March 16, 1885.

At the time of the sheriff's sale there were five judgments which were claimed to be liens against the property; the first two, which were judgments against W. L. Moseby, were paid in full out of the fund; the third was a purchase money judgment of W. L. Moseby v. Sarah J. Fillman and Jacob Fillman for \$368, entered December 5, 1883; the fourth was a purchase money judgment between the same parties for \$364.50, entered December 6, 1883; the fifth was a judgment of Patterson, Renshaw & Co. v. Jacob Fillman, entered February 14, 1884, upon which judgment a *fi. fa.* had been issued prior to the sheriff's sale against Jacob Fillman and W. L. Moseby, *terretenant*, and a levy made.

On March 14, 1885, W. L. Moseby assigned the two purchase money judgments to his wife Margaret E. Moseby; and on April 14, 1885, all the real estate of Mrs. Fillman bound by the lien of said two judgments was released therefrom by Mrs. Moseby, and the judgments as to Mrs. Fillman marked "satisfied" on the record.

Mrs. Fillman had not sufficient separate estate to enable her to purchase the property upon her own credit; and it was conceded upon the argument that it was a purchase by her husband Jacob Fillman.

W. L. Moseby testified before the auditor: "When I repurchased the property from Sarah J. Fillman and her husband, Jacob Fillman agreed to pay the two judgments which Mrs. Moseby then held; and until they were paid, they were to remain liens against Jacob Fillman. When I assigned the judgments to Mrs. Moseby, it was for a valuable consideration."

The auditor found as to the two judgments of Mrs. Moseby that "The fact of actual payment is not denied nor in any way disputed." He accordingly distributed the fund, after the payment of costs, to the uncontested judgments and to the judgment of Patterson, Renshaw & Co., leaving a balance undistributed, and excluding the two judgments of Mrs. Moseby.

Mrs. Moseby filed exceptions to the distribution: 1, that the auditor erred in distributing any part of the fund to the judgment of Patterson, Renshaw & Co., and 2, in not distributing the balance remaining after paying the costs and the first two judgments to her, judgments against Jacob Fillman. No exception was filed as to the findings of facts by the auditor. The court, McClean, *P. J.*, overruled the exceptions and confirmed the report.

The assignments of error specified the distribution of any part of the fund to the judgment of Patterson, Renshaw & Co; the exclusion of the judgments of Margaret E. Moseby v. Jacob Fillman; and the decree of the court dismissing the appellant's exceptions and confirming the report of the auditor.

Messrs. W. Scott Alexander and R. Bruce Petriken, for appellant:

The auditor was bound to distribute the fund according to the record of liens as they are found on the judgment docket.

Kendig's App. 82 Pa. 68.

In the absence of fraud or collusion, the auditor must treat a judgment as conclusive; he has no right to disregard it or allow any later lien priority over it.

Thompson's App. 57 Pa. 175.

Upon the distribution of the proceeds of a sheriff's sale, a subsisting judgment can only be attacked by other creditors collaterally, upon the ground of collusion.

Dougherty's Est. 9 Watts & S. 189; *Lewis v. Rogers*, 16 Pa. 18; *Thompson's App.* 57 Pa. 175; *Clark v. Douglass*, 62 Pa. 408; *Sheetz v. Hanbest's Exrs.* 81 Pa. 102.

Parol evidence is admissible to show that upon a conveyance of the mortgaged premises to the mortgagee the lien of the mortgage was to remain, and to rebut the presumption of a merger by showing an intent to the contrary.

Helmhold v. Man, 4 Whart. 410.

"Parol evidence is indisputably proper to rebut a presumption or an equity. 'The meaning of this,' says Professor Greenleaf in his treatise on Evidence, Vol. 1, part 2, chap. 5, pl. 296, 'is, that where a certain presumption would in general be deduced from the nature of an act, such presumption may be repelled by extrinsic evidence showing the intention to be otherwise.'"

Gibson, *C. J.*, in *Bank v. Fordyce*, 9 Pa. 278.

Messrs. J. Nelson Sipes and W. Rush Gillan, for appellees:

While as to general creditors the title to the real estate sold was in Jacob Fillman, yet Moseby dealt on the basis of the title being in the wife, and he must be held to the legal consequences of the same.

The assignment of the judgments by Moseby to his wife is a subterfuge and a scheme for cheating the creditors of Fillman. It was an attempt to keep alive these judgments to the prejudice of subsequent lien creditors, which, in the absence of other interests which require them to be kept alive for their protection, cannot be done.

Loverein v. Humboldt Safe Deposit & Trust Co. 17 W N. C. 488; *S. C.* 3 Cent. Rep. 590.

Per Curiam:

This fund was correctly distributed. The auditor found as to the judgments on which

the appellant claims that "The fact of actual payment is not denied, nor in any way disputed." It is undoubtedly true that parol evidence is admissible to rebut a presumption or any equity, yet all the evidence in this case is insufficient to postpone the claim of the appellees or to rebut their equities. The appellant is not in a position to successfully claim this fund.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Rachel E. TAYLOR, by Her Father and Next Friend, John F. Taylor, *Plff. in Err.*,
v.

The President, Managers and Company of the DELAWARE & HUDSON CANAL CO.

1. A person **crossing a railroad track** by a common and well known foot path, used by the public for many years, without let or hindrance on the part of the railroad company and its employees, is **not a trespasser**.
2. While such user does not convert the company's right of way into a public highway, it implies a **license from the company**, and charges the company with the duty of using **ordinary care** toward those crossing by the path.
3. Whether such **user** exists, and whether the company exercised **ordinary care**, as regards speed and signals in a given case, or was guilty of **negligence**, which was the proximate cause of the injury, are **questions of fact** for the jury.
4. **Contributory negligence** is not a defense to an action for injuries to a **child**, eight years of age, who is crossing the track by such a foot path.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, to review a judgment of compulsory nonsuit in an action of trespass on the case for negligence. *Reversed.*

At the trial, before Hand, *P. J.*, the plaintiff proved the facts set forth in the opinion of the court below refusing to take off the nonsuit.

The plaintiff offered in evidence also a resolution of the City Councils of Scranton prohibiting railroad companies from running their trains at any street crossing in the city, at a rate of speed greater than five miles an hour, and a resolution requiring railroad companies to station flagmen at the street crossings of their roads in the city. Counsel for the defendant objected to the offers as irrelevant and incompetent, the plaintiff's evidence showing that at no rate of speed could the accident have been prevented, as the plaintiff's own testimony is that she could not see any train coming, over the freight train standing on the side track, and that she did not see any train, and went as quick as she could from in front of the standing locomotive to the track where she was injured, and being a distance of two or three feet, therefore no rate of speed is material upon the

question of negligence of the Company, as the accident to the plaintiff could not possibly have been avoided under the circumstances, at any rate of speed; and they further objected that the crossing at Phelps Street was not one of those mentioned in the resolutions.

The court sustained the objection and excluded the evidence.

At the conclusion of the plaintiff's testimony the court, on motion of the defendant's counsel, entered a compulsory nonsuit.

Subsequently, in discharging a rule to take off the nonsuit, the following opinion was delivered by HAND, *P. J.*:

"This is an action brought to recover damages for injury to the plaintiff, a girl eight years of age at the time of the accident, while crossing the track of the defendant in the outskirts of the City of Scranton, along an alleged foot path, as shown in the testimony.

"The facts of the case are as follows, as gathered from the map and testimony in the case:

"Rachel E. Taylor was sent on the third day of November, 1883, by her mother to Kelley's store, on Phelps Street, about 1 o'clock, to obtain some oil. From her home on the east side of Washington Avenue, in the City of Scranton, she passed across Washington Avenue in a westerly direction, and several other streets running at right angles to Washington Avenue, crossing private property, passed the school house which she was accustomed to attend, and from the school house along a path to the track of the defendant. As she reached the track, a train of cars was standing upon the switch, with a locomotive at the head blowing off steam. She passed immediately in front of the locomotive and around it and, as she went to step upon the main track of the railroad, was struck by a passing passenger train, thrown down and her foot was crushed; her foot had to be amputated, and it is for this injury that suit is brought.

"The train standing upon the switch was a freight train, lying by to enable the passenger train to pass. The passenger train came along at its usual time, running at a rate of from twelve to fifteen miles an hour. The railroad of the defendant at this point is the main line of railroad, not near a depot, and in no yard of the defendant; the switch being used for holding the freight train there while the passenger train passed upon the regular track.

"The alleged foot path went from the school house to the brow of the cut, the railroad being in a cut a few feet in depth, and the path passed down diagonally along the bank, and diagonally across the track. This path was used, so far as the testimony shows, by persons not for the purpose of crossing directly across the track to reach a point, but for the purpose of going along the track itself, and within the right of way of the railroad, for the purpose of reaching Phelps Street, some of the witnesses stating that it was a shorter cut than to pass by the regular streets and alleys of the city. There was an alley running parallel with the railroad, a short distance from it, entirely outside of the right of way of the railroad, which parties could use and reach Phelps Street, as the map shows, by as short if not shorter distance than by the railroad track.

"The little girl testified that she could not see the approaching train by reason of the train standing upon the switch; that her attention was called to the locomotive blowing off steam, which she was afraid would start, and which she passed as rapidly as she conveniently could. Durkin, one of the witnesses who saw the accident and picked the child up, says he saw her running down the bank, saw the train coming, shouted to her with no avail. The accident took place a few feet from him.

"Some of the witnesses testified that the train was stopped at Phelps Street, some just past it. The evidence was that the girl could not see the approaching train and that the engineer of the train could not see her; that immediately as she passed in front of the standing train she was struck.

"It was claimed by the plaintiff that this path was a permissive way. The evidence is that it was not a path leading to any of the works of the Company, nor is it shown that it directly or indirectly acquiesced in it, by any proof except such use of it as the evidence shows. P. M. Walsh, a witness for the plaintiff, who made the map put in evidence, testified that for fourteen years he knew well the locality and made surveys of that locality for Mr. Phelps and the property owners of New Street before he made the surveys for the purpose of this trial; that he was acquainted with the houses in the vicinity of that place about the time of the accident. He says:

"I didn't know the fact of a crossing above Phelps Street until my attention was called to it after the accident, and I was employed to make a survey. I found that there was a foot path there, well defined, a well beaten foot path leading from No. 9 school house across the Delaware & Hudson track up towards Phelps Street. After it crossed the track, the children I presume used it to go up across Phelps Street along parallel with the track of the railroad. The double dotted line upon this map represents the foot path leading across the railroad; then it ceased to be well defined there; people used sometimes to go to Phelps Street this way, and at other times they would not cross it, but would go that way; meaning the east side.

"Other witnesses testified to the use of this path more or less by the school children. One witness Mr. Hull testified that he saw some cross the track and go up the other side of the bank; he is the only witness who testified to that. There is no evidence of any other use of the path directly across the track. Some witnesses testify to the use of the track itself at times between the rails. At the time of this accident there was no flagman stationed at Phelps Street, but there was one stationed there subsequently to the accident. The little girl testified that she heard no bell or whistle; some of the passengers on the train stated that they heard no bell or whistle before reaching the pathway. The distance of Phelps Street was about 127 feet from the place of the accident, and the train was approaching Phelps Street.

"The route the girl undertook to take to go to Kelley's store was along the track of the railroad, although she had not reached the farther side of the track which she attempted to cross; and when the accident occurred she was

upon the railroad after passing the switch of the Company.

"Upon the showing of the plaintiff's witnesses we granted a nonsuit. Our reasons for granting this nonsuit may be stated as follows:

"This is a case of a main track of a railroad with a side switch for the purpose of holding a freight train while the passenger train passes; it is in no yard of the Company where cars are switched back and forth for the purpose of making up trains; it is not near any depot or works of the Company; no agents of the Company are in the locality, except possibly when the freight train is to be switched off and the brakeman may get off his train to turn the switch.

"The path spoken of in the evidence is not a common and public path directly across the track to any point, used by the public for any particular purpose. It is a path used almost entirely by school children to reach Phelps Street. The track and path are in the cut with banks on both sides. The path goes down the bank not at right angles but diagonally; and so far as it crosses the track at all it crosses it diagonally, for the purpose of walking down the track and along it within the railroad company's right of way. The evidence shows that after leading into the cut, the path was used more upon the east side of the track than upon the west, but used sometimes upon both sides and sometimes in the middle. There is no such use of this path as to constitute a presumption of permission on the part of the Company; its use is entirely within a period when continued trespasses could not ripen into a right; it was just such use of the railroad track as is sometimes common in the outskirts of the city, and such as we consider the law severely condemns.

"The Company had the full right of a clear track at that point; it was not a way of necessity; hardly, we think, can the plea of convenience be urged, for an alley a short distance parallel to the railroad was open to Phelps Street, which reached it at the same distance.

"We consider that the plaintiff was a trespasser upon the track, as all others were during the time when crossing this path to go down the track. This case differs in this respect from the cases cited, although it is not so strong in its facts as the case of *Lewis v. R. R. Co.* 79 Pa. 83, in which the court below, and with the approval of the supreme court, withdrew the question of permissive way.

"If the plaintiff was a trespasser, she was entitled to proper care by the Company, but only to proper care, in case such care could avail. The evidence is that she was running; she herself says she was hurrying past the train with the locomotive standing on the switch; she could not see the approaching train; the engineer could not see her; she darted in front of the standing engine, not over ten feet from it, into the approaching train. Her impetuosity and thoughtlessness, common it is true to a child, put her into a place, in disregard of the shout of her teacher, who warned her without hearing, where no care nor possible foresight of the Company could have prevented the accident. The question of speed and signal is out of the case. It is not the case of a trespasser walking on a track in sight

of an approaching train. It is the case of a trespasser out of sight, and comes within the rule laid down in the text books and the decisions which relieve the defendant, in our judgment, from liability.

"We are of the opinion that the use of this track as a byway, as shown in the evidence, is severely condemned by the decisions of our courts, particularly in cities and thickly settled towns. It is true that railroad companies are held to accountability, even against trespassers walking on the track; but this is a reasonable accountability, not an impossible one.

"The case, while perhaps a close one, differs from those to which we have been referred, and in which there is evidence of negligence, suffered to go to the jury.

"After a careful examination of all the cases, we are satisfied that if sympathy should control our decision in this case, it would simply be cruelty to the children frequenting this school house. We therefore grant the nonsuit, because we deem that no negligence is shown such as contributed to the accident; and because it was one of those inevitable accidents, caused by the impetuosity and heedlessness of the child, which could not have been prevented, being upon the track where there was no public crossing, and where the child could not be seen, such as to throw upon the Company any further care than the evidence shows it exercised.

"We refer to 2 Wood's Railway Law, 1891, 1278; *R. R. Co. v. Hummel*, 44 Pa. 375; *R. Co. v. Connell*, 88 Pa. 520; *Moore v. R. Co.* 99 Pa. 801.

"The rule to take off nonsuit is discharged."

Whereupon the plaintiff took this writ and assigned as error the action of the court: 1, in granting a compulsory nonsuit; 2, in discharging the rule to show cause why the nonsuit should not be taken off; and 3 and 4, in rejecting the resolutions offered in evidence by the plaintiff.

Messrs. E. N. Willard and Everett Warren, for plaintiff in error:

Where a person crosses a railroad track by a common and well known foot path, used by the public for many years without let or hindrance on the part of the employees of the railroad company, he cannot be regarded as a trespasser.

R. R. Co. v. Troutman, 11 W. N. C. 453; 1 Rorer, Railroads, p. 476; *Kay v. R. R. Co.* 65 Pa. 278; *Davis v. R. Co.* 15 Am. & Eng. R. R. Cas. 424; *Barry v. R. Co.* 92 N. Y. 289.

Where persons are in the habit of crossing a railroad at a particular place, although there is no right of way there, it throws upon the company the responsibility of taking reasonable precautions in the use of such place.

Barrett v. R. Co. 1 Foster & F. 361; *R. R. Co. v. Dunn*, 56 Pa. 284; *Vanderbeck v. Hendry*, 84 N. J. L. 472; 2 Wood, Railway Law, § 344 and cases cited; *Sweeney v. R. Co.* 10 Allen, 368; *R. R. Co. v. Schwindling*, 12 W. N. C. 349.

The question whether the defendant did or not use reasonable care, considering the circumstances of the case, was for the jury.

Kay v. Pennsylvania R. R. Co. 65 Pa. 278; *Barrett v. Midland R. Co.* 1 Foster & F. 361; *Bateman v. Bluck*, 18 Q. B. 870; *Hepburn v. McDowell*, 17 Serg. & R. 884; *Lefevre v. Lefevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Serg. & R. 267; 806

Reeves v. R. R. Co. 30 Pa. 461; *R. R. Co. v. Spearman*, 47 Pa. 305; *Smith v. O'Connor*, 48 Pa. 222; *Frankford & B. Turnpike Co. v. R. R. Co.* 34 Pa. 345; *Shearm. & Redf. Neg.* § 11; *R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *R. R. Co. v. Hammer*, 72 Ill. 347; *Townley v. R. Co.* 53 Wis. 626; *Bateman v. Bluck*, 14 E. L. & E. 69.

The criterion of the defendant's duty was at least ordinary care, and this was a question for the jury.

Kay v. R. R. Co. 65 Pa. 269; *Huyett v. R. R. Co.* 23 Pa. 373; *R. R. Co. v. Spearman*, 47 Pa. 305; *Smith v. O'Connor*, 48 Pa. 218; *R. R. Co. v. Doak*, 52 Pa. 381; *R. R. Co. v. Henrice*, 92 Pa. 431; *Goshorn v. Smith*, 92 Pa. 438; *R. R. Co. v. Fortney*, 90 Pa. 323; *R. R. Co. v. Morgan*, 82 Pa. 134; *R. R. Co. v. McEluell*, 67 Pa. 311; *R. R. Co. v. White*, 88 Pa. 327.

Especially is this the case where the person exposed to danger is a child of tender years.

Lynch v. Nurdin, 1 Q. B. 29; *R. R. Co. v. Lewis*, 79 Pa. 44; *Murphy v. R. Co.* 45 Iowa, 661; *Brown v. R. R. Co.* 50 Mo. 461; *Daley v. R. R. Co.* 26 Conn. 591; *Barrett v. R. R. Co.* 1 Foster & Fin. 361; *R. R. & Trans. Co. v. West*, 8 Vroom, 91; *Johnson v. R. R. Co.* 6 Duer, 633; *Harty v. R. R. Co.* 42 N. Y. 468; *Finlayson v. R. R. Co.* 1 Dill. 579; *Linsfield v. R. R. Co.* 10 Cush. 562; *Shaw v. R. R. Corp.* 8 Gray, 45; *Delaney v. R. R. Co.* 83 Wis. 67; Just. Inst. liber 4, title 3, p. 6, *De Putatione*; *Nicholson v. R. Co.* 41 N. Y. 525; opinion by Earl, Ch. J.; *Sutton v. R. R. Co.* 66 N. Y. 243; *Hounsell v. Smyth*, 97 Eng. C. L. 729; *British Museum v. Finnis*, 5 Carr. & P. 460; *R. R. Co. v. Hummel*, 44 Pa. 378.

The true rule for determining what is proximate cause is that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances.

R. R. Co. v. Hope, 80 Pa. 373; *Shearm. & Redf. Neg.* § 10 and cases cited.

The erection of an obstruction to the view at a crossing, while not negligence *per se*, should be left to the jury to say whether under the circumstances it was negligence.

2 Rorer, Railroads, pp. 456, 1065, and cases cited; *R. R. Co. v. Goetz's Admr.* 12 Reporter, 616; *R. Co. v. Green*, 67 Ill. 199; *Harris v. Udelhoer*, 75 N. Y. 169; *R. R. Co. v. Feller*, 84 Pa. 226.

The learned judge in the court below rejected our offers of the ordinances and the supplements regulating the speed of trains and the position of flagmen at street crossings.

The evidence was direct and conclusive that the train was coming, at the time the injuries were sustained by this plaintiff, at a rate of speed of at least fifteen miles an hour. This, we submit, the jury would have been justified in inferring was a dangerous and reckless rate of speed, considering the locality of this private crossing and its proximity to Phelps Street and the surroundings. It is beyond reason to say that the train could have slowed to five miles an hour at Phelps Street, only 127 feet distant.

While it is true that trains must be run at a high rate of speed to reach their greatest utility, populous towns and cities must be exceptions, when the speed must be moderated in view of the danger of life, limb and property.

R. R. Co. v. Long, 75 Pa. 265; *R. R. Co. v. Lewis*, 79 Pa. 44; *Shearm. & Redf. Neg.* § 487, and cases cited.

What is a reasonable rate of speed for a railroad train at a crossing is a question for the jury.

R. R. Co. v. Smith, 28 Legal Int. 101; *R. R. Co. v. James*, 81 * Pa. 194.

Railroad companies running their trains through cities or populous towns are held to a degree of care commensurate with the danger involved.

R. R. Co. v. Harmon, 47 Ill. 298; *Johnson v. R. R. Co.* 6 Duer, 633; *Daley v. R. R. Co.* 28 Conn. 595; *Langan v. R. R. Co.* 3 Am. & Eng. R. R. Cas. 356.

In an action to recover damages for alleged negligence, proof of the violation of a city ordinance does not establish negligence *per se*. It is competent evidence upon the question to submit to the jury, but not conclusive.

Knuffle v. Knickerbocker Ice Co. 84 N. Y. 488; *Beisegel v. R. R. Co.* 14 Abb. Pr. N. S. 29; *Massoth v. Canal Co.* 64 N. Y. 524; *Faber v. R. R. Co.* 29 Minn. 465; *Hayes v. R. R. Co.* 111 U. S. 228 (Bk. 28, L. ed. 410); *Meek v. Pennsylvania Co.* 13 Am. & Eng. R. R. Cas. 648.

If a railway company omits to keep a flagman at crossings, and circumstances exist rendering it wanting in ordinary care not to do so, then if injury and damage be caused by reason of such omission, the company is liable.

2 Rorer, Railroads, 1012; *R. R. Co. v. Boyer*, 2 Am. & Eng. R. R. Cas. 172; also cases cited in note, p. 182.

The failure on the part of this Company to comply with the requirements of the ordinance constituted a portion of the proof of negligence and was evidence for that purpose.

Dillon, Mun. Corp. § 713, note; *Massoth v. Canal Co.* 64 N. Y. 424; *R. R. Co. v. State*, 29 Md. 252; *R. R. Co. v. Reidy*, 66 Ill. 44; 4 Am. & Eng. R. R. Cas. 578.

There was evidence of negligence on the part of the defendant Company for the jury, in the failure and omission to ring a bell or blow a whistle or signal in any way on approaching this crossing under the circumstances.

It was not for the judge to say that this failure in no way contributed to the injury.

Kelly v. R. R. Co. 6 Am. & Eng. R. R. Cas. 95; *R. R. Co. v. Stinger*; 78 Pa. 319; *R. R. Co. v. Allen*, 53 Pa. 276.

The testimony of a witness who, being near the crossing, was expressly listening for train warnings and heard none, is of a higher grade than mere negative testimony; and in connection with the negative testimony of other witnesses, it is sufficient to require the submission of the evidence to the jury.

Longenecker v. R. R. Co. 105 Pa. 328; *R. R. Co. v. Hagan*, 47 Pa. 244; *R. R. Co. v. Killips*, 88 Pa. 412; *R. R. Co. v. Ogier*, 35 Pa. 72; *Thomas v. R. R. Co.* 2 Am. & Eng. R. R. Cas. 643; *R. R. Co. v. Benton*, 69 Ill. 174.

In *R. R. Co. v. Hummell*, 44 Pa. 375, the boy when first seen had hold of the cars, and was running along with them, and so was injured. He was a trespasser on the track and cars of the company. That case is clearly distinguishable from the one at bar.

In *R. R. Co. v. Connell*, 88 Pa. 520, a boy between six and seven years suddenly jumped

upon the front platform of a moving street car, fell and was injured.

In *Moore v. R. R. Co.* 99 Pa. 801, the boy was loitering on the track, and walking on the outer edge of the sleepers along the track. He was not on the track at a public crossing. The boy was walking along the track when he was struck, and was clearly a trespasser.

A child crossing a railroad track is responsible only for the exercise of the caution and discretion of which children of its age are presumed to be capable, and not to the degree of care required of an adult.

Casey v. R. R. Co. 6 Abb. N. C. 104.

When both the duty and the measure of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proven.

R. R. Co. v. Walling, 97 Pa. 62; *R. R. Co. v. McEtwell*, 67 Pa. 311; *R. R. Co. v. Henrice*, 92 Pa. 484.

Messrs. Wm. H. Jessup and Horace E. Hand, for defendant in error:

The plaintiff not being a passenger upon the cars of defendant, the burden of proving negligence is upon her; and the legal presumption is against negligence.

Whart. Neg. § 421; *Cotton v. Wood*, 8 C. B. N. S. 568; *R. R. Co. v. Weber*, 76 Pa. 157; *R. R. Co. v. Napheys*, 90 Pa. 142.

If there is no sufficient proof of negligence, the court must take the case away from the jury.

R. R. Co. v. Yerger, 73 Pa. 121; *R. R. Co. v. Heil, Glark v. R. R. Co. and R. R. Co. v. Fries*, 5 W. N. C. 91, 119, 541; *Goshorn v. Smith*, 92 Pa. 435; *Parrot v. Wells*, 15 Wall. 524 (82 U. S. bk. 21, L. ed. 206); *Howard Express Co. v. Wile*, 64 Pa. 201; *Longnecker v. R. R. Co.* 42 Legal Int. 59; *S. C. 105 Pa. 328*; *Hyatt v. Johnston*, 91 Pa. 196; *Ryder v. Wombwell*, L. R. 4 Exch. 32.

The negligence alleged must be the proximate cause of the injury complained of.

Morrison v. Davis, 20 Pa. 171; *Fairbanks v. Kerr*, 70 Pa. 86; *Scott v. Hunter*, 46 Pa. 192; *McGrew v. Stone*, 53 Pa. 441; *R. R. Co. v. Kerr*, 62 Pa. 353; *Fleming v. Beck*, 48 Pa. 313; *R. R. Co. v. Spearen*, 47 Pa. 302; *Goshorn v. Smith*, 92 Pa. 435.

The defendant had a right to a clear track at all points upon the road, except at public crossings.

R. R. Co. v. Hummell, 44 Pa. 375; *Beach, Cont. Neg.* 208; *R. R. Co. v. Goldsmith*, 47 Ind. 43; *R. R. Co. v. Huffman*, 28 Ind. 287; *R. R. Co. v. Eaton*, 53 Ind. 810; *R. R. Co. v. Wolf*, 59 Ind. 89; *Kenyon v. R. R. Co.* 5 Hun, 479; *Green v. R. Co.* 11 Hun, 333; *R. R. Co. v. Schwindling*, 101 Pa. 253; *R. R. Co. v. Houston*, 95 U. S. 697 (Bk. 24, L. ed. 542); *Gaynor v. R. Co.* 100 Mass. 208; *R. Co. v. Collins*, 87 Pa. 405.

At public crossings the rights of railroad companies are concurrent with those of the public.

Reeves v. R. R. Co. 80 Pa. 454; *R. R. Co. v. Heileman*, 49 Pa. 60; *Wood, Railway Law*, 1322.

Travelers must stop, look and listen, before entering upon the track at such crossing; a failure to do so is negligence *per se*.

R. R. Co. v. Beale, 78 Pa. 504; *Weiss v. R. R. Co.* 79 Pa. 387.

If obstacles obstruct the view they must use increased vigilance.

Wood, Railway Law, 1829; *Garland v. R. Co.* 8 Brad. (Ill.) 571; *Haas v. R. R. Co.* 47 Mich. 401; *Cordell v. R. R. Co.* 70 N. Y. 119; Beach, Cont. Neg. 208; *Thomas v. R. R. Co.* 19 Blatchf. 538.

Where the defendant has a right to a clear track, all persons not in the employ of the defendant, going upon such track, are trespassers.

There is no difference in the rule between children and adults.

Moore v. R. R. Co. 99 Pa. 301; *Cauley v. R. R. Co.* 95 Pa. 308; *S. C.* 39 Legal Int. 348.

The defendant owes no duty to trespassers, either to give signals or use ordinary care.

R. R. Co. v. Spearen, 47 Pa. 301; *Harty v. R. R. Co.* 42 N. Y. 471; Wood, Railway Law, 1827; *R. R. Co. v. Schweindling*, 101 Pa. 262.

It is only liable for gross or wanton injury.

Wood, Railway Law, p. 1263; *Mulherrin v. R. R. Co.* 81 Pa. 366.

A license must be proven to be with the knowledge and consent of the defendant.

No inference of consent can arise from an inference of knowledge.

R. Co. v. Henrice, 92 Pa. 481; *Douglass v. Mitchell's Exrs.* 85 Pa. 442.

Where want of ordinary care as to rate of speed is alleged as the proximate cause of injury (as in this case), yet if it appears from the plaintiff's own case that ordinary care in that respect would not have avoided the injury, such want of ordinary care would be immaterial and impose no liability.

Goshorn v. Smith, 92 Pa. 485; *R. R. Co. v. Long*, 75 Pa. 268; *Pa. R. R. Co. v. Morgan*, 82 Pa. 141; *R. R. Co. v. Houston*, 95 U. S. 697 (Bk. 24, L. ed. 542).

The same rule holds good with reference to omission of signals.

R. R. Co. v. Spearen, 47 Pa. 300; *Cosgrove v. R. R. Co.* 13 Hun, 329; *Cauley v. Pitts. C. & St. L. R. Co.* 39 Legal Int. 348.

As the plaintiff was a trespasser, not at a public crossing, the omission to have a flagman (even if required by ordinance) at Phelps Street did not cause or contribute to the injury, and therefore was immaterial.

Briggs v. R. R. Co. 72 N. Y. 26; *R. R. Co. v. Ervin*, 86 Legal Int. 244; *Atkinson v. New Castle Water Works*, L. R. 2 Exch. Div. 441; *Couch v. Steel*, 8 Ellis & Bl. 402; *Kirby v. Boylston Market Assn.* 14 Gray, 249; *Flynn v. Canton Co.* 40 Md. 312; 2 Am. & Eng. R. R. Cas. 183, note.

Mr. Justice Sterrett delivered the opinion of the court:

In his opinion refusing to take off the compulsory nonsuit, the learned president of the common pleas concedes that the case is a close one, but appears to think the judgment should be sustained on the ground that the child's unfortunate injury resulted from her own impetuosity and heedlessness and not from any neglect of duty on the part of defendant Company. If he is correct in this, the nonsuit was rightly entered. But plaintiff's contention is that the jury would have been warranted in finding negligence of the Company defendant from which the injury complained of resulted;

308

that the testimony tended to prove such facts and circumstances as bring the case within the general principle recognized and approved by this court in *R. R. Co. v. Troutman*, 11 W. N. C. 458, in which it is ruled that where a person crosses a railroad track by a common and well known foot path, used by the public for many years without let or hindrance on the part of the railroad company and its employees, he cannot be regarded as a trespasser; and where it is shown, as was done in this case, that the foot path across the company's land has been habitually used by the public for many years without objection, it is for the jury to say whether the company has not acquiesced in such use.

While such user does not convert the company's right of way into a public highway, it certainly does relieve persons passing on the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise towards mere trespassers and those who may be using the right of way by tacit consent or implied permission of the company.

In the case of such long continued user by the public, the company and its employees are charged with notice of the fact, and therefore cannot with impunity neglect precautions to prevent danger to persons thus using the same.

In *Barry v. N. Y. Cent. R. R. Co.* 92 N. Y. 289, it is said: "The acquiescence of defendant for so long a time in the crossing of the tracks by pedestrians, amounted to a license and permission by defendant to all persons to cross the tracks at this point. These circumstances imposed a duty on the defendant, in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed, but, so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. * * * The company, in such cases, is an actor at the time in creating the circumstances which imperil human life, and it would be an alarming doctrine that it was under no duty to exercise any care in the movement of its trains."

The principle clearly settled by the foregoing and many other cases that might be cited is that when a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point, not in itself a public crossing, it owes the duty of reasonable care towards those using the crossing; and whether in a given case such reasonable care has been exercised or not is ordinarily a question for the jury under all the evidence.

Without undertaking to review the testimony on which plaintiff relied, we think the evidence is quite sufficient to warrant the submission of her case to a jury on the question of permissive crossing at the point where she was injured, and whether in the movement of its train the Company exercised that degree of care which,

under the circumstances, it was in duty bound to do.

There was testimony tending to show that the whistle was not sounded, the bell not rung, nor any warning given of the approach of the train by which plaintiff was struck. This was properly for the consideration of the jury; and in view of all the circumstances, including the fact that the siding was occupied by a standing train of cars and the main track thus out of view, we have no right to say the jury would not have found negligence in not warning those who might be in the act of crossing that the train was approaching.

If plaintiff had been duly warned, either by sounding the whistle or ringing the bell, it is not at all probable she would have attempted to cross the track in the face of known danger. The question of contributory negligence does not arise in the case. The age of plaintiff at the time of the accident precludes that. If, under the evidence, she was not a trespasser on the premises of the Company, the question is whether it was not its duty to give suitable warning of the approach of its train; and, failing to do that, whether it was not guilty of negligence which was the proximate cause of the injury.

The first and second specifications of error are sustained. There was no error in refusing to receive the evidence specified in the third and fourth assignments, and hence they are not sustained.

Judgment reversed and a procedendo awarded.

Charles RICHARDSON *et al.*, *Appts.*,

v.

Benjamin RICHARDSON *et al.*

1. **Under a residuary devise** "to my said beloved wife (naming her) for the term of her natural life; and upon the decease of my said wife, I do order and direct that all the said residue and remainder of my estate be sold by my executor; and after paying the afore named bequests it is my will and I do order that the moneys arising therefrom and so remaining shall be divided among my children (naming seven of his nine children) share and share alike; and if any of my last named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to if living shall go to such issue," **the children take vested remainders in fee at the death of the testator, his wife surviving.**
2. **A tenant in common** acting as attorney in fact for his cotenants in the collection of rents, etc., **may purchase for himself the share of a cotenant.**
8. **The other cotenants can not claim the benefit of the purchase,** especially after notice to elect and pay, and failure to do so within a reasonable time.

(Decided October 4, 1886.)

APPEAL from a decree of Common Pleas No. 2 of Philadelphia County, dismissing a bill in equity for an account, etc. *Affirmed.*
PA.

The bill was filed by Charles Richardson, William C. Richardson, Emma Walton, and Joseph H. White and Elizabeth B., his wife, in right of the wife, to compel defendant, Benjamin Richardson, to render a true account of all moneys, and the disbursement thereof, received by him, or made on account of certain real estate devised by William Richardson, deceased, to take charge and management of which property, as attorney in fact, defendant had been appointed by complainants, parties in interest under the will of the said William Richardson, and for the ascertainment and award of the true shares of complainants in said property.

On October 29, 1881, the complainants, the defendant's attorney consenting, by leave amended the bill by adding Elizabeth Richardson, widow of Edward Richardson, deceased, as a party defendant. On March 2, 1882, the death of Emma Walton, one of the complainants, was suggested of record and the record amended by substituting the executor of her last will and testament, William L. Dilkes, as a party complainant in her stead.

The bill averred in substance that William Richardson died in 1855, seised of certain realty, and leaving a will dated December 15, 1854, and proved January 25, 1855. In the residuary clause of the will, which is the principal clause to be regarded in considering the questions raised in the case, he gave the residue of his estate "To my said beloved wife, Jane Richardson, for the term of her natural life; and upon the decease of my said wife, I do order and direct that the said remainder of my estate be sold by my executor; and after paying the afore named bequests it is my will and I do order that the moneys arising therefrom and so remaining shall be divided between my children: John, Elizabeth Berley, Edward, Charles, Emma, William Carman, and Jane, share and share alike; and if any of my said last named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to if living shall go to such issue."

The bill averred that the testator left surviving him his wife Jane Richardson, and his children: John, Elizabeth B., Edward, Charles, Emma, William C., Jane, and Benjamin the defendant. Jane the widow died August 8, 1878; Jane the daughter married Augustus W. Boener, and died March 6, 1874, intestate and without issue; Augustus W. Boener still survives; Edward Richardson, a son, died June 2, 1877, intestate, leaving surviving him his widow Elizabeth Richardson, the defendant, and one child William, who died during minority unmarried and without issue, on March 8, 1878. John Richardson, a son, died December 8, 1878, leaving a will, by which he gave his share of the proceeds of the real estate bequeathed to him by his father's will to William C. Richardson and Emma Walton, two of the plaintiffs, and Benjamin Richardson, the defendant, in equal parts. Elizabeth B. Richardson, a daughter, is now intermarried with Joseph H. White; Emma Richardson, a daughter, married Lloyd H. Walton, since deceased.

The bill further avers that the plaintiffs and the said John Richardson, on August 26, 1878, on the death of the widow Jane, appoint-

ed Benjamin Richardson, their attorney in fact, to take charge of the real estate directed by William Richardson's will to be sold, to collect the rents and to account to them for their proper proportions thereof, since which time he has acted as their attorney; but as is averred he has not properly accounted to the plaintiffs for their due proportions of the same, pretending that he is the owner of the share bequeathed to Jane Boener, and that Elizabeth Richardson, the widow of Edward, is entitled to a share of the said rents.

The bill charged that the defendant is not so entitled as he pretends, and that the accounts rendered by him are not true and correct. Wherefore they pray relief that the defendant render a true account of the moneys received and disbursed by him in respect to the said real estate, and that the plaintiffs' shares in the net balance be ascertained, and that the defendant be directed to pay their respective shares of the same to them, etc.

The answer of the defendant, Benjamin Richardson, averred that the facts set forth in the bill were true, except that the last will and testament of John Richardson, deceased, admitted to probate on December 12, 1878, was in the words following, namely: "I, John Richardson, do make this my last will and testament. I give and bequeath and devise all my property and estate to Benjamin Richardson, Emma Walton and William C. Richardson, absolutely, in fee simple, in equal shares, with the following proviso and condition: should the said Emma Walton be deceased at the time of the partition of the estate, or any part thereof, then it is my will that the share of the said Emma shall go to the above mentioned Benjamin Richardson, except the sum of \$250, to Harry Hooper Walton. I appoint the said Benjamin Richardson executor of this, my will;" and that the said Emma Walton died June 23, 1881, before any partition of the estate, or any part thereof in said will mentioned.

That on August 26, 1878, John Richardson, Charles Richardson, Emma Walton, William Carman Richardson, Joseph H. White, and Elizabeth H. White, in writing, appointed the defendant their attorney in fact, "to collect, receive and give acquaintance for all rents and moneys due or to become due upon the real estate late of William Richardson, deceased, and to take all legal or other proceedings to collect the same; and let said real estate to such tenants and on such terms as the said attorney may deem expedient," and that the foregoing was the defendant's whole authority in the premises.

That the defendant has duly accounted to his constituents under said letter of attorney, and that the only dispute between him and them is a claim on the part of the plaintiffs that Elizabeth Richardson, the widow of Edward, is not entitled to a share of the rents, and that the defendant, as assignee of Augustus Boener, is not entitled to a share of said rents, or if he is, that he is entitled for their benefit as well as for his own.

The answer further averred that the said Augustus W. Boener, on May 14, 1879, conveyed to the defendant his share in the estate for \$500, in cash, and release of claims which he owed defendant's mother, which claims amounted to over \$2,000, and which had been

bequeathed by defendant's mother to him, and that soon afterwards the plaintiffs united with the defendant and with Elizabeth, widow of Edward Richardson, in a sale of a lot at Tacony, belonging to William Richardson's estate, the conveyance reciting the interest of the said Boener and its purchase by the defendant, and the plaintiffs and their counsel being acquainted with the same.

The answer further averred that after said conveyance, defendant rendered accounts in which he was credited with the Boener interest, and Elizabeth Richardson with the share of Edward, and that the plaintiffs never claimed any benefit of the defendant's purchase of the Boener interest.

The answer further averred that in the fall of 1880 some of the plaintiffs began to claim a share in the benefit of the defendant's purchase of the Boener interest, and that subsequently they claimed that no property or estate passed to him by reason of the said purchase, and that neither the said Boener nor the said Elizabeth had any interest in the estate of which the testator died possessed.

On March 12, 1881, the defendant wrote to the plaintiffs' counsel asking them to elect whether they would or would not claim the benefit of the Boener purchase; whereupon, the plaintiffs, through their counsel, on March 18, 1881, declined to make any election, and thereafter filed this bill, without making any election, and averred a general account of past transactions, which are the subject of a settled account between the parties.

The answer further averred that the defendant, as assignee of Augustus W. Boener, is entitled to an undivided seventh of the estate, free from all trusts for the plaintiffs' benefit, and also that Elizabeth Richardson is entitled to an undivided seventh of the estate. The answer then avers that the plaintiffs have no right to apply for relief to this court, and pleads to the bill, and to the whole relief therein prayed for: first, that Elizabeth Richardson is a necessary party to the bill; second, a settled account.

The cause was referred to George Tucker Bispham, Esq., as examiner and master, to find the facts and report a decree. He found the facts as set forth in the bill and answer, and reported besides as follows:

"There are two general questions which are to be passed upon in deciding the rights of the parties to this controversy: first, Was the interest of the children of the testator a vested one during the lifetime of the widow? and second, if that is so, Was the purchase of the Boener interest by the defendant, made under such circumstances that the plaintiffs are now entitled, after what has passed, to claim the benefit of it?

"The first question, while not, possibly, free from difficulty, may nevertheless be perhaps properly decided in the light of one or two general and well settled principles and of a few authorities in this State.

"We start with the general rule that bequests are to be treated as vested rather than contingent, if the language of the instrument is capable of admitting of such a construction. It is also a well established rule that where beneficiaries are mentioned by name, the doctrine

Of survivorship does not ordinarily apply, although it is true that the mere fact that the beneficiaries are named does not necessarily exclude that doctrine.

"It is further to be noted in the present case that the residuary clause of the will is distinguished by the absence of certain phrases, the construction of which by the courts has not always been uniform, but which might indicate a contingent gift. Thus, in the bequest to his children, William Richardson makes no use of any such expressions as "all my children who shall be then living," "all the children that shall then be living and the lawful issue of such as may then be deceased," and the like. These forms of expression have often been held to signify contingencies, and perhaps just as often the contrary.

McBride v. Smith, 54 Pa. 245; *Buzby's App.* 52 Pa. 111; *Delbert's App.* 88 Pa. 462; *Schweibert's Est.* 40 Legal Int. 194; *Appeal of Lumbermen's Bank*, 13 W. N. C. 191; *Manderson v. Lukens*, 23 Pa. 31; *Womrath v. McCormick*, 51 Pa. 507; *Crawford v. Ford*, 7 W. N. C. 532; *Laguerenne's Est.* 12 W. N. C. 110.

"Their absence, however, is worthy of note, as furnishing an argument in favor of the vested character of the interests.

"There is in other words in the will under consideration no language which on its face suggests a gift to persons who shall be alive at a specified time.

"The case is in substance, so far as the first words in the residuary clause are concerned, a present gift to children with the time of distribution postponed. That such postponement will not interfere with the present vesting of the gift must now be considered as thoroughly settled.

Womrath v. McCormick, 54 Pa. 504; *Manderson v. Lukens*, 23 Pa. 31; *Crawford v. Ford*, 7 W. N. C. 532; *Laguerenne's Est.* 12 W. N. C. 110.

"The question then is: Do the subsequent words modify the intention thus gathered from the first part of the sentence?

"The fact that there is no gift to the children other than that found in the direction to the executors to distribute *in futuro* will not prevent the immediate vesting when, as in this case, the gift is postponed only to accommodate the estate by enabling it to meet the burden imposed by the gift to the first taker.

2 Wms. Exrs. 1844; *McClure's App.* 72 Pa. 414.

"Nor, in my judgment, does the added gift to any deceased donee, leaving issue, vary this construction; that only defines the quantity of estate and refers to the succession of the interest.

Womrath v. McCormick, 54 Pa. 504; *Crawford v. Ford*, 7 W. N. C. 532; *Laguerenne's Est.* 12 W. N. C. 110; *Schweibert's Est.* 40 Legal Int. 194.

"I do not think, therefore, that either the postponement of the gift, or the fact that there is no gift to children other than that found in the direction to the executor to distribute *in futuro*, or the added gift to issue of any deceased donee leaving issue, renders the estate contingent, under the authorities above referred to.

"But it is to be seen whether from the entire language of the residuary bequest, there can be

gathered an intention on the part of the testator to limit the ultimate beneficiaries to such of his children as should be alive at a certain time or should answer a certain description; because if no such intention can be gathered from the general scope of the residuary bequest, the will is to be construed as giving what the disposing words under the above authorities would seem to assert, namely: an absolute vested estate to the parties named in it.

"It was argued that the general intent of the testator was to benefit a class, the constituents of which were to be the survivors of certain named children, who shall be living at the death of the widow; but I do not think that the argument in this case, that the legacies are to be considered as given to the named children as a class, is a sound one. I do not see anything to take this residuary gift out of the rule that children named take as individuals, and not as a class.

2 Jarm. Wills. p. 701 and cases there cited.

"The only other question remaining to be considered under this branch of the case is whether the dying without issue constitutes a condition subsequent or a divesting contingency. It is to be noticed that whatever contingency existed in this respect is inferential, nothing of the kind being expressly stated in the will. It would have been very easy (as was done in *Peterson's App.* 88 Pa. 397) for the testator, if he had wished to do so, to indicate in his will that the death of any child without issue would have the effect of divesting the estate of the parent, by casting it upon the survivors. In the absence of such express divesting contingency, one ought not to be inferred.

Gray v. Garman, 2 Hare, 268; *Salisbury v. Petty*, 3 Hare, 86, cited in 2 Wms. Exrs. 1359; *Laguerenne's Est.* 12 W. N. C. 110.

"I am, therefore, of the opinion that the interest of Jane Boener was vested during the lifetime of the widow, and that the interest of Edward Richardson was likewise so vested. In what way, exactly, the interest of Jane Boener passed to her surviving husband is not, perhaps, clear; but it seems to me that this is a question which concerns only Jane Boener's personal representatives on the one hand, and the purchaser from her husband on the other. If they are satisfied (the one that the title has passed, and the other that it has been acquired), I do not see how the other children of the testator have anything to do with the matter. The interest of Edward passed, on his death to his son; and upon the death of his son, Elizabeth A. Richardson took the share under the Intestate Act.

"Second. The facts as to the purchase by Benjamin Richardson remain to be considered. They are as follows:

"The terms of the will were such that a legacy of \$500 to the testator's reputed son William was made a lien upon the residuary real estate. For the purpose of discharging this lien and paying the legacy, it was proposed in the family that a lot of ground at Tacony, belonging to the estate, should be sold.

"Benjamin Richardson (who had, it seems, been advised or told that Jane Boener's interest under the will was vested in her during her lifetime and had passed on her death to her husband) requested Mr. Boener to unite with the

other devisees in a conveyance of the Tacony lot. Boener declined to do this; and thereupon Benjamin bought his interest in the whole estate for \$500 in cash, and a release of an alleged claim which he (Benjamin) as an executor and sole legatee of his mother's estate, had against Boener, for moneys advanced by his mother for the support of Mrs. Boener, and for her funeral expenses. The amount thus alleged to have been advanced was \$2,000.

"A deed for the Tacony lot was then prepared and was signed by all the devisees. It appears that in the deed there was a recital that Benjamin had become the assignee of the Boener interest.

"I find as a fact that, at the time of the execution of the deed for the Tacony lot, the plaintiffs knew that Benjamin had purchased and claimed to be the owner of the Boener interest. The deed itself recited the fact; and in the absence of fraud it is to be presumed that the parties to an instrument are acquainted with its contents.

"This presumption is strengthened by the fact that both William C. Richardson and Charles Richardson were informed by Benjamin, at or about the time of the execution of the Tacony deed, that he had had some difficulty in getting Boener to unite in the sale, but had finally 'fixed the matter.' This certainly was sufficient to put them upon inquiry; and, from all that took place (as appears by the testimony) I find as a fact that both William C. and Charles had notice, either personally or by their attorney, that Benjamin was then the assignee of the Boener interest.

"There is no question that prior to the filing of the bill, namely: on March 12, 1881, the plaintiffs were fully advised, by a letter addressed to their counsel by the counsel for the defendant, of the fact of Benjamin's purchase, and were then asked to make their election whether they declined to have any share in the purchase or whether they would claim the benefit of it, in which latter case they were asked to say that they would contribute their share of the purchase money, whatever that purchase money might be.

"The plaintiffs declined to make any election; and this declination was repeated before the master and has continued to the present time.

"Under the facts as found in this report, I am of opinion, upon this branch of the case:

First, that the relation to the plaintiffs which Benjamin Richardson occupied was not such that they were entitled to claim the benefit of his purchase of the Boener interest. It is true that he was attorney in fact of the plaintiffs to collect the rents; but he was also a co-owner with them, having acquired an interest under the will of his brother John. If Boener also had an interest, there seems to be no reason why Benjamin was not entitled to purchase it for himself, and without being obliged to account to the owners for the purchase. If one of several tenants in common purchases from another, under such circumstances, I do not think that there is any rule of equity which requires him to allow his cotenants the benefit of the purchase. The case is entirely different from the purchase by one co-owner of a claim or encumbrance against the whole estate. The purchase of an adverse claim might operate to the

injury of all the tenants in common, and they all are therefore well entitled to claim the benefit of it. But I do not see upon what ground one out of five or six tenants in common who buys an interest of one of his cotenants can be compelled to admit his remaining cotenants to the benefit of the purchase.

"Second, that the plaintiffs, even if they ever were entitled to claim the benefit of the Boener purchase, were bound to elect so to do within a reasonable time after knowledge and especially after notice and demand; and having failed to do this, in the present case, they cannot now be heard to insist upon being given the benefit of the purchase. If the Boener title was doubtful, but the plaintiffs desired to claim the benefit of it, they should have promptly offered to share the risk. Before the bill was filed they were fully informed of all the facts; and they ought not in fairness to throw the whole burden of the uncertainty as to the legal question upon Benjamin. If they affected to regard him as their agent in the purchase, they should have either promptly ratified it or promptly disavowed it.

"The view taken above renders it scarcely necessary to consider the question as to how much Benjamin paid for the Boener interest. If, however, the question should become material, then in my judgment the plaintiffs, if they are entitled to the benefit of Benjamin's purchase, must pay him their proportion of \$2,500, at which sum the consideration of his purchase from Boener ought properly to be fixed. This amount was made up of \$500 in cash, and a release of claims, as already stated, of \$2,000. If the settlement between Boener and Benjamin Richardson was in good faith (and there is no evidence to show that it was not), the figures agreed upon by them should be taken as fixing the consideration which Benjamin paid.

"Upon the whole case, therefore, I report that the defendant has fully accounted to the plaintiffs, and that there is nothing in his hands due them or any of them in respect of their shares of rents collected by him.

"I report, consequently, that a decree should be entered dismissing the bill with costs."

The court below entered a decree accordingly; whereupon, the plaintiffs appealed and assigned as error the action of the court in finding that under the will of William Richardson, deceased, the interests of John Richardson, Elizabeth Berley White, formerly Richardson, and Joseph H. White, her husband, in right of the said Elizabeth, Edward Richardson, Charles Richardson, Emma Walton, deceased, formerly Richardson, William Carman Richardson, and Jane Richardson, and Augustus W. Boener, her husband, in right of said Jane, in the residuary estate of William Richardson, deceased, were vested during the lifetime of Jane Richardson, the widow of the testator.

Also the action of the court in entering a decree that the bill should be dismissed with costs.

Messrs. Walter Murphy, Robert H. Hinkley and George Junkin, for appellants:

Where there is no antecedent absolute gift of a future legacy, independent of a direction and time of payment, the legacy is contingent.

Moore v. Smith, 9 Watts, 408; *Leake v. Robinson*, 2 Merivale, 363; *Appeal of the Lumbermen's Bank*, 13 W. N. C. 191.

The gift was to the testator's children, not as individuals, but as a class; and not to the class as it existed at the time of his death, but to the class restrictively defined by survival of the life tenancy.

The naming of some of a class of children, or others of a number of beneficiaries, does not by any means, of itself, render the gift any the less a gift to a class. Thus, in *Porter v. For*, 6 Simons, 485, the gift was to the testator's grandchildren and to his nephew T. O.

In *Clark v. Phillips*, 17 Jur. 886, to the children of A, the children of B, and to D.

In *Re Stanhope's Trusts*, 27 Beav. 201, by name to four of the testator's five living daughters and their issue, with a subsequent provision that every daughter his wife might thereafter have should be admitted.

In *Aspinall v. Duckworth*, 35 Beav. 307, to a nephew A, and the children of a lately deceased sister. All of these gifts were held to be gifts to a class.

Williams v. Neff, 52 Pa. 333, which seems to decide *contra*, is opposed to the weight of authority on this subject if that decision is rested solely upon the fact that the beneficiaries are all named. A gift to several children, or other persons, all of whom are named, may very often be construed to be a gift to those children or persons as individuals. But such a decision cannot be rested on the sole ground that the beneficiaries are each named. The reason is always found in other clauses or in the general scheme of the will.

In *Hoppe v. Tucker*, 59 N. Y. 202, the testator divided his estate into six parts, corresponding to the number of his children, giving substantially one part to each or to their children. One part (after deducting a specific legacy) he bequeathed "in equal proportions, share and share alike" to A, B and C, children of his deceased daughter A. M. It was held that while the clause, taken alone, would be construed as a bequest to the persons named as individuals, yet in order to effectuate the general scheme of the will (which in this case was that the issue of all his children, where they took under the will, should take by representation) it must be construed as a gift to a class.

So also a gift of a residue to A, B and C, sons of testator's deceased brother, was held to be a gift to a class in *Bolles v. Smith*, 39 Conn. 217, upon the sole ground that a duty was placed upon them by the testator, which they must jointly perform, the duty namely, of paying from the residue a pecuniary legacy to the testator's wife, and several other legacies (which payments in fact amounted to nothing more than the ascertainment of the residue itself).

See also *Page v. Gilbert*, 32 Hun, 301.

The law always favors that construction of a will which would prevent intestacy as to any part of the testator's property.

Stelman v. Stehman, 1 Watts, 466; *Azford's Est.* 2 W. N. C. 663; *Board of Missions' App.* 91 Pa. 507.

In applying this principle it is immaterial that no alleged intestacy did as a matter of fact happen to occur, for as is said in *Jarman on Wills*, p. 469: "In construing wills we must

look indifferently at actual and possible events."

Nothing in the construction of wills is better established than that a gift to an individual lapses by the death of that individual before that of the testator; while if the gift be to a class, the share of a member of that class predeceasing the testator does not lapse, but inures to the surviving members.

Jarm. Wills, p. 623 and cases cited.

As the legacies here are of the residue itself, a lapse must necessarily occasion intestacy. If, therefore, the interests here given are to the children as *persons designates*, and not as a class, then the testator has made just the kind of a will which the law by virtue of the principles above stated universally presumes a testator not to have intended to make.

The gift here was not only not to designated persons and to a class, but that that class was to be ascertained at the time of distribution, namely: the death of the life tenant.

The residuary estate is converted into personality at the expiration of the life estate; and therefore the interest of all the remaindermen are interests in personality.

"Issue" in a limitation of personal property take as purchasers, the reason of the rule being that the operation of law, whenever possible, "makes real estate descendible and personal estate distributable."

Re Wynch's Trusts, 17 Jur. 588; *Myer's App.* 49 Pa. 111; *Sheet's Est.* 52 Pa. 257; *Snyder's App.* 95 Pa. 174; *Clark's Est.* 14 W. N. C. 94.

Womrath v. McCormick is a case which, even as applied to gifts of real estate, was received with surprise on all hands, has been restricted as closely as possible, followed reluctantly in a few cases and tacitly overruled in the *Lumbermen's Bank's App.* 13 W. N. C. 191, and *Barger's App.* 100 Pa. 239.

It certainly could not be extended, beyond its own operation, to gifts of personal property, in flat disregard of the principle that "issue" in such gifts are purchasers.

Messrs. Crawford & Dallas, for appellees:

The will works a conversion as to the realty by the direction to sell on the widow's death; and if the clause would give a vested estate, if the subject were realty, it would of course give a vested interest in the personality.

McClure's App. 72 Pa. 421.

The well established principles that the substance and not the form of (the gift is the material consideration to determine whether it is vested or contingent—that if there is a doubt upon the construction, the law vests the gift—that where futurity in a gift relates not to the substance of the gift, but to the time of its payment, and there is an antecedent absolute gift of a life estate and the gift in question is postponed for its benefit, to let it in, although there be no other gift than in the direction to pay or distribute *in futuro*, the gift is vested—determined the supreme court in *McClure's App.* 72 Pa. 415, to decide in a precisely similar case to the present, that a gift of realty to a wife for life and on her death "to be sold and equally divided amongst my nephews and nieces, namely:" and naming them, gave them a vested legacy on the testator's decease.

This was affirmed in *Chees' App.* 87 Pa. 364, *Mr. Justice Sharswood* there stating that *Mr. Justice Williams'* opinion in *McClure's App.*

was an elaborate and exhaustive opinion on the subject. This construction as to realty was assumed in *Cote's App.* 79 Pa. 235.

Nor does the added gift to issue of any deceased donee leaving issue vary this construction. That only defines the quantity of estate, and refers to the succession of the interest.

Womrath v. McCormick, 51 Pa. 504; *Crawford v. Ford*, 7 W. N. C. 532, and *Laguerenne's Est.* 12 W. N. C. 110.

In each case the gifts in question were of a residue of both personality and realty.

In the *Lumbermen's Bank's App.* the gift was to children then living, and decided expressly upon the authority of *McBride v. Smyth*, 54 Pa. 248, and previous cases; which last case and *Fairfax's App.* 13 W. N. C. 274, decide that it is only where the gift is to such child or children or individuals as shall attain a certain age or sustain a certain character or do a particular act or be living at a certain time, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the person to take, that a different construction obtains, following the established rule expressed in Smith's Executory Interests, p. 281.

In *Barger's Appeal*, 100 Pa. 239, the will, which was that of a very eminent lawyer, who knew the use of legal terms, expressly provided in legal phrase that the gift should not vest during the time in question after his death.

The term class, applied to a gift involving survivorship and upon the question of vesting, "is applicable only to the case of a plurality of persons comprised under one general description, indefinite in number and individually undistinguished by name or particular description."

Lord Langdale, in *Burrell v. Baskersfield*, 11 Beav. 525.

Therefore, if a testator in a gift to children, or any plurality of persons comprised under one general description, names them (*Bain v. Lescher*, 11 Sim. 397; *Burrell v. Baskersfield*, 11 Beav. 525; *Re Hull's Est.* 21 Beav. 314; *Creswell v. Cheslyn*, 2 Eden, 123; *Re Gibson*, 2 Johns. & Hem. 656; *McClure's App.* 72 Pa. 421; *Williams v. Neff*, 52 Pa. 383), or only specifies their number, as, to the five children of A (*Creswell v. Cheslyn*, 2 Eden, 123; *Re Smith's Trusts*, L. R. 9 Ch. Div. 117; *Re Stansfield*, L. R. 15 Ch. Div. 84), this is a *designatio personarum*, and not a gift to a class, and of course without survivorship.

Sir W. Paigé Wood, V. C. said, in *Re Gibson*, that with the exception of *Knight v. Gould*, 2 Mylne & K. 295, where the gift to three executors by name and office was held to be a gift to them as a class, passing to the two survivors, because given as a reward for performing their office, and the office being joint, their reward should be joint, he knew of no case of a gift to persons "herein before" or "herein after" "named" or "mentioned" in which the gift was held to be to a class, involving survivorship.

And in this will the words of distribution "share and share alike" also strengthen the intent. A gift of aliquot shares to several as tenants in common is not to a class.

Ramsay v. Shelmerdine, L. R. 1 Eq. Cas. 129.

The English cases of *Porter v. Fox*, 6 Sim.

485; *Clark v. Phillips*, 17 Jur. 886; and *Aspinall v. Duckworth*, 35 Beav. 307, cited by the appellants, are merely to the point that the addition of another person by name to a class gift does not destroy that class gift.

In *Re Stanhope's Trusts*, 27 Beav. 201, the Master of the Rolls held that the gift to the named daughters was not to a class; but the added words that all his other daughters should take with them made it a gift to all his daughters simply and therefore to a class, which is of course not the present case.

Mr. Justice Trunkley delivered the opinion of the court:

It is admitted that the sole question is: Was the interest of the children of the testator vested one during the life of the widow? The opinion of the learned master well expresses all that need be said upon this question.

Decree affirmed and appeal dismissed, at costs of appellants.

The President, Managers and Company of the DELAWARE & HUDSON CANAL CO.,
Pff. in Err.,

v.

Gilbert L. WEBSTER.

1. It is not **negligence per se** for a passenger to get off a car that is moving slowly, in response to an invitation by a person in charge of the train.
2. If the **train is moving so rapidly** as to render it clearly dangerous to attempt to get off, the passenger who does get off is **negligent**.
3. When there is doubt whether the **speed of the train** was so rapid as to render it clearly dangerous to get off, the **fact is for the jury**.
4. In a **suit for damages for injuries** sustained by a passenger on a **gravity railroad** in alighting while the train was moving no faster than a man can walk, past the point at which the conductor had promised to let him off, there was a **conflict of testimony** as to whether the conductor ordered him to get off or cautioned him against getting off until the train stopped. **Held**, that the fact of the passenger's **negligence was for the jury**.
5. The validity of the execution of a **commission to take testimony** is not affected by the fact that the commissioner signs himself throughout as a notary public merely, except across the seal of the envelope in which he returns the testimony.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Wayne County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case for negligence. *Affirmed*.

This was an action by Gilbert L. Webster against the President, Managers and Company of the Delaware & Hudson Canal Co., to re-

cover damages for injuries to the plaintiff, alleged to have resulted from the negligence of the defendant's employees.

At the trial before Collum, P. J., the following facts appeared:

The defendant operated a gravity railroad between Carbondale and Honesdale. The cars ran on a moderate down grade between the inclined planes, and were controlled by means of brakes; they were light and easily stopped and controlled by the brakes; and the practice was to stop at almost any point where passengers desired to get on or off.

The only intermediate point on the road where a depot was maintained was Waymart; and while at the time of the accident there were many other places that were understood by the conductors and those who frequented the road as stopping places when there were passengers to get on or off, there was nothing to indicate these stopping places, not even platforms. The plaintiff was not acquainted with the road and knew nothing about these stopping places or their location. On the 17th of December, 1879, he started to go to the house of his son-in-law, who lived on the railroad but a few rods from Keen's sawmill. He knew where his son-in-law lived, but did not know whether Keen's mill was a regular stopping place or not.

He asked the ticket agent at Waymart if he could get a ticket so he could get off at Keen's mill and was given to understand that he could. He bought a ticket marked "Keen's." The conductor understood that he was to get off at Keen's mill and promised to let him off at that point. The cars were stopped at George Keen's house, which was not a regular stopping place about half a mile above Keen's mill, to allow other passengers to get off. When nearing Keen's mill, the conductor applied the brakes, the plaintiff came out on the platform of the car preparatory to getting off; the conductor stood at the brakes and the speed of the train was slackened so it was moving about as fast as a man would ordinarily walk, or, according to the conductor's evidence, perhaps a little slower.

They had passed Keen's mill, and plaintiff was standing on the car step.

As to what then occurred the testimony was contradictory.

The plaintiff testified:

"Mr. Penwarden (the conductor) came out of his car, he was in the head car, and broke up the car because it was running very fast, until we got right opposite the house. Said he 'Get off.' I didn't make him no reply. Right away said he, 'Get off.' I spoke to him and said: 'I will when you stop your shebang.' We went a short distance farther, and he said, 'I tell you get off.' I got off, and as I got off, I staggered back against the car, and that threw me down. I had a box in my hand, and it tore that pretty bad, and I fell onto my hands and knees."

The conductor testified as follows:

"When he came out on the platform I said: 'Mr. Webster, where are you going here?' Then we had got fully up to the house, even with it, and a trifle past it, and he said: 'I am going right here.' He had a square box in his hand. It was, perhaps, such a box as milliners keep feathers and such things in. It might

have been two foot long and it might not. He had that right in both hands, and I saw that he was making an effort as if he wanted to get off. I saw by his motions that he intended to get off. I said: 'Wait until we stop,' but he stepped right off upon the ground. He didn't take hold of the railing of the car. There is a hand rail to take hold of, to get on and off, and to protect the platform. He took hold of nothing but stepped right down."

For the injuries there suffered this suit was brought.

The plaintiff offered the deposition of Dr. Garrison, taken in the State of Florida, on a commission issued to C. Codrington. This was objected by defendant:

"1. Because the commissioner had made and signed no return to his commission.

"2. Because the paper showed upon the face of it that the answers to the cross interrogatories were neither written by the commissioner nor at his office, the ink being entirely different from all that used by the commissioner, but that they were written by some person and brought to the commissioner's office and signed there by the witness."

The caption stated that the deposition was taken before "C. Codrington, Notary Public for the State of Florida," and all the jurats were signed in the same way. The envelope was lost, but it was proved that across the seal had been written the words "C. Codrington, Commissioner," and that the envelope was indorsed "Deposited in the postoffice at De Land this 18th day of April, A. D. 1882. C. Codrington, Commissioner."

The paper book of the plaintiff in error did not contain this deposition.

The court overruled the objection to the deposition and permitted it to be read. *First assignment of error.*

The defendant asked the court to charge that:

"Even supposing it to be true, as alleged by plaintiff, that Penwarden, the conductor, ordered him to get off the train, no evidence being given of any threats or cause of fear, the plaintiff, in jumping from the train while in motion, at the place and in the manner in which he did with the box in his hands, and not supporting himself by taking hold of the rail upon the step, was guilty of negligence contributing to his alleged injury, and he cannot recover in this action." Ans. "We refuse this point. The jury are to ascertain, from all the evidence, whether there was negligence on the part of the plaintiff, contributing to this injury." *Third assignment of error.*

And also asked the court to charge that: "The plaintiff, having admitted that he jumped off the cars while in motion, was *per se* guilty of negligence, and therefore cannot recover." Refused. *Fourth assignment of error.*

The court charged, *inter alia*, as follows:

"When a railroad company undertakes the transportation of a passenger for an agreed price, the contract implies that it is provided with a safe and sufficient railroad to the point indicated; that its cars are stanch and road-worthy; that means have been taken beforehand to guard against every apparent danger that may be set the passenger, and that the servants in charge are tried, sober and competent

men. When in the performance of this contract a passenger is injured, without fault on his part, the law raises a *prima facie* presumption of negligence, and throws on the company the *onus* of showing that it does not exist. This rule, however, does not apply to a case where a passenger receives an injury in alighting from a car, when he has an opportunity of seeing and knowing where he is going, and controlling his movements. * * *

"The implied contract to carry a passenger safely includes the duty of giving him a reasonable opportunity to alight in safety; and it is the duty of a railroad company to cause its cars to come to a full stop for passengers to get off. But while it is the duty of a railroad to provide safe and convenient means of ingress and egress to and from the cars, it is equally the duty of passengers to use the means thus provided with reasonable circumspection and care. While the company is held to a high degree of care and skill in the transportation of passengers and is responsible for injuries to them caused by the want of it, the passengers are required to be careful and prudent, and to conform to the reasonable regulations of the company. If a passenger is injured as a result, in part, of his own want of reasonable care and discretion, he cannot recover, even though it should appear that the negligence of the company contributed to the injury. Where both parties are in fault and their mutual negligence produces the injury, neither has a right of action for it. This is called contributory or concurrent negligence. If, therefore, the negligence of a plaintiff in any degree contributed to the injury for which he sues, he cannot recover. Concurrent negligence is the absence of such a degree of care as the circumstances of the case demand. * * *

"Is the defendant responsible for the acts of the conductor in this action? We think it is. He is in command of the train and controls its movements. His negligence in letting off a passenger at a point other than a regular station affects the Company. We do not mean by this to say that the plaintiff is entitled to recover in this case, or to say that there was any negligence on the part of the conductor, but to affirm that if there was negligence on his part, and if it alone, without fault of the plaintiff, produced an injury to him, the Company is responsible, and must answer for it.

Now if the conductor agreed with the plaintiff to stop the train at Keen's mill, and to allow the plaintiff to get off there, it became his duty to the plaintiff to stop the train there and to afford the plaintiff a reasonable opportunity to get off; and if the train was not stopped at that place, but its speed was slackened, and the plaintiff came out on the platform of the car and was told by the conductor to get off, and, obeying this direction, was injured without fault of his own, and by reason of an omission or refusal on the part of the conductor to stop the train and afford him a reasonable opportunity to leave the train safely, then for such injury the plaintiff may recover.

"But if, while the train was in motion, the plaintiff was told by the conductor to get off, and the circumstances were such as would necessarily or probably render such an act perilous, the plaintiff cannot recover, because to

do the act would be negligence on his part, notwithstanding he was told to do so. And if it did not appear perilous and unsafe, it was his duty to exercise ordinary care and prudence in complying with the request or direction of the conductor; and if the want of such care on his part contributed to the injury, he cannot recover. When the plaintiff got off the cars he had a bundle or box in his hands. He stepped from the car to the ground while the train was moving, without taking hold of the railing of the car or platform, or taking any precautions to steady himself. Was this ordinary care, under the circumstances as developed by the evidence of the plaintiff—such care as the situation demanded? [This is for the jury, upon all the evidence in the case.]

"We have been requested to say that the evidence of the plaintiff shows contributory negligence on his part, which must defeat a recovery by him in this action. [We cannot say this. We think the jury are to inquire, in this connection, whether the plaintiff exercised ordinary care and prudence in getting off the car, having regard to the situation in which he was placed, and if he did not, whether the want of it contributed to the injury which he received.]"

Verdict and judgment were for the plaintiff, whereupon the defendant took this writ. The portions of the charge inclosed in brackets were the subject of the second assignment of error.

Messrs. W. H. Dimmick and H. Wilson, for plaintiff in error:

To alight from a railroad car, when in motion, is an act of negligence as obvious and unmistakable as many of the acts which have been judicially pronounced negligence; as, for instance, in *Reilly v. R. Co.* 2 W. N. C. 198; *R. Co. v. Hassard*, 75 Pa. 377; *Gerety v. R. R. Co.* 81 Pa. 274; *Carroll v. R. R. Co.* 12 W. N. C. 348; *Transportation Co. v. Wamautta Oil Refining Co.* 63 Pa. 14; *Coal & Coke Co. v. McEnery*, 91 Pa. 185; *Payne v. Reese*, 100 Pa. 301; *R. R. Co. v. Zebe*, 33 Pa. 318; *Honor v. Albrighton*, 93 Pa. 475.

When the standard is fixed, when the measure of duty is defined by the law and is the same under all circumstances, its omission is negligence, and may be so declared by the court. And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law.

West Chester & P. R. R. Co. v. McElwee, 67 Pa. 315.

What is negligence and what is ordinary care must generally be submitted to a jury. This is so, if there be any dispute as to the acts claimed to establish the alleged negligence; but negligence is not to be found without evidence.

Gramlich v. Wurst, 86 Pa. 74.

Negligence is a question for the jury, if there be reasonable doubt as to the facts tending to prove it, or as to the just inferences to be drawn therefrom.

McKee v. Bidwell, 74 Pa. 218.

It has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. In questions of negligence it has been repeatedly held that certain facts, when established, amount to negligence *per se*.

Hoag v. R. Co. 85 Pa. 297.

The province of the jury is to find facts. If the facts be admitted or ascertained, it is the duty of the court to declare the law thereon.

Baker v. Fehr, 97 Pa. 72.

If the undoubted evidence clearly shows any fact which proves that the deceased was guilty of concurring negligence, the court should say there can be no recovery.

R. R. Co. v. Fortney, 90 Pa. 323.

When the only fact in dispute is an immaterial one, and would not have warranted an inference of negligence, whichever way decided, and the remaining evidence is uncontroverted, and would not warrant an inference of negligence, the court should direct a verdict for defendant.

Goshorn v. Smith, 92 Pa. 435.

When the admitted facts clearly show contributory negligence, it is the duty of the court to withhold the question from the jury, and determine it as a matter of law.

R. Co. v. Walling, 97 Pa. 55.

The standard of care is shifting where the measure of duty is ordinary care, where the circumstances admit of a wide range of variation, and the degree of care varies with the change of circumstances; the question, in each case, being as to the degree of care which should be exercised under the particular circumstances.

Such is the rule where the question was whether the plaintiff, who used a blind mule in towing on a defective towpath, exercised the degree of care reasonably required under the circumstances.

Canal Co. v. Bentley, 66 Pa. 30.

Where the question was whether a safe deposit company had provided an adequate guard, under the circumstances.

Safe Deposit Co. v. Pollock, 85 Pa. 391.

Where the question was whether the defendant has exercised a reasonable degree of care to prevent the fall of a platform.

Hydraulic Works Co. v. Orr, 83 Pa. 332.

Where the question was whether there was unreasonable delay by the city authorities in removing a nuisance on the street.

Fritsch v. Allegheny, 91 Pa. 226.

Where the question was whether a locomotive engineer was guilty of negligence in running over a child of tender years.

R. R. Co. v. Morgan, 82 Pa. 135.

Where the question was whether the blowing of a locomotive whistle, by which a horse was frightened, was unnecessary, extraordinary and unreasonable.

R. R. Co. v. Killips, 88 Pa. 405.

The standard is fixed, where the circumstances present too narrow a range of variation to admit of varying degrees of care; where the conditions are substantially the same in all cases, and are such as to make the measure of duty obvious, and the same in all cases.

Such is the rule where a boy left his regular employment at a coal breaker, to carry an oil can to a fellow employee at another point, and stepped into a pair of rollers which had been left uncovered.

Honor v. Albrighton, 98 Pa. 475.

Where a passenger, instead of getting out on the platform, alighted on the opposite side, on another track, and was there run over by another train; no necessity for leaving the car on that side being shown.

R. R. Co. v. Zebe, 33 Pa. 318.

Where the plaintiff, with others, was passing along a pathway, under which was laid a blow pipe from the boilers of defendant's engine, terminating in a wooden box. At the time, the stream was being blown off from the boilers, and escaping through the ground above the box. Seeing this, plaintiff's comrades turned aside to avoid injury; but the plaintiff, instead of turning aside, went on and stepped into the box, whereby he was scalded.

Payne v. Reese, 100 Pa. 301.

Where a teamster, knowing the unsafe condition of a bridge, and failing to notify those who were bound to repair it, was killed by its fall.

Coal & Coke Co. v. McEnery, 91 Pa. 185.

Where one car in a train was loaded with combustible matter, easily ignited by sparks, and the couplings were so defective that it could not be detached.

Transportation Co. v. Oil Ref. Co. 63 Pa. 14.

It has been declared negligence in a parent to permit a child to trespass on a railroad track.

Cauley v. R. Co. 95 Pa. 398.

Or to permit a child of tender years to run at large in a city traversed by vehicles and cars.

Glassey v. R. Co. 57 Pa. 172; *R. Co. v. Pearson*, 72 Pa. 169.

Or to permit a child of tender years to engage in a dangerous employment.

Smith v. R. Co. 92 Pa. 450.

Or for the driver of a street car to allow a child of tender years to ride on the front platform.

R. Co. v. Caldwell, 74 Pa. 421.

Or for a locomotive engineer to fail to give warning, and reduce his speed, on approaching a public highway where danger is to be apprehended.

R. Co. v. Stinger, 78 Pa. 219.

It has also been declared negligence to attempt to cross a railroad track immediately in front of an approaching locomotive.

Gerety v. R. Co. 81 Pa. 274; *Nagle v. R. Co.* 88 Pa. 35; *Boys v. R. R. Co.* 3 W. N. C. 198; *Anderson v. R. R. Co.* 4 W. N. C. 274.

To attempt to cross the track without looking out for approaching trains.

R. Co. v. Heileman, 49 Pa. 60; *R. R. Co. v. Coyle*, 55 Pa. 396; *R. Co. v. Beale*, 73 Pa. 504; *R. Co. v. Feller*, 84 Pa. 226; *Carroll v. R. R. Co.* 12 W. N. C. 343.

To be on the track, except at a public crossing.

Little Schuylkill R. R. Co. v. Norton, 24 Pa. 465; *Mulherrin v. R. Co.* 81 Pa. 366; *R. Co. v. Collins*, 87 Pa. 405; *Moore v. R. Co.* 99 Pa. 301; *R. R. Co. v. White*, 88 Pa. 327.

To allow the elbow to project from the car window.

R. Co. v. McClurg, 56 Pa. 294.

To ride on the platform without necessity.

R. Co. v. Hooley, 99 Pa. 492.

To attempt to get on or off a train while in motion.

Colter v. R. Co. 9 W. N. C. 477; *R. R. Co. v. Appell*, 23 Pa. 147.

To leap from a ferry boat approaching the landing, when about three feet distant.

Fish v. Ferry Co. 4 Phila. 108.

To get off a street car while in motion.

Hagan v. R. Co. 10 W. N. C. 860.

Where the plaintiff, by direction of the conductor, got off a street car by climbing over the guard on the front platform, and while doing so was thrown off by the starting of the car, his act was declared negligence.

Reilly v. R. Co. 2 W. N. C. 198.

Mr. George S. Purdy, for defendant in error:

While the commissioner has added the title of notary public to his signature, it certainly in no way invalidates the deposition.

Comrs. of Berks Co. v. Ross, 8 Binn. 538;

Wright v. Waters, 32 Pa. 517.

The commissioner signed his name across the seal of the envelope as "Commissioner." This was a proper execution.

Wright v. Wood, 25 Pa. 120; *Nusscar v. Arnold*, 13 Serg. & R. 323.

And it was proper for the witness to write down his own evidence in answer to the interrogatories propounded by the commissioner.

Piper v. White, 56 Pa. 90; *Crossgrove v. Himelrich*, 54 Pa. 203.

The Company cannot repudiate the acts of its agents, the ticket agent and conductor, so as to free itself from responsibility.

R. Co. v. Chenevith, 52 Pa. 382; *Western R. R. Co. v. Young*, 51 Ga. 489; *R. R. Co. v. McClosky*, 23 Pa. 532.

Whether there was negligence in a given case is generally a question for the jury.

Hydraulic Works Co. v. Orr, 88 Pa. 832; *R. R. Co. v. McKeen*, 90 Pa. 122; *R. R. Co. v. Kirk*, 90 Pa. 15; *R. R. Co. v. Killips*, 88 Pa. 405; *Born v. Plank Road Co.* 12 W. N. C. 283; *Jamison v. R. R. Co.* 3 Am. & Eng. R. R. Cas. 350; *Kay v. R. R. Co.* 65 Pa. 273; *Canal Co. v. Bentley*, 66 Pa. 80.

Where the measure of duty on the part of the passenger is ordinary and reasonable care, and the standard shifts with the circumstances of the case, the question of contributory negligence is for the jury.

R. R. Co. v. White, 88 Pa. 329; *R. Co. v. Walling*, 97 Pa. 55; *R. R. Co. v. Killips*, 88 Pa. 407; *R. R. Co. v. Ogier*, 35 Pa. 60; *R. R. Co. v. Barnett*, 59 Pa. 259; *Johnson v. Bruner*, 61 Pa. 58.

It is not negligence *per se* to stand on the step of the front platform of a street car, with the implied assent of the conductor and driver.

R. Co. v. Walling, 97 Pa. 55; *Wilton v. R. R. Co.* 107 Mass. 108; *Sheridan v. R. R. Co.* 36 N. Y. 89; *Measel v. R. Co.* 8 Allen, 234.

If the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger acts under the instructions of the conductor, then the defense of contributory negligence is unavailing. And it is for the jury to say whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passenger to desist from the attempt.

Johnston v. R. R. Co. 70 Pa. 357; *Ill. Cent. R. R. Co. v. Able*, 59 Ill. 181; *Lambeth v. R. R. Co.* 68 N. C. 494; *Filer v. R. R. Co.* 49 N. Y. 47; *Delamatyr v. R. R. Co.* 24 Wis. 578; *Pa. R. R. Co. v. Kilgore*, 32 Pa. 392.

It has become the settled rule of law in England and in the United States that for a passenger to get off a car that is moving slowly is not negligence *per se*, but is a question for the

jury, under the particular circumstances of the case.

In *Robson v. N. E. R. Co.* L. R. 10 Q. B. 271; 12 Eng. Rep. (Moak's) 802, where a passenger attempted to alight from the steps of a car that extended beyond the platform, the height from the ground being an unusual one, held, "that the jury might not improperly have found that the expectation of being carried beyond the station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and the defendants were therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty." On appeal the judgment in favor of the plaintiff was affirmed. L. R. 2 Q. B. Div. 85, 19 Eng. Rep. (Moak's) 228.

The same rule is applied in *R. R. Co. v. Hendricks*, 41 Ind. 48; *Filer v. R. R. Co.* 49 N. Y. 47; *Mulhado v. R. R. Co.* 30 N. Y. 370; *Morrison v. R. R. Co.* 56 N. Y. 302; *McIntire v. R. R. Co.* 87 N. Y. 287; *Doos v. R. R. Co.* 59 Mo. 27; *Johnson v. R. R. Co.* 70 Pa. 357; *R. R. Co. v. Kilgore*, 32 Pa. 292; *Nichols v. R. R. Co.* 83 N. Y. 181; *Lambeth v. R. R. Co.* 66 N. C. 494; *Curtis v. R. R. Co.* 27 Wis. 158; *R. R. Co. v. Badely*, 54 Ill. 20; *Cameron v. Milloy*, 14 Upper Can. Com. Pl. 840; *Uppendorf v. R. R. Co.* 51 How. Pr. 475, affd. in 4 Week. Dig. 398; *Day v. Brooklyn City R. R. Co.* 12 Hun, 435; *Tabor v. R. R. Co.* 5 Week. Dig. 504; *Sauter v. R. R. Co.* 66 N. Y. 50; *R. R. Co. v. Able*, 59 Ill. 131; *Delamatyr v. R. R. Co.* 24 Wis. 578.

The rule is doubtless otherwise if the train is moving so rapidly as to render it clearly dangerous to attempt to get off.

Cram v. R. R. Co. 112 Mass. 88; *R. R. Co. v. Aspell*, 28 Pa. 147.

Or when a passenger steps off a moving car when he has reason to believe it will be brought to a full stop, or jumps from a moving car after a reasonable opportunity has been given him to alight while the car was standing.

McClintock v. Pa. R. R. Co. 42 Legal Int. 82.

Mr. Justice Trunkay delivered the opinion of the court:

If the deposition referred to in the first assignment of error was inadmissible for the reasons stated, it is not shown by anything printed in the paper book of the defendant. From what is printed by the other party it appears there is no fatal defect. And from inspection of the return of the commissioner we find no valid objection.

The remaining question raised by the assignments is: Was it the duty of the court to instruct the jury to render a verdict for the defendant because of the plaintiff's concurrent negligence? That it was fairly submitted to the jury, if it was proper to submit at all, to find whether the plaintiff was negligent, with instruction that if his negligence contributed to the accident he cannot recover, is conceded.

Had the jury found that the whole of the conductor's testimony was true, the plaintiff had no case, and so the court charged. The statements as to what the conductor said just before the plaintiff stepped off the car are in sharp conflict. One testifies that the conductor told the plaintiff three times to get off; the con-

ductor, that he said to the plaintiff: "Wait till we stop." It is uncontroverted that the plaintiff was to get off at Koen's Mill; that the train was not running as fast as a person would ordinarily walk; that it was under control and could have been stopped within the length of a car.

The principles applicable to the question presented are well settled. It is not negligence *per se* for a passenger to get off a car that is moving slowly, in response to invitation by a person in charge of the train. But if the train is moving so rapidly as to render it clearly dangerous to attempt to get off, the passenger who does is negligent. When there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury.

"Although, if a passenger, without any directions from the conductor, voluntarily incurs danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom, yet if the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger acts under the instructions of the conductor, the defense of contributory negligence is unavailing; and it is for the jury to say whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passenger to desist from the attempt." Whart. Neg. § 880.

This doctrine is sustained by numerous decisions in other States and is not in conflict with the authorities in this State.

When a person, about to jump from a car running ten miles an hour, in midnight darkness, is warned by the conductor of the danger and told that the train shall be stopped, takes the risk, jumps and is hurt, his concurrent negligence bars recovery. In that case the court rules that an action cannot be maintained. *R. R. Co. v. Aspell*, 23 Pa. 147.

In *McClintock v. R. R. Co.* 42 Legal Int. 82, the plaintiff got off a moving train without direction or notice of any person in charge of the train; there was some conflict of testimony respecting the circumstances, and the question was submitted to the jury.

When a woman, accompanied by three children, on arriving at her place of destination proceeded to alight, two of the children had left the car, and while she was still on the car, the train started, when she sprang upon the platform and was injured. The question of concurrent negligence is to be determined by the particular circumstances, and is for the jury. Her case was not like *Aspell's*. The abstract truth, "that it is wrong for a party to attempt to leave the cars while they are in motion," did not apply to the circumstances in which she was placed. *R. R. Co. v. Kilgore*, 33 Pa. 292.

In *Johnson v. R. R. Co.* 70 Pa. 357, the question was whether the plaintiff, who had attempted to board a train while in motion, was guilty of contributory negligence. The court charged that if the train was distinctly running upon the track when the plaintiff attempted to enter, he was guilty of negligence and could not recover. That was held to be error; and this court ruled that it was for the jury to say, under all the circumstances in evidence,

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whether the danger of boarding the train when in motion was so apparent that the plaintiff was guilty of contributory negligence in making the attempt.

There was no error in submitting the question to the jury.

Judgment affirmed.

M. J. BUCK, *Plff. in Err.*,

William M. WILSON *et al.*

1. A debt upon a continuous account of book entries, made in the ordinary course of dealing, is entire; and it cannot, without an agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits.
2. Receiving promissory notes on account of a claim will not imply an extension of the time of payment or an agreement to sever the debt in an action on the book account.
3. The agreement to sever the debt must be proved as a fact, dependent upon the understanding of the parties when the notes were given.
4. While suit may be brought on the promissory notes as they fall due, a recovery in an action on the book account, on the common counts in assumpsit, and on the notes due, will bar a recovery in a similar action on the other notes falling due and on the book account.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Blair County, to review a judgment on a verdict for the plaintiffs in an action of trespass on the case upon promises. *Reversed.*

On July 1, 1884, a former suit was brought by the plaintiffs in this action against the defendant. The declaration alleged that the defendant was indebted to the plaintiffs, to wit: on June 10, 1884, in the sum of \$500, on the common counts in assumpsit, and proceeded as follows: "And for that, whereas, the said defendant heretofore, to wit: on the 10th day of June, A. D. 1884, in the county aforesaid, is indebted to the said plaintiffs in the sum of \$378.17, as follows: first, a balance due on a book account for merchandise sold and delivered to said defendant, through the order and direction of his agent, W. J. Sharbaugh, a copy of which said book account, duly probated, is hereto attached and to the court here shown; second, a certain promissory note, dated Houtzdale, April 2, 1884, at two months, for \$100, payable at 206 Market Street, Philadelphia, as well as another note, dated Houtzdale, March 6, 1884, at three months after date, for the sum of \$225, payable at 206 Market Street, Philadelphia; which said notes were duly signed by W. J. Sharbaugh, agent of Dr. M. J. Buck, and delivered to plaintiffs in payment of merchandise, consisting of drugs, etc., sold and delivered by plaintiffs to defendant for use in his store at Houtzdale, Pa., a copy of which said notes is hereunto attached and to the court here shown."

The account as filed contained credits for the notes above mentioned and also three notes not then due, leaving the balance on the book account \$52.67, and the affidavit of the bookkeeper alleged that that amount was due and owing thereon. January 29, 1885, verdict for plaintiffs for \$393.30.

On February 7, 1885, this suit was instituted. The declaration alleged that the defendant, to wit: on August 4, 1884, was indebted to the plaintiffs in the sum of \$600 on the common counts in assumpsit, and then proceeded as follows: "And for that, whereas, the said defendant heretofore, to wit: on the 30th day of January, A. D. 1884, in the county aforesaid, was indebted to the said plaintiffs in the sum of \$495.29, being the amount of a balance due on a book account for merchandise sold and delivered by the plaintiffs to Wm. J. Sharbaugh, agent for M. J. Buck, for the drug store at Houtzdale, Pennsylvania. The said merchandise being such goods as were necessary for the proper conducting and carrying on of said drug store and were used therein. The said sum of \$495.29 being the balance due on said account on the 5th of August, 1884, the same being the termination of the extension of the time of payment on said account as represented by three several promissory notes of W. J. Sharbaugh, agent of said defendant, due respectively, the first one July 13, 1884, for \$100; the second, July 19, 1884, for \$267.65; and the third one, August 5, 1884, for \$125, and the said amount being the balance of said account not yet due on the first day of July, 1884, at the time of bringing a former suit in that part of this account that was then due, which account is duly probated, attached, and to the court here shown."

The copy of the account as filed in this case was the same as in the former suit, except that the five notes were charged against the defendant in the account with interest, showing a balance of \$875.46, and the affidavit of the bookkeeper averred "that there is now due and owing thereon" that amount; "that no part of said principal sum or interest has ever been paid, or in any manner settled, and that there are no deductions or off-sets of any kind, except such as are therein specified and credited."

At the end of the declaration plaintiff's claim is indorsed as follows:

Balance due July 13, 1884.....	\$100 00
Interest from July 13, 1884.....	
Balance due July 19, 1884.....	267 65
Interest from July 19, 1884.....	
Balance due August 5, 1884.....	125 00
Interest from August 5, 1884.....	

On the trial, the plaintiffs claimed only the above items. Defendant pleaded the general issue and non assumpsit, and under the plea of the general issue offered the record of the former suit in evidence and asked the court to charge that it was a bar to the plaintiffs' recovery and that the verdict must be for the defendant. The court, DEAN, P. J., in answer to this point said *inter alia*: "On this state of facts defendant bases his third point: that his plea of former recovery is sustained and he must have a verdict. The authorities establish that a note given as collateral merely, and not in payment of an antecedent book debt, does not extinguish the original cause of action on the account; and if

the defendant was now moving for a nonsuit because the claim was not founded on the notes, plaintiffs might successfully invoke this rule against him. It seems to us, however, in view of the facts here the rule has no application. Neither party alleges that the debt on the book account was paid by giving the notes; both affirm that it was not. The plaintiffs argue that by accepting the notes the date of payment was postponed; the defendant alleges that the whole of the book account could have been sued upon at any time, notwithstanding the time given in the notes; as it could have been claimed in the first suit they were bound, he alleges, to lay it before that jury and have it passed on by them, and it must now be assumed that it was passed on."

"The record does not show that it was claimed; the plaintiffs' claim on their narr. is expressly limited to three items, viz.: the small balance of \$52.67 and probate, and two notes then due. In this suit the claim is limited to the amount covered by the three notes not due when the first suit was brought. No evidence is offered to contradict the record in the first case; evidence is given in explanation of it."

"At request of Sharbaugh, alleged agent of defendant, plaintiffs agreed to give defendant time by accepting notes at short dates. By this arrangement the plaintiffs reaped this advantage: the balance was settled beyond dispute, by a distinct written admission, and they had their debt in the shape of negotiable paper which they might at once use. The defendant secured the time stipulated for by him in the notes. The defendant, by giving the several notes, and the plaintiffs, by accepting them in consideration of the advantages resulting to both, impliedly agree that a book account then due should be paid in installments; there is no reason why they should not so agree if they chose; there is no reason why plaintiffs should not sue for each installment as it became due."

"If the defendant had given plaintiffs a bond in the full amount of the balance of the book account payable in installments, as provided by these notes, the plaintiffs could have proceeded to collect the installments as they became due; the judgment for one installment would have been no bar to a recovery for a second not due when the first suit was brought. Here the entire book account is adopted as the sum due; it is made payable by installments in giving and accepting the notes. The pleadings in the first suit might have been so framed as to aver with more certainty the precise sums sued for, but to recover the installments due on the book account it was necessary under the rule of court to file a copy of the whole account; the pleadings clearly disclose that plaintiffs' claim was limited to the three items mentioned: the agreement for extension by installments is not inconsistent with the record; why should it not be enforced?"

"On the facts before us, the plea of 'former recovery' comes with a poor grace from this defendant. He argues that the plaintiffs could have sued at once for the entire amount of the book account and were bound to do so; but that is just what he wanted to prevent by the agreement stipulating for the time specified in the notes; he now complains that plaintiffs did what at his request they agreed to do, gave him

time; because they did not take all they might have taken, notwithstanding their agreement, they must not have what is yet unpaid.

"We think the agreement for time, after the plaintiffs had accepted the notes, is one which would have been enforced against them, had they attempted its violation; after the defendant has had the time he stipulated for, it is one which ought to be enforced against him. As the record itself does not conclusively show that the first suit was for the same cause of action as this, while the undisputed evidence from the witness stand shows that it was not, we deny defendant's third point." *First and second assignments of error.*

On the trial the plaintiffs offered the notes testified to by witness, William M. Wilson, for the purpose first, of showing the extension. Objected to: that the evidence is irrelevant and does not show payment.

By the Court: The notes are admissible, as tending to show an agreement to extend the time of the bill due on May 4, 1884. Objection overruled, notes admitted, exception noted and bill sealed for defendant. *Third assignment of error.*

Mr. Samuel S. Blair, for plaintiffs in error:

The receipt of the debtor's note does not discharge the debt unless it be so agreed. It is a mere concurrent security.

Weakly v. Bell, 9 Watts, 280.

There is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note at a future day on account of it.

Shaw v. First Ref. Presb. Church, 39 Pa. 226.

The cause of action, the account, was entire, and plaintiffs are barred of a second suit, whereby the defendant may be oppressed.

Hees v. Heeble, 6 Serg. & R. 57.

If the evidence in the second suit would have been equally available in the first suit, then the verdict and judgment in the first is an absolute bar to any recovery in the second.

Logan v. Caffrey, 30 Pa. 177.

There is no rule of legal practice of higher value than that which arrests the strife of litigation by declaring that one suit and judgment is an end of controversy as to all matters in issue, and which ought to have been put in issue.

Rockwell v. Langley, 19 Pa. 508.

To permit a party to recover in a second action what was included in and might have been recovered in the first action would be against the policy of the law and unjust, because it would harass a defendant and expose him to double costs.

Brenner v. Moyer, 98 Pa. 274.

The rule is not to be relaxed from any consideration of hardship.

Hees v. Heeble, and *Logan v. Caffrey*, *supra*.

Mr. A. A. Stevens, for defendants in error:

If parties agree that a debt shall be payable in installments, they have severed it; and a recovery of one installment under a declaration which counts for the whole debt does not bar a subsequent suit for an installment not due when the first suit was brought.

Sterner v. Gower, 8 Watts & S. 143; *Logan v. Caffrey*, 30 Pa. 201.

Assumpsit will lie for money to be paid at different times as each sum becomes due.

Cooke v. Whorwood, 2 Saund. 328; *Ashford v. Hand*, Andrews, 270; cited in *Wilson v. Hamilton*, 9 Serg. & R. 429.

If claims may be counted on separately, they are separate causes of action, and a suit for one cause is no bar to the other.

Killion v. Wright, 34 Pa. 92; *Croft v. Steele*, 6 Watts, 374.

What the contract or understanding was at the time the notes were given as to the extension is to be proved as a fact, dependent for its existence upon the understanding of the parties at the time.

Shaw v. Presbyterian Church, 39 Pa. 226.

Where a judgment in a former trial between the same parties is relied upon by way of evidence as conclusive *per se*, it must appear by the record of the former that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the verdict and judgment in the former trial show that it could not have been rendered without deciding the particular matter, it will be considered to have settled the matter.

Washington, etc. Packet Co. v. Sickles, 5 Wall. 592 (72 U. S. bk. 18, L. ed. 553).

Where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be conclusive.

Coleman's App. 62 Pa. 272; *Haak v. Breidenbach*, 3 Serg. & R. 204; *Sterner v. Gower*, 8 Watts & S. 143; *Kane v. Fisher*, 2 Watts, 253; *Bull v. Hopkins*, 7 Johns. 22.

The statement of claim at the conclusion of the narr. was equivalent to a bill of particulars, and nothing could be recovered thereunder that was not included in the narr. and bill.

Dilzer v. Beethoven Build. Assn. 13 W. N. C. 165; *Gilpin v. Howell*, 5 Pa. 54.

The plea of former recovery is composed partly of law and fact, is a mixed question, and where there is any conflicting testimony is always for the jury.

Wilson v. Hamilton, 9 Serg. & R. 429; *Rockwell v. Langley*, 19 Pa. 509.

In *Weakly v. Bell*, 9 Watts, 280, and in *Shaw v. Presbyterian Church*, 39 Pa. 226, there was no evidence of an agreement for an extension, as in this case; there the party receiving the notes denied that there was any agreement or understanding as to an extension. In this case the defendant in error declares that there was to be an extension of the account in installments, as represented by the notes.

It was competent for the plaintiff to show that at the first trial the amount claimed in the present suit was not claimed or included in the former suit; but on the contrary was distinctly excluded because it was not due and payable, and was not passed upon by the jury.

Carmony v. Hooper, 5 Pa. 309 (foot) 310.

Mr. Justice Clark delivered the opinion of the court:

This action of assumpsit was brought by Wm. M. Wilson & Co. against Dr. M. J. Buck, on a book account for goods sold and delivered. The defendant gave in evidence the record of a former action, upon which judgment had been rendered in favor of th

1, under

the plea of the general issue, defended upon the ground of a former recovery. See *Finley v. Hanbest*, 30 Pa. 190.

The former suit was also an action of assumpsit for goods sold and delivered, and an examination of the particular statement of the plaintiff's claim, filed in the respective suits, shows that the items are in each case identical. The sales, it is admitted, were on thirty days' credit; the last item in the account was for goods sold and delivered April 23, 1884. The first suit was instituted on the first day of July, 1884, and the entire claim of the plaintiff was therefore at that time due and payable.

The plaintiffs contend, however, that on the first day of July, 1884, their whole account against the defendant amounted to \$1,595.95; that the defendant had given to them his notes, as follows: March 6, 1884, at three months, for \$225; April 2, 1884, at two months, for \$100; April 10, 1884, at three months, for \$100; April 2, 1884, at four months, for \$125; and May 17, 1884, at sixty days, for \$267.65, and that the payment of the account was thereby extended, according to the tenor and effect of the several notes.

Deducting the credits and the amount of these notes, the balance of the account on the first day of July, 1884, was \$52.67, and the plaintiffs say that the suit instituted on that day was for the recovery of that portion of the account represented by this balance and the first two of the notes above recited, which were then due and unpaid; that the itemized copy of account filed showed a balance of \$52.67, and was accompanied by copies of the two notes only. The verdict and judgment in that case was for the plaintiffs in the sum of \$398.30.

The present action, they say, is brought to recover that portion of the account represented by the last three notes. The suit is not upon the notes, it is for goods sold and delivered; a copy of the book entries, properly verified by the oath of the plaintiffs' bookkeeper, is filed; and these entries are, as we have said, precisely the same as were contained in the former suit; the balance, however, which the account discloses to be "due and owing thereon," is \$875.46, which is, as the account itself shows, the amount of the whole five notes before mentioned, with interest thereon, and the \$52.67, which, with the first two notes, was embraced in the previous action.

The plaintiffs' claim at the trial, however, notwithstanding the showing of the account and of the accompanying affidavit, was for that part of the account only which is represented by the last three of the notes, and as showing this, we are referred to an indorsement on the narr. to that effect.

It is admitted that the notes were neither given nor received in payment of the account; that there was no other extension of time on part of the plaintiffs, when the notes were given, than was to be implied from their receiving them. Mr. Wilson, the plaintiff, testified that they were not considered as a payment, until they were paid.

"They weren't taken," he says, "as a settlement of the account, because they weren't paid; they were charged back to his account, the same as you would take a check; if the check is good it is all right." A promissory note

taken for the whole or part of a debt, will only operate as an extinguishment of it, if so intended by the parties. The notes did not, therefore, discharge the original debt evidenced by the account; they were taken merely for convenience and as concurrent securities only.

A debt due upon a continuous account of book entries, made in the ordinary course of dealing, is entire; it cannot, without agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits; if divisible into two parts, it may on the same principle be divided into as many parts as it contains distinct items of charge; and no one would suppose that an action might be instituted on every item in a book account.

It is undoubtedly true, however, that if parties contract that a debt shall fall due and be payable in installments, they have severed it, and distinct recoveries may be had for the several installments in portions of the debt, according to the agreement, without involving the whole debt; but when the consideration is fully executed, and there is no stipulation of severance, the obligation to pay is ordinarily indivisible and entire. *Sterner v. Gower*, 3 Watts & Serg. 143; *Logan v. Caffrey*, 30 Pa. 196.

In this case, however, it is not pretended, as we have said, that there was any actual or express agreement to this effect. Mr. Wilson himself says there was "no special agreement" about extending the account, more than was implied in taking the notes; that the notes were credited in the account and charged back if not paid; they can therefore neither be regarded as effecting payment of the debt, nor an extension of the time of payment. For "Where a creditor takes from his debtor a note payable at a future day on account of his claim, the law raises no implication that he agrees to give time, until the maturity of the note for the payment of the original debt; but the agreement must be proved as a fact, dependent upon the understanding of the parties at the time when the security was given." *Shaw v. Church*, 39 Pa. 226. See also *Weekly v. Bell*, 9 Watts, 273; *Bank v. Potius*, 10 Watts, 150.

When the cause of action is the same, a former judgment in a suit between the same parties, although an inadequate one, is a bar to a second recovery. *Pinney v. Barnes*, 17 Conn. 420.

So, an action brought for a part of an entire and indivisible demand, and a recovery therein, will bar a subsequent suit for the residue of the same demand. *Bendernagle v. Cocks*, 19 Wend. 207. See also *Staples v. Goodrich*, 21 Barb. 317; *Warren v. Comings*, 6 Cush. 103; *Lucas v. Lecompte*, 42 Ill. 308.

There can be no question, under the evidence, that on the first day of July, 1884, if, in case of the threatened insolvency of the defendant, the plaintiffs had desired to collect the whole debt, they might have done so; the entire claim and demand of the plaintiffs was then due and unpaid, and they had the undoubted right to sue for and recover it. It is equally clear that the plaintiffs had a right in the first suit to proceed upon the two notes then due, which they then held as concurrent or cumulative securities; but they proceeded also upon the account, declaring for goods sold and delivered, and filed an itemized statement or bill of particulars em-

bracing every item of charge in the account filed in the present case. If they allowed credit upon it, to which the defendant was not entitled, and in consequence failed to recover as much as they were in fact entitled to recover, their failure must be attributed to a misapprehension as to the effect of such a proceeding; but in our view of the case they are certainly barred from recovering in a second suit, for the same subject matter as that embraced in the first. To permit a party to recover in a second action what was included in and might have been recovered in the first would be against the policy of the law and unjust, because it would harass a defendant and expose him to double costs. *Brenner v. Moyer*, 98 Pa. 274; *Hess v. Hebble*, 6 Serg. & R. 57.

The judgment is therefore reversed.

POTTSTOWN IRON CO., *Plff. in Err.*,

v.

Jeffrey FANNING *et ux.*

The owner of a trestle who negligently leaves great masses of ore piled against one side of it in such a manner as to make it unable to bear the weight of a locomotive run upon it by the employees of a railroad company, in accordance with a contract between him and the railroad company for delivering to him ore cars, is liable in damages for the death of a member of the crew of the locomotive, resulting from the fall of the trestle and locomotive.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 3, of Philadelphia County, to review a judgment for the plaintiffs on a verdict in an action of trespass on the case for negligence. *Affirmed.*

This was an action of trespass on the case by Jeffrey Fanning and wife against the Pottstown Iron Co., for negligently causing the death of the plaintiffs' son, Edward H. Fanning, at Pottstown, Pa., December 29, 1882.

At the trial before LUDLOW, P. J., the following facts appeared:

The deceased was a brakeman in the employ of the Philadelphia & Reading Railroad Company, and on the day of his death was at work upon an engine belonging to the railroad company, which was engaged in pushing cars loaded with iron ore upon a trestlework about fifteen feet in height, erected upon the property of the defendant and belonging to it. After leaving the cars at the point where they were to be unloaded, the engine and tender were coming slowly down, when the trestlework gave way, throwing the engine to the ground and causing his death.

The point at which the trestle gave way was at a two story or double trestle, which had been allowed to remain by the defendant after all others of a similar construction had been removed by it. As originally constructed, the trestlework had been composed entirely of single trestles about ten feet high. The spaces between the trestles were used for the storage of iron ore, and communicated with bins for the same purpose.

In 1879 the defendant desired more storage room, and, not finding it convenient to remove the ore and put in new trestles, decided to raise the old trestles by adding a second story.

There was no evidence as to who planned the original structure, or under whose supervision or direction it was built. When the defendant decided to elevate the trestle Mr. Bines, the engineer of the Philadelphia & Reading Railroad Company, at the request of Mr. Morris, one of the owners of the defendant, and as a matter of accommodation to him, gave him a ground plan or sketch showing the lines of the tracks with the necessary grade to give the elevation proposed, but gave no plan of the proposed addition to the old trestles, and made no suggestions as to how they should be constructed.

A letter from Mr. Bines accompanied the sketch of the lines of track, in which, referring to the elevation proposed by Mr. Morris, Mr. Bines said: "Should this be adopted, the principal part of the work would consist in blocks."

This mode of elevating the trestles by blocking or adding a second story to the old trestles was not recommended by Mr. Bines. On the contrary he disapproved of it.

At the same time that the defendant put the additional story on the old trestlework, it caused its contractor to prepare an entire new set of single trestles to take the place of the double trestles.

At the time of the injury all the old double trestles had been removed by defendant, except the one which broke down, and the new single trestles built for the defendant had been substituted.

The business of putting the rails on the trestles and of looking after the rails belonged to the Philadelphia & Reading Railroad Company; but the care of the trestlework and the handling of the ore in the bins between the trestles belonged exclusively to the defendant.

The spreading of trestles had occurred on the defendant's premises on a previous occasion, from the weight of coal deposited between the trestles, causing the engine to be thrown from the track.

On the morning of the accident, all the ore from one of the spaces adjoining the double trestle had been removed, and about thirty to fifty tons remained piled up against the other side and nearly to the top. The pressure of this body of ore, plaintiffs claimed, forced the double trestle out of position, and caused it to "buckle" or double upon itself, and thus removed the support to the track and caused the engine to break through. There was positive testimony to that effect.

The defendant contended that the injury was due to the derailing of the engine upon the trestlework, showed the absence of a fish plate on the broken stringer, and that the engine had a pair of unflanged wheels, called "blind drivers," which frequently got off the track, and that on one or two occasions the entire body of the engine was derailed. The engine had been three years at work on the trestles, and was never off on the straight line of trestlework.

The conductor, the engineer and a brakeman, all of whom were on the engine at the time of the accident, testified that the engine did not leave the track and come down on the

stringer, as defendant contended, before breaking through; that if such a thing had happened they would have noticed it; and that they always felt the jar when the engine got off at other times.

There was also testimony that after the accident, the double trestle was bent over at an angle of 45°, and that the ore was on top of it; that this position of the double trestle was not due to its having been struck by the engine in falling; that if the engine had struck the double trestle in falling, it would have thrown it the other way, and that if the engine had been derailed, it would have fallen four inches on the stringer and would have cracked the bolster supporting the stringer but would not have sheered it off in the manner in which it was found.

The engine belonged to the railroad company, and the defendant paid the railroad company one dollar per hour for every hour that the engine and its crew were engaged in hauling the cars from the main track on to the trestlework. The crew of the engine, of whom decedent was one, were in the regular employment of the railroad company at this and other work and were paid by the railroad company.

There was no evidence that the trestle broke by reason of excessive weight being put upon it, or that there were any defects in the trestlework, of which decedent had knowledge, and which caused the accident.

The defendant's points and the answers of the court were as follows:

"First, the burden in this case is on the plaintiff, to satisfy the jury that the accident in question was wholly due to the negligence of the defendant; and unless the jury is so satisfied the verdict must be for the defendant."

Answer. "Affirmed."

"Second, if the jury believe that the excessive weight of the engine, or its undue tendency to get off the rails, or the absence of fish or splice plates at the place of the accident contributed to this accident, the verdict must be for the defendant."

Answer. "Affirmed."

"Third, inasmuch as the decedent had been employed in hauling cars over the trestle in question and dumping the contents into their respective bins for over a year, and was during all that time almost every day engaged more or less in such occupation, he must be presumed to have had as much knowledge of the sufficiency of the trestle for the weights he was taking upon it and dumping into said bins as the defendant; and as no notice of any defect therein was given by the decedent or any other person to the Company defendant, there is no liability on the part of the defendant for the accident in question, and the verdict must be for defendant."

Answer. "If the jury find that the bridge was in a dangerous condition, then and in that event the point is affirmed. If the jury find that no apparent cause existed which would lead an employee to suspect danger, than the point is refused." *First assignment of error.*

"Fourth, the uncontradicted evidence being that defendant employed the Philadelphia & Reading Company, a competent party, to construct for it the original trestle at the place in question; and having obtained from the engineer of that company a competent person's sug-

gestions and ground plan and grades as to the proper method of elevating such trestle, and having in all respects followed said suggestions and plan, the verdict must be for defendant."

Answer. "Declined as stated. Affirmed, if the jury so find as a matter of fact. I have substantially said that in addressing the jury." *Second assignment of error.*

"Fifth, the uncontradicted evidence being that the trestle in question was constructed at first for defendant by the Philadelphia & Reading Railroad Company, a competent party for such work, and in the second place by Josiah Keim, also a competent party for such work, and no notice of any defect therein having been brought to the knowledge of the defendant, the verdict must be for the defendant."

Answer. "If the jury so find the facts, then only the point is affirmed." *Third assignment of error.*

"Sixth, there being no sufficient evidence in this cause to justify a finding by the jury that the defendant was guilty of any negligence in building the trestle or caring for the trestle in dispute, the verdict should be for defendant."

Answer. "Refused. These are questions of fact for the jury, and therefore the point as stated is declined." *Fourth assignment of error.*

"Seventh, under all the evidence in this cause the verdict should be for defendant."

Answer. "Declined and refused." *Fifth assignment of error.*

The verdict was in favor of the plaintiff for \$1000; and judgment was duly entered thereon. The defendant took this writ and assigned for error the answers of the court to its points as above indicated.

Messrs. M. D. Evans and Wayne McVeagh, for plaintiff in error.

The relation of the Pottstown Iron Company to the Philadelphia & Reading Railroad Company was either that of an employer to an employee, or that of a corporation to a contractor.

We have therefore to consider the obligations that are due to an employee's servant from the employer, or to a contractor's servant from the corporation contracting. Those obligations are very far from being those of the insurer to the insured. Even the carrier of passengers is not liable as insurer.

Laing v. Colder, 8 Pa. 479; *Meier v. R. R. Co.*, 64 Pa. 225; *R. R. Co. v. Napheys*, 90 Pa. 135.

The carrier's liability for injury to passengers is only *prima facie*, and can be removed by proof that the injury complained of resulted from inevitable accident or from something against which no human prudence or foresight could provide.

R. R. Co. v. Anderson, 94 Pa. 351.

His extraordinary liability is based upon the implied contract that belongs in every agreement for personal transportation; that all possible means shall be taken to provide for the passenger's safety, and upon the policy of the law which requires the utmost care to be exercised when a man, paying a consideration, intrusts his person wholly to the care of the carrier.

Sullivan v. R. R. Co. 30 Pa. 284.

The money consideration passing to the carrier, coupled with the helplessness of the individual in his carriage, is the basis for demanding of him unusual care. The lessee of a

grand stand at the races, receiving a compensation for admission to the stand, was liable to the same extent as a carrier of passengers.

Francis v. Cockrell, L. R. 5 Q. B. 184.

A party cannot recover for injuries he incurs in risks, themselves legitimate, to which he intelligently submits himself. Whart. Neg. 199, n. 8.

For the exemption of the defendant it is not necessary that there should be an actual contract between the defendant as employer and the workman. A contractor is not liable to the servant of a subcontractor for injuries occasioned by the negligence of the plaintiff's fellow servant.

Wiggett v. Fox, 11 Exch. 832.

Nor is an employer generally liable for injuries received by a subemployee hired by an employee, when the negligence of any of the workmen engaged in the common task is the cause of the injuries.

Johnston v. Boston, 118 Mass. 114; *Woodley v. R. Co.* 36 L. T. N. S. 419.

The obligation of the defendant in general in the premises may be considered both with reference to the building of the trestle and the subsequent care or repair of it. That the defendant in a case such as this is not liable for the defects in a structure inherent in it from the time of its erection, provided he employs a competent party to build it, is unquestioned law.

When an owner has done all in his power to erect a proper structure, he is not liable to others for its occult defects, if he had no knowledge of them and no reason to believe in their existence. *Walden v. Finch*, 70 Pa. 460.

When a person employs others, not as servants but as mechanics or contractors, in an independent business, and they are of good character, if there is no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill.

Ardesco Coal Co. v. Gilson, 63 Pa. 146; *Painter v. Mayor etc. of Pittsburgh*, 46 Pa. 213; *Mansfield Coal Co. v. McEnery*, 91 Pa. 185.

When a person employs another to do a lawful act, it must be presumed, in the absence of evidence to the contrary, that he employs him to do it in a careful and proper manner; and unless the relation of master and servant exists between them, the employer is not responsible for the negligent manner in which the act is done.

Butler v. Hunter, 7 Hurl. & Norm. 826; *Hilliard v. Richardson*, 8 Gray, 349; Whart. Neg. § 181; Wood, Mast. & S. pp. 610-616.

The owner employing a contractor may in a measure have some personal control of the work in hand without subjecting himself to liability for its faulty performance.

Reedie v. R. Co. 6 Eng. Ry. & Can. Cas. 184; *S. C.* 20 L. J. N. S. (Exch.) 65; *Pack v. Mayor etc. of N. Y.* 8 N. Y. 222; *Steel v. R. Co.* 32 Eng. L. & E. 366.

If the defendant Company was not liable, on the theory that the accident was occasioned by defects in the trestle due to its improper construction, the only ground left for the plaintiffs is to endeavor to fix negligence upon the defendant in not duly repairing or caring for it.

"Negligence does not consist in not putting one's buildings or machinery in the safest pos-

sible condition, or in not conducting one's business in the safest way."

Judge Cooley, in *Southern Law Review* for 1876, p. 114.

No one in exercising a lawful calling is liable for anything more than the diligence of a good business man in such calling.

Whart. Neg. § 30-54.

An employer is bound to exercise reasonable care in providing for the safety of his servant in the course of his employment; but he is not required to exercise that exquisite and exhaustive care in the constant examination and overhauling of his machinery and works which would be incompatible with the proper furtherance of business.

Priestly v. Fowler, 3 Mees. & Welsb. 1; Whart. Neg. § 212.

Negligence short of that which springs from the insurer's liability is not to be implied. It must be made apparent in the case of the relation of employer and employee, as in other cases, by affirmative proof.

Allen v. Willard, 57 Pa. 877.

The simple fact of the happening of an accident upon the employer's premises will not charge him with liability.

There was no evidence that the defendant had any knowledge or had ever received any notice from any source that the trestle was defective; nor was there any pretense that as matter of fact there was any rotten wood about it, or other appearance of decay or neglect. Under these circumstances the defendant cannot be held liable for the accident in controversy.

Warner v. R. Co. 39 N. Y. 468.

When one has erected a structure to be used in his ordinary and accustomed business, without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skillful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency and with such tests as custom and experience have sanctioned and prescribed, he has exercised such care and skill as the law exacts of an employer in reference to his employee; and no liability can attach to him for a defect in such structure, by which an employee has sustained an injury, unless there had been actual notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences.

Id.; *DeGraff v. R. R. Co.* 3 Thomp. & C. 255; *Deppe v. R. Co.* 36 Iowa, 52; *Tinney v. R. R. Co.* 62 Barb. 218; *R. Co. v. Donahue*, 75 Ill. 136; *Ludd v. R. R. Co.* 119 Mass. 412; *Elliott v. R. R. Co.* 67 Mo. 272; *R. R. Co. v. Barber*, 5 Ohio St. 541.

A master cannot be held responsible for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master.

Southern Law Rev. 1876, p. 114; *Williams v. Clouch*, 8 Hurlst. & N. 258-260; *R. R. Co. v. Barber*, 5 Ohio St. 541.

The land owner is perhaps liable for the exercise of ordinary care, but nothing more. The want of it affirmatively shown will establish

negligence, upon which a recovery may be had; but nothing short of an affirmative proof will suffice for this.

Allen v. Willard, 57 Pa. 374; *Cotton v. Wood*, 98 Eng. C. L. 568; *Hammack v. White*, 103 Eng. C. L. 588; *Lehman v. Brooklyn*, 29 Barb. 284; *Spencer v. Campbell*, 9 Watts & S. 32; *Loose v. Buchanan*, 51 N. Y. 476; *Marshall v. Welwood*, 38 N. J. L. 389; *Canal Co. v. Graham*, 63 Pa. 290; *R. R. Co. v. Hughes*, 11 Pa. 141.

Schuylkill Nav. Co. v. McDonough, 38 Pa. 78; *Erie City v. Schwing*, 22 Pa. 384; *O'Donnell v. R. R. Co.* 59 Pa. 239, and *Pittsburgh v. Grier*, 22 Pa. 55, are other cases where a stricter liability was enforced, for the reason that the defendant in each case was knowingly guilty of gross negligence.

Manley v. Canal & R. Co. 2 Hurlst. & N. 840; *Burgesses of Lyme Regis v. Henley*, 3 Barn. & Ad. 77; *Parnaby v. Lancaster Canal Co.* 11 Adol. & E. 228; *Yale v. Turnpike Corp.* 18 Pick. 351; *Carleton v. Iron & Steel Co.* 99 Mass. 216, are similar cases outside of the State, where the defendants were held liable for gross negligence in knowingly retaining injurious agencies or for neglecting duties which by chartered contracts they had undertaken to do.

With the plaintiffs' decedent considered as a stranger lawfully upon the structure which fell, upon the state of facts disclosed at the trial the defendant is not liable for his death. It having been before seen that if he be regarded as an employee, the defendant is likewise exempt from liability, the claim against the latter is unsupported in reason or precedent, and must fail.

Coal Co. v. McEnery, 91 Pa. 185.

Mr. Henry S. Hagert, for defendants in error:

Where injury happens to a servant in the course of his employment, the master is responsible if it was occasioned by his negligence.

Johnson v. Bruner, 61 Pa. 58.

The master is bound to provide safe machinery, and to renew it at intervals if perishable. *Baker v. R. R. Co.* 9 W. N. C. 337.

This duty: to see that the machinery is kept in proper condition, imposes on him the duty to see that its safety is not affected from any cause which is apparent to him, or which can be anticipated and provided against. The neglect of this duty is the direct personal negligence of the master.

Where the servant's injury is attributable to the master's direct personal negligence, he may recover, irrespective of all distinctions based on employment.

Whart. Neg. § 189.

The master must see that the buildings and machinery are kept in repair; and the repairer's neglect is his. He is liable, no matter who may be the agents through whom he acts.

Id. § 235.

The agents who are charged with the duty of supplying safe machinery are not to be regarded as the fellow servants of those engaged in operating it. They are charged with the master's duty to the servant.

Ford v. R. R. Co. 110 Mass. 246.

The neglect, by the agent of the master, of ordinary care in supplying and maintaining suitable instrumentalities, is a breach of duty for which the master is liable.

Mullen v. Steamship Co. 78 Pa. 25.

Where the servant is employed in a work of danger, the master is bound to see that the machinery is in a safe and proper condition, so as to protect the servant against unnecessary risks.

Paterson v. Wallace, 1 Macq. H. L. C. 751.

No case has been cited and none can be found, from which it can be successfully argued that the decedent and defendant's employees occupied the position of fellow servants, so as to relieve the defendant from liability for the death. To constitute them fellow servants they must be in the employ of a common master and engaged in a common business.

Smith v. Steele, L. R. 10 Q. B. 125; *Smith v. R. R. Co.* 19 N. Y. 127.

A person who is injured by the negligence of another servant cannot be a fellow servant with the servant whose neglect caused the injury, so as to exempt the master from liability, unless he is under the control and orders of the master.

Swainson v. R. Co. 47 L. J. N. S. (Exch.) 372; 38 L. T. N. S. 201; *Smith v. R. Co.* 1 Pears. 248; *Baird v. Pettit*, 70 Pa. 483; *R. R. Co. v. Armstrong*, 49 Pa. 186.

This is not the case of a trestle which was defective by reason of faulty design merely, or of improper construction, or of defective or decaying timbers. No neglect by reason of these things is alleged against the defendant, but that on the day preceding the injury, the defendant had rendered what might have otherwise been safe, unsafe; and so left it, without notice or warning to the deceased. That this was a clear failure of duty towards those whose business called them upon the trestlework is plain; and the failure to perform a duty which the law casts upon a man is negligence, and makes him answerable to one who is injured by such failure.

Ferguson v. Earl of Kinnoull, 9 Clark & F. 289.

And where there is negligence it is immaterial whether the defendant could have foreseen the consequences or not.

Smith v. R. Co. L. R. 6 C. P. 21; *Feltham v. England*, 4 Foster & F. 461.

Mr. Justice Sterrett delivered the opinion of the court:

Recognizing the propriety of submitting the case to the jury on questions of fact raised by the evidence, the defendant below requested the court to charge: "First, the burden in this case is on the plaintiff to satisfy the jury that the accident in question was wholly due to the negligence of the defendant; and unless the jury is so satisfied their verdict must be for the defendant; second, if the jury believe that the excessive weight of the engine, or its undue tendency to get off the rails, or the absence of fish or splice plates, at the place of the accident, contributed to the accident, the verdict must be for defendant."

These propositions were both affirmed without any qualification, and a verdict was given in favor of plaintiffs below. In view of the instructions thus given, it follows that the jury, in reaching the conclusion they did, must have found that the accident in question was wholly due to the negligence of defendant below, and that neither of the causes specified in the second point contributed thereto.

In its sixth and seventh points, the Company defendant, somewhat inconsistently with the position assumed in the points above quoted, requested the court to charge in substance that under all the evidence the verdict should be for defendant, because there was no sufficient evidence to justify the jury in finding the Company guilty of negligence in building or caring for the trestle in question. The court declined to so charge, and thus withdrew the case from the jury, saying: "These are questions of fact for the jury, and therefore the point as stated is declined."

An examination of the testimony satisfies us that there was no error in this; that there was evidence, proper for the consideration of the jury, tending to prove negligence of the defendant. Plaintiffs' main contention was that the accident resulted from the condition in which the trestlework was carelessly and negligently left by defendant on the morning of the accident, by removal on the previous night of all the ore from one of the spaces adjoining the double trestle, and thereby allowing from thirty to fifty tons of ore to remain piled up against and nearly to the top of the other side; that the pressure of this body of ore forced the double trestle out of position, and caused it to "buckle," or double upon itself, as one of the witnesses expressed it, thus depriving the track of necessary support, and causing the engine to break through.

The testimony of Benjamin M. Gest, John A. Elliott and others tended to support this theory of plaintiffs below, and was manifestly proper for the consideration of the jury. It is unnecessary to refer more particularly to the testimony on this subject. Suffice it to say that it was quite sufficient to justify the court in refusing defendant's sixth and seventh points. The fourth and fifth specifications are therefore dismissed.

The subjects of complaint in the three remaining specifications are: the refusal of the court to unconditionally affirm defendant's third, fourth and fifth points. There is nothing in the qualified answers of the court to either of these points that can justly be regarded as unduly prejudicial to plaintiff in error. On the contrary they are quite as favorable to the Company as, in view of the testimony, it had a right to ask.

The case hinged on questions of fact, arising out of the testimony, to the admission of which there is no objection. These questions were fairly and correctly submitted to the jury, the proper tribunal for their final determination, and their finding has been adverse to the plaintiff in error. If their finding was contrary to the weight of the evidence, the power to grant relief was in the court below. That question is not before us. We find nothing in either of the five specifications of error that would warrant a reversal of the judgment.

Judgment affirmed.

Edward S. WHELEN, *Plff. in Err.*,
v.

Alexander BOYD.

1. Where the **certificate** of the promisor's agent, that **work** has been done in ac-

cordance with the contract, is by the terms of the contract prerequisite to payment, the agent's **refusal to give** the certificate is **no defense** to a suit for payment, if it is proved that the work was in fact done in accordance with the contract.

2. In such a case it is the **duty of the agent to give the certificate**; and the promisor cannot avail himself of his agent's wrong.

8. One who had agreed to erect certain houses, and was to have a mortgage assigned to him by A, in consideration of their erection, when they were finished, engaged plaintiff to plaster them and assigned his interest in the mortgage to plaintiff in payment therefor and released A from his obligation to deliver to him the mortgage and the plaintiff assigned the mortgage to A's wife, on **A's agreeing to pay plaintiff for his work** when done, not exceeding the sum mentioned in the assignment. **Held**, that the plaintiff was **entitled to recover from A**, on completing the plastering, the amount due him therefor, not exceeding the sum so mentioned, notwithstanding the fact that the builder had not finished the houses.

4. The **obligors in a bond** for the performance of a contract are **released from liability by a new contract** in relation to the same subject matter, with different security, entered into by the parties after breach of the old contract and before notice or demand upon them.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 4 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of assumpsit. *Affirmed.*

At the trial before Elcock, J., the following facts appeared:

The plaintiff Boyd contracted about October 1, 1878, with one Asay to plaster, for \$300 each, twelve houses which Asay was building. On the completion of the work Asay was to assign to him in payment a mortgage of \$3,600 on one of the houses.

Before beginning work Boyd discovered that Asay did not own the mortgage, but that it belonged to the defendant, Whelen, who was party to a contract under which Asay was building the houses, and that Asay was to receive the mortgage when the houses were finished.

On October 18, 1878, Asay, by an instrument in writing, in which he recited his contract with Whelen, released Whelen from all obligation to deliver the mortgage in payment for Asay's work, and assigned his interest in the mortgage to Boyd for Boyd's sole use in payment for the plastering as soon as Asay should be entitled to it under his contract with Whelen. The assignment concluded with the words: "And I do hereby acknowledge this as my receipt in full to said Edward S. Whelen, for all claims and demands upon him, for the sum of \$3,600 under my contract with him, in consideration of

his paying to said Alexander Boyd such sum as may become due for plastering as the work is performed and completed, from time to time, not exceeding in all the sum of \$3,000 in cash payment, at which price the said Alexander Boyd has sold the said mortgage."

On the same day Boyd executed an assignment in the following words:

"For value received, and the sum of \$5 to me in hand paid, the receipt of which I do hereby acknowledge, I do hereby assign, transfer, and set over unto Mrs. Isabella N. Whelen all my right, title, and interest in the mortgage of \$3,600, which A. M. Asay has assigned to me in payment for contract for plastering twelve houses on south side of Butler Street, east of Broad Street, on the condition that in all the sum of \$3,000 shall be paid over to me as I shall be entitled to it under the contract of A. M. Asay with Edward S. Whelen for the completion of said houses so fast as said A. M. Asay shall be entitled to any payment, I having sold my claim to said mortgage for the sum of \$3,000, which is more valuable to me than the said mortgage, when earned under Asay's contract with Edward S. Whelen."

Boyd then proceeded with the work, and in the course of it Whelen paid him \$2,000 on account. When Boyd, as he claimed, finished his work, he brought this suit against Whelen for the \$1,000 still due.

Under the pleas of non assumpsit, set-off with notice, and payment with leave to give special matter in evidence, the defendant Whelen contended that Boyd had not done the work properly, that Asay had not finished the houses and that no certificate that Asay had finished the houses had been furnished by Whelen's superintendent Bye. Whelen claimed also to set off against Boyd's claim a counterclaim against him for \$10,000 on a bond of indemnity or guaranty.

The facts out of which these alleged defenses arose are fully set forth in the opinion of the court.

The charge and answers to the defendant's points by the court below virtually took away from the jury and excluded from the case the defenses based upon Asay's failure to finish the houses, and upon the want of a certificate from Bye, and left it to the jury to say whether the work was well done by Boyd.

The court refused to charge that if Boyd executed the bond of indemnity, Whelen advanced money upon the faith of it, and Asay failed to finish the houses at the time stipulated, Boyd could not recover.

Verdict and judgment were for the plaintiff; whereupon, the defendant took this writ and assigned as error the charge and answers of the court.

Messrs. John G. Johnson and W. Heyward Drayton, for plaintiff in error:

An insurance company which has insured a mortgagee's interest is liable for the injury to the property, although the remaining land is ample security.

Kernochan v. Ins. Co. 17 N. Y. 428.

A mortgagee in an action on the case for damages to the property can recover the damage done to the estate, without regard to the sufficiency of the security.

Gooding v. Shea, 103 Mass. 360; *Byrom v. Chapin*, 113 Mass. 311.

In *Curtis v. Baugh*, 79 Ill. 242, a vendor having a lien took a bond from the owner in \$3,000 for indemnity against loss by the sale of timber on the land. Timber to the value of about \$2,000 was sold, and afterwards the land was sold to pay the lien, and there was a deficiency of \$5,000. It was held that the measure of damages is the value of the timber.

When the contract is more than for indemnity against damages; where a party stipulates against the doing of certain acts, or the existence of certain conditions, or for payment or performance of any kind; then damages are not the gist of the action, and the value of performance of the contract will measure the damages recoverable for the breach.

2 Suth. Dam. p. 611.

Johnson v. Britton, 23 Ind. 105; *Lathrop v. Atwood*, 21 Conn. 117; *Norway Plains Savings Bank v. Moors*, 134 Mass. 135; *Kidd v. McCormick*, 83 N. Y. 391; *Gilbert v. Wiman*, 1 N. Y. 550; *Chase v. Hinman*, 8 Wend. 452.

Bye's certificate was required; it was not competent to prove a substitute for it; and evidence of what he had said as to the condition of the work was immaterial.

Reynolds v. Caldwell, 51 Pa. 298; *Howard v. A. R. R. Co.* 69 Pa. 489; *O'Reilly v. Kerna*, 53 Pa. 214.

Mr. Lewis Staver, for defendant in error:

It is claimed that the two papers of October 18, 1878, contain the whole and only agreement. They do not purport to be agreements *inter partes* upon their face; they are not *in fieri*, but final; they are signed but by one person and bind but one. They were deeds-poll and nothing else. Mr. Boyd's testimony did not contradict or vary the terms of any written instrument.

Rogers, J., in *Hinckly v. Walters*, 9 Watts, 182, says: "Here the parol evidence is in accordance, and not in opposition to the legal effect of the indorsement. The agreement was collateral to the assignment, and does not infringe the rule that a contract cannot be partly in parol and partly in writing."

It did not appear that the bond had been forfeited, because there was no proof that Asay had committed a breach of his building agreement. The agreement made between Whelen and Asay without notice to the sureties of April 8, 1879, superseded and did away with the building agreement; and the bondsmen, who were sureties for the faithful performance of that agreement on the part of Asay, were thereby released.

Estate of N. A. Land Co. 60 Pa. 260; *Kellogg v. Stockton*, 29 Pa. 463; *Douglass v. Reynolds*, 7 Pet. 120 (32 U. S. bk. 8, L. ed. 629).

When a creditor has in his hands the means of paying his debt but gives it up, the surety is discharged.

Everly v. Rice 20 Pa. 299; *Clow v. Derby Coal Co.* 98 Pa. 439.

Mr. Justice Green delivered the opinion of the court:

The jury have found by their verdict that Boyd did the plastering sufficiently well to earn his money. It is true that Bye declined to give

him a certificate of approval, but what of that? It is by no means clear that a certificate of approval was an indispensable prerequisite before Boyd could claim payment; but if it were there was testimony enough to justify the inference that it was not given, not because Bye did not think it was deserved, but because Whelen, under whose orders he was acting, would not permit him to give it; and if so, the law is settled that he cannot take advantage of his own or his agent's wrong. We see nothing then in this point which would warrant us in disturbing the judgment.

Nor is there anything in the contention that under the papers of October 18, 1878, Boyd was to be paid \$3,000, only in case Asay did what was necessary to entitle him to receive the \$3,600 mortgage. It is true that in the first of these two papers Asay recites that he has assigned to Boyd his right to said mortgage "so soon as I shall be entitled to receive and demand the same under my contract to complete the twelve houses," etc. He could assign nothing else so far as this mortgage was concerned, for he had nothing else to assign; but when we come to the consideration for which, by this same paper, he releases Whelen from his obligation to deliver to him this mortgage, we find that it was "of his paying to said Alexander Boyd such sum as may become due for plastering as the work is performed and completed from time to time, not exceeding in all the sum of \$3,000, in cash payment, at which price the said Alexander Boyd has sold the said mortgage;" that is, Boyd is to be paid cash from time to time, not to exceed \$3,000 in all, as his work, plastering, not Asay's work, the building of the houses, is performed and completed.

And the second of these papers, by which Boyd assigned to Whelen's wife what Asay had assigned to him, explains why he had sold for \$3,000 in cash his right to the \$3,600 mortgage, viz.: "I having sold my claim to said mortgage for the sum of \$3,000, which is more valuable to me than the said mortgage when earned under Asay's contract with Edward S. Whelen."

If, as contended by the plaintiff in error, Boyd would be entitled to be paid only when the mortgage should be earned under Asay's contract, then the plain language of these papers must be ignored, and we are at a loss to know for what Boyd paid or abated \$600 in the price of his work; unless, which seems incredible, he was paying or abating this sum for the privilege of retaining the risk which the papers show he intended to avoid. These papers were drafted by Whelen and are to be read together as explanatory and expressive of the arrangement between him and Asay and Boyd; and so read, we cannot doubt that it was understood that Boyd undertook to do the plastering in consideration that he should be paid, as and when his own work was done, independently of the fact whether the work contracted to be done by Asay was done well, or in time, or at all.

But conceding this, it is further contended that there is a set-off in the shape of a bond (whether of indemnity or guaranty) in which Boyd is one of the obligors, which had become payable by reason of Asay's default under his building contract with Whelen. But, accord-

ing to the evidence, Asay had made actual or essential default, and while Boyd was going on with the plastering, Asay, finding or fearing that he would be "unable to fulfill his contract," made another agreement April 8, 1879, with Whelen, as to the finishing of the said houses, differing materially from the original contract, and in pursuance of which Asay conveyed the said lots and houses to Whelen's son as security for Whelen.

This was done so far as appears without the knowledge or consent of the obligors in the bond. It is true that Whelen notified them of Asay's inability to fulfill his contract and called their attention to their obligation to complete the said houses; but this was not until April 23, 1879, fifteen days after Whelen had made his new contract with Asay, had taken conveyance of the property to his own son as security, had in effect, if not in very terms, released Asay from the original contract, and when, therefore, the obligors had become released from the obligation of their bond.

Why, if Whelen intended to look to the bond, he thus made this new contract it is not easy to understand. It was not merely taking additional security; it was making a new contract with substituted security. When Asay made default, if he did make actual default, Whelen's remedy on the bond was complete and the cases cited by the plaintiff in error would apply. If the obligors had omitted or refused to fulfill their covenant, he could have brought suit against them and recovered damages to the extent of the injury suffered or loss sustained. But he did not. Before, so far as appears, there was any operative default upon the part of Asay or any knowledge by the obligors of his immediate or prospective inability to go on, Whelen, without their consent, without calling upon them or affording them an opportunity to fulfill their covenant, entered into a new contract with Asay which not only prevented them from doing so, but would have made them trespassers if they had attempted to do so. A new contract to perform on different terms, the unperformed part of the old contract, which took the place of the unperformed part of the old contract, and which, under the settled law, released them from performing it, and of course from all damages, under their bond, because it was not performed.

If the obligors are "allowed to escape, scot free," it is because the plaintiff in error did not choose to hold them, when they could have been held. Without going into the question as to whether, if the set-off, had been admitted, the money expended by the defendant below in finishing the houses would have been the proper measure of damages under the circumstances, we think that the judgment was right.

Judgment affirmed.

Louis ZURN, *Plff. in Err.*,
v.

George W. NOEDEL *et ux.*

1. A **commission merchant** is not entitled to **commissions** on the sale of goods consigned to him, unless he has in all things performed his duties as consignee in a proper manner.

2. A judgment given by a married woman, when covert, before she had applied for the benefit of the Act of April 3, 1872, which secures to a married woman her separate earnings, is not a binding obligation upon her; yet she has a right to pay it and, having paid interest upon it, cannot recover it back.
3. A note given by her, after having applied for the benefit of such Act, for money borrowed to enable her to engage in business, is valid as against her.

(Decided October 4, 1886.)

ERROR to the Common Pleas of York County, to review a judgment in favor of plaintiffs, in an action of trespass on the case upon promises. *Reversed.*

In 1875 George W. Noedel was engaged in farming and in the business of manufacturing Limburger cheese in the County of York. Louis Zurn was then and still is a commission merchant, doing business in Philadelphia. Zurn advanced money to Noedel to the amount of \$1,500, for which Noedel and his wife, Bertha Noedel, executed a note with warrant of attorney to confess judgment, upon which judgment was entered in 1875, which judgment has been duly revived by *act. fa.*

On October 29 and November 8, 1875, the personal property of George W. Noedel was sold on executions against him. Among his personal property sold on October 29 was a large quantity of Limburger cheese partly manufactured, which was purchased by Joseph Lebach for Bertha Noedel. At the second sale, on November 8, said Lebach purchased for her other personal property, consisting of farm implements and supplies amounting to \$438. Of this amount \$375 was furnished her by W. C. Chapman.

On November 8, 1875, Mrs. Noedel filed her petition to obtain the benefit of the Act of April 3, 1872, securing to married women their separate earnings; and at once, with the goods purchased at the sheriff's sale and others of her own, she assumed the management of the farm and proceeded to finish and prepare the unfinished Limburger cheese for market, and to engage in the business of manufacturing Limburger cheese.

On November 17, 1875, Zurn, the plaintiff in error, advanced to Mrs. Noedel \$400, with which she paid W. C. Chapman the money advanced by him to pay for the articles purchased at the sale of November 8, and gave to Zurn her note for \$402 at thirty days.

Mrs. Noedel finished the cheese, and from time to time consigned it to Zurn for sale on a commission of 10 per cent, the dates of shipment being from November 30 to December 13, 1875, and the total amount consigned being 111 boxes aggregating 12,808 pounds. Mr. Noedel acted as the agent of his wife and conducted the correspondence. Letters of instruction were sent with each consignment, which were in evidence.

The first letter dated November 29, 1875, directed the consignee to "Make the best price you can for it." The second letter, December 4, expressed the "Hope that you are making good prices." The third letter accompanying consignment of December 9, says: "You need

not hurry with the sale. I need no money before the beginning of March; only at good prices; I wish to get about 15 cents."

The letter accompanying consignment of December 13, said: "Sell to the highest price as the sale is not pressed." With the letter of November 29, 1875, was sent the sum of \$100 on account of Mrs. Noedel's note of \$402.

In the course of the correspondence defendant repeatedly asked for payment of the balance of the \$402 note. In her letter of December 13, in connection with a promise to remit money on account of the note she says (referring to the consigned cheese): "You have enough to cover you."

In her letter of February 12, 1876, she demanded an account of sales, and said: "Make now all the disbursements and advances and the interest on the \$1,500 on the above lot of cheese, and try to make account sales as soon as you can." In her letter of February 26, she informs him that she requires the money realized on the consignment, by March 1, and asks an advance of \$1,000. In her letter of March 15, she reproaches him for not accounting, and asks an advance of \$200. Merchandise was sent to Mrs. Noedel by Zurn, to the amount of \$29.02, and \$10 in cash, March 1.

On May 17, 1876, Zurn wrote Mrs. Noedel requesting her to remove the balance of her cheese, and that on her failure to do so he would store it at a public store house at her risk. On May 31, 1876, he wrote her that the unsold balance of cheese would be sent to Comley & Co., auctioneers, for sale at auction on June 7, then next ensuing, unless ordered to the contrary. Thereafter the said cheese, consisting of 69½ boxes, was sent to said auctioneers and sold at public auction on June 9, 1876, realizing the net amount of \$29.97. The cheese was in good order and condition when shipped to and received by defendant. It was spoiled when sold by Comley & Co. The cause of its deterioration was not disclosed in the evidence.

On December 3, 1879, this suit was brought by G. W. Noedel and Bertha Noedel, his wife, in her right and for her use. The original narr. contained only the common counts for goods sold and delivered, work and labor, and the money counts. Afterwards an amended narr. was filed, containing special counts averring consignments by the plaintiffs to defendant for sale on commission of a large quantity of cheese, and charging defendant with a failure and refusal to account and pay over proceeds to plaintiff.

On July 20, 1885, an additional count was filed by leave of court averring the consignment, by plaintiffs to defendant, of the cheese, and charging the defendant with negligence in the custody of the same, as well as in the sale, whereby it was alleged that a large portion of the cheese was injured and deteriorated in value, and with selling the same at auction, to the damage of the plaintiffs, etc.

To the original narr. and first amendment the defendant pleaded non assumpsit, payment with leave, and subsequently, set-off; and to the last amended narr. he pleaded not guilty. The action was referred to a referee who found the facts as above stated and the defendant liable in the amount of \$845.86, and made his calculation as follows:

Gross proceeds sale of 41½ boxes cheese as per testimony of defendant	\$541 41	
Net proceeds auction sales	29 97	
Defendant realized	\$571 38	
Less following Credits allowed:		
Merchandise, Nov. 30, 1875 ..	\$ 7 27	
" Dec. 6 " ..	21 75	
Cash advance, March 1 " ..	10 00	39 02
Balance due consignee	\$532 36	
Interest from April 29, 1876, the date of commencing first suit, to Feb. 18, 1886	813 00	
Due plaintiffs	\$845 36	
Defendant filed exceptions to the report of the referee, and on the argument before LATIMER, J., the report of the referee was modified as follows:		
Amount of award against defendant as per referee's report filed Feb. 18, 1886	\$845 36	
Deduct additional credits for freight, etc., admitted by plaintiff on the argument ..	\$40 60	
Interest on same, April 29, 1876—Feb. 18, 1886	23 89	64 49
Amount due plaintiffs, Feb. 18, 1886	\$780 87	
Interest on same, Feb. 18, '86—April 9, '86	6 67	
	\$787 54	

Judgment was entered for plaintiffs and against defendant, for the sum of \$787.54, with costs; and defendant took this writ specifying errors as follows:

1. The court below erred in dismissing the defendant's sixth exception, filed to the report of the referee, which exception in part was as follows:

"The referee erred in rejecting the defendant's claim for commissions and guaranty, which plaintiff had agreed to allow him."

2. The court below erred in dismissing the defendant's twelfth exception filed to the report of the referee, which exception was as follows:

"The referee erred in rejecting the \$302, due on the note of plaintiff, to the defendant, as a credit under the agreement of the consignor and consignee, made after the execution of the note and the shipment of the cheese to the defendant, and under all the circumstances of the case."

3. The court below erred in dismissing the defendant's fifteenth exception filed to the report of the referee, which said exception was as follows:

"The referee erred in rejecting the disbursements and advances disallowed by him; the plaintiff in her letter of February 12, 1876, having directed him to 'Make now all the disbursements and advances and the interest on the \$1,500 note, on the above lot of cheese,' etc."

4. The court erred in dismissing the defendant's fourteenth exception to the referee's report which exception was as follows:

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"He erred in not allowing defendant credit for the interest due on said judgment of \$1,500, which the plaintiff by her letter of February 12, 1876, directed him to make for himself out of the cheese consigned to him for sale."

5. The court erred in dismissing the defendant's ninth exception to the referee's report, which exception was as follows:

"He erred in rejecting the balance due the defendant on the note of Bertha Noedel to defendant, of \$402, as a set-off against the plaintiffs in this action."

6. The court below erred in dismissing the defendant's eleventh exception filed to the referee's report, which said exception was as follows:

"The referee erred in rejecting the judgment note of \$1,500, against the plaintiffs as a set-off against plaintiffs' claims in favor of the defendant."

Messrs. N. M. Wanner and W. F. Bay Stewart, for plaintiff in error:

Mrs. Noedel used the money furnished as the consideration of the note in stocking the farm and in farming operations, which brings her within the plain ruling of this court in *Bovard v. Kettering*, 101 Pa. 181.

Her husband acted as her agent and conducted the correspondence. He knew what disposition she was making of her property. She might give it to a stranger with his consent.

Keen v. Philadelphia, 8 Phila. 49; *Dando's App.* 94 Pa. 76.

In *Dando's App.* this court said: "A married woman may transfer her separate property to pay a present or future indebtedness of her husband." Her power is not lessened by the Act of 1848. She may transfer it in the same manner she could have done before; citing *Haffey v. Carey*, 73 Pa. 431.

"While she may not be liable on a contract to sell and deliver her personal property at some future time, yet she cannot repudiate a gift or contract fairly made, under which she has delivered possession of the property."

Brown's App. 94 Pa. 367. See also *Fryer v. Rishell*, 84 Pa. 524.

Messrs. H. L. Fisher and T. W. Noedel, for defendant in error:

"There can be no reasonable doubt that in particular circumstances a wish expressed by a consignor to a factor may amount to a positive command."

Brown v. M'Gran, 14 Pet. 479 (39 U. S. bk. 10, L. ed. 550).

This has been held in a case similar to this in principle.

Porter v. Patterson, 14 Pa. 229.

In *McMullen's App.* 107 Pa. 94, it was held by this court that a married woman was not liable on such a note, although for money borrowed and applied to the purposes of repairing or improving her separate estate, simply because it was not shown affirmatively that such improvements or repairs were necessary.

See also *Vandyke v. Wells*, 103 Pa. 49; *Glyde v. Kiester*, 32 Pa. 85; *Shyder v. Noble*, 96 Pa. 286.

Mr. Justice Paxson delivered the opinion of the court:

We are unable to see any error in the refusal

of the court below to allow the plaintiff in error his claim for commissions. Undoubtedly he would have been entitled to them had he in all things performed his duties as consignee in a proper manner. But the referee has found that he did not, and we are entirely satisfied with that finding. Even if we were not, and were disposed to review it, we could not do so in the absence of the evidence, the documentary portion of which only is printed.

Nor do we see any error in the disallowance of the \$1,500 judgment. It was given to Mrs. Noedel when *covert*, and before she applied to the court for the benefit of the Act of April 3, 1872. It was not, under all the authorities, a binding obligation upon her.

But we think the court below fell into error in rejecting the claim of the plaintiff in error to be allowed the interest on this judgment, and also for the balance of the note of \$402.

Mrs. Noedel (defendant in error) had consigned to the plaintiff in error a large amount of Limburger cheese which she had manufactured on a farm in York County. The farm appears to have been owned, at least carried on, by her husband at one time. He failed in business and some personal property he had there, including some Limburger cheese, was purchased by his wife Mrs. Noedel, who continued the business of manufacturing this species of cheese, in connection with the farm. It was found by the referee that she had sufficient separate estate to make the purchase. The \$402 note referred to grew out of this transaction. Prior to her giving it she had applied to the court of common pleas for the benefit of the Act of April 3, 1872, which secures to a married woman her separate earnings. This brings the case within the ruling of *Bonard v. Kettering*, 101 Pa. 181.

The learned judge below held that *Bonard v. Kettering* did not apply, for the reason, in part, that the proceeds of the \$402 note were not traced directly into the manufacture of the cheese consigned to the plaintiff in error. We think this was error. The money was borrowed to enable her to engage in the business which her husband had previously followed. She did so engage and as a result thereof shipped a large amount of cheese to the plaintiff in error, who had advanced the \$402. In her letter of February 12, 1876, she authorized the plaintiff in error to retain, out of the proceeds of the consignment, the interest on the \$1,500 judgment and all disbursements and advances. She was not obliged to pay the principal or interest of this judgment, for the reason already given, yet she had a right to do so; and it is no part of our duty to prevent a married woman from being honest. Her consignee held this judgment against her, and her letter to him was an appropriation of so much of her money in his hands to the payment of this interest.

Under the ruling in *Bonard v. Kettering*, she was clearly liable on the note; and it did not need her letter to her consignee to justify him in deducting the amount from the sales of the cheese.

Both of these claims should have been allowed.

Judgment reversed and a venire facias de novo awarded.

Charles I. LANDIS, *Plff. in Err.*,

v.

Robert A. EVANS.

1. **Assignments of error** should be so complete in themselves as not to require reference to other parts of the record. Each **specification** of error should, in and of itself, present the question to be decided.
2. Where the **primary design** of a plaintiff, in issuing an execution, is to obtain a lien upon defendant's personal property and **not to sell the same** except in the contingency of a subsequent execution being issued, the **lien of the first execution will be postponed to the second.**
3. But where the facts show nothing more than a disposition on the part of plaintiff to treat the family of defendant in the execution with due consideration, by not subjecting them to **unnecessary inconvenience or annoyance**, as where the plaintiff told the sheriff not to go to defendant's house until next day as the house was torn up, the lien of the execution will **not be postponed** to that of a later one.

(Decided October 4, 1898.)

ERROR to the Common Pleas of Lancaster County, to review a judgment directing the payment of moneys collected on an execution sale. *Reversed.*

The judgment of the court below was rendered on a case stated. The parties are judgment creditors of F. A. Diffenderfer and the moneys in question were collected on a sale of his property on executions issued on such judgments.

The facts are further stated in the opinion.

Mr. D. G. Eshleman, for plaintiff in error: Only in cases where the execution is not issued for the enforcement of the judgment is it fraudulent as to subsequent execution creditors.

Dorrance's Admrs. v. Commonwealth, 13 Pa. 160; *Brown's App.* 26 Pa. 490; *Hickman v. Caldwell*, 4 Rawle, 376.

The great question in every case is the intention of the plaintiff.

1 Trickett, Liens, p. 343, § 289; *Lantz v. Worthington*, 4 Pa. 155; *Thorn's Case*, 2 Pa. 831.

If the sheriff was directed not to levy until the afternoon as claimed by defendant, was he not bound to levy as soon as the afternoon commenced, which was at least two hours before defendant's execution was issued?

"An execution will not be postponed for an officer's default. His procrastination, even by sufferance of the creditor, is not fraudulent *per se*, and postpones only where the creditor directs him not to proceed."

McGinnis v. Prison, 85 Pa. 116.

Even if a plaintiff is guilty of laches, and none has been shown in this case, he will not be postponed, if he order the sheriff to proceed before another writ comes into his hands.

1 Trickett, Liens, p. 351, § 295; *Deacon v. Govett*, 4 Phila. 7; *Freeburger's App.* 40 Pa. 244; *Mentz v. Hamman*, 5 Whart. 150.

In *Childs v. Dilworth*, 44 Pa. 123, where one of the plaintiffs desired the sheriff to postpone

the sale of the personal property until after that of the real estate, which the sheriff refused to do, postponing the advertisement of the personal property for one day only, and then proceeded to sell, it was held that the plaintiff's priority of lien was not destroyed.

Mr. A. J. Eberly, for defendant in error:

This court decided in *Earl's App.* 18 Pa. 483, that delay will defeat an execution whether owing to the directions or permission of the plaintiff, or to the default of the officer.

In 5 Rawle, 290, *Justice Sergeant* says: "If the plaintiff delivers an execution to the sheriff with directions not to levy at all, or not until further orders, it creates no lien on the defendant's personal property as against a creditor issuing and proceeding with a subsequent execution."

Commonwealth v. Stremback, 8 Rawle, 344.

"The rule is the same if there is a levy accompanied with instructions to stay proceedings."

Hickman v. Caldwell, 4 Rawle, 376.

"In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt; and the employment of an execution for this purpose is a perversion of its design, and a fraud against third persons."

Justice Kennedy in *Weir v. Hale*, 3 Watts & S. 288, 289, delivering the opinion of the court on the same subject, says:

"In order to make the execution first put into the hands of the sheriff available against those delivered to him subsequently, it is not sufficient that the plaintiff in it has a valid judgment, and that he is entitled to have execution of it; but he must sue out his execution, and deliver it to the sheriff, not merely for the purpose of having his debt secured by creating a lien on the personal property of the defendant, or still less of protecting the defendant thereby in the use and enjoyment of it, but for the purpose of having his judgment satisfied by a *bona fide* execution of the writ as far as it may be practicable."

In *Truitt v. Ludwig*, 25 Pa. 149, *Lewis, Ch. J.*, lays down this rule on the subject of executions: "Nothing can be better settled than that an execution is intended not to secure, but to enforce, payment of a debt. It must be used in good faith for its legitimate purpose, or the plaintiff in whose favor it issues gains no advantage from it."

It is true that the directions given by the plaintiff in *Stern's App.* 64 Pa. 447, to the sheriff on Sunday to proceed with the *pluries* writ had not the effect on the writ to make it a lien from the time the order was given and to galvanize it into life again without a levy, because the order was given on Sunday; but the court does not decide that it would not have the same effect if given on any other day.

Mr. Justice Sterrett delivered the opinion of the court:

As has been repeatedly said, the assignments of error are an essential part of the pleadings in this court, and as such should be so complete in themselves as not to require reference to other parts of the record. When the case is disposed of and the record returned to the court below, the precept, assignments of error and plea thereto are all the papers that usually remain of record in this court as the basis of our judgment or decree, as the case may be. It must be obvious, therefore, that each specification of error should, in and of itself, present the question we are called upon to decide.

In the case under consideration, there are only two specifications, one of which is: "The court erred in discharging the rule of Charles I. Landis," and the other: "The court erred in making absolute the rule of Robert A. Evans."

What these rules respectively were, in disposing of which it is insinuated the court below committed manifest error, we are not informed by the pleadings, and we might, with propriety, and perhaps ought to affirm the judgment, for the reason that there is no valid assignment of errors.

By referring to the case stated in the record of the court below, we find that the former was a rule to show cause why the sheriff should not be ordered to pay the proceeds sale of Dufferden's personal property to Charles I. Landis, the plaintiff in error, and the latter a rule to show cause why the same money should not be paid to Evans, the defendant in error. It appears that Landis and Evans were both executive creditors of the defendant whose property was sold on both executions.

Landis' execution was issued and placed in the hands of the sheriff at 2.15 o'clock P. M. on February 26, 1835, and Evans' execution at 2 o'clock P. M. of the following day. Ordinarily there would be no question that the first execution would be entitled to the money; but the court awarded it to the second execution, upon the ground that the first was postponed in consequence of directions to the sheriff not to proceed immediately and levy on defendant's property. What passed between the sheriff and Landis' attorney is set forth in the case stated; and the question is, whether, upon the facts there presented, the court was right in holding that the first execution was postponed to the second.

It appears, in substance, that on the day the first execution was issued, Landis, the plaintiff therein, told the sheriff's deputy not to go to defendant's house until next day, as the house was torn up; and on the following morning he informed the sheriff that the ladies were clearing up or fixing things up in the house, and suggested to the sheriff that, if it made no difference to him, he might go up in the afternoon.

It cannot be doubted that what was thus said and suggested by the plaintiff in the execution was prompted by a desire to accommodate the family of the defendant in the execution, and cannot be fairly construed as evidence of a design on his part to merely obtain a lien by virtue of his execution and hold the same as security.

The authorities are abundant that when the primary design of a plaintiff, in issuing an execution, is to obtain a lien upon defendant's personal property and not to sell the same except in the contingency of a subsequent execution being issued, the lien of the execution will be postponed. The facts recited in the case stated, however, do not warrant any such conclusion. On the contrary, they show nothing more than a disposition on the part of plaintiff to treat the family of defendant in the execution with due consideration, by not subjecting them to unnecessary inconvenience or annoyance. We

think, therefore, that the learned court erred in holding that the lien of the first execution was lost.

The order of court is reversed, and the rule to show cause why the sheriff should not be ordered to pay the proceeds of sale to plaintiff, Charles I. Landis, is made absolute.

James HUFFMAN, *Ptff in Err.*,

v.

Davis W. JOHNS.

A debt discharged by proceedings in bankruptcy is revived by a subsequent absolute and unconditional promise, by the debtor, to pay it, and by a partial payment.

(Decided October 18, 1888.)

ERROR to the Common Pleas of Greene County, to review a judgment on a verdict for plaintiff in a action of trespass on the case on promises to pay a pre-existing liability. *Affirmed.*

The facts of the case as they appeared in the court below are stated in the charge to the jury by INGRAM, J.

"It appears from the evidence in this case that on the 10th day of December, 1873, the defendant, James Huffman, gave to the plaintiff, D. W. Johns, his note under seal calling for the payment of \$325.50, one year after date. From the evidence it doesn't appear that anything was done with that note, but it does appear that on the 17th day of July, 1876, the defendant, James Huffman, was adjudicated a bankrupt; and on the third day of December, 1879, he was discharged in bankruptcy, of course dating back to his adjudication on the 17th day of July, 1876; and that relieved him from all liability on this note.

"But it is claimed by the plaintiff that on or near the first of July, 1880, he called upon the defendant at his house and asked him to renew the note dated on the 10th day of December, 1873, but that the defendant refused to renew it, but said that he must and would pay it; and it is claimed by the plaintiff that he offered to give him a horse on the note, which he considered worth \$100; and that he, the plaintiff, agreed that he would take the horse on the note, and that they went to the field to look at the horse; that they did look at him, but the defendant wanted to use the horse for a few days in some of his farming operations, possibly; and that he left him there, but when he went back the defendant claimed that the horse was worth \$120.

"The plaintiff claims that he said he would give him credit on the note for the horse and that the defendant sanctioned that proceeding, and he claims that he afterwards did give the defendant credit on the note for \$120, the price of the horse, and also gave the defendant a pocket receipt for the amount of the value of the horse. This is, as we remember it, the evidence on the part of the plaintiff on which he relies for a recovery in this action, claiming that there has been such a promise on the part of the defendant to pay this debt, as would render him liable to a recovery in this action.

"On the part of the defendant it is not denied

that he gave the plaintiff the horse on the note, or as a payment on the note, but he claims that it was under different circumstances and under a different state of facts than that claimed by the plaintiff. He claims that the plaintiff came to his house or his place, about the first of July, 1880, and asked him to renew the note, but that he declined and refused to do so, but stated to the plaintiff that he would like to pay the note, but was unable to do it. It is claimed also that he stated to the plaintiff that he would give him the horse on the note if he, the plaintiff, would release the defendant, or rather discontinue a suit in the name of the administrators of Cowan against the defendant and his brother that was then pending in this court; and further, that if he would discontinue that suit and give him an opportunity to pay the note by assisting him (the plaintiff then being a candidate for the nomination for treasurer of the county, and the defendant believing the plaintiff's prospects for the nomination were pretty fair)—that he stated to the plaintiff that if the plaintiff would give him an opportunity of clerking for him and collecting money for him, he would in that way pay the note; and he claims that he made no other promise than that; that he did state in reply to the request of the plaintiff to renew the note, that he wouldn't do it; that he would like to pay it, and if the plaintiff would give him the opportunity he would pay it, and that he would give him the horse on the note, if he, the plaintiff, would release the suit then pending against him in the name of the administrators of Cowan.

"The defendant claims that the promise, if any was made, was entirely conditional upon his being allowed to assist the plaintiff in his business, in his office, and that the further condition was that they would discontinue the proceedings in the Cowan suit against the defendant; and he claims that the proceedings in that case were not discontinued, and the record in that case shows that they proceeded until he was finally successful in recovering a verdict in his favor on the 21st of April, I believe, 1885.

It is claimed by the defendant that whatever promise was made about the first of July was conditional and entirely so; that the condition failed and that he is not now responsible for this note or the balance of it, after deducting the credit of the price of the horse.

"On the part of the plaintiff it is not denied that they had some conversation about the Cowan suit, and about assistance in the office of treasurer if the plaintiff should be nominated and elected; but he claims that the promise to pay the note was before that, that the promise to pay the note was made at or near the house of the defendant and that nothing was said about assisting in the office of treasurer, and that nothing was said about the Cowan suit at that time; but that after they had been talking there awhile and the promise had been made and they had gone to the field to look after the horse, and were out in the field, or returning to the house afterwards, the defendant did say something afterwards about the discontinuance of the Cowan suit and about clerking in the office of treasurer for him, or collecting moneys for him, but he denies that such conversation took place at the time the promise, as he claims, was made.

"The question for you to determine, gentlemen of the jury, is whether there has been an absolute promise to pay this note or debt since the discharge of the defendant in bankruptcy. Whatever promise was made was made, of course, since his discharge in bankruptcy, that having taken place in December, 1879; and it is claimed by the plaintiff that the promise which he alleges was made was made in July, 1880. It will be a question of fact for you to determine from all the evidence in the case, relying upon your own recollections of the testimony as to what has been testified to on the one side or the other. It is not what we may state was the testimony, or what the counsel may state that you are to rely upon in making up your verdict, but it will be your duty to remember the testimony of the witnesses, and upon your recollection of it make up your verdict. * * *

"If the jury should find that there was a promise of the defendant, that it was an absolute promise to pay the amount of that note, and that he did pay the \$120 on it, then the plaintiff would be entitled to recover, and your verdict should be for the plaintiff for the balance of the note with its interest. * * *

"If the jury should find from the evidence that it was a conditional promise, not unconditional and absolute on the part of the defendant to pay, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. It will be altogether a question of fact for you, gentlemen of the jury, under the evidence in the case. If you believe it was unconditional and absolute after his discharge in bankruptcy, then the plaintiff is entitled to recover, and your verdict should be for the plaintiff for the balance of the note, with its interest down to the present time. If, on the other hand, you find that the promise was not unconditional and absolute, the plaintiff would not be entitled to recover, and your verdict should be for the defendant."

The jury found a verdict for plaintiff, upon which judgment was entered; and defendant took this writ, assigning errors as follows:

1. The court erred in affirming plaintiff's point, as follows:

"That if the jury believe from the evidence that the defendant promised to pay the plaintiff after his discharge in bankruptcy as stated by plaintiff, to wit: 'I must and will pay it,' in speaking of the note, and paid by a horse \$120, on said note, the plaintiff is entitled to recover the residue of said note."

2. The court erred in refusing defendant's second point, as follows:

"Under all the evidence in the case the verdict of the jury should be for the defendant."

Messrs. Sayers & Son, for plaintiff in error: When a case is submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is its plain duty to reverse.

Couffman v. Long, 82 Pa. 80 and cases cited.

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not it should be withdrawn from the jury.

Hyatt v. Johnston, 91 Pa. 196.

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It is not enough that there was a recognition of the debt or payment made on same after discharge in bankruptcy; there must be an express promise to pay, unconditional and absolute.

Canfield's App. 1 W. N. C. 67; *Yostheimer v. Keyser*, 11 Pa. 386.

The effect of such evidence has been carried very far to avoid the Statute of Limitations; much farther than it ought to be in order to avoid a bankrupt's discharge, which would otherwise be a dead letter. *Id.*

The decisions of this court apply very strict rules to acknowledgments, to take the case out of the Statute of Limitations.

Johns v. Lantz, 68 Pa. 324; *Shaeffer v. Hoffman*, 17 W. N. C. 501; *Landis v. Roth*, 16 W. N. C. 309.

Mr. A. A. Purman, for defendant in error.

Per Curiam:

In order to restore the legal efficacy of a debt discharged by proceedings in bankruptcy, the promise to pay must, undoubtedly, be unambiguous and explicit. But in the case in hand, as the jury has found, there was not only an absolute and unconditional promise by the defendant to pay the note in controversy, but also a partial payment. Than this there could be nothing more unequivocal, and it fully and in every particular complies with the rule for the revival of the discharged debt.

Judgment affirmed.

Edward T. STEEL *et al.*, *Plffs. in Err.*,
v.

Henry J. GOODWIN *et al.*

1. A foreign attachment, issued in any county where the property of a non-resident is situated, after the execution in another State of an assignment for the benefit of creditors, but before the assignment is recorded in the county, has priority over the assignment.
2. The power to quash a writ is limited to proceedings that are irregular, defective or improper.
3. That the debt is not presently due is not sufficient ground for quashing a writ of foreign attachment, at the instance of the defendant's assignee for the benefit of creditors.
4. An existing indebtedness from the defendant to the plaintiff being undisputed, the question whether the debt is or is not presently due is for the jury.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 1 of Philadelphia County, to review a judgment making absolute a rule to quash a writ of foreign attachment. *Reversed.*

The facts appear in the opinion.

Messrs. George P. Rich and Mayer Sulzberger, for plaintiffs in error:

The assignee not being a party to the record had no standing in court.

The declared object of the Act was to prevent nonresidents from withdrawing their effects from the State, leaving their debts unpaid.

Fitch v. Ross, 4 Serg. & R. 564.

The defendant is authorized to have the attachment of his effects dissolved, by entering security for the debt. When this is done, the action becomes merely a common-law remedy.

Ins. Co. v. Whitney, 70 Pa. 248.

The defendant has also the right to ask the court, as in the case of a *capias*, to inquire into the cause of action and, if no satisfactory cause be shown, to dissolve the attachment.

Vienne v. M'Carty, 1 Dall. 154 (1 U. S. bk. 1 L. ed. 79).

In the absence of the defendant, the courts, in view of the hardship resulting from the attachment of his property, have permitted the garnishees, on behalf of the defendant, and for the protection of his interests, to make this motion.

Morris v. Turner, 3 Clark, 428.

But a stranger, claiming that the property attached in the garnishees' hands belonged neither to the defendant nor the garnishees but to himself, was without any protection whatever, and was in danger of losing his property or at least the enjoyment of it, without redress, until the Act of June 10, 1881, P. L. 107, *Purd. Dig.* p. 1361, pl. 89, was passed. That Act extends the benefits of the Sheriff's Interpleader Act to any claim which has been or shall be made by any person, persons or corporation not being the parties against whom process of foreign attachment has issued, to any goods or chattels taken or entitled to be taken by or under any process of foreign attachment.

The only means, then, in which a stranger to the record, which *ex necessitate* includes one claiming to be the owner of the goods attached by purchase or assignment from the defendant, can have any relief is under this Act; and the only relief contemplated by this Act is an interpleader. It does not, in its terms or in the very nature of things, apply to choses in action; as to these, the stranger claiming ownership in them would be as much without relief since the Act as before.

In addition to dissolving the attachment where no cause of action is shown, the court may also, on motion of the defendant or of the garnishee in his behalf, quash it, where it appears on the face of the record that the proceedings are irregular and void.

Crawford v. Stewart, 38 Pa. 34.

A debt due to a nonresident debtor is bound by a foreign attachment issued in this State, notwithstanding a previous assignment by him in trust of all his estate and effects, where the assignment was not recorded within the county in which the debt attached was due, as required by the Act of May 3, 1855, and no notice of the assignment was given to the attaching creditor.

Philson v. Barnes, 50 Pa. 280.

An assignment for the benefit of creditors, executed, delivered and recorded outside of this State, is ineffectual to pass title to property within this State, until recorded in the county where said property lies. Where, therefore, a foreign attachment is issued in said county after the execution of said attachment, but prior to the recording thereof in said county, it has priority over the attachment.

Warner's App. 13 W. N. C. 505.

Irregularities in the proceedings, and that they were commenced in violation of an agree-

ment on the part of the plaintiffs to extend the time of payment of the debt, are not sufficient to warrant the court in dismissing the proceedings. The agreement to give time is a matter to be pleaded and tried in the regular way, and not on a motion to dismiss the suit.

Murlock v. Steiner, 45 Pa. 349.

It is error for the court in a summary manner, by motion or rule to quash, to pass upon the rights of one claiming to be assignee of the fund attached. The parties have a right to appear and plead, and have the issue tried by a jury.

Pleasants v. Cowden, 7 Watts & S. 379; *Lancaster Co. Bank v. Gross*, 50 Pa. 224; *Lorenz v. Orady*, 87 Pa. 226.

Messrs. Sharp & Alleman, for defendants in error:

If the garnishee can intervene (*Morris v. Turner*, 3 Clark, 428), or if a subsequent judgment creditor may do so (*Pfouts v. Comford*, 36 Pa. 420), the assignee for the benefit of creditors may be allowed that right.

Reed's App. 71 Pa. 382.

A foreign attachment cannot be maintained in this State for a debt not due.

McCullough v. Grishobber, 4 Watts & S. 202; *Coakes v. White*, 11 W. N. C. 171. See *Rend v. Ware*, 2 La. Ann. 498; *Hearne v. Keath*, 63 Mo. 84.

The foundation of the action was the existence of a debt, due and payable; the right to the effects in the garnishees' hands depended upon the legal service of the writ and their attachable character. If any of these requisites were wanting, it went to the foundation of the matter and a motion to quash was the proper one.

Troubat and H. Pr. § 2299; *Downing v. Phillips*, 4 Yeates, 274; *Ross v. Clarke and Doane v. Penhallow*, 1 Dall. 354, 218 and *McCombe v. Dunch*, 2 Dall. 73 (1 and 2 U. S. bk. 1, L. ed. 173, 108, 294).

In view of the severity of the remedy the courts have exercised the largest powers in the protection of the rights of those in interest, requiring the plaintiff to affirmatively prove his cause of action, and inquiring into it the same as on a *capias* where the defendant is in custody.

Troubat and H. Pr. §§ 2271, 2272; *Vienne v. M'Carty*, 1 Dall. 154 (1 U. S. bk. 1, L. ed. 79).

Prior to the passage of the Act of May 3, 1855, *Purd. Dig.* p. 122, pl. 14, assignments for the benefit of creditors, made by debtors domiciled in another State, had been recognized as valid in this State as to property located here and as to choses in action, where the debtor lived here, even though the assignments were not recorded here.

Lavo v. Mills, 18 Pa. 185; *Speed v. May*, 17 Pa. 91.

While the phraseology of the Act of May 3, 1855, standing by itself, would seem to purport an extension of the rights of foreign assignees, it is plain from the adjudicated law and the Act taken together that its purpose and effect was to limit their rights as conferred by the common law. The Act therefore, being in derogation of a common-law right, must be strictly construed and must not be held to deprive the foreign assignee of any right he previously had unless such is the plain intent of

the law. But the law relates only to such property as is situate within this Commonwealth.

A chose in action whose owner is domiciled in the State of New York is not "situate within this Commonwealth," even though the debtor may be resident here.

A chose in action is an intangible thing that has no actual situation; it has only a legal situs, or is in law "situate" where the creditor is or where he resides.

Kuntzing v. Hutchinson, Legal Int. 1877, p. 865.

No Pennsylvania case prior to 1855 held any other doctrine, and the Act in question does not purport to define the word "situate," as applied to a chose, differently from what it had been defined by the prior decisions.

Philon v. Barnes, 50 Pa. 280, does not commit this court to a contrary doctrine. The point now made was not suggested by counsel or the court in that case.

Nor does *Warner's App.* 18 W. N. C. 505, make against this view. The property there attached was not a chose in action, but tangible personalty that was situate in this State.

So was the property in *Smith's App.* 104 Pa. 381, a trust fund, not a chose in action.

Mr. Chief Justice Mercur delivered the opinion of the court:

This was a proceeding in foreign attachment against the defendants who resided in New York, with notice to garnishees who resided in Philadelphia. The writ was served on the latter. On the application of Bird, assignee for the benefit of creditors of the defendants, the court quashed the writ of attachment. This is assigned as error.

The assignment of the defendants was executed on the 11th of December, 1884, and on the day following was recorded in the City of New York, where it was made, but was not recorded in Pennsylvania until the 24th of the same month.

This writ of attachment was issued and served on the 12th of December. The plaintiffs were then informed of the insolvency of the defendants, but had no knowledge of the assignment.

Neither at the issuing of the writ nor at any time thereafter was the assignee made a party to the record; nor did he pray to become such. He did not ask that the attachment be dissolved, nor that the service of the writ be set aside. He only asked that the writ itself be quashed. The court granted his request. Was this error? He certainly occupied no higher ground than the defendants under whom he held. He did not stand in the position of a good faith purchaser for value. *Ritter v. Brendlinger*, 58 Pa. 68; *Missimer v. Ebersole*, and *Kent, Santee & Co's App.* 87 Pa. 109, 165; *Morris' App.* 88 Pa. 368.

The garnishees did not allege any defect in the service on them. On the contrary, they admitted its validity and asked leave to pay in to court the money attached.

The defendants resided in the State of New York. The plaintiffs resided in this State, and the property sought to be attached was here. Was it subject to foreign attachment for a debt due from the defendants? No service of the

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writ on them was required. The service on the garnishees was not set aside, nor was the attachment dissolved. It is not now necessary to decide any question relating thereto. The writ having been quashed, the sole contention is whether the action of foreign attachment lies.

The Act of May 3, 1855, P. L. 415, declares: "Whenever any person, making an assignment of his or her estate situate within this Commonwealth, for the benefit of creditors, shall be resident out of this State, such assignment may be recorded within any county where such estate, real or personal may be, and take effect from its date; *Provided*, That no *bona fide* purchaser, mortgagee, or creditor having a lien thereon before the recording in the same county and not having had previous actual notice thereof, shall be affected or prejudiced" by said assignment.

The power of a State to regulate the transfer of all property within its territory is well established. *Story*, Conf. L. § 390; *Milne v. Moreton*, 6 Binn. 361; *Green v. Van Buskirk*, 7 Wall. 151 [74 U. S. bk. 19, L. ed. 113]; *Warner's App.* 18 W. N. C. 505.

When this power is asserted by legislation of the State where the property is situated, any principle of comity in conflict therewith must not render the legislation invalid. *Id.*

When, therefore, a foreign attachment is issued in any county in this Commonwealth where the property of a nonresident is situated, after the execution of an assignment in another State, but prior to the recording thereof in the county where the property is found, the attachment has priority over the assignment. *Id.*; *Philon v. Barnes*, 50 Pa. 280.

The power of quashing writs is limited to proceedings that are irregular, defective or improper. *Crawford v. Stewart*, 38 Pa. 34.

If it appears on the face of the record that the proceedings are void or grossly irregular, or where it is clearly shown that a valid cause of action in this form does not exist, the court may, on motion of the defendant or of the garnishees in his behalf, quash the writ. No such case is presented here. This record does not show anything irregular, defective or improper in the commencement of the action.

As we have declared, the residence of the defendants and of the garnishees, and the debt due from the latter, were such as to make the action proper. The attempt of the assignee was to show, by evidence *dehors* the record, that the indebtedness from the defendants to the plaintiffs was not yet due. This, however, was a disputed question which should be passed upon by a jury. The learned judge erred in determining it against the plaintiffs as matter of law, and thus putting them out of court. The right of the plaintiffs to maintain an action under all the evidence cannot be disposed of in this summary manner. An existing indebtedness from the defendants to the plaintiffs being unquestioned, the latter are entitled to have the other question which is controverted, submitted to a jury. *Lancaster County Bank v. Gross*, 50 Pa. 224; *Lorenz v. Orlady*, 87 Pa. 226.

Judgment reversed, rule to quash the attachment discharged, and a procedendo awarded.

Frank K. WARD, *Plff. in Err.*,

v.

City of PHILADELPHIA.

1. As a general rule a lessee is not permitted to **impeach** or in any way to call in question the **title of his landlord**, except in cases of fraud, misrepresentation or mistake.
2. If an **owner of land** is in possession and, with full knowledge of his own title, **takes a lease from a stranger**, he will **not**, in the absence of fraud, misrepresentation and mistake be permitted, during the existence of the term, to **assert his own title** against his lessor, or as a defense to the payment of rent.
3. The same rule applies to a **tenant holding over**.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 4 of Philadelphia County, to review a judgment on a verdict for the defendant in an action of replevin. *Affirmed.*

This was an action of replevin by Frank K. Ward against the City of Philadelphia, for goods belonging to him distrained by the defendant for rent alleged to be due.

Upon avowry by the defendant the plaintiff pleaded *non demisit* and *non tenure*.

At the trial it appeared that in 1870 the City was authorized by Act of Assembly to take actual possession of any land or property at or near South Street which it might deem necessary for the site of a bridge. Under this Act the City built the arched eastern approach to the South Street Bridge, diagonally through a lot of ground belonging to one Rubicam. The lot was almost a rectangle, fronting on the Schuylkill River, and the approach divided it into two triangular pieces, one of which had all the river front.

The jury to assess damages awarded Rubicam \$14,500, stating that the property was very seriously injured, and that the whole wharf front and a part of the dock adjoining on the north had been "taken."

In 1874 Rubicam sold to Ward the lot with the following reservation: "Subject to the rights of the City of Philadelphia to the use of that portion of the hereby granted premises taken and necessary for the construction of the bridge crossing the River Schuylkill at South Street."

Ward took possession of the whole lot, including the triangular space on the river and the spaces under the arches of the approach, and was in possession up to the trial. He used the property as a coal and wood yard, unloading his supplies from towboats under the bridge or on the triangular piece. His possession was undisputed until some time in the year 1880, when, having previously rented out the triangular space, he was summoned by the commissioner of city property who demanded the rents received from it, on the ground that it belonged to the City. He refused; and his possession was not again threatened until early in the year 1881, when, having been informed by bills posted on the premises that the City was about

to sell immediately to the highest bidder a lease of the triangular space and the ground under the arches, he took a lease of the property in dispute, from the city, for the term of three years, commencing March 1, 1881, at the annual rental of \$810. If it had been rented and occupied by another person his business would have been destroyed. Before signing another lease for this property, he happened to examine his title papers and discovered that the City had not taken the triangular lot, and that the title thereto was in himself and not in the City, and that he had a right to use the ground spanned by the arches of the bridge in such a way as not to interfere with the City's use of the ground for the purpose of perpetually maintaining the bridge, and could not be compelled to pay rent therefor; he therefore refused to pay rent to the City for his own property; whereupon, the City distrained for the same, and this action arose.

Of the rent distrained for, but \$77.50 accrued under the old lease. The balance was due on a verbal contract of letting which was never reduced to writing, but was made before the plaintiff had discovered that the City had no title to the premises.

After the defendant had proved the lease, the plaintiff, having put in evidence the facts under which he was compelled to sign the lease, offered the deed from Rubicam to himself, in order to show superior title. The offer was rejected, on the ground that no fraud had been shown on the part of the City.

The verdict, by the direction of the court, was for the defendant; whereupon, the plaintiff took this writ and assigned as error the rejection of his deed.

Messrs. Ellis Ames Ballard and Rufus E. Shapley, for plaintiff in error:

The doctrine of estoppel, as applied between lessee and lessor, does not hold where the lease has been taken under fraud, force or illegal behavior on the part of the lessor.

Hamilton v. Marsden, 6 Binn. 45.

Where one in possession of property is induced to take a lease, the circumstances being such that he could not, at the time, refuse to sign it, he may, nevertheless, impeach his landlord's title. And it is for the jury to say whether, under the circumstances, his acceptance of the lease was a waiver or abandonment of his title.

Brown v. Dyeinger, 1 Rawle, 408, 415.

In *Robins v. Kitchen*, 8 Watts, 390, it is said that upon the issues of *non demisit* and *no rent* in arrear, it is competent for the plaintiff to show that he was induced to execute the lease and become the tenant of the defendant, by fraud and misrepresentation, and that at the time it was executed he was really the owner of the land himself.

In the present case the plaintiff's position is greatly strengthened by the fact that he had enjoyed the exclusive and uninterrupted possession of the property in dispute for six years, and that, indeed, the City had never before either been in possession or asserted its right so to be.

Where one in peaceable possession of property is approached by another who has no right and who induces him to become his tenant, it must be by some misrepresentation of fact or

law or both, or by some unfair combination between him and the tenant.

Hockenbury v. Snyder, 2 Watts & S. 240; *Baskin v. Sechrist*, 6 Pa. 154, 163; *Miller v. McBrier*, 14 Serg. & R. 382; *Hall v. Benner*, 1 Penr. & W. 402.

The wording of the Act under which, in this case, the City took the property in dispute is: "The city commissioners may take actual possession of any land or property at or near South Street which they may deem necessary for the site of the bridge."

Act April 28, 1870, P. L. 1289.

To vest the fee in the public it must clearly appear that it was the intention of the Legislature, disclosed by the Act itself, to take a fee.

Washington Cemetery v. R. R. Co. 68 N. Y. 591.

No more of the title is divested from the former owner than is necessary for the public use. Redf. Railways, 156.

"If the language of the Act admits of a construction which will leave a fee in the owner, subject to the public easement; it will be so construed."

Mills, Em. Dom. § 49.

The fact that the word "taken" is used, either in the Act of Assembly or in the award of the jury, does not raise a presumption that a fee was intended.

People v. Blake, 19 Cal. 579; *Mills*, Em. Dom. § 80.

The owner of property along which a road has been built at an elevation can use the spaces under the trestle or arches, provided such use does not interfere with the use of the road.

R. R. Co. v. Allen, 22 Kan. 285; *Overman v. May*, 35 Iowa, 89.

The wording of the Act of Assembly in the present case is not so strong as that before the court in two other instances, in which it was held that the State or its representative took but an easement.

R. R. Co. v. Johnson, 59 Pa. 29; *R. R. Co. v. Bruce*, 102 Pa. 23.

Messrs. Frank M. Riter, Robert Alexander and Charles F. Warwick, for defendant in error:

"It is a general rule that neither the tenant, nor one claiming under him, will be permitted to controvert the title of the landlord by showing a better title to the demised premises, either in himself or in a third party. To this rule there are, however, some exceptions, and the tenant may dispute the landlord's title under the following circumstances:

When he can show that the landlord had only a life estate in the premises, which has terminated by his decease.

When he can show that the title of the landlord has expired.

When he can show that the landlord's reversion has been sold.

When he can show that the title to the premises has become vested in himself, by the advice of the landlord.

When he can show that he was induced to accept a lease, by the illegal behavior, fraud or misrepresentation of the landlord.

When he can show that the landlord is holding in violation of law."

Jackson and Gross, Land. & T. p. 336.

The exception to the rule forbidding a tenant to dispute his landlord's title extends only to cases of fraud, misrepresentation and illegal behavior on the part of the landlord.

Hamilton v. Marsden, 6 Binn. 45; *Miller v. McBrier*, 14 Serg. & R. 382; *Hockenbury v. Snyder*, 2 Watts & S. 240; *Brown v. Dwyinger*, 1 Rawle, 408; *Robins v. Kitchen*, 8 Watts, 390; *Thayer v. Society of United Brethren*, 20 Pa. 60; *Mays v. Dwight*, 82 Pa. 462; *Smith v. Crosland*, 106 Pa. 413.

Mr. Justice Trunkey delivered the opinion of the court:

Ward's deed is dated June 1, 1874, and is on its face subject to the rights of the City to the use of that portion of the premises taken and necessary for the bridge. He has been in possession of the premises since the execution of his deed.

In 1881 he became a party to the lease, in which he covenanted to pay rent and to deliver up the premises to the City at the end of the term. Before he accepted the lease he knew all the facts, saw an advertisement for a public sale, attended the sale and became the highest bidder for the lease.

Prior to the advertisement, the commissioner of city property had demanded rent from Ward, on the ground that the City owned the land; the commissioner claimed that the City was the owner.

The assertion at the argument that the City threatened Ward that unless he should accept a lease, a powerful corporation would be put into possession, is a mistake. Ward testifies that the commissioner told him the City had received an offer from such corporation for the use of the premises. But the offer was not accepted; on the contrary, the lease was sold at auction to Ward himself.

There is no evidence that the city officer made false statements respecting the title, or that he made threats or menaces, or that he threatened to convey or lease to another person, before Ward could consult and advise with others, or that Ward was imbecile. The testimony discloses no sign of coercion. In fact, Ward knew what the title was, and preferred taking a lease to resisting the adverse claim. He does not say that it was told him or that he believed that a lessee under the City would have a better right to possession than the City, or could take it by force. Nor is there anything to show a mistake, that is, "some unintentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence."

Where an ignorant, imbecile and timid old man has been induced to take a lease of his own land, by misrepresentation and threats, the proof of such misrepresentation and threats need not be very strong. *Robins v. Kitchen*, 8 Watts, 390.

If one who has no right induces the owner who is in possession to become his tenant, it will require little proof of fraud, or threats, or imbecility, or some undue influence, to dissolve the relation of landlord and tenant, and put the tenant into the situation in which he was before he was induced to sign the lease. *Hockenbury v. Snyder*, 2 Watts & S. 240.

As a general rule it is incontrovertible that a lessee is not permitted to impeach or in any way to call into question the title of his land-

lord, except he has been guilty of fraud, misrepresentation or unfair dealing in the transaction. And the exception is more stringently applicable where the owner or tenant in possession takes the lease. It matters not whether the deception practiced is voluntary falsehood or is simple mistake, for the immunity it confers springs not so much from the fraud of the lessor as from the wrong which the deception would work upon the rights of the lessee. *Baskin v. Seechrist*, 6 Pa. 154.

But deception is not to be inferred without any evidence; neither is mistake. If the lessee was in possession at the time the lease was executed, and the lessor had no title or right of possession, the lessee may resist proceedings to turn him out, because the landlord, if he fails, is in no worse condition than he was before the lease. In order, however, to give the tenant this right, it is necessary to prove that he accepted the lease in mistake, or was induced to accept it by some fraud or misrepresentation. A lease given in good faith by one party and accepted by another with his eyes open is valid and binding on both. The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud, or accepted by mistake. *Thayer v. Society of United Brethren*, 20 Pa. 60.

That case was for recovery of possession; its doctrine could not apply with less force in a proceeding to collect rent.

The same rule extends to a tenant holding over, as to a tenant within the stipulated term. *Taylor, Land & Ten.* § 705.

Judgment affirmed.

George H. SHEBLE *et al.*, Trading as
Sheble & Hill, *Plffs. in Err.*,
v.

Andrew BRYDEN.

1. The **finding of a jury** upon a controverted question of fact is **conclusive**, unless the trial judge erred in the admission or rejection of testimony or in his instruction to the jury.
2. An **assignment of policies to pay a debt** of the assignor is **not void** as to his creditors because there is no time therein provided for the payment of the debt, or for the return of the surplus to the assignor, and especially where there is no surplus.
3. Such an assignment, duly recorded, is **not inadmissible** in evidence because it is not a **recordable** paper, as being necessarily **void** as to creditors.
4. That the deed of **assignment** of a limited partnership was at first **indexed** in the "Limited Partnership Docket" and not in the "Deed Book Index" **does not invalidate** the **recording** of the instrument.
5. A deed left with the recorder for the purpose of being recorded is, in contemplation of law, recorded, and takes effect, from the time it was so left.
6. **Actual notice** of a deed is equivalent to its recording.

7. Where a debtor assigned part of his property in trust to pay certain specified debts on a feigned issue to try the ownership of the proceeds of the assigned property, to which the trustee is a party, **evidence to prove the insolvency** of the assignor for the purpose of avoiding the assignment as to other creditors, is **inadmissible**.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Luzerne County, to review a judgment in favor of plaintiff in a feigned issue to try the title to certain insurance moneys. *Affirmed*.

On November 30, 1882, certain property of the Pittston Knitting Company, limited, was destroyed by fire and there became due to said company, on policies of insurance issued on such property, the sum of \$15,168.93. Two of the policies were made payable to beneficiaries (creditors) therein named; and after deducting the amount of their adjusted loss the sum of \$10,669.08 was found due the company.

In November, 1882, George H. Sheble & Co. obtained a judgment against the company and, December 14, 1882, attached in the hands of the insurance companies the amount of the insurance moneys due the company.

On December 1, 1882, the knitting company by instrument in writing assigned to Andrew Bryden, as trustee, all its insurance policies and money due thereon: first, for the benefit of certain of the bondholders of the knitting company; second, to return to the knitting company any surplus that might be left after the payment of these bondholders.

Andrew Bryden, as plaintiff, and George H. Sheble *et al.*, as defendants, were made parties to a feigned issue to try the ownership of the moneys due from the insurance companies, and such moneys were paid into court.

The court allowed Bryden as trustee to interplead in the attachment suit judgment of Sheble *et al.*, and with the approval of the court an interpleaded issue was raised by way of declaration averring, and plea denying, that the right of property to the fund in court was in said Bryden as trustee.

At the trial of such issue before Rice, *P. J.*, Bryden, the plaintiff in such issue, showed that on March 1, 1880, the knitting company executed a mortgage to him as trustee to secure bonds to the amount of \$12,000, and alleged that these bonds were held by different parties and that the assignment to Bryden was for their benefit.

Bryden testified that the assignment was delivered to him December 1, 1882, and that it was handed back to have it acknowledged and recorded. It was acknowledged December 29, 1882, and recorded December 30, in Limited Partnership Book, No. 1, in the office of the Recorder of Deeds of Luzerne County, and was not indexed in the deed book until July 5, 1883.

The court, RICE, *P. J.*, charged *inter alia* as follows:

"It is alleged by the defendants that this assignment was invalid. You have heard the course of the argument and the contest that has been before the court as to certain questions of evidence; their first point being that this as-

signment was invalid because the knitting company was insolvent at the time, and that they could not prefer these creditors except by following the method which the law has provided. We have held, however, that that question is not material in the present issue, for if they were insolvent, then by operation of law the assignment became an assignment for the benefit of all of the creditors, notwithstanding only certain of the creditors were mentioned in it; and if in another issue it should be ascertained as a matter of fact that the company was insolvent at that time, then, as we at present view the law, this assignment would be by operation of law for the benefit of all of the creditors and not simply of the bondholders.

"We have been requested by the defendants' counsel to charge you upon two points, which substantially raise the questions involved in the case. They are as follows:

"I. That the deed to Bryden is void because delaying the defendants from realizing their judgment from the moneys in court, no time being provided for the payment of the bonds therein mentioned or for the return of the surplus to the assignor. The verdict of the jury must therefore be for the defendants and against the plaintiff."

"We decline to charge as requested in that point. In the first place [if as matter of fact the bonds amounted to \$12,000, and the fund which was assigned only amounted to something like \$10,000, the reservation to the plaintiff of any surplus which might be left after the payment of these bondholders would be entirely harmless; because there would be no surplus.] In the next place [this assignment, as we view it, did not remove this surplus, if any, from the grasp or reach of an attaching creditor. In effect, in equity at least, the assignment was only of so much of the fund as was necessary to satisfy the bondholders; and the residue, if any, could have been attached and reached as the property and effects of the Pittston Knitting Company, even though the assignment might have been in terms for the whole fund.] Hence, we decline to charge as requested on that point. We are of opinion, as the case is now presented, that the assignment was valid, and if there were nothing else in the case, would entitle the plaintiff to the fund in court.

"II. That a deed of assignment must be delivered; and if the jury find that there was no formal delivery, then the time will be presumed to be when the assignment was acknowledged without the officers of the knitting company saying or doing anything to qualify the act of acknowledging the deed. The acknowledgment being after the attachment of the defendants, the verdict must be for the defendants."

"We decline to charge as requested in that point. It is essential to every paper of this nature that it be executed, of course. That includes a delivery.

"There would be a presumption of delivery at the time that it purported to have been executed; but if you believe the testimony of Mr. Bryden, who has testified as matter of fact that the deed was delivered to him on the evening of December 1, 1882, then there was a sufficient delivery of the deed to vest in him the title, notwithstanding it was subsequently taken back to the officers of the company to be acknowledged."

edged. We say if you believe the testimony of Mr. Bryden upon this subject (and there is no contradictory testimony), then the delivery was sufficient and the title vested in him, and your verdict should be for the plaintiff."

Verdict was for the plaintiff, Bryden, upon which judgment was entered and defendants took this writ assigning as error 1 and 2, the portions of the charge of the court embraced in brackets; and 3, the action of the court in declining to charge as requested in the first point.

4 and 5. In overruling the objections to the admission in evidence of the assignment to Bryden: 1, on the ground that it is not a recordable paper; 2, that it is void as hindering the collection of the judgment on which the attachment was executed.

6. In sustaining plaintiffs' objection [as irrelevant] to proof that the assignment to Bryden was not indexed in the general deed index, as required by the Act of 1875, within thirty days from its date.

7. In sustaining objection to defendants' offer to prove the insolvency of the assignor, for the purpose of avoiding the assignment.

8. In overruling the offer to show that the assignment was an assignment for the benefit of creditors and not recorded within thirty days.

Messrs. F. C. Sturgis and John Bethell Uhle, for plaintiffs in error:

The assignment was invalid. There was a reservation of the surplus.

Bentz v. Rocky, 71 Pa. 77.

The law regards the fact of the reservation of a portion as fraudulent, without inquiring as to whether there is a surplus. *Hart v. McFarland*, 13 Pa. 182.

The learned judge erred in holding that the ability to attach any surplus would save the assignment; for it is the delay and the hindrance which the law objects to, not the ability to realize at a deferred time or after the surplus has been ascertained.

Adlum v. Yard, 1 Rawle, 163, 171.

An absolute conveyance without valuable consideration cannot stand where there are creditors, unless the grantor has sufficient ability to otherwise pay his debts and there has been no collusion.

Kepner v. Burkhart, 5 Pa. 478; *Chambers v. Spencer*, 5 Watts, 404.

Or rather, to draw the line closer: "If a deed is a voluntary one, and its effect is to hinder or delay creditors * * * a vendee without consideration, whether there was fraud on his part or not, would take no title as against creditors."

Clark v. Depew, 25 Pa. 509, 516.

The court below refused to consider any evidence showing a failure to enter the assignment on the general deed index of the county, within the thirty days, solely because this court had ruled the effect of the laws prior to the Act of 1875 to be that a paper was recorded when handed to the recorder, with his fees.

Glading v. Frick, 88 Pa. 460, 464; *Clader v. Thomas*, 89 Pa. 343, 345; *Schell v. Stein*, 76 Pa. 398, 401.

But this court has not yet considered the effect of the Act of 1875.

Wyoming Nat. Bank's App. 11 W. N. C. 567, 568.

Notice is the first and greatest of the two

reasons for recording an assignment for the benefit of creditors.

Englebert v. Blanjet, 1 Miles, 226; *Dougherty v. Darrach*, 15 Pa. 402; *Reigart's App.* 4 Pa. 477.

The plaintiffs in error contend that no notice is equivalent to no recording.

By P. L. 1875, p. 32, Brightly, *Purd. Dig.* 566, ed. 1885, the Legislature expressly declared it to be the recorder's duty to keep a general index, the absence of which requirement was the foundation for the ruling that the indexes were for the recorder's convenience and not for the notification of the citizen. In other words, formerly everyone received record notice of a deed, etc., as soon as it should be accepted by the recorder for record, although no entry of its contents had been made on the books.

Schell v. Stein, 76 Pa. 898, 401.

And this was said, notwithstanding each book of deeds was required to have an index.

Speer v. Evans, 47 Pa. 144.

Because the Act of 1827 did not make the index notice, as the Act of 1875 does.

Sec. 5. Act March 29, 1827, P. L. 156, Brightly, *Purd.* 1467.

The instances are rare in which an Act of Assembly designates the book in which an instrument must be recorded. Where such direction is given in a statute its terms must be complied with or the record would be worthless.

Glading v. Frick, 88 Pa. 460, 463, 462.

Mr. George S. Ferris, for defendant in error:

The assignment is not void as hindering or delaying creditors. The surplus, if any there might be, at once became payable to the assignor and attachable by its creditors, with no greater hindrance and delay than if the assignment had not been made.

Hubler v. Waterman, 33 Pa. 414.

There is nothing to invalidate the assignment, in the provision that any surplus, if any, is to be returned to the assignor. This reversionary clause could have nothing to operate upon, there being no surplus. Nor is such provision in contravention of law. It is no more than the law would require without it. It does not impair the rights of any creditor in any way, and "would be implied if it were not expressed."

Hubler v. Waterman, 33 Pa. 414; *Wiener v. Davis*, 18 Pa. 333; *Heckman v. Messinger*, 49 Pa. 473; *Dana v. Bank of U. S.* 5 Watts & S. 223, 250.

Even if the effect of the assignment were to hinder and delay creditors it would not be void.

Witt v. Franklin, 1 Binn. 513, 514.

The validity of such assignments has been recognized by legislative authority and by all the cases since *Witt v. Franklin*.

Under the earlier Acts preferences were allowed. The Act of April 17, 1843, however, while making the preferences void, continued the assignment as valid, but to inure to the benefit of all, instead of the preferred creditors. And this is true as against attaching creditors.

Wiener v. Davis, 18 Pa. 331; *Law v. Mills*, Id. 185; *First National Bank of Newark v. Holmes*, 85 Pa. 231.

The assignment was recorded "within thirty days after the execution thereof" in the recorder's office of the proper county.

Act March 28, 1818, *Purd.* 121.

The recording of the assignment in the limited partnership book by the recorder will not invalidate it.

There being no requirement in the Act that the paper should be recorded in any particular book, it was properly recorded in any book kept by the recorder. The party depositing the instrument has nothing to do with the book in which it is recorded.

McLanahan v. Reeside, 9 Watts, 511; *Glading v. Frick*, 88 Pa. 463; *Clader v. Thomas*, 89 Pa. 343; *Paige v. Wheeler*, 92 Pa. 282; *Marks' App.* 85 Pa. 231, 234.

These rules of law are not affected by the Act of March 18, 1875, P. L. 32, requiring recorders of deeds to keep general, direct and *ad sectam* indices to deeds and mortgages.

The Act is *in pari materia* with and would seem to point to and supplement the system of legislation known as the Recording Acts. It should therefore be construed in reference to them. These Acts have to do with titles to real estate, and do not apply to assignments for the benefit of creditors.

Spackman v. Ott, 65 Pa. 131.

The moment an assignment for the benefit of creditors is placed, by the assignor or anyone interested, in the office of the recorder of deeds of the proper county and within the prescribed time, the beneficial interest of the creditors, the *cestuis que trust*, is certainly and completely vested.

Marks' App. 85 Pa. 231.

Mr. Justice Sterrett delivered the opinion of the court:

The controlling question of fact, properly submitted to the jury and by them found in favor of plaintiff in the issue, was whether the assignment to him of the insurance policies was duly executed and delivered before the attachment execution of defendants below was issued. This finding of the jury is conclusive of the case, unless the learned judge erred in the admission or rejection of testimony, or in his instructions to the jury.

There was no error in charging as complained of in the first and second specifications, nor in refusing to affirm defendants' first point, viz.: "That the deed to Bryden is void, because delaying the defendants from realizing their judgment from the moneys in court, no time being provided for the payment of the bonds therein mentioned or for the return of the surplus to the assignor. The verdict of the jury must therefore be for the defendant and against the plaintiff."

The testimony tended to prove that the bonds, for payment of which the policies were assigned, amounted to \$2,000 more than the insurance. In view of this evidence the learned judge said if that was the fact, the reservation to the Pittston Knitting Company, the assignor, of any surplus that might remain after payment of the bondholders would be harmless, because there would be no surplus. In the next place, the reservation of a possible surplus did not remove it from the grasp of attaching creditors. In effect the assignment was only of so much of the insurance money as would satisfy the bondholders. The residue, if any, could have been attached as the property of the assignor.

The fourth and fifth specifications, relating to

the admission in evidence of the deed of assignment, cannot be sustained; nor is there any merit in the objection covered by the sixth specification, that the deed of assignment was at first indexed in the "Limited Partnership Docket" and not in the "Deed Book Index." This did not invalidate the recording of the instrument. In contemplation of law it was recorded and took effect from the time it was left with the recorder, for the purpose of being duly recorded. This principle is recognized in *Glading v. Frick*, 88 Pa. 463; *Clader v. Thomas*, 89 Pa. 343; *Paige v. Wheeler*, 92 Pa. 282, and *Marks' App.* 85 Pa. 231.

Plaintiffs in error were not prejudiced by the failure of the recorder to enter the assignment on the general deed index. Their attachment issued before the instrument was left for record but, as the jury found, after it was executed and delivered; and they appear to have had actual notice before any further steps were taken.

There is nothing in the remaining specifications of error that requires special notice. There is no merit in either of them. The issue was well tried, and we discover nothing in any of the rulings of the court that would warrant a reversal of the judgment.

Judgment affirmed.

APPEAL of George H. SHIBLE *et al.*

1. An auditor's finding upon a pure question of fact, when the court is not satisfied that a mistake has been committed, must be confirmed.
2. An assignment by a solvent assignor of a portion of his property to pay certain specified debts is not void as to his other creditors; and the latter cannot participate in the distribution of the fund.

(Decided October 4, 1886.)

APPEAL from a decree of the Common Pleas of Luzerne County, overruling exceptions to the report of an auditor distributing moneys in the hands of a trustee for creditors. *Affirmed.*

The questions in this case arise out of the facts stated in the preceding case of *Shible v. Bryden*.

Bryden stated an account as trustee, which was excepted to by appellants and referred, by agreement of counsel, to William S. McLean, as auditor, to pass upon the exceptions and report distributions. The exceptions were practically abandoned and the contest before the auditor was on the question of distribution: whether it should be confined to the bondholders for whom the assignment was intended, or should embrace as well the other creditors of the company.

The appellants claimed, with other creditors, that the knitting company was insolvent at the time of making the assignment, and made it to prefer creditors, and on account of inability to pay its debts, and that the assignment consequently inured to the benefit of all creditors of the company, under the Act of April 17, 1848, P. L. 278.

The bondholders contended that the insurance money should be distributed *pro rata* only to them, for the reason that when the assignment was made the knitting company was able to pay its debts.

The auditor reported *inter alia* as follows:

"A great deal of evidence was adduced by the creditors other than the bondholders, going to show that when the assignment was made the company was insolvent. A great mass of testimony was also adduced by the bondholders going to show that when the assignment was made the company was solvent. The witnesses to insolvency were highly respectable and disinterested in the question at issue. The witnesses to solvency were equally respectable, but mainly interested in the question at issue.

We have carefully and conscientiously considered and analyzed the testimony upon one side and the other. We have also carefully gone over the briefs of the learned counsel on the one side and the other on this point. We are convinced that all of the witnesses are equally honest in their opinions of value; and the result of our examination is that the weight of the testimony established the fact that, at the time of the assignment in question, the company was solvent; or in other words, that at that time, its assets exceeded in amount its liabilities. In coming to this conclusion we have not forgotten the interest of some of the witnesses to solvency in the question at issue, and we are mindful that that interest may affect the judgment; but we are also convinced that it does not necessarily.

"The witnesses in support of solvency, as a rule, seemed more familiar with the premises in controversy and the property on them than the witnesses in support of insolvency. The average estimate of value of all the witnesses called clearly established the solvency of the company at the time of the assignment; so does the average estimate of the exceptant's witnesses. A tabulated statement of these averages was prepared for us by the counsel for the trustee. We have examined it carefully, found it correct, and have adopted it as a part of our report, not as establishing in itself the main question, but simply to present one feature of it. We are convinced of the fact of solvency from the weight of the testimony alone, and not from any rule of average.

"We, therefore, specifically find as facts:

"First, that the Pittston Knitting Company 'Limited,' made an assignment to Andrew Bryden, of the insurance money belonging to it in trust for the bondholders aforesaid, some of the creditors only of the company.

"Second, that it then was of ability to pay its debts; and,

"Third, that this assignment was made to prefer these bondholders.

"We also find, as a conclusion of law, that the money so assigned belongs to these bondholders; and after deducting reasonable expenses, it should be distributed to them, in proportion to their respective demands.

"We will now proceed to dispose of the exceptions, which are four in number:

"The second exception charges that the claim of the trustee for services is excessive. The claim is \$531. There was no testimony taken to support the exception; hence it must be disposed

of on what appears in the account. At common law, the rule is "that a trustee, executor or administrator shall have no allowance for his care and trouble. 2 L. Cas. Eq. Part 1, Page 508.

"This rule does not prevail in Pennsylvania. *Swartswalter's Acct.* 4 Watts, 79; Rawle, Note, 2 L. Cas. Eq. Part 1, p. 317.

"And the general practice in this State is to allow compensation to trustees by commission; 5 per cent is the usual allowance. The accountant in this case has charged 5 per cent on the money for distribution. We think we are justified in enforcing the rule laid down by Judge Rhone in the *Watson Estate*, 6 Kulp, 13, which reads as follows:

"When over 5 per cent is charged for services of an administrator, and is excepted to, the burden of proof is on him to show that his services are worth more than that sum; and when the parties interested desire to have the charges reduced below 5 per cent, the burden of proof is on them to show that it is worth less.' The second exception is, therefore, discharged.

"The first exception charges that the counsel fee is excessive. The counsel fee, together with the expenses incurred in defending the fund for distribution, amounts to \$550. Since the trustee is entitled to an allowance of reasonable counsel fees, and other expenses necessary for his guidance, and incurred in protecting the trust fund, we cannot see how, in the absence of any evidence in support of the exception, we can sustain it. There seems from examination of the account to have been a contest over the ownership of the insurance money between certain creditors of the knitting company and the trustee. Taking into consideration this contest, the amount of money involved, and the absence of any testimony going to show that the charges in question are excessive, we are inclined to hold that they are reasonable; and, therefore, we overrule the first exception.

"The third exception complains that the accountant has not charged himself with interest on the money for distribution. There is no evidence that he received any; he never actually had the moneys in his possession. They were paid into court by the insurance companies. The trustee was not to collect and invest the trust funds; his duty was simply to collect and pay them over to the parties entitled to them. Not being obliged to invest or able to invest, it clearly became the duty of the exceptant to support his exceptions by affirmative testimony. This was not done; and, therefore, we are obliged to overrule the third exception.

"The fourth exception is general and we find nothing in the testimony requiring us to consider it; and therefore, it is dismissed.

"Counsel for exceptant have in writing requested us to find certain facts and conclusions of law, which we have appended to the report and which we will now proceed to answer.

"We find substantially the first fact as requested. The request states the indebtedness of the Pittston Knitting Company 'Limited' at the date of the assignment, December 1, 1882, at over \$25,400. We find as a matter of fact that the indebtedness was about \$25,150; this

amount was past due when the assignment was made, except \$4,000.

"We find the second fact substantially as requested. The request states the assets of the Pittston Knitting Company 'Limited' on the first of December, 1882, to consist of claims for insurance money, amounting to \$15,168.92, and the factory lot. We find as matter of fact that the assets consisted of the \$15,168.92 of insurance money, the factory lot and the improvements not destroyed by the fire, together with the engine and machinery upon it, and that the insurance money was not payable until sixty days from the proof of loss.

"The first conclusion of law which we are requested to find, we refuse. The request is in the following words: '1. The value of the factory lot is immaterial in this case; and from the undisputed testimony in this case, the assignment to Andrew Bryden comes under the provision of the Act of April 17, 1843, and inures to the benefit of all the creditors.' We are of opinion that the value of the factory lot is material, in order to determine the question whether the knitting company at the time of the assignment was of sufficient ability to pay its debts. The value of this lot must necessarily be considered.

"The second conclusion of law which we are requested to find, is in the following language: 'If the assets of the Pittston Knitting Company exceeded their liabilities at the time of the assignment, yet if they were not available and could not be readily converted into cash, then the assignment comes within the provisions of the Act of April 17, 1843, and inures to the benefit of all the creditors.' This request embodies matter of fact rather than of law. The question of the availability of assets, and their ready conversion into cash, is one of fact. If an asset is not available, it is because of the fact that it is worthless; if it cannot readily be converted into cash, it is because of the fact that it has not a ready sale in the market. For these reasons we must refuse to find the request as stated; but we do find specially that the assets of the knitting company were available; that is, that they could be converted into cash, and that they had a market value at the time of the assignment.

"Having disposed of all the questions raised by the exceptions, the evidence and the requests, we will first distribute to the costs of the audit, and the balance of the trust moneys we will distribute to the bondholders, the *ce-tuis que trust, pro rata*, according to their respective demands. The owners of the bonds appear in a list appended to this report, which was conceded by all parties to be correct.

"The fund for distribution as per the account filed is - - - \$9,487.27

From which deduct:

Paid prothonotary filing acct.	\$2.50
Recording this report	5.57
Advertising audit	6.00
Auditor's fee	100.00—114.07

* Balance to be distributed to bondholders - - - \$9,373.20

"The bondholders are entitled to 78.11 cents on the dollar on the face of the bonds."

Supplement to foregoing report:

"In the oral argument, after the taking of the testimony, we were asked by Mr. Sturgis, of counsel for exceptant, to strike out the testimony of all the witnesses, called to support the solvency of the "Knitting Co., Limited," who were bondholders, for the reason that, being experts and interested, their testimony was not admissible. We forgot to pass upon this request, in writing up our report, but will proceed to do so now.

"We refuse to strike out the testimony of these witnesses. The Act of 1869 makes them competent. It makes no distinction between an expert and an ordinary witness.

"Besides, if it were the law that an expert, interested in the issue, is still incompetent as a witness, the testimony in question could not be stricken out, because the witnesses who gave it simply testified as to the value of certain real estate, or, in other words, knowing the real estate, gave their opinions as to its value. They were not called as experts, but as ordinary witnesses, having a knowledge of the land in question. The market value of land is not such a question of science and skill upon which only an expert can give an opinion. *Canal Co. v. Bunnell*, 81 Pa. 414; 1 Greenl. Ev. § 440 a; Rogers, Expert Testimony, § 162."

The appellants excepted to the report of the auditor, and on the argument on such exceptions before the court below, the following opinion was delivered by RICE, P. J.:

"Four things are essential to entitle the exceptants to participate in this distribution: 1, inability of the assignors to pay their debts; 2, an assignment on that account; 3, in trust; 4, to prefer one or more creditors. The fourth essential has been correctly found by the auditor, and the third appears on the face of the assignment; but the first two the learned auditor negatives.

"It is unnecessary to attempt any general definition of the term, insolvency, which will apply to all cases. It is enough to ascertain its meaning in an assignment of this kind; and I think the following definition is correct and applicable: Insolvency, then, is the inadequacy of a debtor's means, that is, of his whole means or resources (including not only money or its equivalent, but property in its most extensive sense), for the payment of his debts. Debts are paid with property; and so long as a debtor is in possession of means of any kind with which or out of which he can himself at once discharge all his liabilities in full, or out of which his creditors can collect all their debts by legal process, he cannot be considered insolvent. *Burr. Assign. 78 et seq.; Herrick v. Borst*, 4 Will, 652.

"Now it appears that on November 30, 1882, a large portion of the property of the Pittston Knitting Company (limited) was destroyed by fire. On the following day the company assigned the policies of insurance, and the money to become due on the same, to the accountant, in trust for the benefit of certain preferred creditors.

"Mr. Stinson, the managing superintendent of the company's affairs, says: 'Immediately preceding the fire the knitting company was

not in a prosperous condition. They were unable to meet their indebtedness at that time. The indebtedness past due was considerable. Notes were given prior to the fire which matured before the fire. A number of these notes were not paid; some of them were protested. Before the fire suits were brought against the company. The company had been requested to pay claims. Don't think any threats were made if they did not pay. There were one or two intimations from creditors that they would have to collect their claims.'

"On cross examination, he says: 'We considered that the day after the fire we had more property than required to pay debts. I mean, when I say that the company at the time of the fire were not able to pay their debts, that they were not prepared at that time to do so. Most of the mortgage debt was not due.'

"The evidence also shows that about a week before the assignment, awards of arbitrators had been filed in two suits against the company, in the gross amount of \$4,586.56, and that appeals have not since been taken.

"Under all these circumstances, we think it is correct to say that, if the remaining assets of the company were insufficient, upon an immediate liquidation, to pay the remaining debts of the assignors, the fact of insolvency is made out; the inference is then irresistible that the assignment was made on account of their insolvency, and being made in trust to prefer a part of the creditors, it becomes by operation of law an assignment for the benefit of all the creditors. Act April 17, 1843, P. L. 278.

"If such circumstances (the fact of insolvency being for the moment assumed) do not establish the second essential stated at the outset, it is difficult to see how the fact that the assignment was made on account of the inability of the assignor to pay his debts could be proved in any case where he had not expressly declared his reasons in the assignment itself.

"Where an assignment is made under the circumstances disclosed by this evidence, the debtor has no right to say to his unpreferred creditors: 'If I am permitted and given time to administer my remaining assets, I can eventually pay you in full.' He must be able to say: 'My remaining assets are at once convertible into money sufficient to pay you in full.' Otherwise the purpose of the legislation against preferences would be frustrated, and the failing debtor would still be enabled to dictate the course his property shall take.

"In the case in hand the remaining assets of the assignors consisted principally of real estate. In determining its value the auditor had to depend upon the conflicting opinions of witnesses. In giving their opinions upon questions of value, especially of real estate, witnesses are often inclined to rely on their judgment of what it ought to bring in the market rather than on any knowledge of the actual state of the market. But opinions of what the land would be worth for manufacturing purposes, without proof that it could be sold or was in demand for such purposes; of what the witness would give for the land if he had the money to invest; of what the property would sell for if time were given for payment; of its value as an investment, without proof that money was seeking

investment in that direction; opinions based on these and like conditions do not answer the question now before us.

"The question is whether the assignors were in possession of means of any kind with which, or out of which, they could themselves at once discharge all their remaining liabilities in full, or out of which their creditors could collect all their debts by legal process.

"In deciding this question favorably to the preferred creditors, we must know then: 1, that the property was available; for, owing to peculiar circumstances, the debtor's assets, though in ordinary times ample, may prove unavailable because unconvertible into money; 2, that if convertible into money, it would bring enough at an immediate cash sale by the assignors, or at a forced sale at the instance of the creditors, to pay the assignors' debts in full.

"If these are the facts in this case, then the learned auditor's general conclusion that the assignors were able to pay their debts is correct, and his report of distribution proper; but a finding that they were able to pay their debts, based upon any other theory of the value of their remaining assets, would be incorrect.

"For the purposes of this case, the property was worth just what it would bring if immediately converted into money, and no more. The learned auditor's conclusion is 'that the weight of the testimony establishes the fact that, at the time of the assignment in question, the company was solvent; or, in other words, that at that time its assets exceeded in amount its liabilities.'

"If it were not for his subsequent answer to the exceptant's second legal point, we might have no cause to doubt that this finding necessarily implies all that we have suggested as to the meaning of the term 'inability to pay debts,' in the Act of 1848. But in the point referred to the learned auditor was requested to find as follows:

"If the assets of the Pittston Knitting Company exceeded their liabilities at the time of the assignment, yet if they were not available and could not readily be converted into cash, then the assignment comes within the provisions of the Act of April 17, 1843, and inures to the benefit of all the creditors."

"The learned auditor refused to find as requested, and perhaps, upon a critical analysis of the point, he was justified in so doing. But, nevertheless, the point would seem to have been intended to obtain a specific ruling to the effect that in deciding the main question of the assignor's ability to pay their debts, it was the adequacy and availability of their property for that purpose at the time of the assignment, by reason of its ready convertibility into money, by the voluntary act of the assignors, or by process of law at the instance of the creditors, which was to control. Thus understood, it will be seen, from what we have heretofore said, that a correct legal principle applicable to assignments of this nature was involved in the point.

"The questions constantly recur: Was the property of the assignors of such nature and value that they could themselves have disposed of it at once for enough to pay all their debts, or that the creditors could at that time have collected their debts out of it by legal process?

If, in this sense, their assets exceeded their liabilities, they were unquestionably solvent. These, as we think, are the vital questions of fact in the case. From their decision is to be deduced the main conclusion as to the ability or inability of the assignors to pay their debts.

"The learned auditor has evidently considered the case with great care, and his findings upon the general question are stated unequivocally. They will not be disturbed except for very clear mistake. But it is because of this degree of conclusiveness which attaches to an auditor's findings as to matters of fact, and because his remarks in answer to the exceptant's second legal point (by reason of what is omitted more than by what is said) have created some uncertainty in our mind as to the basis upon which his conclusion as to the value of the assignors' assets is rested, and not because we are prepared to declare his general conclusion unwarranted by the evidence, that we feel constrained to refer the matter back to him for a specific finding in the particular mentioned.

"We adopt his reasons for overruling the exceptions to the account.

"And now, January, 1885, the report is re-committed to the auditor, with the request that he report specifically upon the questions suggested in the foregoing opinions."

The second report of the auditor was as follows:

"To the Honorable the Judges of the Court of Common Pleas in and for the County of Luzerne:

"In pursuance of the request of Your Honors, contained in opinion by Rice, *P. J.*, filed January 13, 1885, the undersigned, the auditor appointed in above case to pass upon the exceptions filed to the account of A. Bryden, trustee of the Pittston Knitting Company, Limited, and report distribution of the moneys in hands of said trustee, would respectively report:

"That a day was fixed by the auditor, to further hear the parties for and against said exceptions, more particularly upon the question of the ability of the knitting company aforesaid to pay its debts at the time of its assignment to Bryden. The parties met the auditor on the day fixed by their counsel, when the arguments were heard. And the testimony has been fully considered, as well as the arguments by the auditor, and we have to report that upon the question of the ability of the Pittston Knitting Company to pay its debts at the time of the assignment, we are of the same opinion as we were when the auditor's report was prepared. We, therefore, in accordance with the request of the court and after a careful and full consideration of the testimony, find specifically the following fact:

"That when the Pittston Knitting Company 'Limited' made its assignment to A. Bryden, in trust for certain of its creditors in said assignment referred to, it had assets sufficient to have at once paid all its debts, and that these assets at the time of said assignment would have sold for cash for a sum sufficient to have paid all its liabilities in full."

On argument of the exceptions filed to the second report of the auditor, the court delivered the following opinion:

"In his original report the auditor found that

the assignment of the insurance moneys to the accountant, in trust for certain of the creditors of the assignors (the Pittston Knitting Company), was not on account of its inability at that time to pay its debts. His supplemental report has removed all doubt as to the basis upon which the main conclusion was rested. He now reports specifically that at the time of the assignment the Knitting Company 'had assets sufficient to have at once paid all its debts, and that these assets at the time of said assignment would have sold for cash for a sum sufficient to have paid all its liabilities in full.'

"This finding fully meets the requirements stated in our previous opinion (see *Re Bryden*, 42 Legal Int. 80), and if it is warranted by the evidence, then the assignment to the accountant cannot be held to inure to the benefit of all the creditors, and the distribution reported by the auditor must be confirmed.

"The very earnest and able argument of the counsel for the exceptants has caused us to re-examine the evidence with great care. The testimony upon this question of fact is conflicting, and it must be confessed that the opinions expressed by some of the witnesses as to the value of the assets are not entitled to much weight, for the reason that they are speculative and involve the existence of conditions which do not appear in the facts. This remark, however, does not apply to the testimony of all the witnesses produced by the bondholders; and we are unable to declare that the auditor is clearly mistaken in his finding, much less to declare that there is no evidence whatever to sustain it. It is unnecessary to cite authorities as to the weight which must be given to an auditor's finding upon a pure question of facts. According to the familiar rule upon the subject, the court not being satisfied that a mistake has been committed, this report must be confirmed."

A decree having been made and entered overruling the exceptions to the reports of the auditor and confirming said reports, the appellants took this appeal, making the following specification of errors in the decree of the court below:

1. Overruling the first exception to the first report of the auditor, to wit: that the learned auditor erred in failing to report that the said Pittston Knitting Company, Limited, was insolvent at the time of making the assignment of December 1, 1882, though the uncontradicted testimony of the manager established that the company was then unable to pay its debts as they fell due in the ordinary course of trade and business.

2. Overruling the second exception to the first report of the auditor, to wit: that the learned auditor erred in failing to report the placing of a portion of the company's assets in the hands of a trustee, for certain of its creditors, was a preference within the scope of the Act of 1843.

3. Overruling the third exception to the first report of the auditor, to wit: that the learned auditor erred in reporting that the bondholders of the knitting company alone should participate in the distribution of the fund accounted for.

4. Overruling the fourth exception to the first report of the auditor, to wit: that the

learned auditor erred in reporting as a fact that the knitting company was solvent because its assets exceeded in amount its liabilities.

5. Overruling the fifth exception to the first report of the auditor, to wit: that the learned auditor erred in reporting as a fact that the value of the assets of the company, limited, exceeded its liabilities, because the weight of expert testimony of the value of its real estate was the only foundation for so finding.

6. Overruling the sixth exception to the first report of the auditor, to wit: that the learned auditor should have found the value of the real estate of the company, limited, at the sum which it would have brought at a forced sale at the time of the assignment.

7. Overruling the seventh exception to the first report of the auditor, to wit: that the learned auditor erred in reporting that the company, limited, was of ability to pay its debts at the time of the assignment of December 1, 1882.

8. Overruling the eighth exception to the first report of the auditor, to wit: that the learned auditor erred in dismissing the first exception filed to the said account of Andrew Bryden. This first exception to the account being that "The accountant's claim of \$550 for legal services is excessive."

9. Overruling the ninth exception to the first report of the auditor, to wit: that the learned auditor erred in dismissing the second exception filed to the account of Andrew Bryden. This second exception to the account being, that "Claim for \$481, commission, is excessive."

10. Overruling the tenth exception to the first report of the auditor, to wit: that the learned auditor erred in refusing to find the first conclusion of law as requested by the present exceptants. This first conclusion of law being that "The value of the factory lot is immaterial in this case; the assignment to Andrew Bryden comes within the provisions of the Act of April 17, 1843, and inures to the benefit of all creditors."

11. Overruling the eleventh exception to the first report of the auditor, to wit: that the learned auditor erred in refusing to find the second conclusion of law as requested by the present exceptants. This second conclusion of law being that "If the assets of the Pittston Knitting Company exceeded its liabilities at the time of the assignment, yet if they were not available and could not be readily converted into cash, then the assignment comes within the provisions of the Act of April 17, 1843, and inures to the benefit of all creditors."

12. Overruling the twelfth exception to the first report of the auditor, to wit: that the learned auditor erred in failing to report that the embarrassments of the company, limited, its unpaid bills, the four suits against it, and its partial assignment of its only cash assets to a trustee just prior to the issuing of executions against it, were the natural succession of events in the history of a case of inability to pay debts within the meaning of the Act of 1843.

13. Overruling the thirteenth exception to the first report of the auditor, to wit: that the learned auditor erred in excluding the exceptants from a *pro rata* share or dividend of the fund accounted for by the said Andrew Bryden.

14. Overruling the fourteenth exception to

the first report of the auditor, to wit: that the learned auditor erred in reporting and finding the solvency of the company, limited, from the weight of testimony of the value of its lands for manufacturing purposes or investment, without regard to their value at a forced sale.

15. Overruling the fifteenth exception to the first report of the auditor, to wit: that the learned auditor erred in finding that the lands of the knitting company, limited, had a market value and were available for conversion into cash, without finding what that market value and availability for conversion into cash amounted to in dollars and cents.

16. Overruling the sixteenth exception to the first report of the auditor, to wit: that the learned auditor erred in disregarding the testimony of the company's manager, that at the time of the assignment to Bryden in trust, the company was unable to meet its indebtedness.

17. Overruling the former part of the first exception to the second report of the auditor, to wit: because there is no evidence to support his (the auditor's) finding of fact, that the Pittston Knitting Company had assets sufficient at the time of the assignment to Andrew Bryden to have at once paid all its debts, and that the auditor erred in such finding.

18. Overruling the latter part of the first exception to the second report of the auditor to wit: because there is no evidence to support his (the auditor's) finding of fact that these assets (which the company had), at the time of the assignment, would have sold for cash for a sum sufficient to have paid all its liabilities in full, and that the auditor erred in such finding.

19. Overruling the second exception to the second report of the auditor, to wit: that the auditor erred in such finding of fact (that the assets of the knitting company at the time of the assignment would have sold for cash for a sum sufficient to have paid all its liabilities in full), because it was contradictory to the only competent testimony in the case.

20. Overruling the third exception to the second report of the auditor, to wit: that the auditor erred in said finding of fact (that the assets of the knitting company at the time of the assignment would have sold for cash for a sum sufficient to have paid all its liabilities in full), because it was clearly against the weight of the evidence.

Messrs. F. C. Sturgis and John Bethell Uhl, for appellants.

Mr. George S. Ferris, for appellees.

Mr. Justice Sterrett delivered the opinion of the court:

It would be a useless expenditure of time and labor to specially notice each of the twenty specifications of error in this case. The only result would be to make more apparent what is very evident from an examination of the evidence: that there is no special merit in any of them.

Some of the assignments of error present questions which arose and have been finally disposed of on the writ of error brought by appellants to No. 84 of this term [the preceding case]. The learned auditor's findings of fact, which constitute the burden of complaint, were fully warranted by the evidence before him; and, upon the facts thus found, no other decree

than that entered by the court below could have been consistently based.

Decree affirmed and appeal dismissed, at the costs of appellants.

LANCASTER COUNTY NATIONAL BANK, *Pf. in Err.*,

v.

Michael L. HUVER, Assignee.

1. A lender who, before paying over money on a borrower's discounted note, **discovers** that the borrower is **insolvent**, **may** tender back the note and **refuse** payment of the money.
2. The **assignee** of the borrower has no rights superior to those of the borrower himself.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment for the plaintiff for want of a sufficient affidavit of defense. *Reversed.*

This was an action of assumpsit by Michael L. Huver, assignee of Henry H. Shenk and wife, against the Lancaster County National Bank.

In his affidavit of claim the plaintiff alleged that the suit was founded upon the following claim, viz.:

"A deposit in Lancaster County National Bank, March 30, 1885, of \$248.58, in favor of said Henry H. Shenk, who has since assigned his estate to Michael L. Huver, by deed of voluntary assignment, in trust for creditors; and he verily believes there is now due and owing by the said Lancaster County National Bank, the defendant, to the said plaintiff, the sum of \$248.58, with interest from April 25, 1885, for the recovery of which this suit is brought."

The defendant filed an affidavit of defense in which it alleged that the affidavit of claim was not such a copy of a book debt or claim as entitles the plaintiff to judgment for want of an affidavit of defense; and that the defendant had a just and legal defense to the whole of the plaintiff's demand, the nature and character of which were as follows:

On March 30, 1885, Henry H. Shenk made his note for \$250 payable thirty days after date, and on same date had it discounted by the Lancaster County National Bank; the proceeds, \$248.58, were placed to his credit on the books of the Bank, and no check was drawn against that sum. The next day he made an assignment for benefit of creditors to Michael L. Huver; and at once the Bank, on discovering his insolvency, credited his account with \$1.42, the discount, charged him with \$250, the amount of the note, and tendered the note to Shenk and his assignee. They refused to receive it; Huver, the assignee, demanded the \$248.58 and, on refusal, brought suit in his own name against the Bank.

The note had not matured when the suit was entered.

PATTERSON, J., making absolute a rule for judgment for want of a sufficient affidavit of defense, delivered the following opinion:

"The statement of the case is, we are of the

opinion, enough to show that the plaintiff must have judgment against the above defendant. The defendant discounted on March 30, 1885, the note of Henry H. Shenk, and same day placed to his credit, on the books of the Bank, defendant, the proceeds thereof, to wit: \$248.58. On the 31st day of March, 1885, said Henry H. Shenk assigned his estate, by deed of voluntary assignment for the benefit of his creditors, to Michael L. Huver, the above named assignee; which deed was recorded same day, at 8.55 A. M. This assignment passed all the property or money to the credit of Shenk to his assignee, the said Huver. Then on the same 31st of March, did the defendant restate the said assignor's account in the Bank, as set forth in his affidavit of defense. At this time there was no subsisting demand or debt due the Bank by Shenk. 'A set-off can only be made of a debt or demand which existed at the time of the commencement of the action, and the defendant must be able to show that it was then his.' *Huling v. Hugg*, 1 Watts & S. 418.

"And to the same principle, see *Roig v. Tim*, 103 Pa. 115; 1 Story, Eq. §§ 327, 639; *Waterman*, Set-Off, 74, 75; *Jordan v. Nat. Shoe & L. Bank*, 74 N. Y. 467; *Bank of Chicago v. Bank of Grand Rapids*, 68 Ill. 398, 402.

"Other authorities could be cited.

"The defense here we think is untenable. The court makes the rule absolute, and enters judgment against the defendant for \$248.58, with interest to be added from the date of the bringing of this suit to this date, November 14, 1885."

Thereupon the defendant took this writ and assigned as error the action of the court in entering the judgment for the plaintiff.

Mr. Wm. Aug. Atlee, for plaintiff in error, cited and relied upon *Dougherty v. Cent. Nat. Bank*, 93 Pa. 227.

Messrs. D. G. Eshleman and L. Ellmaker, for defendant in error:

No attempt of the Bank to change its relations with Shenk, after it was informed of the assignment, could be successful. The assignment fixed their relations. At that time it owed Shenk \$248.58, and Shenk was not indebted to it. The assignment passed all the money standing to the credit of Shenk to Huver, the assignee.

Will v. Franklin, 1 Binn. 502

This action was commenced by Huver, the assignee, before the note was due. A demand, to be set off, must be a subsisting cause of action at the time of the commencement of the plaintiff's suit, and upon which an action might have been sustained.

Waterman, Set-Off, 74, 75, § 60; *Pennell v. Grubb*, 13 Pa. 552; *Huling v. Hugg*, 1 Watts & S. 418; *Varney v. Brewster*, 14 N. H. 49, 54; *Ryan v. Barger*, 16 Ill. 28; *Re Commercial Bank Co. L. R. 1 Ch. App. 588*; *Roig v. Tim*, 103 Pa. 115, 118; *Jordan v. Nat. Shoe & L. Bank*, 74 N. Y. 467; *Bank of Chicago v. Bank of Grand Rapids*, 68 Ill. 398.

In *Dougherty v. Cent. Nat. Bank*, 93 Pa. 227, the facts are not precisely similar to those in this case. In that case the defendant had discounted the plaintiffs' note and extended their

credit for its amount, upon learning of their insolvency before payment to or notice of any checks or assignments by them. Here the Bank changed its account after it had notice of the deed of assignment. This fact takes this case out of the principle of stoppage *in transitu*.

In *Lockwood v. Beckwith*, 6 Mich. 168, where a partnership became insolvent and made a general assignment for the benefit of creditors, including therein a note past due, and the maker of the note held the acceptance of the partnership not then due, it was held that the insolvency of the acceptors was not of itself sufficient to authorize a set-off, in equity, of the acceptance against the note in the hands of the assignee, in the absence of evidence that the acceptance was based upon the note, or that the maker of the note trusted to it at the time, as the means of discharging his obligation. A bank has no lien upon money standing to the credit of one of its depositors for the amount of a note of such depositor discounted at the bank, but which has not matured.

Mfrs. Nat. Bank v. Jones, 2 Pennyp. 377.

The mere insolvency of the depositor intervening before the maturity of the note cannot affect the question as against a creditor attaching the fund. *Id.*

Mr. Justice Paxson delivered the opinion of the court:

This case is ruled by *Dougherty v. Cent. Nat. Bank*, 93 Pa. 227. The facts of that case are upon all fours with this. There is no substantial difference between them. It is true, in the case in hand there was an assignment for the benefit of creditors, after the discount and before the withdrawal of the credit. But the assignee has no higher standing than his assignor. Had a check been drawn against the fund produced by the discount, prior to the withdrawal of the credit, such check would have been good in the hands of a *bona fide* holder for value. But there was nothing of the kind here. The rights of third parties have not intervened.

We have the case of a man who procured a discount at a bank one day and makes an assignment for the benefit of his creditors the next morning. He was insolvent when he procured the discount. The note which he gave the Bank was a worthless thing, and he knew it when he offered it to the Bank.

There was an utter failure of the consideration; the Bank received nothing for the credit which it gave him. When it learned next morning of his insolvency, the Bank withdrew the credit and tendered him back the note. It is conceded that if the rights of third parties had intervened, the case would have been different. So it would have been had the Bank paid over the money to Shenk, or upon his order. But as between the parties the Bank had the right to withdraw the credit to Shenk. The cases cited in the opinion of the court below and by the learned counsel for the defendant in error are good law, but they have no application to this case. We need not repeat what was said in *Dougherty v. Cent. Nat. Bank*.

The judgment is reversed and a venire facias de novo awarded.

John STEWART, *Plff. in Err.*,

v.

City of PHILADELPHIA, *To Use, etc.*

1. Municipal claims for **paving and curbing** in Philadelphia are to be estimated according to frontage, except in the case of rural or suburban land.
2. *Prima facie* all land within the city limits is subject to the **frontage rule**, and the burden of proving land rural rests upon the owner.
3. **Rural land** is land not already so far improved or in the midst of or in such close proximity to city improvements that it can fairly be said that paving and curbing are requisite for the benefit of the land as a part of the City proper.
4. Municipal **assessment of land as rural** for the purpose of taxation does **not estop** the City from denying its rural character in a claim for paving and curbing.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 4 of Philadelphia County, to review a judgment on a verdict for the plaintiff in *scire facias* sur municipal claim. *Affirmed, by a divided court.*

This was a claim by the City of Philadelphia to the use of Cunningham & McNichol, against John Stewart, owner or reputed owner or whoever may be owner of a lot of ground at the Northwest corner of Forty-Eighth Street and Silverton Avenue, in the twenty-fourth ward of the City, containing 150 feet in front on Forty-Eighth Street, and 100 feet in depth along the North side of Silverton Avenue.

The claim was filed November 20, 1878, and was for work done and materials furnished by the use plaintiffs in curbing and paving Forty-Eighth Street, in front of the premises.

On November 20, 1882, a *scire facias* issued. The defendant pleaded *non assumpt*, set-off and payment, with leave, etc., and especially that the work was charged for according to the frontage rule of assessment "and that the ground, etc., against which said claim has been filed, is and was at the time of doing said work, rural and suburban, and assessed as such; and further because said paving and curbing were not called for by any reason save as a general public improvement and conferred no special benefit on defendant's property."

On this plea issue was joined.

At the trial, before WILLSON, J., the following facts appeared:

There were no buildings or improvements of any kind on said lot; Forty-Eighth Street in 1878 was opened only from Haverford Avenue northward to Westminster Avenue, a distance of four squares. The paving claimed for was started at Haverford Avenue and carried to Aspen Street, 150 feet north of defendant's lot, in all a distance of two squares. No streets were opened on the east side of Forty-Eighth Street north from Haverford Avenue.

An open common, through which a creek thirty feet wide ran, faced the east side of Forty-Eighth Street directly opposite defendant's lot, and extended eastward to Forty-Sixth Street;

and extended this width a mile northward from Haverford Avenue; said tract lying between defendant's lot and the improved part of the City.

There were no houses on either side of Forty-Eighth Street north of Silverton Avenue excepting one at the N. W. corner of Forty-Eighth and Aspen Streets and three small brick houses built in 1878. Three hundred feet south of defendant's land, at the south end of Forty-Eighth Street, were the insane asylum grounds containing 119 acres. To the westward of defendant's lot, at Fiftieth Street, was open country used for farming purposes only, there being in the intervening space on the north side of Silverton Avenue two houses between Forty-Eighth and Forty-Ninth Streets and only one house between Forty-Ninth and Fiftieth Streets where the farms begin.

The open tract on the east side of Forty-Eighth Street north from Haverford Avenue which was on the other side of the street from defendant's lot, was assessed in large blocks. Morse's estate had a frontage on Forty-Eighth Street of 415 feet and extended in depth a square to Forty-Seventh Street; then came McInne's lot, 860 feet front on Forty-Eighth Street, of same depth below grade; adjoining this to the north was a lot with a 864 feet frontage on Forty-Eighth Street.

Silverton Avenue was not open east of Forty-Eighth Street. It was opened west only two squares to Fiftieth Street on to farming land.

The general character of the place (to use the language of the city assessor) was that of "an isolated neighborhood cut off from the railroads." There were no compact buildings there.

Forty-Eighth Street was out of the line of travel and was not used at all by the general public. Defendant's land and also that surrounding was assessed as rural up to the year 1885, seven years after this paving was laid.

The defendant asked the court to charge as follows:

"First. If the jury is satisfied from the evidence in the case that the land against which this claim is filed was in 1878 rural or suburban, it is its duty to find for the defendant."

"Answer. I affirm this point; adding, however, that [the real test is not whether the property in question could properly be called either rural or suburban, but whether the work done was required or justified by the locality of the property and the character of the surrounding improvements]; in other words, if the locality and character of the property and its surroundings were such that the work done would not properly be considered to have been done for the general public advantage but to have been done for the special benefit of that neighborhood of the City in which the property in question was situated and for the advantage of such property as city lots, then the property should under the law be charged with its share of the expense, and the plaintiff is entitled to a verdict."

"Second. If the jury find that the land against which the lien is filed was at the time of filing the lien beyond the built up section of the City, that land in the immediate vicinity was used for farming purposes and that Forty-Eighth Street was not cut through, then said lot was protected from such a tax as is

levied by this lien and the verdict must be for the defendant."

Answer. I do not affirm this point as stated. [I do not regard the near proximity of farm land or the fact that Forty-Eighth Street was not cut through, which is a very indefinite expression, to be of themselves of conclusive importance.] Farm land might be in the immediate vicinity of a closely built city. Such proximity would undoubtedly be an element to be taken into consideration in connection with all the evidence adduced to show that the property in question was rural in the sense to which I have called your attention in my answer to the last point. So, also, would be the incident of being beyond the built up portion of the City. If by this is meant that the property against which the claim is filed was so far separated from the building improvements of the City that the work covered by the claim did not bring to the property the special benefit which such work would ordinarily bring to city lots as such, then the claim should not and cannot be enforced against the property."

"Third. If the jury believe that the paving, the subject of this suit, was not called for by any reason save as a general public improvement and conferred no special benefits on defendant's property, or conferred no benefits equal to the amount of this claim, then said charge is excessive and unlawful, and plaintiff is not entitled to recover for the same."

"Answer. I affirm this point, with the exception that I instruct you that [if you believe from the evidence that the property in question, or the neighborhood of which it was a part, required or justified the work, or that the work was justified or required to be done for the benefit of defendant's land as city lots and as a portion of the City at large] and that the work was not done for general public benefit, then it is not necessary for the plaintiff to show that the amount of the special benefits to the defendant's property was equal to the amount of the claim."

"Fifth. The City, by its assessment, having given the land in question a rural or suburban rating, it is estopped from denying its rural character."

"Answer. [I decline to affirm this.]"

The court charged, *inter alia*, as follows:

"It is an ordinary rule of the City that the owners of real estate shall pay for paving in front of it according to the number of feet frontage."

"Within a few years, however, it has been settled by repeated decisions of the supreme court that this method of taxation is not constitutional when applied to properties which are rural or suburban, as distinguished from those which would in the ordinary sense of the term be called city properties."

"This ruling of our highest court must be our guide in this case. It is undoubtedly true that the plaintiffs here, the contractors, establish a *prima facie* case by exhibiting the claim filed, and the authority under which they did the work."

"The effect of this in this case is to throw upon the defendant the burden of establishing that the property against which the claim was filed was exceptional; that is, that though it was situated within the limits of the City, it was not subject to the claim, because it was

rural or suburban in the sense to which I have referred, and therefore protected from taxation by the feet frontage rule. The defense here relies upon this ground of contention. [To substantiate it, it is incumbent upon the defendant to satisfy you by evidence that his property, to which the claim filed relates, was not city property in the ordinary meaning of that term; that it was not property already so far improved or in the midst of or in such close proximity to city improvements that it could fairly be said that the paving was requisite for the benefit of that property as a part of the City proper.] Substantially this test is what I understand the supreme court to have laid down. [The fact that some persons or many would use the term rural in connection with a given property, would not settle the question in favor of an exemption from such a tax as is levied in this case.

"Some might describe all West Philadelphia as rural. What you are to consider is the nature of the benefit done by the work in question.] If this work had principally a general advantage, and was not demanded by the wants and interests and for the special benefit of the immediate vicinity of the defendant's property, and of that property as a part of the City proper, then your verdict should be for the defendant. Otherwise your verdict should be for the plaintiffs for the amount claimed."

The verdict was for the plaintiffs for the full amount claimed \$742.25, and judgment was entered accordingly; whereupon, the defendant took this writ and assigned as error the portions of answers and charge included in brackets, and also that the court erred in not instructing the jury that the completely rural character of the neighborhood protected the land from the frontage rule.

Mr. Joseph Leedom, for plaintiff in error: Assessments according to the frontage rule are justified only where they provide a just and equal apportionment according to the benefits conferred, and do not impose unfair and unequal burdens, and are practically applied only to cities and large towns when the density of population along the street and the small size of lots make it a reasonably certain mode of arriving at a true result.

Re Washington Ave. 69 Pa. 361.

The facts established at the trial, together with its rural assessment, determined the rural character of the land and the rural character of the neighborhood, and protected defendant's lot from the frontage rule of taxation.

Philadelphia v. Rule, 93 Pa. 18; *Hammett v. City*, 65 Pa. 146; *Seely v. Pittsburgh*, 83 Pa. 360.

The case of *Craig v. Philadelphia*, 89 Pa. 265, practically decided the question raised in this case as to the rural character of the neighborhood of defendant's lot. The lot involved in *Craig v. Philadelphia*, was situated at Forty-Ninth and Market Streets, on one of the main thoroughfares and on the line of the principal travel. The lot involved in this case is on Forty-Eighth Street, north of Haverford Avenue. Forty-Eighth Street, in 1878, when this paving was done, was not even opened for public travel north of Westminster Avenue. It is in an isolated neighborhood out of the line of travel. The close proximity of defendant's lot

to that involved in *Craig v. Philadelphia*, brings this case directly under the rulings in that case.

It is not incumbent on the defendant to satisfy the jury "that his property is not in close proximity to city improvements," as ruled in the court below.

No paper book filed for defendant in error.

Per Curiam:

This judgment is affirmed by a divided court.

H. C. FRICK, *Appt.*,

v.

George E. BALDWIN.

1. In case of the **refusal or incompetency** of all the kindred of a decedent, and no creditor applying, the register of the proper county may grant **letters of administration** to any fit person, in his discretion.
2. Although **letters** may not be void when granted to a **nonresident** who gives the requisite bond, a nonresident has no right to the administration.
3. Generally, it is the duty of the register, in **appointing an administrator**, to regard the **expressed will** of the parties entitled to the estate, whether they reside within or without the State; and, if they are incompetent, the trust should be committed to their nominee, if a fit person; and **letters** may be **revoked** on their application, when granted without their assent.

(Decided October 4, 1886.)

APPEAL from a decree of the Orphans' Court of Fayette County, revoking letters of administration. *Reversed.*

This was a petition by George E. Baldwin, to the Register of Wills of Fayette County, for the revocation of letters of administration granted to H. C. Frick upon the estate of William Baldwin, deceased. The facts, as they appeared from the pleadings and the testimony taken before the register, were as follows:

William Baldwin died at Connellsville, Fayette County, Pennsylvania, on the 7th day of January, 1884, intestate, unmarried and without issue. Connellsville was at the time of his death and had been for many years prior thereto his domicile and principal place of residence. The only relatives left by the deceased were a brother residing in Massachusetts, a sister residing in Vermont, and nephews and nieces living in various States of the Union, one, namely: George E. Baldwin, the petitioner, residing at Philadelphia.

Within a few days after Mr. Baldwin's death Daniel Kaine, Esq., of Uniontown, who had been his counsel for many years, wrote to the nephew residing in Philadelphia, telling him that letters should be taken out in Fayette County and suggesting that he (Kaine) being familiar with the estate should act. To this letter George E. Baldwin replied that he did not wish to have anything to do with the matter; that the whole thing was in the hands of Franklin B. Baldwin, the brother, who resided in

Massachusetts, and that he had forwarded the letter to said brother.

On the 15th day of January, 1884, Franklin Baldwin, acting for himself and the other relatives of the deceased, applied to the Probate Court of Worcester County, Massachusetts, by petition in which he set forth that William Baldwin, at the time of his death, was a resident of the City of Worcester, in Worcester County, Massachusetts; and he asked for and obtained letters upon that day to be issued to him, as administrator of the estate.

On the 8th of February, 1884, he came into Pennsylvania and filed with the Register of Wills of Allegheny County, in the City of Pittsburgh, a petition in which he reiterated the statement that William Baldwin had died a resident of Massachusetts and asked the Register of Wills for Allegheny County to grant ancillary letters upon said estate to William Bissell, of Pittsburgh, upon the ground that a portion of the estate was in Allegheny County.

The other relatives of the deceased, including George E. Baldwin, the Pennsylvania nephew, joined in this proceeding and renounced all right that they might have to administer upon said estate. Ancillary letters were granted, pursuant to the prayer of the petition, by the Register of Allegheny County, upon the same day.

On the 13th day of February, 1884, the Register of Fayette County, discovering this combination upon the part of the relatives of the deceased to withdraw the estate from his jurisdiction and to deprive the Commonwealth of the collateral inheritance tax upon that portion of the estate not taxable if the domicile of the deceased was beyond the borders of the Commonwealth, issued letters of administration upon said estate to H. C. Frick, and required him to file a bond in the sum of \$600,000 to protect the parties in interest. The bulk of the estate consisted of bonds and other obligations for the payment of money, having no situs of their own.

Shortly after Mr. Frick's appointment, finding that he would be hampered and embarrassed in his administration of the estate by the outstanding ancillary letters granted to Mr. Bissell in Allegheny County, he filed a petition with the Register of Allegheny County to revoke the letters ancillary to the Massachusetts administration, improvidently granted upon a misrepresentation of the facts as to decedent's residence.

In this action the Commonwealth intervened and a decree was made by the Register of Allegheny County, revoking the ancillary letters, upon the ground that there had been a misrepresentation made as to the domicile of the deceased.

From this decree Mr. Bissell appealed to the Orphans' Court of Allegheny County. The court sustained the decree of the register and dismissed the appeal. He then appealed to the supreme court, but eventually abandoned the appeal about time of the argument.

George E. Baldwin, at the instance of the foreign administrator, presented this petition to the Register of Fayette County, asking that Mr. Frick's letters be revoked and letters be issued to Mr. Bissell. This proceeding was commenced the 28th day of October, 1884.

The register refused to revoke Mr. Frick's letters and petitioner appealed to the Orphans' Court of Fayette County, which court sustained the appeal and ordered the letters to be revoked. From this decree the present appeal was taken by Mr. Frick.

Subsequent to the appeal, but before *certiorari* was filed, George E. Baldwin presented his petition to the orphans' court, setting forth that the estate had been settled by Mr. Frick and further litigation and expense was unnecessary, and withdrawing all objections to Mr. Frick's administration.

Messrs. Boyle & Mestresat and Knox & Reed, for appellant:

The exclusive right to grant letters upon this estate belonged to the Register of Fayette County.

Act March 15, 1832, § 6.

The Commonwealth looked to him to see to the collection of the collateral inheritance tax.

Act April 10, 1849, § 16.

Quiescence upon his part would have been negligence, and that would have cost the Commonwealth many thousands of dollars, because the personal estate of the deceased was of a character having no situs of its own; and the tax thereon could not have been collected if the fraudulent claim that the domicile or residence of the deceased was in Massachusetts had been allowed to stand unchallenged.

Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them to the widow, if any, or to such of decedent's relations or kindred as by law may be entitled to his estate. And in case of refusal or incompetency of every such person, to a creditor applying, or to any fit person at his discretion.

Act March 15, 1832, § 22.

It was the duty of the register, there being no widow, to appoint a relative, unless he found such to be incompetent, or refusing the letters at his hands.

All of William Baldwin's relatives and kindred were incompetent to administer, for they were all nonresidents, except George E. Baldwin, the nephew who lived in Philadelphia.

Sharpe's App. 87 Pa. 163; *Sarkie's App.* 2 Pa. 157.

Upon the part of all of his relatives, including the Philadelphia nephew, there was a refusal to administer. There were no creditors applying. Therefore, that condition of affairs existed when it was the register's duty to appoint a fit person at his discretion.

This he did February 13, 1884, in the person of H. C. Frick, the appellant.

Messrs. T. C. Lazear, Nathaniel Ewing and P. S. Newmyer, for appellee, relied on *Brubaker's App.* 98 Pa. 21.

Mr. Justice Trunkley delivered the opinion of the court:

William Baldwin, a resident of the County of Fayette, on January 7, 1884, died intestate, leaving no widow or lineal heirs. The only person interested in his estate, residing in Pennsylvania, is George E. Baldwin, who has never wished to administer the estate himself; and he made no move to nominate to the register of the proper county a person to be appointed, until October 28, 1884, when he petitioned for

the revocation of the letters which had been granted to Frick. Within a week after the decedent's death, he intrusted the business to Franklin Baldwin of Massachusetts.

On January 15, 1884, Franklin Baldwin represented to the Probate Court of the County of Worcester, Massachusetts, that said decedent last dwelt in said county; whereupon, in due course of procedure, said court on February 5, 1884, issued letters of administration of the estate of said decedent to said Franklin Baldwin.

Upon the petition of Franklin Baldwin to the Register of Allegheny County, representing that William Baldwin of Worcester County, Massachusetts, died leaving personal property in Pennsylvania, the principal part thereof being in Allegheny County, and that letters of administration had been granted to himself in said County of Worcester, the register, on February 8, 1884, granted ancillary letters of administration to William S. Bissell.

All parties interested in the estate who are now seeking the revocation of the letters to Frick were privy to the action of Franklin Baldwin. A glance at the procedure shows that they moved quickly, not in the county and State where the decedent resided when he died, but in another State where they obtained primary administration, and then in another county in this State where they obtained ancillary administration. It was well known that the estate was of considerable magnitude, and subject to the collateral inheritance tax. No creditor has appeared anywhere, to this day, asking for letters or objecting to the appointment of anybody.

The facts coming to the knowledge of the register of the proper county, on February 13, 1884, he granted letters of administration to H. C. Frick. In case of the refusal or incompetency of all the kindred of the decedent, and no creditor applying, by the letter and spirit of the statute, the register may grant letters "to any fit person, at his discretion."

That Frick was a fit person is unquestioned. That it was proper for the Register of the County of Fayette to grant letters of administration is clear; no jurisdiction of the subject was in the register of any other county.

Brubaker's App. 98 Pa. 21, cited by appellee, ruled that it is error to create separate co-ordinate administrations on the same estate. In that case the register who had jurisdiction of the subject granted both letters, the second by order of the orphans' court. Here, the register having jurisdiction rightly granted the letters, and the lawfully appointed administrator took an orderly and legal way to have the ancillary letters, issued in Allegheny County, vacated.

On February 9, 1884, Frick began proceedings for the revocation of Bissell's letters. Those who had been active in procuring Bissell's appointment had knowledge, if not actual notice, of that proceeding. Nearly fifty witnesses were examined, a large number being residents of the New England States. The letters were revoked in October, 1884; Bissell appealed but, on consultation with the heirs, abandoned the appeal, and George E. Baldwin immediately began this proceeding, giving no cause whatever for the revocation of the letters to H. C. Frick, save the following: "A person in nowise related to nor being a creditor of said decedent,

and without notice to your petitioner, or to any other relations of the said decedent legally entitled to such administration."

George E. Baldwin has since become satisfied; but if these were otherwise, his own testimony reveals that he has no cause to complain for want of notice. Doubtless, as alleged, the other parties concerned in the attempt to maintain the appointment of Bissell concurred in the petition for removal of Frick. They are incompetent because they are nonresidents. If an administrator removes from this State, on the application of any person interested, the orphans' court may vacate his letters. Although letters may not be void when granted to a non-resident who gives the requisite bond, no non-resident has a right to the administration. *Sarkie's App.* 2 Pa. 157; *Sharpe's App.* 87 Pa. 168; Hood, Exrs. 59; Scott, Intest. Laws. 32.

Among the reasons for refusing administration to a nonresident is that he should be within the jurisdiction of the courts of this State. He is a trustee, answerable as such for the conduct of the trust estate; and interested parties, when their rights are withheld, should not be confined to the slow process against sureties.

A stranger has no right to demand letters nor to object to the granting of letters, for he has no interest in the estate. Generally, it is the duty of the register to regard the expressed will of the parties entitled to the estate, whether they reside within or without; and if they are incompetent, the trust should be committed to their nominee, if a fit person. *Jones' App.* 10 W. N. C. 249.

While a stranger is not in position to be heard objecting, the register ought not to grant letters to a nonresident even if there should be none to object. Cases may arise where letters have been granted to fit persons, without assent of nonresident parties in interest, which should be revoked on their application.

When Frick was appointed to the trust, he was competent, and it was proper that the register should act promptly. All the parties now complaining were active to avoid the tribunal having jurisdiction. In what they represented to the probate court in another State, and in what they did in Allegheny County, they may have acted in good faith; and we say naught to the contrary. The appointment of Frick was lawful and provident. As the case comes, considering the facts and circumstances, there is no reason for the revocation of his letters.

Decree revoking the letters of administration granted to H. C. Frick is reversed, at the cost of the appellee.

READING FIRE INSURANCE & TRUST CO., Guardian, Appt.,

v.
Ellen RIEGEL.

1. Without proof of subsequent actual marriage it will not be presumed, from continued cohabitation and reputation, that a relation illicit in the beginning has been changed to that of husband and wife.
2. When a woman's claim for widow's exemption out of a decedent's estate rests entirely upon cohabitation and rep-

utation, and her prior cohabitation and reputation as the wife of a man still living is proved by evidence of the same general character, no presumption of marriage with the decedent will arise.

(Decided October 4, 1883.)

APPEAL from a decree of the Orphans' Court of Berks County, dismissing the appellant's exceptions to a widow's exemption appraisement, and confirming the appraisement absolutely. *Reversed.*

After the death of Jacob R. Riegel, leaving a minor child, Charles B. Riegel, Ellen Riegel claimed to be the widow of the decedent; and at her request the appraisers of the decedent's personal estate set apart property to the amount of \$300 to her as the widow's exemption.

The Reading Fire Insurance & Trust Company, guardian of the minor child, excepted to the appraisements, but the orphans' court dismissed the exceptions and confirmed the appraisement absolutely.

The facts upon which Ellen Riegel rested her claim are set forth in the opinion.

From this decree the Reading Fire Insurance & Trust Co. guardian, appealed.

Messrs. Bland & Dettra and Isaac Hiester, for appellant:

The claimant cannot be the widow of Jacob R. Riegel, because she is the wife of Jeremiah Ribble, who is still living. The evidence of that marriage is clear and unmistakable.

Marriage is regarded in this State as a civil contract, and is provable in all civil actions by cohabitation, reputation, acknowledgment of the parties, reception by the family, and any other circumstances from which it may be inferred.

R. R. Co. v. Hall, 61 Pa. 361; *Senser v. Bower*, 1 Penrose & W. 450; *Throndehl v. Morrison*, 25 Pa. 326; *Hanna v. Phillips*, 1 Grant, 253; *Guardians of the Poor v. Nathans, Physick's Est.* and *Bicking's App.* 2 Brewst. 149, 179 and 202; *Chambers v. Dickson*, 2 Serg. & R. 475; *Vincent's App.* 60 Pa. 238.

The cohabitation between Ribble and the claimant was constant and continuous. The house in Wood Street was the house of both; neither lived anywhere else; and no other person lived there.

Cohabitation is to have the same habitation, so that where one dwells, there the other dwells with him. No particular length of time is essential to cohabitation as evidence of marriage.

Yardley's Estate, 75 Pa. 207.

The reputation was general and undoubted in the neighborhood. Reputation consists of the speech of the people who have an opportunity to know the parties, to be proved by them.

Commonwealth v. Stump, 3 Pa. 132.

The best evidence of a reputation is that it never was discussed or questioned in the community.

The acknowledgment of the parties by each other as husband and wife was unequivocal. The admissions of a party to the fact of marriage are entitled to great weight, while denials are entitled to but little consideration.

Greenawalt v. McEnelley, 85 Pa. 352.

The reception by the respective families is

conclusively established. General reputation, which the conduct of the parties establishes, may be, with cohabitation, primary evidence of marriage. *A fortiori* is family reputation of marriage authoritative in such case.

1 Whart. Ev. § 84; *Blackburn v. Crawford*, 3 Wall. 175 (70 U. S. bk. 18, L. ed. 186); *Senser v. Bower*, 1 Penrose & W. 450; *Physick's Est.* 2 Brewst. 179.

Where a man and a woman are shown to be cohabiting in a house, under a general reputation of marriage in the neighborhood, what each said and did and how the family of each received the other, is of the utmost importance and of the greatest value as corroborative and interpretative of facts already independently established. Declarations, part of the *res gestæ*, are evidence to show the relation of the parties to each other.

1 Whart. Ev. § 259; *Potts v. Eberhart*, 26 Pa. 493; *Kimmel v. McRight*, 2 Pa. 38; *Jones v. Brownfield*, 2 Pa. 55; *Rees v. Livingstone*, 41 Pa. 118; *Ellis v. Guggenheim*, 20 Pa. 287; *Potens v. Postens*, 3 Watts & S. 127; *Koch v. Howell*, 6 Watts & S. 350.

The fact that a woman cohabited with and spoke of a man as her husband is sufficient to bar her claim to the estate of another man, whom she claimed to have married during the lifetime of the former.

Adose v. Fossit, 1 Pears. 304; *Thompson v. Thompson*, 10 Phila. 131; *Kenley v. Kenley*, 2 Yeates 207; *Heffner v. Heffner*, 28 Pa. 104; *Griffith v. Smith*, 1 Clark, 479.

The existence of the former marriage with Ribble is the only key to the petitioner's relations with the decedent. She lived with the decedent for a period of seven or eight years preceding his death; her child was recognized by him as his own, and both were treated as members of his family; her companionship was evidently agreeable to him, and the existing arrangement was contemplated by both as a permanent one; and yet it is admitted that no marriage ever took place between them, either by formal ceremony or private contract; no general reputation of marriage was permitted to surround them in the neighborhood, and no seal of legitimacy was in any way placed upon their child.

Such inexplicable conduct presents a problem capable of but one solution, and that solution must be found in an impediment to a legal union, namely: the petitioner's former marriage with Ribble, who was still in full life.

A wife is a competent witness to prove a marriage contract between herself and her deceased husband, in a contest where the legality of the marriage is in question.

Greenanall v. McEnelly, 85 Pa. 352.

The claimant was a competent witness, who was best able, of all the world, to throw light upon the origin of her relation with Riegel, was present in court and giving testimony, and yet said never a word in reference to the subject. This silence, more expressive than words, is morally conclusive proof that there was no marriage relation between the parties.

The only evidence on the subject fully supports the conclusion of the illicit origin of their relations.

A relation between a man and a woman which was illicit at the commencement is pre-
PA.

sumed to continue so, until proof of change; and a marriage therefore will not be presumed from cohabitation and reputation where the relation between the parties was of an illicit origin, in the absence of proof of a subsequent actual marriage.

Hunt's App. 86 Pa. 294; *Brinckle v. Brinckle*, 12 Phila. 234; *Rose v. Clark*, 8 Paige, 574; *Commonwealth v. Stump*, 53 Pa. 132; *Bicking's App.* 2 Brewst. 202.

A man may live with his kept mistress in such a way as to create a kind of repute of marriage among some persons. He may even, to gratify her, allow himself to be held out, or hold himself out, to her friends and acquaintances as her husband; he may recognize the fruit of the connection as his children, and manifest affection and tenderness towards them, and yet the evidence may fall far short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife.

Bicking's App. 2 Brewst. 202; *Yardley's Est.* 75 Pa. 207; *Hill v. Hill*, 82 Pa. 511; *Brinckle v. Brinckle*, 12 Phila. 232; *Tholey's Est.* 93 Pa. 36; *Clark v. Trinity Church*, 5 Watts & S. 266; *Blackburn v. Crawford*, 3 Wall. 189 (70 U. S. bk. 18, L. ed. 192); *Sitler v. Gehr*, 105 Pa. 577.

Messrs. H. O. Schrader and Ermentrout & Ruhl, for appellee:

The question passed upon by the court below was a pure question of fact; and, like the decision of an auditor, its decision cannot and ought not to be reversed if there was competent evidence before it deemed sufficient, and its conclusions from that evidence appear to be correct. Like the verdict of a jury, its decision is presumptively right.

The law favors the legality of marriage, and will not uselessly bastardize issue. Public cohabitation of parties as husband and wife is presumptive proof of a valid marriage, and becomes conclusive proof of marriage when not distinctly proved that the parties did not intend to contract matrimony.

Montague v. Montague, 2 Add. 375; *Thorndell v. Morrison*, 25 Pa. 326.

Cohabitation is presumed to be lawful until the contrary appears.

Senser v. Bower, 1 Penrose & W. 450; 2 Greenl. Ev. § 462.

There is no proof in this case, no evidence that the origin of this intercourse between the appellee and Riegel was illicit. It is true, he paid attentions to her before marriage; but there is nothing illicit in that. They had their season of courtship; there is nothing illicit in that. He made her acquaintance, according to the evidence, at Dreibelbis' Hotel, and in due course of time introduced her to his relatives as his wife; this was followed by cohabitation and the birth of issue.

Even where the relation is shown to have been illicit at its commencement, and therefore raised no presumption of marriage, yet if there is proof of a change in the character of the relation, and a marriage in fact, this marriage in fact can be proven by acts of recognition, continued matrimonial cohabitation, and general reputation from which marriage can be inferred under the decisions.

Physick's Est. 2 Brewst. 179; *Hunt's App.* 86 Pa. 294; *Richard v. Brehm*, 73 Pa. 140; *Husb. Mar. Wom.* p. 11.

For civil purposes, reputation and cohabitation are sufficient evidence of marriage.

Senser v. Bower, 1 Penrose & W. 450; *Thorn-dell v. Morrison*, 25 Pa. 326; *Lehigh Valley R. Co. v. Hall*, 61 Pa. 861; *Hanna v. Phillips*, 1 Grant, 253; *Guardians of Poor v. Nathans*, *Bicking's App.* and *Physick's Est.* 2 Brewst. 149, 202 and 179; *Brice's Est.* 11 Phila. 98.

In *Seibert's Estate*, 1 Pa. C. C. Rep. 229, the legal principles governing the case are discussed by Judge Ashman of the Orphans' Court of Philadelphia, and it is held that a presumption of marriage raised by cohabitation and reputation, and fortified by admissions, cannot be rebutted by inconclusive evidence of an existing prior marriage with another. Although, in the language of *Vincent's App.* 60 Pa. 246, speaking of the sanctity of the contract of marriage, mystery may surround its origin, suspicion may linger in its circumstances, and slight doubt disturb its clearness, the policy of the State demands that this relation should not be lightly discredited and the issue bastardized.

Mr. Chief Justice Mercur delivered the opinion of the court:

This is an appeal from a decree setting off \$300 worth of property to the alleged widow of Jacob R. Riegel, deceased. Whether the appellee was ever his lawful wife is the question in the case.

It is clearly proved that they lived and cohabited together for several years. She gave birth to a child which he claimed and recognized to be his. There is evidence that at times he declared she was his wife and introduced her as such. On one occasion when he conveyed some real estate, she joined in the deed as his wife. At other times when asked whether he was married to her he would give evasive answers, neither admitting nor denying that he was or was not. At the time the child was born, Rebecca Forney swears they were not married. That witness asked each of them about that time. "He said he was not married, that he would take her for a housekeeper." "He said he would never marry her." "She said she was long ago married."

At other times the appellee spoke of him as her husband. Mrs. Dr. Rhoads however testifies after Riegel and the appellee had lived together for some time that the latter "complained to her that he would not marry her." "She blamed his sister for being opposed to his marrying her." "She said whenever she would ask him to marry her, he would say: 'I cannot, my sisters don't want you in the family.'" Witness further testified that appellee said "she told Jacob Riegel to get himself another housekeeper if he would not marry her."

The whole evidence discloses quite a difference of opinion in the minds of their neighbors, as to whether they were married. It was so uncertain that there appears to have been much talk questioning it, while they were living together. The evidence does not show any actual marriage nor any well recognized general reputation that they were married.

Soon after the death of Riegel and before his funeral, Ressler swears he was at her house and said to her: "You know, there are rumors on the streets that you and Jacob Riegel were not married," and she answered: "If we ain't

married, I was true to him all the time we lived together."

She was afterwards called and testified in her own behalf. She denied generally that she had such a conversation with Mrs. Rhoads, and swore that she did not tell her that she said to Jacob: "If you don't want to marry me, then get yourself another housekeeper." She did not specifically deny other portions of Mrs. Rhoads' evidence, equally as strong and expressive, that no marriage existed; nor did she deny having used the language testified to by Ressler. She did not swear that she was ever married to Riegel, or that there was any agreement between them, under which they lived together as husband and wife.

On the argument of the case in the court below, it appears by the opinion of the court that the appellant asked why she was not examined with reference to her marriage with the decedent. The answer was that she was called and testified only in rebuttal. The learned judge says: "The question why she was not called and did not testify in chief still remains unanswered; and I submit that I am not able to answer it."

We think the easy and correct solution of this question is to infer she was not called in chief to testify to an alleged marriage with Riegel, by reason of her known inability to testify to any fact sufficient to prove a marriage.

Undoubtedly they lived together for a long time, under circumstances sufficient to prove intimate sexual relations; but cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. *Hunt's App.* 86 Pa. 294.

When the relation between a man and a woman living together is illicit in its commencement, it is presumed to so continue until a changed relation is proved. Without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin. *Id.*

Here the evidence establishes with sufficient certainty that in its inception the relation between the appellee and Riegel was illicit; and there is no sufficient evidence to create a legal presumption of any subsequent marriage. In arriving at this conclusion we do not doubt the correctness of the law as declared in *Richard v. Brehm*, 78 Pa. 140, and numerous kindred cases. Many times marriage may be proved by acts of recognition, continued matrimonial cohabitation, and general reputation. Here, however, the evidence falls far short of satisfying the mind that there was ever any actual agreement to form the relation of husband and wife.

There is another feature in the case which if proved would establish that she is the wife of another man who is still living.

The appellant gave evidence tending to prove that before the appellee formed any relations with Riegel, she lived and cohabited with one Jeremiah Ribble and was reputed to be his wife, and he is still living. Some eight witnesses testify that Ribble and she were living together, keeping house and reputed to be husband and wife. Four of these witnesses were

neighbors living on the same street with them. One was a cousin of the appellee, and three of them were brothers of Ribble. Two of the brothers testify that he told them he and she were married and were living together or keeping house.

The evidence of cohabitation and reputed marriage with Ribble, during the time she lived with him, is of the same general character as that given to prove the subsequent relations between her and Riegel, but that time was of much shorter duration.

She swears she never lived with Ribble as his wife. If in fact she lived and cohabited with him as his mistress, the reputation proved and his declarations would not make her his wife. They would not be sufficient to establish the existence of a valid marriage with him. They do, however, tend to strengthen the probability that she may have formed the same kind of meretricious relation with Riegel. The evidence of any marriage with him is too weak and uncertain to establish that relation; and the learned judge erred in holding otherwise.

Decree reversed, at the costs of the appellee; the confirmation of the appraisement to her is taken off, the exceptions thereto are sustained, and the appraisement is set aside.

Elizabeth SAGER, Guardian, *Plff. in Err.*,
v.

John GALLOWAY *et al.*

1. Devises are governed by the **intention** of the testator, to be **ascertained from his words in the will and the circumstances.**
2. A **devise to a grandson when he arrives at a certain age**, and if he dies before that age the devise to pass to another person, indicates an intention that the devise to the former shall be **contingent** on his arriving at the age designated.
3. The **law favors the vesting** of estates, and where there is doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken.
4. Where a testator creates a **particular estate** and disposes of the **ulterior interest**, especially in an event which will determine the prior estate, the words descriptive of such event, occurring in the later devise, will be construed as referring merely to the **period of the determination** of the possession or enjoyment under the prior gift.
5. Where the **particular age** at which the devise shall pass to the devisee is made a constituent **part of the description** of the object of the **devise**, the remainder cannot vest before. The person is not ascertained before the given age.
6. When the **remainder is limited** to a person not *in esse*, or not ascertained, as when it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determina-

tion of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, the **remainder is contingent.**

(Decided October 4, 1884.)

ERROR to the Common Pleas of Warren County, to review a judgment of compulsory nonsuit in an action of trespass on the case for waste. *Affirmed.*

The defendants had bored or sunk oil wells upon lands belonging to the estate of George Ashworth Cobham, deceased, which land plaintiff claimed under the provisions of the will of said Cobham, the material part of which will is set forth in the opinion.

The testator executed the will in question September 28, 1870, and died October 6, 1870, leaving, him surviving, his three daughters: Georgena Catherine, Elizabeth and Alice, and a stepson, Henry Cobham, who was also his nephew. Elizabeth was at that time married to one John Sager, and Alice thereafter married one George Mead.

Georgena Catherine Cobham died without issue. The plaintiff in interest, Cobham Bolton Hargraves Sager, is the oldest son of Elizabeth and John Sager, and at the commencement of this suit in September, 1884, was about eight years of age. On the 29th day of July, 1884, Elizabeth Sager, his mother, was, by the orphans' court, duly appointed his guardian, and brought this suit for damages in the nature of waste committed by the defendants upon the estate of her ward, to which defendants pleaded "not guilty, with leave." She proved that in the summer of 1884, the defendants, claiming under and through Henry Cobham, drilled a number of oil wells of great depth, upon the land described in the narr. and took therefrom about 80,000 barrels of petroleum, of the market value of about \$25,000, which belonged to the estate of her ward and was of great value.

At the close of her case the defendants moved for a compulsory nonsuit which was granted; whereupon, the plaintiff moved the court to take off the nonsuit, upon which the court granted a rule to show cause which was the same day discharged by the court.

Plaintiff took this writ of error, assigning as error the action of the court in entering the nonsuit and in discharging the rule to take off the judgment of nonsuit.

Messrs. George A. Jenks, J. H. Donly and S. T. Neill, for plaintiff in error:

For centuries the rule of construction has prevailed, favoring the vesting of estates in remainder, at the earliest possible period.

Boraston's Case, 8 Coke, 19.

A remainder becomes vested as soon as there is anyone in existence capable of taking.

Lantz v. Trustler and Chew's App. 37 Pa. 482, 28; *Young v. Stoner*, Id. 106; *Minnig v. Baidorf*, 5 Pa. 503; *Manderson v. Lukens*, 23 Pa. 81; *Letchworth's App.* 80 Pa. 75.

It was argued at the trial in the motion for nonsuit, and will doubtless be argued here, that the words of this will: "It is my meaning and intention, that if a son he shall take the same when he arrives at the age of twenty-one years; and if he should die before that age the devise passes," etc., create such a contingency as

to destroy the vested and indefeasible character of the estate before given by the words: "I hereby give and devise Cobham Park to the oldest son of my daughter Elizabeth Sager and to his heirs and assigns forever." But the uniform current of authorities, from *Boraston's Case to Kerlin's Lessee v. Bull*, 1 Dall. 177 (1 U. S. bk. 1, L. ed. 88), on down to *McArthur v. Scott*, 118 U. S. 340 (Bk. 28, L. ed. 1015), the latest and a very important case upon the question in this suit, are to the contrary.

Goodtitle v. Whitby, 2 Burr. 228; *Minnig v. Baldorff*, 5 Pa. 503; *Kinsey v. Lardiner*, 15 Serg. & R. 191. See also 4 Kent, Com. 7th ed. p. 217, *p. 206, note; *Fearne*, Cont. Rem. 349 et seq.; *Doe v. Perry*, 3 Term Rep. 484; *Doe v. Proctor*, 4 Johns. 61; *Moore v. Lyons*, 25 Wend. 119; *Linton v. Laycock*, 33 Ohio, 128; *Doe v. Consioline*, 6 Wall. 458 (73 U. S. bk. 18, L. ed. 869); *Cropley v. Cooper*, 19 Wall. 167 (86 U. S. bk. 22, L. ed. 109); *McArthur v. Scott*, 118 U. S. 380 (Bk. 28, L. ed. 1027); *Roome v. Phillips*, 24 N. Y. 463; *Bromfield v. Crowder*, 4 Bos. & Pul. 313; *Doe v. Moore*, 14 East, 600.

Nor do the authorities, *Mergenthaler's App.* 15 W. N. C. 441, or *Dunwoodie v. Reed*, 3 Serg. & R. 315, cited on the argument in the court below, in the least qualify this rule when critically examined.

The cases of *Roberts' App.* 59 Pa. 72; *Gülliland v. Bredin*, 63 Pa. 893; *Provenchere's App.* 67 Pa. 466, concern legacies and not devises; and as to the difference see *Kinsey v. Lardiner*, 15 Serg. & R. 195.

The argument used by *Lord Mansfield* in *Goodtitle v. Whitby*, *supra*, is strikingly applicable here. Suppose the devisee had married and died before he arrived at twenty-one, leaving a son, it will not be pretended that testator meant to disinherit that son.

The estate of the devisee in this case was to him and to his heirs and assigns forever. It was an absolute, indefeasible estate. There are not only words of inheritance, but also the word "assigns," granting full power of alienation. Whether it is a vested equitable remainder or a vested remainder in fee makes no difference. The testator has used technical words having a known legal import, and these in expressing his primary or paramount general intent to devise an indefeasible estate, and the secondary or minor intent to limit this estate by a devise over gives way.

Doebler's App. 64 Pa. 14; *Karker's App.* 60 Pa. 141; *McCarthy v. Dawson*, 1 Whart. 4; *Williams v. Leech*, 28 Pa. 89; *Doe v. Consioline*, 6 Wall. 458 (73 U. S. bk. 18, L. ed. 869).

Messrs. Brown & Stone, Johnson, Lindsey & Parmlee, Wetmore, Noyes & Hinckley and H. McSweeney, for defendants in error:

Is the interest of the plaintiff's ward vested or contingent? If the latter, this suit cannot be maintained.

Washb. Real Prop. 4th ed. 120.

1 *Fearne*, Rem. p. 3, defines a contingent remainder as "A remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate."

At page 4 he distinguishes four classes: 1. Where the remainder depends entirely on a

contingent determination of the preceding estate. 2. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate. 3. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not yet ascertained or not yet in being.

Lord Chief Justice Willes, in *Parkhurst v. Smith*, Willes, 327, declared there were but two sorts: 1, where the person to whom the remainder was limited was not *in esse*; 2, where the commencement of the remainder depended on some matter collateral to the determination of the particular estate.

Chancellor Kent, in Volume 4, 207, adopts *Fearne's* definitions and in note A gives the definition as contained in the New York Revised Statutes, Vol. 1, 723, § 13. A remainder is contingent, while the person to whom or the event upon which it is limited to take effect, remains uncertain.

Smith on Executory Interests (2 *Fearne*, 189), gives an example which is precisely the case of the one under consideration. He says: "But when the attainment of a certain age forms part of the original description of a devise or legatee, the vesting is suspended till the attainment of that age, even though limitation is only to take effect in case of his death under that age without issue."

So at page 142, where the devise or bequest is to a person when or as soon as he shall attain a given age, or at or upon, or from and after, his attaining such age, the interest will be contingent until he attains the age specified. The present capacity of taking effect in possession, if the possession will need to become vacant, universally distinguishes a vested from a contingent remainder.

2 Washb. Real Prop. 228; 1 *Fearne*, 216, 217.

There must be no further intervening circumstances, in the nature of a condition precedent, which is to happen before such person can take.

The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect.

Washb. Real Prop. 224.

There is no uncertainty about the termination of the life estate in this case; that event will certainly happen, but it may never happen that the plaintiff will reach the age of twenty-one years. If that event never happens, then neither at the revoking of the will nor at this time is the person that is to take ascertained. The plaintiff, when the testator penned his will, was not *in esse*; and of course the taker in remainder was not then ascertained, nor is he ascertained now, because of the condition precedent which may never happen.

Mergenthaler's App. 15 W. N. C. 441; *Dunwoodie v. Reed*, 3 Serg. & R. 435; *Abbott v. Jenkins*, 10 Serg. & R. 296; *McBride v. Smyth*, 54 Pa. 245. See also *Buzby's App.* 61 Pa. 111; *Fairfax's App.* 13 W. N. C. 274; 2 *Fearne*, Sm. ed. 179.

In all the cases cited by the counsel for the appellant, this distinguishing characteristic exists—that there is no devise over.

Another distinguishing feature is an intermediate disposition of the estate, between the determination of the precedent estate and the time when the devisee attains the requisite age to entitle him to the enjoyment of the estate in remainder. If there be no intermediate disposition of the estate the estate so devised is not vested, but contingent.

4 Kent, Com. 206.

Mr. John G. Hall, for other defendants in error:

The question to be determined is, 'What intention does the testator express in the words: "in all which devises above named * * * it is my meaning and intention that if a son, he shall take the same when he arrives at the age of twenty-one years; and if he dies before that age, the devise passes to the son of my next daughter," and so on.

If this language related to the personal property only, there would be little doubt that the gift would be contingent, in the absence of anything in the interest showing a contrary intention. This seems to be well settled.

See 1 Jarm. Wills, 4th Am. ed. chap. XXVI, pp. 760-767 inclusive. Also *Provencher's App.* 67 Pa. 466.

In a note to 1 Jarm. Wills, *supra*, p. 760, to which numerous authorities are cited, the rule is expressed thus:

"If the words 'payable' or 'to be paid' are omitted, and the legacy is given at twenty-one, or if, when, in case, or provided, the legatee attains twenty-one, or any other future definite period, this confers on him a contingent interest, which depends for its vesting, and its transmissibility to his executors or representatives, * * * on his being alive at the period specified."

"It is quite clear that a devise to A, if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only."

1 Jarm. Wills, 4th Am. ed. chap. XXVI, p. 784.

This doctrine is repeated by the learned author at page 788, thus: "There is no doubt that a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent."

The same doctrine is quite as strongly expressed in Smith, *Executory Interests*, § 285, p. 142. This author finds that a distinction exists "between devises of real estate and legacies, where, instead of the words 'when,' 'at,' 'upon,' 'from and after,' the words 'if,' 'in case,' 'provided,' are used;" *Id.* § 290, p. 144; and that the former words more strongly indicate a contingent interest than the latter. The latter words import a condition, but may apply to a condition either precedent or subsequent. "Yet the words 'if,' and 'in case,' are not so directly and necessarily suspensive, in their import and operation, as the words 'when,' 'at,' 'upon,' 'as soon as,' 'from and after,' which are necessarily suspensive."

Id. § 300, p. 146.

Conceding that the courts have been and are disposed to construe a devise as vested rather than as contingent, we next inquire what provisions of the context have been regarded as sufficient to overcome the contingent character

prima facie fixed upon the devise by the provision that the devisee shall take "when he arrives at the age of twenty-one years." They may be classed as follows:

1. The form of words in which the precedent particular estate is defined.

2. Whether or not there is a devise over on failure of the death of the devisee before attaining twenty-one.

3. Whether there is any provision for the devisee out of the rents issues and profits during his minority.

4. A fourth class would embrace all other cases where expressions or provisions of the particular will were supposed to have shown a different intention of the testator.

1. As examples of the first class Mr. Jarman in his work on Wills gives two cases. One is *Boraston's Case*, cited by plaintiff's counsel, in 1 Jarm. Wills, chap. XXVI, p. *805. There "A testator devised land to A and B for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H should come to his age of twenty-one, then to him, his heirs and assigns forever. * * * The court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H attained the age of twenty-one, remainder to H in fee."

It is worthy of notice that in this case the devise appeared to be vested, not only because of the limitation on the previous particular estate but also because, there being no devise over, the devisee, his heirs and assigns seemed to be the ultimate beneficiaries of testator's bounty.

The other case is *Doe v. Ewart*, *Id.* p. *806 (7 Adol. and Ell. 636), "where a testator devised his real estate to trustees, upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, until she should attain the age of twenty-five years, and from and after her attaining that age, then upon trust for his said daughter, her heirs and assigns forever; but in case his said daughter should depart this life without leaving issue, then the testator devised the real estate over."

In this case in addition to the form of the expression "until she should attain" etc., we find provision made for the daughter during her minority and a devise over in case of her death "without leaving issue."

The case of *Doe v. Moore*, 14 East, 600, cited by plaintiff's counsel, does hold that the devise over upon failure of the prior devisee to reach the age of twenty justified the court in treating the prior devise as vested.

This ruling was followed in *Randoll v. Doe*, 5 Dow, 202. In reference to these cases the attention of the court is respectfully requested to the criticism upon them to be found in Smith, *Executory Interests*, § 357, p. 169. The learned author says: "It is perfectly clear, upon principle, and firmly established by authority, that the expressions used in these cases of *Doe v. Moore* and *Randoll v. Doe*, would have amounted to conditions precedent, suspending the vesting, if there had been no devise over. Was then a devise over simply in the event of the prior devisee dying before twenty-one, sufficient entirely to alter the effect of the preceding words? Quite the reverse."

The learned author proceeds to argue that such a devise over, on the contrary, affords a presumption that the devise is contingent, certainly no ground for supposing it to be vested. This reasoning is the view taken by our own courts.

Robert's App. 59 Pa. 72; *Colt v. Hubbard*, 83 Conn. 286; *Gilliland v. Bredin*, 63 Pa. 398.

Messrs. W. G. Trunkay and Wilbur & Schnur, also for defendants in error.

Mr. Justice Trunkay delivered the opinion of the court:

Cobham Park is the subject of ten devises, the first, contingent on the birth and living to a certain age of a son of Georgena Catherine Cobham, and each of the others on the failure of the preceding devise or devises, and of the being of a person therein described. In the same paragraph the testator declares:

"In all which devises above named to the sons of my before named daughters and son Henry, and to my said nephew and niece, it is my meaning and intention that if a son, he shall take the same when he arrives at the age of twenty-one years; and if he dies before that age, the devise passes to the son of the next daughter, and so on as before specified. And if a daughter, upon trust that my said trustees shall have the same settled upon such daughter of any of my before named daughters, or of the said Henry Cobham, or of my said niece, who may become entitled thereto by a settlement on her marriage, so that she cannot be deprived of the same, and to her heirs and assigns."

By the terms of the will when the devisee becomes entitled to take at all, he takes the fee. He shall not possess the property or enjoy the rents and income until after the decease of the testator's son and daughters to whom is given the use and income for life. If they die before he arrives at the age of twenty-one years, he shall neither possess the property, nor enjoy the income, until after that age. Should he die before that age, the devise shall pass to another person.

Plainly, the devise operates in favor of a described person, his heirs and assigns. It is equally plain that no son of any of the testator's daughters can possess or enjoy the property in his minority; nor could the estate descend to the heirs of a son who should die before his majority, and it is immaterial whether he were married and left children surviving.

How can the meaning of the testator be doubtful? The property is devised to a person in fee when he is twenty-one years of age; and no person under that age, although answering the description in all other respects, can take anything; and no person can take through or under him.

It is apparent that the testator employed apt words to express his intention. While not of great importance, it is noticeable that in the clause declaring his intention "in all which devises," he refers to the giving, not to the property devised. The devisors' acts of giving are numerous; the property given is the same in each. He means that a son shall take the devise "when he arrives at the age of twenty-one years, and if he dies before that age, the devise passes to the son" of his next daughter.

Devises are governed by the intention of the

testator. *Kerlin's Lease v. Bull*, 1 Dall. 177 [1 U. S. bk. 1, L. ed. 89].

His intention is to be ascertained from his words in the will; and the circumstances may aid in determining their meaning. At the date of this will or of the testator's death, no living person was the object of the devise in fee of Cobham Park. He had no special affection or personal regard for the unborn son or daughter of one of ten persons who might answer the description and take the estate. The first object of his bounty is a son of his oldest daughter who shall have lived a certain number of years. Expressly, if the son dies before the end of that time, the devise passes to the next person designated, and so on until it reaches the oldest son or daughter of his niece, who, at any age, may take the estate in fee.

Instead of devising Cobham Park to a grandson, if one should be born, to take possession at a certain age if the life estate should be then ended, he devised to such grandson when he arrives at that age; and if there be no grandchild as described, the devise passes to a child of his niece. This indicates an intention that the devise should be contingent on the son arriving at the age designated.

The query of *Lord Mansfield* in *Goodtitle v. Whitby*, namely: "If the object of the testator's bounty, having married, dies before his age of twenty-one, leaving children, could the testator in such event intend to disinherit him?" has no point where the testator, in case of death before that age, in plain terms devises the land to another person.

That the fee vests in a grandson when he arrives at the age of twenty-one years, although the life estate in the children may not have ended, and he can have no enjoyment during the existence of such life estate, by the very words of the will, indicates an intention that the remainder should not vest before.

"It is a well known rule that a limitation shall, if possible, be construed to be a remainder rather than an executory devise." And the counsel of the respective parties have treated this devise as creating a remainder.

The law favors the vesting of estates; and where there is doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken. Where a testator creates a particular estate, and disposes of the ulterior interest, especially in an event which will determine the prior estate, the words descriptive of such event, occurring in the later devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift. This was the controlling principle in *Kerlin's Lease v. Bull*, *supra*, and in a number of other cases cited at the argument.

In some instances words seemingly creative of a future interest have been construed as referring to futurity of possession, occasioned by the carrying out of a prior interest, and as pointing to the determination of that interest, when the terms import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. 1 Jarm. Wills, 805.

Boraston's Case, 8 Coke, 19, is cited as a leading authority for this construction. In that case and others following in its wake the con-

struction was deemed in accord with the testator's intention, evidenced by the prior gift. By all authority "a devise to A, if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only." When the context fails to explain the words creative of a future interest as referring to futurity of possession, the devise must be construed as if isolated.

The recent case of *McArthur v. Scott*, 118 U. S. 340 [Bk. 28, L. ed. 1015], is unlike the present. In that case the whole will was considered, in order to ascertain the intention of the testator. It is said that the terms in which the testator expressed his intention point to a vesting of the remainder, some of which are referred to; among them, the provision that any mortgage, or pledge, or assignment by any grandchild, shall be void. There was no need of this provision, unless the estate were vested. Moreover, the case came within the settled rule that "Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of the particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession."

This plaintiff does not come within the operation of that rule. Were the life tenants all dead he could not take possession. The remainder is not limited to take effect immediately on the death of the testator's children. It is limited to take effect after their decease, and in favor of a person when he attains a given age. Should he die before arriving at that age, no person claiming under him, by descent or otherwise, would have right of possession or property.

Although the plaintiff's ward is the person who will be entitled to the property if he lives long enough, the devise passes to him when he arrives at the age of twenty-one years. The particular age is made a constituent part of the description of the object of the devise, and the remainder cannot vest before. The person is not ascertained before the given age.

The present capacity of taking possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent. Wherever the remainder is limited to a person not *in esse* or not ascertained, or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is contingent. *Fearne, Rem.* 216, 217.

Having no vested interest the plaintiff has no right of action. Therefore it would be out of place to attempt to dispose of the other points suggested in the assignments of error.

Judgment affirmed.

Elizabeth SAGER, Guardian, *Plff. in Err.*,
v.

Henry COBHAM *et al.*

(Decided October 4, 1886.)

Mr. Justice Trunkey delivered the opinion of the court:

For the reasons in the opinion in the case of *Sager v. Gallowsay*, No. 35, July Term, 1885 [preceding case], the assignments of error cannot be sustained.

Judgment affirmed.

Richard S. HUMPHREY, *Plff. in Err.*,

v.

John IRVIN *et al.*

1. In an action for damages for a continuing nuisance (here, the interference with the natural flow of water by the maintenance of a dam), plaintiff may, under the Act of May 2, 1876 (P. L. 95), permitting the recovery of damages up to the day of trial, give in evidence the condition of the obstruction up to the day of trial, including all additions, changes and repairs made after suit brought.
2. If the dam or obstructions maintained by defendants caused back water on plaintiff's land in any degree in the ordinary stages of water or freshets which are to be anticipated, then such dam or obstructions would be illegal, and plaintiff would also be entitled to recover such damages as arose from such dam or obstructions in extraordinary freshets.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Clearfield County, to review a judgment on a verdict for defendants in an action of trespass on the case to recover damages for injuries caused by a mill dam. *Reversed.*

On July 30, 1881, this suit was brought by R. S. Humphrey against defendants, to recover damages for the backing of water on plaintiff's land. The declaration in the usual form claims both general and special damages. The plea was "Not guilty."

July 28, 1884, defendants were duly notified by plaintiff that he proposed to claim damages up to the trial of the suit. September 23, 1884, the trial came on, and September 27, 1884, a verdict was rendered for the defendants. January 24, 1885, judgment was entered on the verdict.

Plaintiff then took this writ, assigning for error various rulings of the court in the course of the trial, as well as the instructions to the jury contained in the charge and in answer to the plaintiff's points, as follows:

1. The court erred in overruling plaintiff's offer "to show, by the witness on the stand and by other witnesses, that (between the time the suit was brought and the present time) the piers and the dam and the other obstructions in the stream were increased in size and height and strength, by the defendants, whereby the amount of back water was increased, and the damage to the plaintiff was increased, for which he claims to recover in this suit."

2. The court erred in saying to the jury as follows:

"The character of this action is such that to entitle the plaintiff to recover in a case of this kind he must satisfy you, first, that he has sustained injury; then he must next satisfy you that the injury was caused by the unlawful acts of the defendants, and that the injury is the direct result of these unlawful acts."

3. The court erred in charging the jury as follows:

"You will remember that when the plaintiff Humphrey was on the witness stand, he said he did not claim damage for any back water; that the water did not do injury, but that it was the ice floods that did the damage of which he complained in this case."

4. The court erred in charging the jury as follows:

"If the injury to plaintiff was caused by the ice gorging in the natural obstructions in the river, then the plaintiff is not entitled to recover from the defendants in this case, because the defendants are not responsible for the shape of the river, its sharp bends, its narrowness, or its being straight or crooked."

5. The court erred in saying to the jury as follows:

"If this injury complained of by the plaintiff really comes from any other cause than the wrongful acts of the defendants, then the plaintiff is not entitled to recover in this action, because these defendants can only be held responsible for their own acts and for none other."

6. The court erred in charging the jury as follows:

"If you should be of opinion in this case that the ice gorges and this damage were caused by the natural obstructions, the curvature of the banks and the narrowness of the stream at those points, but that, incidentally or remotely, the water coming over this dam would have had something to do with it (that is, with making the jam), then the plaintiff would not be entitled to recover."

7. The court erred in further saying to the jury in connection with what is just quoted:

"If the plaintiff has suffered damage by reason of the wrongful acts of the defendants, then he is entitled to recover in this case; but if he suffered his damage from any other cause, then he is not entitled to recover."

8. The court erred in saying to the jury as follows:

"Now you will remember that he (plaintiff) called no witness to the stand, as I remember, who had worked upon the dam or taken any measurement. They testified that from their observation the dam had been raised over a certain height; that from the appearance of the dam they considered it higher. This, together with the backing of the water farther up the stream, he claims to be sufficient to show that the dam has been raised."

9. The court erred in saying to the jury as follows:

"One of the witnesses, I think it was the engineer for the plaintiff (Mr. Butts), testified that when three feet of water was flowing over the breast of the dam, it would be drowned out, it would have no effect on the stream; when the floods were high enough to flow over the breast of the dam, then it would be drowned out."

10. The court erred in refusing to affirm plaintiff's third point. Said point was as follows:

"If said dam or obstructions which were maintained by the defendants caused back water on plaintiff's land, in any degree, in the ordinary stages of water or freshets which are to be anticipated, then such dam or obstructions would be illegal, and plaintiff would also be entitled to recover from defendants such damages as arose from said dam or obstructions in the extraordinary freshets that sometimes occur."

The court answered as follows: "That point is refused. I do not think that is the law."

11. The charge as a whole was erroneous and calculated to mislead the jury, to the prejudice of the plaintiff.

12. The court erred in refusing to allow plaintiff to examine John Irvine on the subject of the repairs made to the dam after the suit was brought and before the time of trial.

13. The court erred in saying to the jury as follows:

"You will also notice that the injury complained of is the overflowing of the land by the ice, and that the ice comes down stream. It is something coming down from above the plaintiff's land, not from below where the defendant's dam is. Of course the ice is not manufactured by the defendants; neither is the water flood produced there by the defendants."

Messrs. McEnally & McCurdy, for plaintiff in error:

The object of the Act May 2, 1876 (Purd. p. 2002), was to avoid a multiplicity of suits by giving the plaintiff a right to recover damages up to the day of trial.

Under that Act, the cause of action in this case, at the time of trial, was the backing of water by defendants on the land of plaintiff from July 30, 1875, to the day of trial, by means of a dam and other obstructions as they were maintained in the stream by the defendants during that period of time.

The plaintiff, therefore, was entitled to give in evidence the condition of said dam and obstructions during that whole period of time, including all such additions, changes and repairs as were made by the defendants. In any view of the case, these things were material and important in ascertaining the amount of damages which plaintiff might be entitled to recover.

Bisbing v. Third Nat. Bank, 93 Pa. 79.

Plaintiff relies upon the following authorities to support this action for damages:

1 *Suth. Dam.* pp. 9, 10, 47, 61; 1 *Rawle*, 27, 28, 29; 2 *Rawle*, 83; 4 *Rawle*, 10; 9 *Watts*, 119, 120, 121; 7 *W. & S.* 9; 55 *Pa.* 419; *Act May 2, 1876*, *Purd.* p. 2002; *Bright. Dig.* 837, pl. 379, 381.

This court will reverse the judgment for error in the charge of the court below.

3 *Bright. Dig.* 3215, pl. 63, 64; 68 *Pa.* 272; 95 *Pa.* 376.

Messrs. Orvis & Snyder, for defendants in error:

The plaintiff had a right to recover damages, if he was entitled to recover at all, from July 30, 1875 (being six years before the bringing of this suit), up to the time of trial for the cause of action existing at the time of the bringing of this suit. But he could not, under the Act of 1876, introduce a new cause of action.

Mr. Justice Sterrett delivered the opinion of the court:

This action on the case was brought against the widow and heirs of John Irvin, deceased, defendants in error, to recover damages for injuries alleged to have been done to plaintiff's land by their mill dam.

In the declaration it is averred that on July 30, 1875, and between that time and the bringing of this suit, the defendants wrongfully, injuriously and unlawfully made, kept and continued, and caused to be made, kept and continued, a dam of great length, width, etc., across the river at a point about three miles below plaintiff's land, more or less, by the course of said river, and by reason of said dam, so made, kept and continued by defendants, the water of said stream during the time aforesaid was raised at divers times to a great height, viz.: the height of ten feet upon plaintiff's said land, above what the waters of said stream would have been if left to flow freely in its natural channel, free from such artificial obstructions; whereby a large quantity of plaintiff's land was overflowed, washed and greatly damaged, and the fences and other improvements partly washed away, and in other respects greatly injured and destroyed, the rafting ground of plaintiff on said land greatly damaged, interfered with and depreciated in value, and said plaintiff's business of farming, lumbering, etc., so interfered with and injured that plaintiff was deprived of great profits, and subjected to large outlays, expenses, etc.

The injuries thus complained of being in the nature of a continuing nuisance, plaintiff gave the requisite notice and under the Act of May 2, 1876, P. L. 95, claimed the right to prove and recover damages for maintenance of the alleged unlawful structure. He accordingly made the offer, the rejection of which forms the subject of complaint in the first specification.

When we consider the old law, the mischief and the remedy, it is very evident that the object of the Act last referred to was to avoid multiplicity of suits, by giving the plaintiff in this class of cases the right to recover damages up to the day of trial.

Formerly damages of the kind complained of, suffered between the imputation of the writ and time of trial, could only be recovered in a second suit. This was considered a defect in the law which the Act was intended to remedy. It is a mistake to suppose the offer was to prove a new cause of action not existing when suit was brought. The cause of action then was, and still is, an unlawful interference with the natural flow of the water through plaintiff's land, by means of a dam, theretofore maintained by the defendants.

The offer was to prove that after suit brought they persisted in continuing, increasing and strengthening the obstruction which constituted the alleged nuisance. We think, therefore, the plaintiff was entitled to give in evidence the condition of the dam and obstructions during the whole period of time, including all such additions, changes and repairs as were made by defendants.

It has also been suggested that if there was technical error in excluding the offer, plaintiff was not thereby prejudiced, because the result

of the trial shows he had no cause of action at the time suit was brought, and he cannot be permitted to recover for a subsequently accruing cause of action. This position is more plausible than sound. It is predicated on the assumption that there was no error, in the course of the trial, which may have prevented recovery for a good cause of action existing when suit was brought. At least one such error, we think, was committed by the refusal of the court to affirm plaintiff's third point. In that point the learned judge was requested to charge:

"If said dam or obstructions maintained by defendants caused back water on plaintiff's land in any degree in the ordinary stages of water or freshets which are to be anticipated, then such dam or obstructions would be illegal, and plaintiff would also be entitled to recover from defendants such damages as arose from such dam or obstructions in the extraordinary freshets that sometimes occur."

As applicable to the facts of the case this is a correct statement of the law, and the proposition should have been affirmed.

In *Pastorius v. Fisher*, 1 Rawle, 27, it is said: "In an action for overflowing plaintiff's land by the erection of a dam on defendant's land, in which the nature and extent of the alleged injury are specially described in the declaration, the plaintiff is entitled to a verdict for nominal damages, though he fail to prove the particular injury complained of or any other actual injury."

In delivering the opinion of the court in that case, Gibson, *Ch. J.*, says: "The law implies damages from flooding the ground of another, though it be in the least possible degree and without actual prejudice. * * * But where the law implies the injury it also implies the lowest damages, except in cases of personal injury, where damages are given, not to compensate but to punish. Here, however, it is said the plaintiff undertook to prove special damage and therefore staked his case on the event. But surely an attempt to prove an injury beyond what the law implies is not necessarily a relinquishment of damages for every thing short of the whole case. Where the plaintiff goes for special damage, he must lay it, else he should not give evidence of it. But the converse of the rule does not hold: that having laid it he must prove it or fail altogether. It would be neither reasonable nor just to compel him to elect between real and nominal damages, or to refuse compensation as far as substantial cause of action has been proved. The action may be brought to try the right, and the verdict, being conclusive, would stand in the way of a recovery for a substantial injury, if any were suffered afterwards."

In *Casebeer v. Mowry*, 55 Pa. 419, the same principle is thus stated: "One man cannot with impunity invade the premises of another by a nuisance, because the damage may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of plaintiff's right."

In support of plaintiff's proposition other cases may be cited, among which are: *Alexander v. Kerr*, 2 Rawle, 88; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 Rawle, 10; *Bell v. McClintock*, 9 Watts, 119.

The last two cases are authority for the posi-

tion that where the loss happens exclusively from an act of Providence the defendant is not liable; but where his negligence or fault concurs with the act of Providence, he is answerable for damages.

It follows from what has been said that the first and tenth specifications of error are sustained; and so far as the remaining specifications are involved in either of these errors they are also sustained.

The remarks of the learned judge complained of in the third, ninth and thirteenth specifications were calculated to create an erroneous impression in the minds of the jury; but standing alone they would not warrant reversal of the judgment.

Judgment reversed and a venire facias de novo awarded.

Jacob RIFE, *Plff. in Err.*,
v.

LEBANON MUTUAL INS. CO. of Jones-town.

1. **Actual knowledge on the part of the owner of insured premises**, that the neighboring construction of a railroad will increase the risk, **must be proved** in order to charge him with the duty to give the insurance company notice under the following condition in the policy:

"If, during the insurance, any alterations be made on the premises, buildings be erected, or change made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard is increased so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium and obtain the consent of the company thereto in writing; otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change; provided, that in case of any alteration and consequent increase of risk, the company may, at their option, terminate the insurance, after notice given to the insured or his representative, of their intention to do so."

2. In an action of covenant against the insurance company on the policy, for a loss originating from sparks of a locomotive passing on the railroad, it is error to submit to the jury a question whether or not according to their judgment, under the evidence, the risk was so increased as to increase the rate. The question should be whether from all the facts in the case the plaintiff knew that it was so increased. (*Lebanon Mut. Ins. Co. v. Losch*, 42 Legal Int. 416, followed.)

(Decided October 4, 1884.)

ERROR to the Common Pleas of Dauphin County, to review a judgment on a verdict for the defendant in an action of covenant. *Reversed.*

384

The facts and the substance of those portions of the charge of the court below which were assigned as error are stated in the opinion.

Messrs. H. M. Graydon and B. F. Etter, for plaintiff in error:

This case is ruled by *Lebanon Mutual Ins. Co. v. Losch*, 42 Legal Int. 416.

Messrs. Mumma & Shopp, for defendant in error:

The case of *Lebanon Mutual Ins. Co. v. Losch*, relied on by the plaintiff in error, is inapplicable. There the property insured was a hazardous risk, paying high rates of insurance. The change complained of consisted in the erection of a building, a coach maker's shop, fifty feet from it on an adjoining lot, which could only endanger the insured premises by taking fire; and it would be only a remote possibility that the insured premises would take fire from it and burn down.

The ordinary risk of fire necessarily incident to the proper and lawful use of the railroad is to be taken into consideration in estimating the market value of the property, and consequently, the damages sustained.

Where a railroad has been run through a farm, and within a few feet of the dwelling-house, the risk of accidental fire is to be considered by the jury in assessing the damages to the premises.

Settler v. R. R. Co. 17 W. N. C. 301; *S. C.* 112 Pa. 56; 2 Cent. Rep. 357.

Mr. Justice Clark delivered the opinion of the court:

This action of covenant is upon a perpetual policy of fire insurance, issued by the defendant, April 8, 1871, to the plaintiff, in the sum of \$2,400; \$1,000 thereof upon his dwelling house, \$1,000 upon the barn, and \$400 on the corn house. The premiums and assessments had all been promptly paid, and due notice and proofs of loss were given as required by the policy.

Among the printed conditions of the insurance set forth in the policy was the following:

9. "If, during the insurance, any alterations be made on the premises, buildings be erected, or change made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard is increased, so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium and obtain the consent of the Company thereto in writing; otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change; provided that in case of any alteration and consequent increase of risk, the Company may, at their option, terminate the insurance, after notice, given to the insured or his representative, of their intention to do so."

In the year 1881, Michael Schall, who was the owner and operator of a furnace property on the adjoining land, by the order of the Court of Common Pleas of Dauphin County, under Act of May 5, 1882, constructed a lateral railroad to connect his furnace with the Pennsylvania Railroad, and locomotive engines and cars were placed thereon and used in transporting coal, ore and iron, between the points named, a distance of about 500 yards. This lateral rail-

road ran within about twelve feet of the corner of the corn house, and the jury has found that the fire, which originated in the corn house, was caused by sparks from the locomotive engines.

The question in the cause arises upon the proper construction of the ninth condition of the policy above quoted. The court submitted to the jury the following questions of fact: first, whether, by the construction of the lateral road, the rate or hazard was increased; and second, if so, Was it increased so as to increase the rate of insurance? and third, Did the fire originate from or in consequence of the change in the occupancy of the neighboring premises?

All of these inquiries were settled in the affirmative, and the verdict, under the instructions of the court, was necessarily for the defendant.

It must be conceded, we think, that the plaintiff was bound only to give notice to the Company of any change of which he had knowledge, and by which he knew the rate of insurance would be increased. He was certainly not obliged to give notice of a change in the use or occupancy of his own or the neighboring premises which, in the fair exercise of his own knowledge and judgment, he believed would not increase the hazard or the rate of insurance; this would be absurd. There may be cases, of course, on which the increase of risk is so palpable and plain that the knowledge of the insured must necessarily be inferred; this inference may be drawn from evidence direct or circumstantial, as in other cases.

But the proper question for the consideration of the jurors was, not as the learned judge of the court below seemed to suppose, whether or not, according to their judgment, under the evidence, the risk was so increased as to increase the rate, but whether from all the facts in the case the plaintiff knew that it was so increased. If he did, he was bound by the express terms of his contract to give notice of the fact to the Company; if he did not, he was not.

The exact question in this case was considered and decided in *Lebanon Mut. Ins. Co. v. Losch*, 42 Legal Int. 410, where our brother Paxson, in his construction of a policy containing the same clause, says: "Had the conditions of insurance required the insured to give notice to the company of any change in the surroundings, it would have been his duty to give notice of the erection of the carriage factory. Such, however, was not the condition. The notice was only required in case the change was such as to increase the risk or hazard so as to increase the rate of insurance."

"Under this clause it is manifest that the insured must be shown to have knowledge that the building would not only increase the risk, but that it would also enhance the rate of insurance. The conditions of the policy must be construed most strongly against the Company. We are not to assume when the plaintiff below seeks to recover on his policies, for what at least appears to be an honest loss, that he knew the factory building would increase the risk to such an extent as to increase the rate of insurance. There was nothing upon the face of his policy, or in the conditions attached, had he carefully read every word of both, which could have given him this information. It was a

fact which must be found outside this policy. There was not a word of evidence to show that the insured knew that the carriage factory would increase the risk to the extent specified in the policy, nor indeed to any extent."

The judgment is reversed and a venire facias de novo awarded.

Hiram F. ANDREWS, *Plff. in Err.*,
v.

W. A. WADE *et ux.*

1. In a deed of land a reservation of "all the pine and hemlock timber growing on said land" applies only to living trees of suitable size for use at the date of the deed.
2. A right to cut and remove timber growing on the land of another must be exercised within a reasonable time or it will be presumed to have been forfeited.
3. Where one having a lien on goods sets up a claim hostile to the owner's title and wrongfully sells the goods, he can not set up the lien as a bar to the owner's recovery, in an action of trover, for his illegal act.

(Decided October 4, 1886.)

ERROR to the Common pleas of Warren County, to review a judgment on a verdict for the plaintiffs in an action of trover. *Affirmed.*

This was an action of trover by W. A. Wade and Ella A., his wife, in the right of the wife, against Hiram F. Andrews for a lot of lumber. The defendant pleaded not guilty.

At the trial before TAYLOR, P. J., the following facts appeared:

In March, 1865, L. D. Wetmore conveyed to Amos R. Ross a tract of land, reserving "all the pine and hemlock timber growing on said land." The plaintiff Ella A. Wade succeeded to Ross' title. In 1877 she took pine logs cut from the land to the defendant to be sawed at his mill.

Before the logs were sawed the defendant received notice from the Great National Petroleum Company forbidding him to deliver the logs or lumber to the plaintiff. The company claimed the logs under a deed of the timber on the tract from Wetmore to its grantor in May, 1865. Between that date and the transfer of Ross' title to the plaintiff, the owners of the timber on the tract had cut and removed all the merchantable timber. The logs in question were "second growth."

The defendant sawed the logs and, ignoring the plaintiff's title, bought the lumber from the company. Upon the defendant's refusal to deliver the lumber the plaintiffs brought this suit.

The court charged, *inter alia*, as follows:

"[Now as to the character of this timber, under the reservation in the deed, we instruct you that the character of the timber trees which were reserved under that clause in the deed was such trees as were at that time fit for mechanical purposes, for commerce or marketing, or for anything that people used timber for, every tree of pine and hemlock that was large enough at the date of that deed to be used for

any mechanical purpose, using as a man usually uses timber or lumber made from timber trees.] The word 'growing,' used in this reservation, we will construe as meaning living trees. And by that reservation the owner of the soil would have the right to take any dead trees that were upon the land, under the construction which we give it, while the word 'growing' meant those trees that were living, in our opinion, and the 'timber trees' were such as were at that time fit for use.

"[Whatever trees were not fit, at the date of the deed of Ross, for timber to be used in some way, and afterwards they grew up to become timber trees, and if you find the defendant converted them to his own use, as there is no controversy here about that, that he did convert them, you should find a verdict for the plaintiff for the value of this lumber] at the time when it was demanded, deducting \$2.50 per thousand for sawing the same; to which you might add interest from the time of the demand and refusal.

"The burden of proof is upon the plaintiffs to satisfy you that their theory is the correct one. If you find from the evidence that the trees that he cut there were timber trees at the time when this deed was executed, and not such as had grown into trees during the ten or eleven years, your verdict should be for defendant."

The defendant asked the court to charge "That the logs having been hauled by the plaintiff and delivered to the defendant at his mill for the purpose of being sawed into boards, and the defendant having sawed them into boards at his mill, and the boards being in his possession, he had a lien on the boards for the amount of a reasonable compensation for the sawing, and he had a right to retain possession thereof until paid or tendered the compensation for sawing."

To which the court answered: "As an abstract proposition of law, this point is affirmed; but with reference to the evidence in this case, if the jury find from the evidence that at the time demand was made and a refusal to deliver, the defendant had either sold the lumber or claimed that he had bought the same from another and claimed the property as his own, and without making any claim for compensation for sawing, defends upon a claim of title adversely to the plaintiff and derived from another source, the plaintiff might recover without a tender if the other facts in the case would warrant a recovery."

Verdict and judgment were for the plaintiffs; whereupon, the defendant took this writ, assigning as error the portions of the charge inclosed in brackets and the answer to his point.

Mr. R. Brown, for plaintiff in error:

The defendant had a lien on the lumber for the reasonable price for its manufacture as against the plaintiff, and he can retain the lumber until the amount for which he has a lien is paid or tendered.

Pierce v. Sweet, 33 Pa. 151; *Mathias v. Sellers*, 86 Pa. 487; *Hoover v. Epler*, 52 Pa. 524; *McIntyre v. Carver*, 2 Watts & S. 392.

The reservation kept in the grantors such a right in the soil upon which the timber was growing as to constitute them tenants in common with the grantee. They had not only the

right to go upon the land to cut and take away the timber proper for the manufacture of boards, but to select such timber and judge of its fitness for the use intended.

Wheeler v. Carpenter, 107 Pa. 275.

All the timber which is growing upon the land is the grantor's until he has notice to take it off. The plaintiff is not entitled to the growth after the date of the reservation. Such as became timber, before the notice, but was too small at the date of the reservation, did not become the property of the owner of the fee by the subsequent growth. *Id.*

In the charge quoted in the fourth assignment the learned judge stated as a fact what was not proven and about which there was very much controversy touching the conversion, wherein he says: "There is no controversy here about that, that he did convert it," although the instruction was not perhaps technically binding, it misled the jury on the pivotal point in the case. Such has frequently been ground for reversal.

Bisbing v. Bank, 93 Pa. 82; *R. R. Co. v. Berry*, 68 Pa. 272; *Neiman v. Ward*, 1 Watts & S. 63.

Messrs. D. I. Ball and C. C. Thompson, for defendant in error:

The defendant's assertion of a title hostile to the title of the plaintiff is inconsistent with a lien in his favor. His lien could only be on her title. And besides, when he converted the property, by such act he parted with his lien.

A lien may be lost by setting up a claim hostile to the title of the owner of the goods.

Paley, Ag. 147, note; *Everett v. Coffin*, 6 Wend. 608; *Holbrook v. Wright*, 24 Wend. 169.

If the transferee sell the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against him.

Davis v. Bigler, 62 Pa. 251; *Story*, Ag. § 367; *Paley*, Ag. p. 145, note, citing *Nash v. Mosher*, 19 Wend. 481. And see *Mucky v. Dillinger*, 78 Pa. 85.

The party having a right to timber upon the land of another may be required to take it off after a reasonable time.

Boult v. Mitchell, 15 Pa. 364, 371; *Saltonstall v. Little*, 90 Pa. 422.

This land had all been cut over before Mrs. Wade purchased it. Having once exercised the right of taking off the timber, it is a fair presumption that the party holding the reservation took all that he regarded as coming within the terms of his reservation.

Per Curiam: **T. E.**

The learned judge gave due effect to the agreement, reserving the pine and hemlock trees growing on the land. It applied to living trees, then of suitable size for use.

A person having a right to cut and remove timber growing on the land of another may be compelled to take it off after a reasonable time, under all the circumstances, or he will be presumed to have relinquished all right thereto. When one having a lien on goods sets up a claim hostile to the rights of the owner and wrongfully sells the entire property, he cannot set up the lien as a bar to an action against him, for his illegal act. We see no error in the charge nor in the answer to the point.

Judgment affirmed.

PENN IRON CO. (Limited), *Plff. in Err.*,

Franklin DILLER, To Use, etc.

1. In a lease of a foundry, adjoining the lessor's rolling mill in which the boilers were heated over the furnaces, together with yard space, joint use of pattern shop and engine room adjoining, in which were engine and machinery but no boiler, at a fixed rent and for a definite term, a covenant that the lessee "shall pay fifteen cents per hour for the steam furnished to his engine" does not, without more, impose upon the lessor an obligation to furnish steam to the lessee's engine. It is merely a covenant that if the lessor furnishes steam and the lessee uses it, the lessee shall pay for it at the rate of fifteen cents per hour.
2. It would be otherwise, if furnishing steam were a necessary incident to a lease of the premises.
3. The measure of damages for the breach of a particular covenant in a lease is not the value of the lease or any part of it, but the loss actually resulting from the breach.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment for the plaintiff on a verdict in an action of covenant. *Reversed.*

This was an action of covenant by Franklin Diller to the use of Rosanna Stehman, etc., against the Penn Iron Company (Limited), a partnership association formed under the Act of June 2, 1874, for alleged breaches of covenants contained in a lease. The defendant pleaded covenants performed *absque hoc*.

At the trial before PATTERSON, J., the following facts appeared:

The defendant had, adjoining its rolling mill, a foundry fitted up for its own use but not actually used. It contained no boiler or engine. The steam for the defendant's own use was furnished by boilers placed over the puddling and heating furnaces, so that if the furnaces were extinguished there was no steam to be had.

With a full knowledge of all these facts, the plaintiff entered into a contract with the Company to lease the foundry, and about the middle of May, 1880, took possession and commenced operations.

About the middle of July, 1880, the contract was reduced to writing, and executed by the parties.

The material portions of the lease were these: "This indenture made the — day of July, A. D., 1880, between the Penn Iron Company (Limited), of Lancaster, Pa., of the one part, and Franklin Diller of the other part, Witnesseth, that the said party of the first part doth by these presents lease and let unto the said party of the second part all that part of the premises of said Company on Plum Street, Lancaster, and the Pennsylvania Railroad, known as the foundry building, space in the yard for necessary stock and materials, the joint use of the pattern shop with the first

party hereto, the engine room adjoining the foundry.

"To have and to hold the premises aforesaid unto the lessee from the 15th day of May, 1880, for the term of one year then next ensuing, he yielding and paying for the same unto the said lessor or its assigns, the rent or sum of \$500, payable monthly.

"It is further agreed that the second party hereto shall pay fifteen cents per hour for the steam furnished to his engine by the first party hereto, and he shall have the right to use the tools in the pattern shop; but in consideration thereof, the first party hereto shall have the use without charge, of the power of the engine of the second party whenever they shall require it in the pattern shop."

The declaration charged the defendant with breaches of its covenants: 1, by failing to furnish the plaintiff sufficient steam to do the business of the foundry; and 2, by failing to furnish him the use of the tools in the pattern shop and dismantling the shop of shafting, belting and pulleys.

In the course of the plaintiff's testimony his counsel asked him:

"What was the value of that branch of the lease, meaning of course the pattern shop, for the term you were there?"

Objected to, because not a proper question, particularly when the plaintiff himself was a witness. Objection overruled. *First assignment of error.*

Again, in the examination of a witness for the plaintiff, the plaintiff's counsel asked:

"Have you any idea of the value of the loss of the pattern shop?"

Objected to. Objection overruled. *Second assignment of error.*

And again, in the examination of another witness for the plaintiff, his counsel asked:

"What was the value of Mr. Diller's lease of the pattern shop, which was the joint use of the pattern shop during the time he was there, for the period of one year and five months; what is the value of that as a lease, in your judgment?"

Objected to. Objection overruled. *Third assignment of error.*

The defendant's counsel asked a witness for the defendant:

"Could the Company while they were conducting their own business, and had the means of generating steam as has been stated, furnish steam for the price of fifteen cents an hour in any specific quantity, to any other person?"

Objected to. Objection sustained. *Fourth assignment of error.*

The defendant's counsel offered to show that Mr. Diller understood the situation of the rolling mill, the boilers and the steam, and all about it, and that the Company understood all that; and that, with all these matters in view and with a desire to accommodate Mr. Diller with the use of the foundry, which had been furnished and fixed up a short time before with the intention of renting it, with the desire of having a foundry there, and with the desire of furnishing Mr. Diller an opportunity to try the experiment of running the foundry, this arrangement was made.

Objected to. Objection sustained. *Fifth assignment of error.*

The defendant's counsel in examining a witness for the defendant asked the following questions:

"Did Mr. Diller ever do any work with the tools in the pattern shop when all the tools were there?"

"Did he ever ask that the tools should be replaced that were removed?"

"Up to what time, when the first tool was removed in November, did Mr. Diller do any work on the tools in the pattern shop?"

These questions were objected to. Objection sustained. *Seventh assignment of error.*

The defendant's counsel also offered to prove that the plaintiff suffered no damages by reason of any breach of covenant, if there was a breach made by the defendant.

Objected to. Objection sustained. *Eighth assignment of error.*

The court charged, *inter alia*, as follows:

"You cannot entertain in your deliberations any other matters pertaining to this contract of lease, or consider any evidence that has been submitted to you, that does not bear on the inquiries: What are the breaches alleged? Have they been proven to your satisfaction? What damages, if any, have been proven that the plaintiff has sustained? What damages in dollars and cents? [For in this action the judgment is damages for all, or any one of the breaches averred in the complaint of the plaintiff, and which the jury do find, from all the evidence in this case, have been proven.] [The first breach alleged is, as you will remember, that the Company did not furnish the necessary amount of steam required for his, the said Diller's, engine, in carrying on his business, the foundry business; and by that means he suffered damages and losses. Is that breach or failure proven? If so, and if damages by reason of that failure have been shown to your satisfaction, you will allow the damages accordingly.]

"I will not recite in detail the testimony of the witnesses, as it has been so fully referred to and discussed by the able counsel of the parties who addressed you. You will give your careful consideration to the testimony in support of this alleged breach by defendant, and of the damages sustained, if any, and render a verdict accordingly. And under the pleadings in this case the performance by the plaintiff is put in issue, and he is bound to make it appear, by proof, to your satisfaction, that he performed his part of the contract in the lease. * * *

"[The other breach alleged is that the Company deprived the plaintiff of the use of the tools, or some of them, in the pattern shop by removing machinery, the shafting and belting, and that he, the plaintiff, thereby suffered loss or damages. Now this alleged breach you will consider distinct from any other, and find and determine if the breach is proven, and will then find and determine if damages in consequence have been shown, and how much if any. The amount of damages is for the jury, under the evidence in the case; it is exclusively for the jury, under the law and the evidence.

"If you should find that the Company has failed to perform its part of the covenant, or failed in any part of the covenant, agreement, but should find at the same time that no material damages, no damages to any extent are

proven, yet the plaintiff Diller would be entitled to your verdict for nominal damages; nominal damages are six cents or some small sum.

"The written agreement or covenant contains all the matters arising in this suit, and hence you will carefully consider the same and the evidence submitted in reference thereto by both the parties to this suit. We say the jury will take all the evidence and look on both sides, and from the whole determine whether the plaintiff has shown a breach of the agreement by the Company; and if so, has the plaintiff shown that he suffered damages, and if so, how much?

"Whether the facts alleged by the plaintiff and denied by the Company are confirmed in the proof, we leave to the jury, whose province it is to determine the facts and draw the proper conclusions under the legal instructions given by the court.

"[Now in conclusion, if the jury believe from the evidence, that the breaches charged of a violation of the written agreement have been made out, and if alleged damages to the plaintiff have been proven to your satisfaction—damages resulting from such breaches, then your verdict should be for the plaintiff, Diller, for such damages in dollars and cents; the amount of damages is for the jury].

"If you find and determine, from all the evidence in the case, that no damages have been suffered by the plaintiff, then your verdict should be for the defendant. Simply say: We find for the defendant."

The portions of the charge inclosed in brackets were respectively the subjects of the *ninth, tenth, eleventh and twelfth assignments of error.*

The thirteenth error assigned was the court's affirmation of the plaintiff's first point, viz.: "The reasonable meaning of the clause in the lease made by the parties, 'that the second party hereto,' Franklin Diller, 'shall pay fifteen cents per hour, for the steam furnished to his engine by the first party hereto' (Penn Iron Company, Limited), is that the steam thus furnished by defendant and paid for by plaintiff at the rate stipulated, was to be in such sufficient quantity, and at such reasonable times, as would enable Mr. Diller to do the work of the foundry up to its ordinary or reasonable capacity."

The fourteenth assignment of error related to the court's refusal of the defendant's first point, viz.: "There is no provision in the agreement between the parties in this suit that binds the defendant to furnish the plaintiff with all the necessary steam required for his engine to carry on his business."

The fifteenth assignment of error was:

"The court erred in answering defendant's second point, viz.: 'The agreement provides that Mr. Diller shall pay to the Company fifteen cents per hour for steam furnished to his engine by the Company. If they furnished Mr. Diller with steam, and he paid them at the rate of fifteen cents per hour, there is no breach by the Company of that part of the agreement,' by saying: 'We affirm this point with this modification, viz.: provided it is to be understood by the paragraph: 'If they furnished Mr. Diller with steam and he paid them for the same at the rate of fifteen cents per hour' it is

to be understood, if they, the Company, furnished Mr. Diller sufficient steam for his engine to carry on his business, his foundry business."

The sixteenth error assigned was the court's refusal of the second division of defendant's fourth point: "This clause of the agreement (in reference to use of tools in pattern shop and use of engine) is independent of the general provision thereof; and the only consideration wherein he was to pay for the use of the tools in the pattern shop was his furnishing the Company with engine power. If, therefore, the jury believe that Mr. Diller cut off the steam of the Company's boilers from his engine, and did not furnish engine power to the Company when they required it in the pattern shop, he cannot recover any damages on account of the removal of the tools."

The seventeenth and last assignment of error was this:

"The court erred in answering the defendant's seventh point, viz.: 'There is no evidence on which the plaintiff can recover damages for the loss of the use of the tools in the pattern shop, if he did lose such use—except the one and a half days' work on the Myers contract,' by saying: 'The jury's province is to hear and decide whether there is not evidence on which the plaintiff can recover damages for the loss of the use of the tools in the pattern shop.'"

The jury returned a verdict for \$750 in favor of the plaintiff; whereupon, the defendant took this writ and assigned as error the rulings of the court mentioned.

Messrs. D. G. Eshleman and A. J. Steinman, for plaintiff in error:

In all cases the acts of the parties are received to give their common interpretation of ambiguous words.

2 Whart. Ev. § 941.

Covenants, like all other contracts, are to be construed according to the intentions of the parties as nearly as the words will permit; and there is no surer guide to the understanding and intentions of the parties, when words are equivocal, than their acts and declarations under the agreement, called commonly its contemporaneous construction.

Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 439.

As to the admission of evidence and the instructions of the court in reference to damages for the alleged breach of that part of the agreement which refers to the furnishing of steam and to that part thereof which refers to the use of the tools in the pattern shop; to recover damages for the loss of profits resulting from the breach of a contract, the plaintiff must prove not only that he had been prevented from performing it by default of the defendant, but also that he has sustained actual loss thereby.

Lentz v. Choteau, 42 Pa. 435, 438; *McKnight v. Ratcliff*, 44 Pa. 156, 169; *Haak v. Wise*, 2 W. N. C. 689; *Sedgw. Dam.* 78.

Mr. William R. Wilson, for defendant in error.

Mr. Justice Green delivered the opinion of the court:

We are quite unable to agree with the learned court below in the interpretation it gave to the written contract of the parties. There was no PA.

agreement by the defendant to furnish any steam whatever to the plaintiff; and there was no leasing of any property or granting of any privilege which makes it necessary for the law to imply a contract by the defendant to furnish steam enough to the plaintiff to enable him to carry on the work of the foundry up to its ordinary capacity.

The things leased to the plaintiff are: 1, certain premises known as the foundry building; 2, yard space for necessary stock and materials; 3, the joint use of the pattern shop; and 4, the engine room adjoining the foundry. There is certainly nothing here to indicate any obligation by the lessor to furnish any steam to the lessee for any purpose. Ordinarily a foundry building and an engine room contain their own motive power; and if they do not, such an extraordinary omission, if it is intended that the lessor shall supply the power, would be provided for by express terms in the lease. But certainly there is no implication in the mere lease of a foundry building that the lessor shall furnish the steam to run it.

In the lease, next after the subjects of the demise are defined, follows the complete obligation of the lessee to pay the lessor \$500 rent for one year, payable monthly. The rent therefore was to be paid as the consideration of the things demised, and these did not include any steam, either expressly or by implication.

Then another term is added to the contract by which it is provided that the lessee "shall pay fifteen cents per hour for the steam furnished to his engine" by the lessor; "and he shall have the right to use the tools in the pattern shop, but in consideration therefor" the lessor "shall have the use, without charge, of the power of the engine" of the lessee whenever they shall require it in the pattern shop.

The plain and obvious meaning of these words is that for whatever steam may be furnished by the lessor to the lessee's engine, the lessee shall pay fifteen cents an hour; but the lessor does not agree to furnish any steam and the lessee does not agree to take any. But if steam is actually furnished to the engine, which means necessarily also if it is used, the lessee agrees that he will pay fifteen cents an hour for it. If the furnishing of steam by the lessor was a necessary incident to his lease of the premises, there would be an implied obligation to furnish it, and the case would be parallel to *Watson v. O'Hern*, and *Koch and Balliet's App.* 98 Pa. 484, and the kindred cases. But it is too manifest to require discussion that there is no such implied obligation. This being the case, when the lessee simply agrees to pay for steam furnished without requiring the lessor to furnish any, and without the lessor agreeing to furnish any, there is no other obligation than that which appears in the words employed.

When the owner of a stone quarry or an ore mine leases his premises to one who is to pay a fixed price per ton for all stone or ore taken out, the very purpose of the lease is that stone or ore shall be taken out; and hence there is an implied obligation to do so. But that obligation arises from a consideration of the necessary object and purpose of the contract. Without it the contract is a practical nullity. But no such situation arises out of the contract we are considering and hence no obligation larger

than its terms impose arises from it. These views require us to sustain as we do the fourth, fifth, tenth, thirteenth, fourteenth and fifteenth assignments of error.

We sustain the first, second and third, because the value of the lease or any part of it is not the measure of the damages to which the plaintiff is entitled for a breach of a particular covenant contained in it. If such a covenant was broken, the actual damage which resulted from the actual breach can be and should be shown. To ask, What was the value of the lease? lets in the wildest and most speculative conjectures which the friendly zeal of the party's witness may choose to indulge in. If there was an injury done, let the witness state what it was and how it was done; and if he can express the value of that particular injury in figures, let him do so.

We think the questions covered by the seventh and eighth assignments should have been allowed, as they bore directly upon the allegation of damages from loss of the use of the tools; and that subject being an open one, presented by the plaintiff, the defendant was as much entitled to give evidence in reply as the plaintiff was in support of it.

We do not sustain the ninth assignment, as it is only a general statement of the law, applicable to any finding of damages and we see no objection to it. The same is true of the twelfth assignment.

The sixteenth and seventeenth assignments are not sustained.

Judgment reversed and venire de novo awarded.

Sarah BOMBERGER, *Exrx.*, *Plff. in Err.*,
v.

UNITED BRETHREN MUTUAL AID
SOCIETY of Pennsylvania.

The personal representative of the insured, in a life insurance policy for the benefit of one without an insurable interest, has no right of action on the policy against the insurance company.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Dauphin County, to review a judgment of compulsory nonsuit in an action of assumpsit on a policy of life insurance. *Affirmed.*

At the trial it appeared from the testimony for the plaintiff that the certificate of membership in a beneficial society, upon which the suit was brought, was issued by the defendant April 18, 1873, and entitled Mrs. Catharine Barnhart, her heirs or assigns, upon the death of Lewis Bomberger, to \$1,000.

Catharine Barnhart had no insurable interest in the life of the assured, by relation in blood, connection by marriage, or as a creditor.

Lewis Bomberger died December 13, 1879. The plaintiff, who was his widow, discovered the existence of the certificate within a few days after his death and by her son and by her attorney caused the following notices to be sent to the defendant:

"Middletown, December 17, 1879.

"To Secretary U. B. Society:

"Do not pay claim of Mrs. Kate Linn, on the

policy of Lewis Bomberger, who died on the 13th of December, as there is something wrong with it, until you hear from me or my attorney.
(Signed) Michael Bomberger."

"B. F. Etter's Law Office,

Harrisburg, Pa. December 29, 1879.

George A. Marks, Esq.,

Sec. U. B. Mutual Aid Society, Lebanon, Pa.:

Dear Sir: The widow and heirs of Lewis Bomberger, late of Middletown, of this county, deceased, have requested me to write you respecting a policy of insurance effected in your Company on the life of said deceased for \$1,000.

It seems the policy on its face is for the benefit of a certain Catharine Linn, who, I understand, holds and claims under it. As the said Catharine Linn never had any insurable interest in the life of Mr. B., I do not think she is entitled to any benefit or advantage under said policy; but all advantage and benefit that can be rightfully and legally claimed under it belongs to his widow and children.

You will please, therefore, not pay any money on account of said policy to said Catharine Linn, or to anyone else, until the matter can be investigated and the right of the parties properly determined.

Please acknowledge receipt, and let me know whether I am rightly informed as to the facts in the case, and what the practice of the Company has been heretofore in similar cases.

And oblige,

Very Truly Yours, etc.,

B. F. Etter, "

Attorney for widow and heirs."

Notwithstanding such notices, defendant thereafter paid the money to Catharine Barnhart; whereupon, the plaintiff, as executrix of Lewis Bomberger's estate, brought this suit. At the close of the plaintiff's testimony the court, on motion of the defendant's attorney, entered a compulsory nonsuit and subsequently refused plaintiff's motion to take off the nonsuit; and she took this writ of error. The assignments of error were as follows:

1. The court erred in granting a compulsory nonsuit and, in doing so, in making the following decision: "The policy given in evidence shows upon its face that there was no contract on the part of the Company defendant to pay the amount of the insurance therein contained to the estate of Lewis Bomberger, the plaintiff in this case. We think the sound rule of public policy applicable to a case of this kind, where a wagering policy was brought into existence by the decedent, whose estate is now plaintiff, is to say that his estate has no right to recover the amount thereof from the Company, at least after it has paid the amount to the person to whom it contracted to pay it in the policy; and we therefore grant the motion for a compulsory nonsuit. The nonsuit is entered accordingly."

2. The court erred in refusing the motion to take off the compulsory nonsuit.

Messrs. H. L. Nissley and George H. Irwin, for plaintiff in error:

This policy, so far as the beneficiary is concerned, was a wagering policy.

Warnock v. Davis, 104 U. S. 779 (Bk. 26, L. ed. 924); *Cammack v. Lewis*, 15 Wall. 643 (82 U. S. bk. 21, L. ed. 244); *Gilbert v. Moose*, 104 Pa. 74.

The estate of the assured may recover the proceeds of a policy from one named as the beneficiary, who has no insurable interest but who has received such proceeds.

Gilbert v. Moose, 104 Pa. 74.

Messrs. Weiss & Gilbert, for defendant in error:

The fact that the beneficiary has no insurable interest in the life of Bomberger does not create any privity of contract between Bomberger's executrix and the defendant.

Gilbert v. Moose, 104 Pa. 78.

Per Curiam:

There was no error in holding that the plaintiff was not entitled to recover. The defendant paid the money according to the terms of its contract, and to the person named in the certificate of membership. The Company did not agree to pay the amount of the insurance to the estate of the person on whose life the risk was taken; nor did the plaintiff, as executrix, notify the Company not to pay the money to the beneficiary mentioned in the certificate. There was no contract with the widow and heirs, and no right of action or legal capacity existed in them as such, to collect the money or to forbid its payment to the beneficiary.

Judgment affirmed.

George W. KIEHL et al., *Plffs. in Err.*,
v.

COMMONWEALTH of Pennsylvania, to Use
of Lizzie A. Kiehl.

1. Where **suit** is brought upon a bond to the Commonwealth, conditioned for the payment of certain sums at different periods to another, **judgment should be entered** in favor of the Commonwealth for the amount of the penalty. This is an essential prerequisite to liquidation in favor of the use plaintiff.
2. Where **judgment is improperly entered**, in the first instance, for the amount due the use plaintiff, it may be treated as a nullity or be stricken from the record; but if the court mistakenly treats this liquidation as a judgment and opens it and subsequently enters judgment for the amount of the penalty, the proceedings although irregular will not be reversed.
3. **Suit was brought on such a bond and judgment entered for the amount due**, which was paid and satisfaction entered. Subsequent sums accruing, a second suit was brought on the bond. The court refused to allow judgment to be entered, but, on application, struck off the satisfaction, opened the judgment and ordered that judgment should be entered for the penalty, on discontinuance of the second suit and payment of its costs. **Judgment affirmed.**

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lancaster County, to review the action of the Court
PA.

in striking off the entry of satisfaction of a judgment, opening the judgment and entering a second judgment. *Affirmed.*

The facts appear by the opinion of the court below. LIVINGSTON, P. J.:

On November 22, 1884, George Wm. Kiehl was, in the Court of Quarter Session of the Peace of Lancaster County, convicted of having willfully deserted his wife, Lizzie A. Kiehl, and was sentenced by the court to pay to said Lizzie A. Kiehl the sum of \$4 per week for the maintenance of herself and child, and to give bond with sufficient sureties to the Commonwealth in the sum of \$300 for the faithful performance of said order; and on the same day George Wm. Kiehl and George A. Kiehl, in pursuance of said order, entered into a bond to the Commonwealth of Pennsylvania in the sum of \$300, for the performance of the said order of court by George Wm. Kiehl. The sum of \$4 per week first ordered to be paid, was on a subsequent hearing changed by the court to \$2 per week, no new bond being asked for or entered.

George Wm. Kiehl having failed for some time to pay his wife Lizzie A. Kiehl the weekly sum directed to be paid, suit was brought upon the bond to May Term 1885, No. 19, and, in said suit, on June 20, 1885, judgment was asked by plaintiff's counsel, and entered, for want of an affidavit of defense, against the defendant, for the sum of \$34.30, which was, on June 22, 1885, paid to plaintiff's counsel, who entered satisfaction and released the judgment on the record.

By reason of the continuing failure of George W. Kiehl to pay his wife the money he was directed by the court to pay her, another suit was brought upon the same bond to August Term 1885, No. 33, and upon this second suit, judgment was asked to be entered for want of a sufficient affidavit of defense, which the court declined to enter, one judgment having already been entered in a suit upon the bond. Plaintiff's counsel then presented a petition, asking the court to strike off the entry of satisfaction on the judgment to May Term, 1885, No. 19, open the said judgment, and enter judgment for \$300, being the penalty of said bond; the aforesaid judgment having been erroneously entered for less than the penalty of the bond.

In *Troubat & Haly's Practice*, § 461, it is said that upon a bond of indemnity there can be but one judgment against the same party, and that must be for the amount of the penalty, with an assessment of damages upon the breaches assigned.

The defendant, however, is accountable only to the extent of the penalty; and as soon as that is recovered, or, if the defendant choose to pay it into court, the plaintiff can proceed no further, but, on the contrary, may be compelled to enter satisfaction on the record. *Id.* § 456; 1 Saund. 58, a.

In *Adams v. Bush*, 5 Watts, 289, it was held, that a bond in a certain penalty, conditioned for the performance of a certain act, at different periods, and with a warrant of attorney to confess a judgment or judgments, after filing one or more declarations, will not authorize the entry of more than one judgment; and no execution can issue until a *scire facias* shall have

issued, and it shall have been ascertained that the act has not been performed, and what damage has resulted from its nonperformance.

In *Arrison v. Commonwealth*, 1 Watts, 874, where a bond given by executors, conditioned for the faithful discharge of their duties, in pursuance or an order of the orphans' court, was sued on by one legatee, in the name of the Commonwealth, for his own use, and a judgment was obtained for the amount of the penalty, with the right to take out execution for the amount of his damages, and these damages were paid by the defendant, and the legatee entered satisfaction on the judgment, it was held that such satisfaction extended only to the interest of that legatee, and that a *scire facias* may be issued upon the judgment, to enable any other of the legatees to recover their legacy, and that a legatee whose legacy did not become due until after the date of the judgment may also maintain a *scire facias* upon it.

In *Duffy v. Lytle*, 5 Watts, 130, Kennedy, J., says: "According to the course of common law, no rule seems to be better established than that but one judgment can be had on the same bond, against the same party." Seeing, therefore, that but one judgment can be entered on the same bond against the same party, and that must be for the amount of the penalty, it is very evident that the plaintiff made a mistake and committed an error, in asking and having judgment entered for an amount less than the penalty of the bond; and as no innocent third party can be affected by having the error corrected, as it of right ought to be, and as a correction will not require the obligors to pay more than by the terms of the bond they were bound to pay, we have decided to strike off the entry of satisfaction, on the docket of the judgment to May Term 1885, No. 19, and to open said judgment, with permission to plaintiff, when the costs in the suit to August Term 1885, No. 33, shall have been paid, and said suit discontinued on the record, to move the court for judgment for the amount of the penalty of the bond, from which when obtained, shall be deducted the amount paid on the erroneous judgment when satisfaction was entered and a receipt for the amount so deducted placed on record.

The assignments of error specified the action of the court:

1. In striking off the entry of satisfaction on the docket of the judgment to May Term 1885, No. 19, and in opening of said judgment, with permission to defendant in error when the costs in the suit to August Term 1885, No. 33, shall have been paid, and said suit discontinued on the record, to move the court for judgment for the amount of the penalty of the bond.

2. In subsequently entering a second judgment on the suit of May Term 1885, No. 19, for the amount of the penalty of the bond, viz.: \$300.

Messrs. B. Frank Eshleman and William T. Brown, for plaintiffs in error:

The first judgment was regularly entered as a judgment and afterwards satisfied on the record, long before any application was made to the court to strike off the satisfaction. The power of the court, therefore, over this judgment was exhausted.

Ulery v. Clark, 18 Pa. 148.

After the end of a term in which the court

has rendered judgment on a case stated on a general or special verdict, from which an appeal may be taken, by writ of error or otherwise, it cannot alter or change it, with a view to correct what the court on the further reflection may consider error therein.

Stephens v. Cowan, 6 Watts, 511; *Smith v. Hood*, 25 Pa. 218.

A party who has received the fruits of a judgment cannot reverse it on a writ of error.

Smith v. Jack, 2 Watts & S. 101.

Mr. Benj. F. Davis, for defendant in error: "The old notion, that the record remains in the breast of the court only till the end of the term, has yielded to necessity, convenience and common sense." "The power of the court to amend being established, the conclusiveness of the record as amended follows of course."

Rhoads v. Commonwealth, 15 Pa. 276.

A court of record has power over its own records and proceedings, whether before or after judgment, or to the same or a subsequent term, it being a matter of discretion with the court.

R. R. Co. v. Burrell, 81 Pa. 420.

In *Crutcher v. Commonwealth*, 6 Whart. 340, where a judgment by mistake was entered for \$1,231.50, when it should have been for \$4,609.50, the supreme court says: "Since the trial and after writ of error, the district court has amended the record. We do not doubt their power to do so, as between the parties themselves."

There can be no doubt as to the right of the court to strike off entry of satisfaction.

Murphy v. Flood, 2 Grant, Cas. 411; *McKinney v. Fritz*, 2 W. N. C. 173.

Mr. Justice Sterrett delivered the opinion of the court:

All that need be said in justification of the orders complained of in this case may be found in the opinion of the learned president of the common pleas.

The suit was necessarily in the name of the Commonwealth, the payee named in the bonds to the use of the deserted wife; and if she was entitled to anything under the conditions of the bond, the only judgment that could be legally entered was one in favor of the Commonwealth, as legal plaintiff, for the precise penalty named in the bond, neither more nor less, with a liquidation of the amount then due the use plaintiff.

Judgment in favor of the Commonwealth for the penalty was an essential prerequisite to a liquidation in favor of the use plaintiff. Without it the liquidation was premature, a mere nullity, and might have been treated as such; or it might have been stricken from the record as wholly unauthorized. The court, however, treated the liquidation as a judgment, and opened it for the purpose of enabling the plaintiff to move for judgment in favor of the Commonwealth for the penalty of the bond. This was not strictly correct, but plaintiffs in error were not prejudiced thereby, and hence they have no reason to complain. The court, out of abundance of caution, adopted that mode of expunging from the record an entry that never should have been made.

It is not pretended that there ever was any but one judgment in favor of the Commonwealth; and the entry of that is the only sub-

ject of complaint in the second specification. The Commonwealth was entitled to judgment for the penalty of the bond, to be followed by liquidation in favor of the deserted wife, and hence there is no merit in the second specification.

The only irregularity in the proceedings was the unauthorized entry of what purported to be a judgment in favor of the use plaintiff for the amount then due her. This was corrected and then the proper judgment was entered. Neither of the plaintiffs in error has been in any manner prejudiced thereby. They can safely pay all that is due or may become due to the use plaintiff under the sentence of the court of quarter sessions, without fear of being required to pay any part thereof a second time. The court below will take care that they are not harmed, either in person or estate.

Judgment affirmed.

Florence M. BUCK, Exrx., Plff. in Err.,
v.

Charles R. HENDERSON et ux.

1. **Declarations** when receiving money, or afterward, clearly evincing an intent to take it in trust at the time of its reduction into possession, repel the presumption of personal acquisition and **fix a trust upon the fund.**
2. Where the **guardian** of the estate, descended to a **minor** daughter from her mother, **pays** over the accumulated **income** to her **father** who is entitled to it as tenant by the courtesy, and the father, upon receiving it and often afterward until his death, declares to the guardian and others that the money is the daughter's, his **declarations** are competent to **prove** an executed **gift** of the money to the **daughter**, in an action of *assumpsit* brought by her after attaining her majority to recover it from his executrix.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Warren County, to review a judgment on a verdict for the plaintiffs in an action of *assumpsit*. *Affirmed.*

This was an action of *assumpsit* by Charles R. Henderson and Anna M., his wife, in right of the wife, against Florence M. Buck, executrix of E. E. James.

At the trial before Brown, P. J., the following facts appeared:

Susanna E. James died in 1860, intestate, leaving one child, the plaintiff Anna, then a minor, and a husband, E. E. James, the defendant's testator. The real estate which Mrs. James owned at her death was sold by order of court. The proceeds were given to the guardian of the plaintiff Anna and were by him invested, in 1865. Before investing the money he went to Mr. James and asked him if he thought government bonds a safe investment. According to the guardian's testimony Mr. James said "He did not care what I put it into; he was not going to have anything to do with it; that he never would touch the money; it

was for Anna. He said he had plenty to live on himself and he did not care for it; that it was Anna's money. I might do what I pleased with it." He never thereafter claimed an interest in the money, nor did he exercise any control over it while it remained in the hands of the guardian. He nearly always stopped to see the guardian when in the neighborhood and asked how he was getting along with Anna's money.

The guardian offered the interest of the money to Mr. James twice, but he said he would not take it, that it was Anna's money. The interest accumulated until 1879 when Mr. James wrote to the guardian as follows:

"My Dear Sir: Your favor received. While I was much pleased to hear from you and my old Honeybrook friends, you did not give me a definite answer to my inquiry as to how much money was due Anna. I had hoped (and having unlimited confidence in your honor and integrity) that you would annually apply interest to principal, thus compounding the interest. This was perhaps, asking too much, and there may have been times when there may have been difficulties in getting 6 per cent. I would say of this accumulated interest, I could invest all or a part for Anna, with good and safe security, to realize 10 per cent, either on the first of April or May. Please give me a definite and full statement of the account, and whether I may secure an investment for all or part of said interest."

In pursuance of this letter the guardian turned over to Mr. James the whole of the accumulations—according to his testimony—to invest for Anna.

Afterward, in July, 1879, Mr. James visited his daughter at her uncle's and said the guardian did not appear to want to put her money out, and he did not want it to lie idle. At the time of this visit he told neighbors that he had given the money to Anna, and it was at the same visit he told his brother that he would invest this money for Anna; that he could get 10 or 12 per cent interest for her, and after receiving the last of the money he wrote to his brother: "I have nearly \$2,000 of Anna's money that I got from Morton (the guardian) last August." This was one month before his death in January, 1880.

In 1881 the plaintiff Anna became of age, received the principal from her guardian, gave him a release, and brought this suit against her father's executrix to recover the accumulation of interest, on the ground that he had given it to her.

The court charged *inter alia* as follows:

"In order to make a valid gift it must go into immediate effect. There must not only be the purpose and intention to give, but that intention must be carried into effect by Mr. James in his lifetime parting with all dominion and control over the subject matter, and vesting the same in his daughter, the alleged donee. It makes no difference how strong or how fixed was the purpose of Mr. James to give this money to his daughter at some future time, or how many times he had declared to third persons he had so given it, provided you find, from all the evidence, that there never was a time in his life when he did actually consummate the gift by surrendering all dominion and

control over the money. You come to that single question of fact, which you are to determine from the whole evidence, and upon which we can throw no particular light. * * *

"[It is for you to take all the evidence and say whether there was a time, in the lifetime of Mr. James, when he consummated a gift of this money to his daughter, parted absolutely with all control and dominion over it, with intention to vest the dominion and control, as against himself, absolutely in his daughter. If there was, then his estate ought to respond, and you ought to give a verdict for the amount claimed with the interest.] If there was not, then your verdict ought to be in favor of the defendant."

Verdict and judgment were for the plaintiff; whereupon, the defendant took this writ, assigning as error: the part of the charge included in brackets; the refusal of the court to give binding instructions for the defendant, and the refusal of the court to charge that the release of the plaintiff Anna to her guardian was, in the absence of fraud, accident or mistake, a bar to the action.

Messrs. D. I. Ball and C. C. Thompson, for plaintiff in error:

There is in the case no sufficient evidence of an executed gift.

A gift is not executed so long as the donor retains any control over it.

Withers v. Weaver, 10 Pa. 391; *Linsendigler v. Gourley*, 56 Pa. 166; *Pringle v. Pringle*, 59 Pa. 281; *Fross' App.* 105 Pa. 267.

The declarations to establish a husband's disclaimer of his wife's chattels must "be deliberate, positive, precise, clear, and consistent with each other; not inconsiderate, vague, or discrepant."

Re Gray's Est. 1 Pa. 829.

In *Madeira's App.* 2 Cent. Rep. 318, it is said: "The legal requisition is that the intention of the donor be established by clear and precise evidence, and that the delivery be *secundum subjectam materiam*."

See also *Herr's App.* 5 Watts & S. 494; *Fross' App.* 105 Pa. 258; *Bond v. Bunting*, 78 Pa. 210; *Scott v. Lauman*, 104 Pa. 593; *Williams' App.* 15 W. N. C. 89.

Mr. James could not give his estate in the money in the guardian's hands except by a writing. The Act of April 18, 1853, *Purd. Dig.* p. 1460, § 7, makes the proceeds of the sale of the real estate by the trustee real estate.

Holmes' App. 53 Pa. 339.

There must be a consideration besides love and affection to support a trust.

Trough's Est. 75 Pa. 118.

Equity carries the doctrine of *nudum pactum* farther than even the law does.

Dennison v. Goehring, 7 Pa. 178.

Where there has been no deceit or unfair practice, and the party may with a good conscience retain the money, he cannot in an action of *assumpsit* on the common counts be compelled to pay it back, even where he could not at law have recovered it originally.

Deysner v. Triebel, 64 Pa. 386; *Irvine v. Hanlin*, 10 Serg. & R. 218; *Mann's App.* 1 Pa. 29; *Hinkle v. Eichelberger*, 2 Pa. 484.

Messrs. A. E. Sisson, and Johnson, Lindsey & Parmlee, for defendants in error:

374

It is not a question whether the father might not have adopted some other mode of renouncing all dominion and control which would have furnished better evidence against himself, but whether all these circumstances are not sufficient to go to the jury and to justify their verdict.

But suppose the jury did not find that the sum of all these circumstances, acts and declarations, quite fulfilled the requirements of the law. They at least had the right to them as lights, by the aid of which they could examine subsequent acts of the father, all in the same general line, to see whether, as thus illuminated, the evidence satisfied them that he afterwards made another and more successful effort to give to his daughter the fruit of her mother's estate.

Madeira's App. 17 W. N. C. 202; *S. C.* 2 Cent. Rep. 313.

Our evidence was sufficient to go to the jury, even had we not shown that the donor and donee were together.

Grangiac v. Arden, 10 Johns. 293.

To make a valid gift *inter vivos* there must be a delivery with the intention of making a gift, but no form of words is necessary to be observed at the time to constitute a good gift. If the circumstances clearly evince the intention it is sufficient; and if these are equivocal, an explicit declaration afterward of that intention is competent.

Minchin v. Merrill, 2 Edw. Ch. 333; *Doty v. Willson*, 47 N. Y. 580; *Trow v. Shannon*, 76 N. Y. 446.

Declarations of the husband when receiving the wife's money or choses in action, or afterwards, clearly evincive of his intent at the reduction into possession, are sufficient to repel the presumption of personal acquisitions and establish the relation of trustee for the wife.

Moyer's App. 77 Pa. 482; *Malone's Est.* 37 Leg. Int. 63; 88 *Id.* 308. See *Hackney v. Vrooman*, 62 Barb. 666; *Re Gray's Est.* 1 Pa. 327; *Wesco's App.* 52 Pa. 195.

It is not necessary that witnesses shall have seen actual delivery take place. The bond or the note or the policy may have been, at the time, already in the custody of the donee; and in such case, words indicating that the donor renounced all ownership would undoubtedly be sufficient.

Malone's Est. 37 Leg. Int. 63; 88 *Id.* 308; *Wing v. Merchant*, 57 Maine, 387.

So, as was said by Lord Romilly, in *Morgan v. Malleson*, L. R. 10 Eq. Cas. 475, cited by Judge Hare, in *Bond v. Bunting*, 78 Pa. 210: "If the donor had said, I undertake to hold the bond for you, that would have been a declaration of trust, though there had been no delivery."

See also *Helfenstein's Est.* 77 Pa. 331.

The delivery may be proved by the declarations of the donor, just as the gift itself may be; and when the donor declares that he had given at a previous time, and that the donee had then become the owner, it is implied that the delivery, and indeed every other formality necessary to create a complete gift, had taken place. The law always presumes knowledge of its requirements.

Malone's App. 38 Leg. Int. 303.

Per Curiam:

We discover no error in this record. Dec-

larations accompanied with acts clearly proving the intent of the donor to execute the gift were given in evidence. The dealings of the donor with the guardian of the ward were tantamount to dealing directly with the ward. Declarations, when receiving the money or afterwards, clearly evincing an intent to take it in trust, at the time of its reduction into his possession, are sufficient to repel the presumption of personal acquisition and stamp the relation of trustee upon him.

Judgment affirmed.

William NESLIE *et ux.*, *Plffs. in Err.*,
v.

SECOND & THIRD STREETS PASSENGER R. CO.

In an action of trespass on the case against a street railway company for personal injuries, evidence on the part of the plaintiff that she, while alighting from one of the defendant's cars and carrying a child on her left arm, tried to reach with her right hand the handle of the rear dasher, but that as another passenger, though there were empty seats in the car, was standing in the way, she missed the handle and, slipping on ice which remained on the step from the previous day, fell, receiving severe injuries, **makes out a case for a jury; and a nonsuit is error**, although it appears that the plaintiff knew there was ice on the step and might, by changing the child to the other arm, have grasped with her left hand the handle on the end of the car.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 4 of Philadelphia County, to review a judgment of nonsuit in an action of trespass on the case. *Reversed.*

This action was brought by William Neslie and Margaret, his wife, in the right of the wife, against the Second and Third Streets Passenger Railway Co. to recover damages for injuries alleged to have been received by the wife through the defendant's negligence.

At the trial, the testimony in behalf of the plaintiffs was substantially as follows: The plaintiff, Margaret Neslie, with her child about two years old, and accompanied by her mother, was a passenger on one of the cars of the Second & Third Streets Passenger Railway Company, in the City of Philadelphia, on the evening of February 3, 1885. When the car reached Second and Market Streets, she started to leave it, carrying her sleeping child on her left arm.

The car was heading down Second Street, being towards the south, and she attempted to get off on the west side, as she wished to go up Market Street. Her right arm being the free one was, therefore, next the car dasher, and she reached it out for the purpose of grasping the handle on the end of the dasher to assist her in alighting. She was unable to reach the handle, owing to the presence of a passenger on the platform, who stood against the dasher

and barred her from it. She then stepped down, not having hold of either the handle on the dasher or the handle on the rear end of the car, slipped on some ice on the car step and fell.

The presence of the ice was proved as being "more than would be caused by persons getting in and out;" and it was also proved that on the day of the accident it had not stormed, while on the day previous it had.

Plaintiff testified that when she first stepped on the car her foot slipped on the ice. She also testified that at the time of the accident there were but four or five persons inside the car.

The extent of the plaintiff's injuries was testified to by several witnesses, including the physicians who attended her.

The trial judge, on motion of the counsel for the defendant, entered a nonsuit, which the court in banc subsequently refused to take off; whereupon, the plaintiffs took this writ, assigning as error the action of the court in entering the nonsuit, and in refusing to take it off.

Messrs. James P. Dolman and John Dolman, for plaintiffs in error:

The plaintiff being a passenger, the defendant was bound to transport her safely. By showing a failure to do this the plaintiff established a *prima facie* case, without affirmative proof of any negligence on the part of the defendant. The burden of showing a state of facts which relieved it from liability was upon the latter.

R. R. Co. v. Goodman, 62 Pa. 329; *Meier v. R. R. Co.* 64 Pa. 225; *Laing v. Colder*, 8 Pa. 482; *Sullivan v. R. R. Co.* 30 Pa. 234; *Shearm. & Redf. Neg.* § 280; *Redf. Railways*, § 1760 and notes.

The testimony on the part of the plaintiffs, however, contained sufficient evidence of negligence in the defendant to send the case to the jury. The duty of a carrier of passengers is to exercise the highest possible degree of care, diligence and foresight.

Meier v. R. R. Co. 64 Pa. 225; 2 *Redf. Railways*, 170-190; *Laing v. Colder*, 8 Pa. 482; *Gillis v. R. R. Co.* 59 Pa. 129; *Sullivan v. R. R. Co.* 30 Pa. 234; *R. R. Co. v. Boyer*, 97 Pa. 91; *Boas v. R. R. Co.* 1 New Eng. Rep. 89.

It has been laid down in many cases that the obligation of a common carrier of passengers extends to furnishing a safe and convenient means of exit.

See *R. R. Co. v. White*, 6 W. N. C. 516.

The defendant was chargeable with negligence, for unnecessarily allowing its platform to be occupied in such a way as to interfere with the safe exit of passengers. If, under any circumstances, permitting an unnecessary occupation of the car platform would amount to negligence, unless it would under all circumstances, the jury alone can determine whether in a particular case it was justifiable.

If the case was decided in the court below on the ground of contributory negligence, it should have been submitted to the jury. To hold as the court below did was to establish plaintiff's negligence as matter of law. Negligence in law is when the standard is fixed, when the measure of duty is defined by the law and is the same under all circumstances; *R. R. Co. v. McElwhee*, 87 Pa. 311; or where the precise measure of duty is determinate and the same under all circumstances; *McCully v.*

Clark, 40 Pa. 406; or the violation of a fixed rule, the same under all circumstances.

R. Co. v. Henrice, 92 Pa. 431.

There is no evidence that plaintiff knew that there was ice on the step in such quantities as to render the exit perilous. Where pressure of circumstances requires an act to be done in a way which does not permit of much time for deliberation, the law will not presume that a previously acquired knowledge of a fact which rendered the act more or less dangerous was present to the mind at the time.

Whart. Neg. § 219; *Lee v. Woolsey*, 16 W. N. C. 337.

Plaintiff had a right to rely upon the assumption that the defendant would perform its clear duty of keeping its steps in a fit condition for use, or of restraining passengers from using them.

Erie City v. Schwingler, 22 Pa. 384; *Humphreys v. Armstrong Co.* 56 Pa. 204.

Plaintiff having been, without her own fault, unexpectedly placed in a position which required her to act promptly, her conduct is not to be scrutinized from the standpoint of one who can coolly look back upon the occurrence and think of various things which the result indicates it might have been more prudent to do.

R. R. Co. v. Kilgore, 32 Pa. 292; *R. R. Co. v. Ogter*, 35 Pa. 60; *R. R. Co. v. Aspell*, 23 Pa. 147; *R. R. Co. v. Hummell*, 44 Pa. 875; *R. R. Co. v. Werner*, 89 Pa. 59.

Plaintiff's duty was to exercise ordinary and reasonable care; and there is a long and unbroken line of authorities in this State that in such a case the question is always for the jury.

Payne v. Reese, 100 Pa. 301; *Johnson v. Bruner*, 61 Pa. 58; *Railway Co. v. Walling*, 97 Pa. 55; *R. R. Co. v. McElree*, 67 Pa. 311; *R. R. Co. v. White*, 6 W. N. C. 516; *McKee v. Bidwell*, 74 Pa. 218; *Johnson v. R. R. Co.* 70 Pa. 357; *Crissey v. R. Co.* 75 Pa. 88; *McCully v. Clarke*, 40 Pa. 406; *Born v. Plank Road Co.* 101 Pa. 334; *R. Co. v. Henrice*, 92 Pa. 431; *Railway Co. v. Whipple*, 5 W. N. C. 68; *R. R. Co. v. Findley*, 4 W. N. C. 438; *Borough v. Warne*, 16 W. N. C. 44; *Schum v. R. R. Co.* Id. 305.

Mr. George W. Thorn, for defendant in error:

When in the opinion of the court the contradicted evidence does not warrant the jury in inferring negligence by the defendant as the proximate cause of an injury, the court should direct a verdict for him.

Goshorn v. Smith, 92 Pa. 435; *R. R. Co. v. Yerger*, 73 Pa. 121.

When there is no evidence from which negligence could reasonably be inferred, it is settled law that the jury shall not be permitted, arbitrarily and without evidence, to infer that there was negligence.

Baker v. Fehr and R. R. Co. v. Schertle, 97 Pa. 70, 450.

A municipality is not liable for injuries which are the result of nothing more than the ordinary slipperiness caused by recent snow and ice.

Mauch Chunk v. Kline, 100 Pa. 119; *City of Erie v. Magill*, 101 Pa. 616; *Denhart v. City of Phila.* 15 W. N. C. 214; *Fleming v. City of Lock Haven*, 15 W. N. C. 216.

378

Mr. Chief Justice Mercur delivered the opinion of the court:

This was an action on the case to recover damages for an injury to the person of the plaintiff. When her evidence was closed, the learned judge ordered a nonsuit which the court refused to take off. The question therefore now is, Should the case have been submitted to the jury?

The plaintiff was a passenger in a car of the defendant. In alighting therefrom she fell and received an injury. Her complaint is that the defendant did not furnish her safe and convenient means of exit as it was bound to provide. If there was no doubt of the existence of the facts complained of, yet if there be substantial doubts as to the reasonable and natural inferences to be drawn from those facts, they should be submitted to the jury. *McKee v. Bidwell*, 74 Pa. 218; *Crissey v. Pass. R. Co.* 75 Pa. 83.

What is or is not negligence in a particular case is generally a question for the jury. *Fritch v. Allegheny*, 91 Pa. 226.

The defendant is a carrier of passengers for hire. As such it was its duty not only to transport them safely, but also to provide reasonably safe means for their getting on and off the car. Did it do so in this case? Under all the evidence was that a question of fact for the jury to find, or was it to be determined by the court as matter of law?

This accident occurred on an evening in the month of February. The plaintiff testified substantially that when she got out of the car she was carrying her child on her left arm; she tried to get hold of the dasher with the other hand; she could not do so as a passenger standing on the platform was leaning against it. There were two passengers on the platform, one on each side of the conductor, and some four or five passengers in the inside of the car. In getting down, her foot slipped on the step by reason of ice thereon, and she fell and was injured.

It appears that there had been a storm on the previous day, but none on this day. It is alleged that this ice had been suffered to remain on the step from the previous day. It was there when she got on the car and she slipped in getting in.

Thus there are two specific causes of complaint. The first is that when there was ample room for all the passengers to ride in the car, the defendant permitted one to stand on the platform in such a position that plaintiff could not avail herself of the security and protection which she otherwise would have enjoyed; the other, the omission to remove from the step the ice formed during the storm of the previous day.

Under the evidence we do not think the plaintiff was so clearly guilty of contributory negligence, in the manner in which she got down from the platform, as to authorize the court to declare it to be such as matter of law. Her previous knowledge of the condition of the step, and whether it was reasonably prudent for her to attempt to alight in the way and manner she did, are questions of fact for the jury.

The other contention relates to the alleged negligence of the defendant.

It may not be negligence *per se* to permit passengers to stand on the platform; yet it is

frequently very annoying to all persons in getting in and out of the cars, and to ladies especially offensive. If, in this case, the defendant permitted a passenger to remain standing on the platform in such a position as to deprive the plaintiff of that reasonable support which would have protected her from injury, and did not furnish other suitable protection, we think the jury is the proper tribunal to find whether the defendant was thereby guilty of negligence.

If the ice on the step caused the plaintiff to fall, or contributed thereto, it is proper for the jury to consider whether, under all the circumstances proved, it was suffered to remain thereon for an unreasonable length of time. It may be impossible in the winter to prevent deposits on the step by falling snow, or from the feet of persons entering the car, and which in either case may result in the formation of ice. The main question in regard to this is whether it remained there for such time and in such form as to establish the negligence of the defendant, and whether this negligence contributed to the injury of the plaintiff.

The evidence is sufficient to send the case to a jury with proper instructions and the court erred in not taking off the nonsuit.

Judgment reversed and a procedendo awarded.

A. E. BURR, *Plff. in Err.*,

v.

John CATTNACH.

A landlord's entry upon demised premises, by forcing the door during the tenant's absence, removing the tenant's signs, locks and goods, and using the room thereafter for storage, amounts to an eviction and is a good defense to an action for rent for the balance of the term.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lackawanna County, to review a judgment for the plaintiff in an action of debt. *Reversed.*

This was an action of debt by John Cattnach, against A. E. Burr, to recover rent reserved in a lease.

By consent of the parties the case was referred to S. B. Price, Esq., in accordance with the Act of April 6, 1869, P. L. 725, authorizing the reference of civil actions, and its supplements: the Acts of March 28, 1870, P. L. 540; and June 22, 1871, Pl. 1363.

The facts as found by the referee are fully stated in the opinion.

The referee reported that the plaintiff had no cause of action, and directed the prothonotary to enter judgment for the defendant.

The court below reversed the judgment and entered judgment for the plaintiff; whereupon, the defendant took this writ.

Messrs. Fred. W. Gunster, and Charles H. Welles, for plaintiff in error:

The referee's findings of fact must be considered as a special verdict.

Butterfield v. Lathrop, 71 Pa. 225; *Thornton v. Enterprise Ins. Co.* 71 Pa. 234.

An eviction is "Any act of the landlord

which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under the lease."

Hoeverler v. Fleming, 91 Pa. 322.

"If the tenant be deprived of the thing letten, the obligation to pay rent ceases, because such obligation has its force only from the consideration which was the enjoyment of the thing demised."

Gilbert, Rents, 145.

If a landlord takes possession of the premises without the consent of the tenant, it is an eviction; if with his consent, it is a rescission of the lease, and in either case the rent is suspended.

Magaw v. Lambert, 3 Pa. 444; *Briggs v. Thompson*, 9 Pa. 338.

When the landlord enters without the consent of the tenant, and such entry is followed by a continuous possession inconsistent with the possessory title assured to the tenant under the lease, that possession amounts to an eviction.

Day v. Watson, 8 Mich. 535.

The mere locking of a door of a pew, thereby preventing one who had the right to use it, has been held to be equivalent to an eviction.

Tayl. Land. & T. 6th ed. § 378; *Lloyd v. Tomkies*, 1 T. R. 671.

And ralling off a part of the demised premises is an eviction.

Smith v. Raleigh, 3 Camp. 513.

A landlord's refusal to allow an under tenant to enter the premises under threats of suit, whereby the lessee is deprived of under letting, is such an interruption of the latter's rights as amounts to an eviction.

Doran v. Chase, 2 W. N. C. 609.

Messrs. Ranck & Smith, for defendant in error:

Where a party abandons the house with his goods, and locks it up, and it is not known where he has gone, it is a clear case of vacant possession.

Tayl. Land. & T. 609; *Jackson & Gross on Land. & T.* 218; *McKinney v. Reader*, 7 Watts. 128.

Request by the landlord for the keys followed by an acceptance of them will constitute a surrender of the term.

Raney v. Fannassy, 14 W. N. C. 91.

Taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant and do not discharge him from his covenant to pay rent.

Breuckmann v. Toibill, 89 Pa. 58; *Mureilles v. Kerr*, 6 Whart. 409.

A removal of the tenant from the premises and an unaccepted offer to deliver up the keys is not evidence of the existence of an agreement for the termination of the lease.

Kiester v. Miller, 25 Pa. 481.

In an action upon a lease to recover rent, an affidavit of defense is insufficient which simply avers that before the time the rent sued for accrued, defendant gave up and left the premises, and plaintiff entered upon and used the same.

Phila. Fire Extinguisher Co. v. Brainerd, 2 W. N. C. 473.

A landlord may receive the key of premises without interfering with the occupancy by the tenant. He is not bound to let the premises suffer, but may take possession for the purpose of caring for them.

Bradley v. Brown, 6 W. N. C. 282.

A surrender of demised premises by the tenant during a term, in order to be effectual so as to release the lessee from liability to pay rent, must be accepted by the lessor; and the burden of proof is upon the lessee to prove such acceptance.

Auer v. Penn., 99 Pa. 370.

Any entry by the landlord on the premises demised, against the will or wishes of the tenant, is not an eviction in point of law which will suspend the rent.

Bennet v. Bittle, 4 Rawle, 389; *Noble v. Warren*, 88 Pa. 840.

An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises. The rent already accrued and overdue is not forfeited by the eviction; but in an action for such rent the tenant may defalcate the damages caused by it.

Tiley v. Moyers, 48 Pa. 404.

Mr. Justice Sterrett delivered the opinion of the court:

After considering the exceptions filed by plaintiff below to the report of the referee, the learned judge of the common pleas in the concluding paragraph of his opinion says: "It follows that the plaintiff's second conclusion of law should have been affirmed and defendant's fourth conclusion of law denied, and that upon the facts found by the referee the plaintiff is entitled to recover. The corresponding exceptions of plaintiff are accordingly sustained, and the judgment of the referee reversed." And thereupon he directed judgment to be entered in favor of plaintiff below for \$221.76.

The plaintiff's second conclusion of law, referred to above, was "That the temporary occupancy, testified to by plaintiff's witnesses, is not such an occupancy as would create an eviction, or a surrender of the term, unless there was an acceptance by the plaintiff."

Defendant's fourth conclusion was "That the plaintiff cannot recover."

The learned referee refused the former and affirmed the latter, and he accordingly directed judgment in favor of defendant below; but, upon the same facts found by the referee, the learned judge reversed these legal conclusions, and judgment was accordingly entered in favor of plaintiff below, as above stated. These rulings are the subjects of complaint in the several assignments of error respectively.

It will be observed that the referee's findings of fact are accepted as substantially correct. It is only as to the legal conclusions drawn therefrom that the court overruled the referee on the controlling questions in the case.

Among other things, the referee found in substance that in November, 1879, plaintiff in error leased from plaintiff below two second story front rooms on Broadway, New York, for five months, from first of December following at \$55 per month, took possession of the same accordingly and paid the rent until February 1, following; that in the early part of February, plaintiff below took possession of the rooms, removed locks, signs and goods left there by plaintiff in error, and thence until the expiration of the lease used the rooms for storing trunks; that at the time he thus re-entered the premises, plaintiff in error was in

possession of the same as tenant under said lease, although not personally present, and had goods and chattels at the same; that defendant in error broke, removed or opened the plaintiff in error's lock on the door of the demised premises, took down his signs, re-entered and took possession of the premises, and used the same for his own purposes in his own business; that at the time he so re-entered, the demised premises were not vacant, nor had the lease expired, and from the time he so re-entered in the early part of February, 1880, until May 1 of that year, he continued in possession; and during that time plaintiff in error was not in possession of any part of the demised premises.

Having found the foregoing and other corroborating facts, the referee rightly concluded as matter of law that plaintiff below having re-entered and taken possession of the demised premises and used the same for his purposes without the consent of plaintiff in error, the latter was evicted and therefore relieved from further payment. The facts found by the referee clearly warranted each of the four conclusions of law claimed by defendant below, the last of which was "that the plaintiff cannot recover."

The first conclusion of law submitted by plaintiff below was "That the lease in evidence was for an entire term of five months and defendant is liable for the rent unless there was an eviction or surrender of the term and an acceptance by plaintiff."

The second as before stated was "That the temporary occupancy, testified to by plaintiff's witnesses, is not such an occupancy as would create an eviction or a surrender of the term unless there was an acceptance by plaintiff." This was rightly refused for the reason that it was not warranted by the testimony nor by the referee's findings of fact.

As to all the controlling points in the case the findings of the referee, as well as his conclusions of law, are substantially correct, and, in accordance with his report, judgment should have been entered in favor of defendant below.

Judgment reversed, and now judgment in favor of defendant and against plaintiff below.

APPEAL of the RIDDLESBURG COAL & IRON CO.

1. The **claim of wages** for labor, under the Acts of April 9, 1872, and June 12, 1878, is **preferred**, in distribution of the proceeds of the lessee's property, **to the landlord's claim for rent.**
2. Where the property is levied on and sold by the sheriff, **on an execution** issuing out of the court of common pleas, **notice of the wages claim**, under the Act of June 12, 1878, need not be given to the landlord, but if given **to the sheriff** it is **sufficient.**

(Decided October 4, 1880.)

APPPEAL from a decree of the Common Pleas of Bedford County, distributing the proceeds of a sheriff's sale. *Affirmed.*
Reported below, 2 Pa. C. C. R. 197.

On August 8, 1884, Nimick & Co. obtained a judgment against the Kemble Coal & Iron Company, a corporation engaged in the manufacture of iron, mining ore, coal, etc., and issued execution and levied on the personal property of the defendant on the same day. The property was sold on August 20, 1884, and on succeeding days. The fund was claimed by three classes of claimants: 1, the holders of assigned labor claims; 2, landlords, for rents; and 3, the execution creditor.

Wight, the secretary and treasurer of the company, and Lauder, the business manager, had a store at which the employees of the company dealt largely. The wages of the employees were paid by deducting the store bill from each man's wages for the month and paying him the balance of his wages in cash, he giving a receipt, transfer and assignment to Wight & Lauder.

On August 1, \$87,000 of these claims for labor, earned within six months prior to the levy, were assigned to the Bedford County Bank and the Union Bank of Huntingdon, on account of indebtedness of Wight & Lauder to these banks. These constituted the assigned labor claims. The auditor found as a fact that these claims were assigned for a valuable consideration and were not extinguished.

The Huntingdon & Broad Top Railroad Company claimed, under a lease, for royalty on coal mined on the lands of its railroad, within a year preceding the date of levy. The Riddlesburg Coal & Iron Company claimed, under a lease to Lauder, for rent of houses and royalty and trackage on coal, within a year preceding the date of levy.

Lauder did not sublet the premises to the Company defendant, but it occupied them the same as if the lease had been made to the Company. Notice of the above claim for rent was given to the sheriff, prior to the sale of the personal property. John W. Fink, another landlord, gave notice after the sale. The property of the defendant, on the premises of the respective lessors, sold for enough to pay these claims in full, if preferred to the claims for wages, but not otherwise.

It appeared from evidence before the auditor that notice of the labor claims was served on the sheriff August 19, and notice of the claims for rent subsequently.

The auditor, Frank Fletcher, Esq., reported, on the question of distribution, *inter alia*, as follows:

"The landlords contend that no notice was served by the banks on the landlords or their bailiff, as the Act of June 12, 1878, requires, and that, therefore, they are preferred to the banks. The banks, on the other hand, contend that the sheriff was the bailiff of the landlords, and that a service of the notice on the sheriff was a compliance with the requirements of said Act of 1878, and that they are entitled to the fund in preference to the rents.

"Is the sheriff the bailiff of the landlord? In England the powers and duties of the sheriff were numerous. He was the King's bailiff, and as his bailiff it was his duty to collect the King's rents within the county, if commanded by process from the exchequer. Sheriff's deputies, appointed by the sheriff to collect fines, make arrests, etc., were also called bailiffs. There is

no such officer as bailiff in Pennsylvania. 'In American law the term "bailiff" is seldom used except sometimes to signify a sheriff's officer or constable, or a party liable to account to another for the rents and profits of real estate.'

"In this case was the sheriff a party liable to account to these landlords for rent? If so, he was, in the opinion of your auditor their bailiff, and the notices served on him by the banks were sufficient, under the Act of 1878, to entitle them to receive the money. That the sheriff was liable to account to these landlords there is no doubt. Under the law he is bound to account to them at his peril. Had the landlord issued warrants to the sheriff, and had notice been served, as in this case, then there could not be any doubt as to which is preferred. When the execution creditor issues his execution and places it in the hands of the sheriff, the right of distress is thus taken away, and the landlord must look to the sheriff to account to him for his rent from the proceeds of sale. The landlords in this case who gave notice to the sheriff to retain and pay over to them the amount of rent due them, thereby, as well as by the act of the law, constituted and made the sheriff their bailiff.

"The Kemble Coal & Iron Company was not the lessee of the Riddlesburg Coal & Iron Company, and notice, as required by the Act of 1878, does not apply to the rent of said Riddlesburg Coal & Iron Company, for the reason that the Kemble Coal & Iron Company did not hold under a lease, and the lessee was not the party employing the miners, mechanics, laborers and clerks.

"As to whether the claim of the Riddlesburg Coal & Iron Company is preferred to wages must be decided irrespective of the Act of 1878. This question has never been decided by the supreme court in any reported case, but has been decided both ways by lower courts. Your auditor, after having examined a number of opinions, adopts as his views in this case the opinion of Judge Finletter in the case of *O'Brien v. Hamilton*, 12 Phila. 387, decided in February, 1878, in which it was held that claims of laborers for wages are entitled to preference over claims of landlords for rents."

The auditor accordingly distributed the fund to the banks. The landlords filed exceptions which were dismissed by the court in the following opinion by BAER, P. J.:

"Our concurring with the auditor in the conclusions arrived at does not necessarily hold us as indorsing the reasoning, etc. As Wight & Lauder procured and paid for the assigned claims as a mercantile firm, and not as secretary and treasurer, or manager, the cases cited by exceptants (viz.: 22 Pa. 320, and 51 Pa. 483) do not apply as we read the cases and the evidence; and approving of his finding that the labor claims were not extinguished, the right of priority follows under the several Acts of Assembly, as there is no dispute that notice was in due form given the sheriff and time.

"Whether the sheriff was the bailiff of the landlord is, as we view the case, immaterial.

"The Act of 9th of April, 1872, required laborers, miners, etc., to give notice in writing, of their claims, to the officer executing an execution, landlord's warrant, attachment, or writ

of a similar nature, at any time before the actual sale of the property levied on. The first section of the Act of June 12, 1878, declares the true intent of the Act of April 9, 1872, to be that laborers shall have a preference over landlords * * * provided that any person claiming a preference, as in the Act provided, shall give notice to the landlord or his bailiff of the amount of his claim. * * * There is no such officer as a bailiff in the State of Pennsylvania. When the landlord deposes another to execute a landlord's warrant, he constitutes such other person a bailiff, but not an officer; and under the Act of 1878 either the landlord or his bailiff executing a landlord's warrant must have the required notice. But where the property is levied on by the sheriff on an execution issuing out of the common pleas, the writ is being executed by an officer, and such a case requires the notice to be given to the officer.

"If the meaning of the Act of 1872, as declared by that of 1878, was that wages for labor had priority over rents, then, as provided by the Act of 1872, the only notice necessary was that required to be given to the officer executing the writ. The Act of 1878 provides for notice when the landlord himself, or by a bailiff, executes a landlord's warrant, which had not been provided for by the Act of 1872.

"To require laborers to notify the landlord when the sheriff levies on an execution to which the landlord is a stranger would be to require, in some instances, an impossibility. For the landlord need not necessarily have notified the sheriff that he claimed a priority for rent in arrear before the sale; then how could the laborer in all cases know that there was a landlord claiming?

"Although the labor claimant must strictly observe the requirements of the law giving him priority, we fail to find them negligent of anything required of them in these cases, as we read and understand the several acts.

"The exceptions are dismissed and the report of the auditor is confirmed."

This appeal was thereupon taken.

The assignments of error specified were, *inter alia*, the action of the court in dismissing the exceptions and confirming the report.

Messrs. Russell & Longenecker, for appellant:

The Act of 1836, 1 Purd. 645, makes rent a first lien on goods liable to distress. Such a law cannot be repealed by implication.

Wood's App. 30 Pa. 274; *Vastine's App.* 88 Pa. 165-6.

It was held by Clayton, P. J., of Delaware County, that the Act of 1872 did not give wages priority over rent.

Maloy's Est. 1 Del. Co. R. 331.

The Act of June 12, 1878, P. L. 207, provided a statutory remedy by which the rent will be preferred, namely, notice to the landlord before the sale. The evident intent of the Legislature was to furnish to landlords information of the amount of claims ahead of them, so that they might protect themselves by attending the sale and bidding the property to a sum which would cover their claims also.

The Common Pleas of Cumberland County recognized that the notice should be given to the sheriff and the lessors before the sale.

Nogle v. Cumberland Ore Bank Co. 1 Ches. Co. R. 491; *S. C.* 1 Del. Co. R. 335.

How can it be alleged that the notice was given to the sheriff as our bailiff when it was served on him on August 19, and our notice that we claimed rent was not given the sheriff until August 20?

The Act of 1872, § 2, provided for notice in case of landlord's warrants. The Act of 1878 could not have been intended, therefore, for such cases alone.

Messrs. John Cessna, R. M. Speer and J. M. Reynolds, for appellee:

The construction contended for by the exceptants would make the law a trap and snare for labor claimants.

The laborers may not know that there is a landlord or that he claims rent. The landlord is not required to give notice of his claim until the return day of the writ. And yet the laborers must give him notice whether they can find him or not, at the risk of his leaving the country to avoid notice, or whether he has rent coming to him or not.

The reasonable view of the law is that all notices shall be given to the officer executing the writ, who is the person to distribute the proceeds; and this is notice to every party interested. The landlord is fully protected as, by such notice, he must know, before the sale, to what sum the property should be bid.

The Act of 1878 declared the intent of the Act of 1872 to give wages a preference over rent. The provision as to notice to the landlord or his bailiff was intended to apply to landlords' warrants or distress for rent. But, if meant to apply to other processes as well, the person executing the writ became the bailiff or receiver for the landlord, for he was bound to account to the landlord at his peril.

Maloy's Est. 1 Del. Co. R. 331, was ruled by the peculiar agreement made in that case. But when Judge Clayton put his ruling on section 2 of the Act of 1872, he overlooked the fact that section 1 provided that wages should be preferred and first paid out of the proceeds, and that the Act further contained an express provision repealing "all laws or parts of laws inconsistent therewith."

The Act of 1849, construed in *Wood's App.* 30 Pa. 280, contained no provision concerning the order of payment.

The weight of reason and authority appears to be with Judge Finletter's opinion in *O'Brien v. Hamilton*, 12 Phila. 387. See also *Livingood's App.* 17 W. N. C. 420, 3 Cent. Rep. 392, where our position seems to be acquiesced in and conceded.

Mr. Justice Sterrett delivered the opinion of the court:

The fund in controversy, part proceeds of execution against the Kemble Coal & Iron Company, was claimed on the one hand by the Union Bank of Huntingdon and the Bedford County Bank, assignees, respectively, of certain labor claims, and, on the other hand, by the respective landlords of premises on which portions of the property sold was located. It is virtually conceded that the Company appellant is entitled to its demand, \$2,129.38, unless its claim is postponed to the assigned labor claims held by the two banks.

The firm of Wight & Lauder, merchants at Riddlesburg, where the Kemble Coal & Iron Company was located, paid in cash and merchandise a large sum to laborers, employed by that Company, and took assignments of their respective claims. Some of these were subsequently assigned by Wight & Lauder to each of the banks above named. Upon the facts found by the learned auditor and approved by the court, the two banks respectively stand in the shoes of the laborers, whose claims they thus acquired by assignment, and are clearly entitled to the sums awarded to them, unless the claim of appellant for rent is superior to theirs.

It is conceded that the assignments, through which the banks claim, gave them a preference over ordinary execution creditors, but it is contended by appellant that under the eighty-fourth section of the Act of 1836, rent is a preferred claim and must be first paid out of the proceeds of such sale, etc. This was formerly the case, but it was competent for the Legislature to give wages a preference over rent, and this we think was accomplished by the Act of April 9, 1872, *Purd.* 1464, pl. 1, and the supplement of June 12, 1878.

The former declares that claims for wages, therein specified, "shall be preferred and first paid out of the proceeds of the sale of such mine, manufactory, business or other property as aforesaid;" and the latter, for the purpose of removing all doubt as to the intention of the Legislature and more fully protecting labor claims, declares: "It is the true intent and meaning of the provisions of the Act of Assembly, entitled 'An Act for the Better Protection of the Wages of Mechanics, Laborers and Others,' passed the 9th day of April, 1872, that the several classes of laborers in said Act mentioned shall have a preference over landlords in all claims for rent of any mines, manufactories or other real estate held under lease, where the lessee or lessees are the parties employing the miners, mechanics, laborers or clerks; *Provided*, That any person or persons claiming a preference as above provided, shall give notice of the nature and amount of his claims to the landlord or his bailiff before the actual sale of the property levied upon." P. L. 207.

It is conceded that notice in due form of the labor claims in question was given to the sheriff before the sale; but it is contended by appellant that it should have been given to the landlord and not to the sheriff, and hence there was a failure to comply with the provisions of the supplement. This would doubtless be correct, if the landlord had been proceeding by warrant of distress for the collection of rent; but such was not the case. The sheriff as an officer of the court of common pleas was executing a writ directed to him by that court.

Construing the Acts together, we have no doubt the notice in such cases is properly given to the sheriff. In some cases, indeed, it would be impossible to notify the landlord before sale of the property.

The conclusions reached by the learned auditor and court below, as to the sufficiency of the notice, are correct.

It follows from what has been said that neither of the specifications is sustained.

Decrees affirmed and appeal dismissed, at the costs of appellant.

APPEAL of the CAMBRIA IRON CO.

The receipt and **acceptance of drafts** for rent due, **held**, under the evidence in this case, to be an **acceptance as payment** of the rent, by means of which the **right to distrain is lost**.

(Decided October 4, 1886.)

A PPEAL from a decree of the Common Pleas of Bedford County, distributing the proceeds of a sheriff's sale. *Affirmed.*

The facts upon which the case arose are stated in the preceding case, *Riddlesburg Coal & Iron Co's. App.*

William S. Robinson, called by the Cambria Iron Company, testified before the auditor: "I reside in Philadelphia; am secretary of Cambria Iron Company. There was a lease between Kemble Coal & Iron Company and Cambria Iron Company for certain ore lands. I have the lease here. (Lease produced.) There is due from the Kemble Coal & Iron Company to the Cambria Iron Company, for rent within one year preceding the 8th of August, 1884, the sum of \$3,091.11. This sum is the rent due from the first day of January, 1884, to August 8, 1884. No part of this rent has been paid.

"For the months of January, February and March, 1884, a draft was given in settlement for royalty for those months, dated April 17, at four months, due August 17 and 20; protested for nonpayment; amount, \$1,275. And for the royalty for the months of April, May, June, and July a draft was given, dated July 15, at four months, which will be due November 15 and 18, for \$1,705. The balance is the royalty for eight days of August, \$111.11. The drafts were drawn by the Cambria Iron Company upon the Kemble Coal & Iron Company and accepted by R. A. Wight, treasurer. The drafts were for the seven months stated, and were for the rents then due."

Cross examined: "These drafts do not represent any other business transaction. They are all for royalty. The royalty was payable on the 15th of each month for the months preceding. On the 8th of August the royalty for July would not be due. The royalty for July would be \$416.66, and for the eight days of August, \$111.11. These drafts were given in settlement of royalty up to the dates of the drafts. Receipts, I suppose, were given by the Cambria Iron Company. These receipts were in full for royalty settled for. The treasurer, Mr. John T. Kille, settled with the Kemble Company on behalf of the Cambria Iron Company and signed the receipts. I have not a blank form of the receipts. The receipts must have been sent to R. A. Wight, treasurer. Those receipts, so far as I know, are still in the possession of the Kemble Coal & Iron Company. I cannot say whether the receipts were given on the days the drafts were drawn or not, but they must have been given when we received the accepted draft from the Kemble Company. The books of the Cambria Iron Company show this account for royalty paid and closed. * * * For a number of years they paid us in cash and after that they began to pay by drafts. From the time they began to pay by drafts our books show the account settled

and paid when the accepted drafts were received."

The auditor found as follows, from the above testimony:

"All the rent of the Cambria Iron Company except for the eight days of August, amounting to \$111.11, has been paid by accepted drafts on the Kemble Coal & Iron Company. When the accepted drafts were received by the Cambria Iron Company, the account was marked settled and paid on the books of the Company, and receipts were sent to the Kemble Coal & Iron Company for the rent represented by each of the said drafts when it was received. The right to claim rent out of the proceeds of a judicial sale depends on the landlord's right to distrain. It is true that the landlord may distrain, even if he has taken a note for the rent, as decided in *Snyder v. Kunkleman*, 8 Pen. & Watts, 487.

"In this case, however, it does not appear that any receipt was taken. In the case in hand the evidence shows that the accepted drafts were received in satisfaction of the rent. The drafts were payable four months after date. They contained interest for four months. The accounts were closed and receipts given. This clearly establishes, to the satisfaction of your auditor, that the drafts were accepted as payment; and the right of distress as to the rent settled and paid by these accepted drafts is taken away and it cannot participate in this distribution.

"As to the \$111.11, that should be paid out of the fund in court, provided the rents are preferred to the wages of labor."

The auditor awarded the whole fund to the assignees of the wages claims, upon the ground that they were preferred claims.

The plaintiff in error filed the following exceptions, *inter alia*, which were dismissed by the court.

The auditor erred in finding that the drafts received by the Cambria Iron Company from the Kemble Coal & Iron Company were accepted as payment of the rent owing by the Kemble Coal & Iron Company to the Cambria Iron Company, and that by taking said drafts the said Cambria Iron Company lost the right to distrain.

The auditor erred in excluding the claims of the landlords and giving the fund or money in the sheriff's hands to the assignees of the labor claims.

The assignments of error specified, *inter alia*, the action of the court in dismissing the above exceptions.

Messrs. Russell & Longenecker, and Cyrus Elder, for appellant:

Although a judgment be obtained and special bail entered for stay of execution, the landlord may legally distrain upon the tenant for the same rent for which the judgment was entered.

Shetline v. Keemle, 2 Ashm. 29.

The recovery of judgment on a covenant for the payment of rent is not, without actual satisfaction, an extinguishment of the rent; and the lessor may, notwithstanding such recovery, distrain for the rent in arrears. The judgment can only be considered as additional security and not as satisfaction for the rent. Nor does it alter the case that the plaintiff has issued a *fi.*

fa. or a *ca. sa.* Still, the landlord has not received satisfaction.

Snyder v. Kunkleman, 8 Penr. & W. 487; *Banbleon v. Smith*, 2 Binn. 146; *Jackson and Gross' Landlord & T.* p. 127.

"Taking the note of a third person, when it was not to be taken in satisfaction of the rent" will not estop the landlord from distraining.

Kreiter v. Hammer, 1 Pears. 559.

Messrs. John Cessna, R. M. Speer and J. M. Reynolds, for appellees:

In *Silver v. Williams*, 17 Serg. & R. 292, it was ruled that the right of preference, as servants claiming their wages, supposing them even to have once had such right, had been waived and extinguished by their taking from the intestate single bills, payable at a future day with interest.

In *Jones v. Shaohan*, 4 Watts & Serg. 257, it was ruled that the acceptance of a note for the amount of the account of the mechanic if a receipt be given at the foot of the bill for a note "in full of the above," is evidence of satisfaction which should be left to the jury; and in *Kreiter v. Hammer*, 1 Pears. 559, it was ruled that the taking of a note would not debar the landlord from distraining unless accepted as satisfaction. See also *Warren v. Forney*, 13 Serg. & R. 52.

Mr. Justice Sterrett delivered the opinion of the court:

The subject of complaint in the first specification is the approval by the court of the learned auditor's finding, that the drafts received by appellant from the Kemble Coal & Iron Company were accepted as payment of the rent owing by the latter, and that by so taking said drafts appellant lost its right to distrain.

If this finding is correct, and presumptively it is so until the contrary clearly appears, it is conclusive of appellant's right to participate in the fund for distribution; and, hence the subordinate questions involved in the remaining specifications become immaterial. An examination of the testimony satisfies us that the learned auditor was fully warranted in finding as he did. Indeed, it is difficult to see how, with due regard to the evidence, he could have found otherwise. There was no error, therefore, in rejecting appellant's claim for rent upon the ground that it had been paid. But if the fact had been found otherwise, still appellant would not have been entitled to participate in the distribution, for the reason that the labor claims represented by the appellees were preferred claims and as such entitled to the whole fund, as has been determined in *Riddlesburg Coal & Iron Company's Appeal* from same decree [the preceding case].

Decree affirmed and appeal dismissed, at costs of appellant.

APPEAL of the HUNTINGDON & BROAD TOP R. R. Co.

The secretary, treasurer and business manager of an iron manufacturing company were jointly engaged in the management of a store not connected with the iron company. Held, that assignments of wages claims by the em-

ployees of the iron company in consideration of store bills and cash were **valid** assignments and did not extinguish the claims.

(Decided October 4, 1886.)

A PPEAL from a decree of the Common Pleas of Bedford County, to review the action of the court in distributing the proceeds of a sheriff's sale. *Affirmed.*

The facts upon which the case arose are stated in the Appeal of the Riddlesburg Coal & Iron Company, *ante*, 702.

On the point passed upon by the court in this case, the auditor reported:

"The landlords contend that the purchase of the wages of the laborers, by Wight & Lauder and by Lauder, was an extinguishment of them, and that the banks have nothing upon which to base their claims: that Wight & Lauder were the Kemble Coal & Iron Company. The evidence taken by your auditor clearly shows that Wight & Lauder were separate and distinct from the Kemble Coal & Iron Company; that they were a firm engaged in the mercantile business, while the Kemble Coal & Iron Company was a corporation engaged in the manufacture of iron, mining ore, coal, etc.

"Wight & Lauder purchased these labor claims against the company, paying full value for them. It is a well established rule that the assignment of a debt or claim carries with it all securities and remedies for its collection. Your auditor is of the opinion that Wight & Lauder having purchased these labor claims for full value, that the said Wight & Lauder thereby acquired all the securities and remedies for their collection that the laborers themselves had or would have had in this distribution, and that Wight & Lauder having assigned these labor claims to the banks for full value, the said banks have all the remedies for their collection that the laborers themselves would have had."

The auditor awarded the whole fund to the banks, upon the ground that they were preferred claims.

The appellant filed, *inter alia*, the following exceptions:

The auditor erred in not sustaining the position of this exceptant, to the effect that payment of wages by Wight & Lauder and W. A. Lauder was in fact, under the evidence, payment by the Kemble Coal & Iron Company and an extinguishment of the labor claims so paid.

The auditor erred in rejecting the claim of the Huntingdon & Broad Top Railroad Company for rent, and in appropriating the fund to the Union Bank and the Bedford County Bank.

The court below dismissed the exceptions, saying as to the first:

"As Wight & Lauder procured and paid for the assigned claims as a mercantile firm, and not as secretary and treasurer, or manager, the cases cited by exceptants, viz.: 22 Pa. 320, and 51 Pa. 483, do not apply as we read the cases and the evidence; and approving of his finding that the labor claims were not extinguished, the right of priority follows under the several Acts of Assembly, as there is no dispute but notice was in due form given the sheriff and in time."

The assignments of error specified, *inter alia*, the action of the court in dismissing the exceptions and confirming the report.

PA.

The evidence upon which the above facts were found was not printed by the appellant in its paper book.

Mr. Samuel T. Brown, for appellant:

A director, officer or confidential agent cannot create relations which place him in hostility to his principal. A purchase of such a debt is an extinguishment of it as against the corporation.

Hill v. Frazier, 22 Pa. 320.

An act innocent in itself becomes a fraud in law on the part of one holding a confidential relation.

Kisterbock's App. 51 Pa. 433.

On the question as to preference between rent and wages claims, substantially the same argument was made as that in the Riddlesburg Coal & Iron Company, *ante*, 704.

Messrs. John Cessna, R. M. Speer and J. M. Reynolds, for appellees:

No question having been raised as to the regularity of the assignment, our legal right to claim as assignees cannot be disputed.

2 Trickett, Liens, 571; *Phila. Trust Co's. Appeal*, 2 W. N. C. 593.

None of the evidence being printed by the plaintiff in error this court should disregard any assignment of error based thereon.

McCandless v. Young, 96 Pa. 289; *Allen v. Laird*, 101 Pa. 70; *Brindle v. Brindle*, 50 Pa. 387.

Mr. Justice Sterrett delivered the opinion of the court:

There was no error in refusing to hold, as complained of in the first specification, that payment of wages by Wight & Lauder and by W. A. Lauder, to the employees of the Kemble Coal & Iron Company, was in fact, under the evidence, payment by that company, and an extinguishment of the labor claims so paid. On the contrary, as has been held in other appeals from the same decree, the court below rightly held that the assignment of the labor claims, first to Wight & Lauder and subsequently by them to the two banks, appellees, invested the latter, respectively, with all the rights the labor claimants themselves would have had, if their respective claims had not been so sold and assigned.

The questions intended to be raised by the remaining specifications have been passed upon, adversely to appellant, in the appeals above referred to, and therefore do not require further comment.

Decree affirmed and appeal dismissed, at the costs of appellant.

APPEAL OF John W. FINK.

(Decided October 4, 1886.)

A PPEAL from a judgment of the Common Pleas of Bedford County, distributing the proceeds of a sheriff's sale. *Affirmed.*

Messrs. Kerr & McNamara, for appellant.

Messrs. John Cessna, R. M. Speer, and J. M. Reynolds, for appellees.

Mr. Justice Sterrett delivered the opinion of the court.

The questions raised by the specifications of

error in this case are substantially the same as those involved in other appeals from same decree, viz.: Nos. 23, 24 and 48 of July Term 1886 [the three preceeding cases].

Without repeating what has been said in those cases, it is sufficient to say that neither of the specifications is sustained and the decree should be affirmed.

Decree affirmed and appeal dismissed, at the costs of appellant.

A. T. HAMILTON, *Exr.*, *Plff. in Err.*,

John BAUM, *Admr.*

1. A married woman's judgment note for the purchase money of land is valid, although it contains no recital of the consideration.
2. Parol evidence is admissible to prove the consideration.
3. In a feigned issue to establish the consideration of a married woman's judgment note, evidence that, on the day the note was given by the defendant to the plaintiff, the plaintiff executed to her a deed of land, in which he recited a consideration for a greater sum than the judgment note, raises a presumption that the note was for the purchase money of the land; and this presumption, in the absence of evidence tending to connect the note with any other transaction, is sufficient to sustain a verdict for the plaintiff.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Mifflin County, to review a judgment on a verdict for the plaintiff in a feigned issue. *Affirmed.*

This was a feigned issue in which John Baum, administrator *d. b. n. c. t. a.* of David Bloom was plaintiff, and A. T. Hamilton, executor of Margaret G. Hamilton, deceased, who survived John Hamilton, deceased, to ascertain the consideration of a judgment entered in 1865 upon a note signed by Margaret Hamilton and John Hamilton. The judgment was duly revived by *sci. fa.* in 1880.

In 1884, at the instance of A. T. Hamilton, executor, the judgment was opened and this issue was awarded. The order of the court was as follows:

"It being admitted that Margaret G. Hamilton was a *feme covert* when the judgment was confessed, the court makes the rule absolute and opens the judgment and directs an issue to ascertain whether the consideration of the judgment was the conveyance of a house and lot by the original plaintiff to Margaret G. Hamilton; the judgment to stand for a narr. and the defendant to plead non assumpsit."

At the trial the plaintiff's counsel offered in evidence the judgment and the note on which the judgment was entered, dated the 6th day of March, 1865, drawn by Margaret G. Hamilton and John Hamilton to David Bloom for \$1,200, payable \$500 on the first day of July, 1866, \$500 on the first day of July, 1867, \$200 on the first day of July, 1868, with interest on

the whole from the first day of March, 1865; to be followed by evidence that a deed was executed by David Bloom and wife bearing date the date of the judgment for a house and lot on Dorcas Street, in the Borough of Lewistown, to Margaret Hamilton, for the consideration of \$2,200.

Defendant's counsel objected: first, that the judgment note did not set out that it was for purchase money; second, that the judgment itself bears interest from a date prior to the conveyance mentioned in the offer of the plaintiff; third, that the prothonotary had no authority to enter judgment in this case against a married woman, unless the paper itself showed her liability; and that it is void as to the defendant, a married woman.

The court admitted the evidence, saying: "It is conceded that the maker of the note, Margaret Hamilton, was a *feme covert* at the time it was executed. We are trying a feigned issue to ascertain simply what the consideration of the judgment was, it being conceded that unless the consideration of the judgment was the purchase money of real estate conveyed by the payee in the note to the wife, the maker, that it would be void.

"The plaintiff offers in evidence a deed for real estate conveyed by plaintiff to the defendant, bearing the same date as does the disputed judgment; and we think that is a circumstance to go to the jury to enable them to determine whether the consideration of the judgment was for part purchase money of this property, as the case now stands. Of course if the defendant can show that the consideration is referred to some other transaction outside of the conveyance of the real estate, the proof would amount to nothing; but we take it that it is our duty to submit it to the jury in order to enable them to determine the question; and for that reason we overrule the objection and admit the evidence."

The evidence adduced at the trial is sufficiently set forth in the charge of the court to the jury, which was as follows:

"This is a feigned issue to try the consideration of a certain judgment entered in this court to number 33, April Term, 1865. The plaintiff alleges that the judgment was given to secure a part of the purchase money of certain real estate conveyed by David Bloom, the payee in the judgment, to Margaret Hamilton, one of the defendants.

"It is the settled law that a married woman cannot execute a valid obligation for the payment of money for any consideration under the sun, other than for the purchase money of real estate sold to her. Equity will sustain a judgment given by her to secure the purchase money of real estate conveyed to her, because it would be wrong to permit her to acquire the title to real estate sold to her without the payment of the purchase money. But even in such a case the obligation cannot be enforced against any other property she may have. Its collection must be enforced against the real estate alone that the obligation was given to secure.

"It is not denied but admitted that Margaret Hamilton, the defendant, was a *feme covert* when she executed the judgment note in dispute. The burden of proof is therefore upon the plaintiff, to satisfy the conscience of the

jury affirmatively by the evidence that the disputed note was given in part payment of real estate conveyed to her by the payee. She denies this, and if the judgment was not given for this purpose plaintiff cannot recover.

["I decline to instruct you, as the learned counsel for the defendant has requested me to do, that the judgment is void because it was given by a married woman and fails to disclose on its face that it was given for purchase money. The sole question in the issue is the consideration of the judgment. It may be that if the judgment disclosed on its face that it was given by a married woman, it would be void because the consideration was not expressed on it. Such is not the case here. The judgment on its face is apparently valid. Parol evidence that the defendant was a *feme covert* when it was executed is invoked to defeat it; and for that reason the same kind of evidence is to be received to sustain it and establish a valid consideration. I charge you that the judgment is good, although it does not show on its face that it was given for purchase money, inasmuch as it does not appear to be against a married woman on its face, provided the evidence satisfies you that such was the fact. If you find from the evidence that such was the consideration, you will find for the plaintiff.] I have already told you that if it was given for anything else whatever, it is void, and you ought to find for the defendant.

["The plaintiff gave in evidence a deed from Bloom, the payee in the note, to the defendant, by which he conveyed to her a house and lot of ground situate on Dorcas Street, in this town. The deed is dated March 6, 1865, the very day the note in dispute was executed. The consideration in the deed is \$2,200, and it is receipted for in the deed. Nevertheless the contention of the plaintiff is that the consideration money was not actually paid at the time, but that the disputed note was given to secure \$1,200 of the purchase money that remained unpaid. It is insisted that you ought to find this, in the absence of evidence that the note was given for some other consideration. The only evidence that we have of any transaction between these parties is the giving of the conveyance, and the execution of the disputed note.

"The principle on which the plaintiff relies for your verdict is that he has given evidence of a transaction to which the consideration of the note can be referred; and that you ought to do so in the absence of evidence indicating that it referred to some other transaction. It is for you to say under all the evidence whether the note was given for the purchase money of real estate. The defendant has given no evidence to show that the note was given for some other consideration, or that it grew out of a different transaction. This is the only transaction in which the parties are brought together by the evidence. It is true the defendant contends that the receipt in the deed shows that the consideration money was fully paid at the time of its execution. On the other hand, the plaintiff contends that the experience of every day life tells us that a receipt for the purchase money is contained in every deed; yet the truth is that obligations are often taken for the payment of the purchase money recited in the deed either in whole or in part.]

P.A.

"The whole evidence is for the jury. The plaintiff must satisfy you affirmatively by the evidence that the consideration of the judgment was the purchase money of the land conveyed. If he has done this to your satisfaction, you will find for him. If he has not, and you believe that the judgment was given for any other consideration whatsoever, you will find for the defendant."

The verdict was for the plaintiff; whereupon, the defendant took this writ and assigned as error the admission of the plaintiff's evidence and the portions of the charge inclosed in brackets.

Mr. J. A. McKee, for plaintiff in error: The deed from David Bloom and wife to Margaret G. Hamilton contained a receipt in full of the consideration money therein mentioned, signed by David Bloom, and was *prima facie* evidence that the property was paid for at the time of its delivery, and would have warranted the court in striking the judgment off as void.

Gibson v. Winslow, 46 Pa. 384.

The court threw the burden of proof upon the defendant, to show what the judgment was given for, and substantially held that unless the defendant could show some other business dealings between the parties to which this judgment could refer, it would properly be referable to this purchase from David Bloom. This was error.

But this judgment on its face shows that it could not have reference to the purchase money of the house and lot mentioned in the deed, for it provides for interest from a time before the conveyance was made. It is error to submit to the jury a fact of which there is no evidence.

Calvert v. Good, 95 Pa. 65.

There was no allegation of fraud, accident or mistake in making the judgment bond to draw interest from March 1, 1865, or in dating the deed on the 6th day of March, 1865; and the law declares the writings to be not only the best but the only evidence.

Martin v. Berens, 67 Pa. 459.

Every judgment against a married woman which does not show her liability on its face is void.

Sheayne v. Lyon, 87 Pa. 486; *Caldwell v. Walters*, 18 Pa. 79; *Keiper v. Helfricker*, 42 Pa. 325; *Steinman v. Ewing*, 43 Pa. 63; *Glyde v. Keister*, 32 Pa. 85; *Mahon v. Gormley*, 24 Pa. 88; *Dorrance v. Scott*, 3 Whart. 309.

The plaintiff must set out such facts in his pleadings as bring the case within some of the exceptions contained in the Act of April 11, 1848, in order to charge the real estate of a *feme covert*.

Parke v. Kleeber, 37 Pa. 251; *Murray v. Keyes*, 35 Pa. 384; *Loomis v. Fry*, 91 Pa. 396; *Huqus v. Dithridge Glass Co.* 96 Pa. 163.

It was only necessary for us to deny our liability, until it was shown affirmatively (either by the instrument itself or by an admission on our part) that this obligation was given for purchase money, in order to defeat this claim.

Hecker v. Haak, 88 Pa. 288; *Gould v. McFall*, 1 Cent. Rep. 853; *Quinn's App.* 86 Pa. 447; *Berger v. Clark*, 79 Pa. 340.

This judgment is not simply voidable. It is absolutely void.

Quinn's App. and Dorrance v. Scott, supra; Shwayne v. Lyon, 67 Pa. 436.

Messrs. D. W. Woods & Son, for defendant in error:

Cited and relied upon *Romborger's Admr. v. Ingraham, 38 Pa. 146.*

Per Curiam:

The evidence was sufficient to carry this case to the jury. It was submitted in a clear and correct charge. The law was correctly declared. There was more than a scintilla of evidence to justify the verdict. The presumption arising from clearly established facts was not rebutted by any evidence whatever.

Judgment affirmed.

COMMONWEALTH of Pennsylvania, *Plff.*
in *Err.*,
v.

William COOK.

SAME v. SAME.

1. Upon conviction of fornication and bastardy, a defendant may be sentenced to pay a fine of \$100, to pay the costs of prosecution, to give bond for the performance of any subsequent order of maintenance, and to stand committed until compliance.
2. Payment of lying-in expenses and an order of maintenance are not required to be imposed as part of the sentence; or at least it is not error to refuse to impose them after the defendant has been discharged from custody under the insolvent laws.
3. A defendant so convicted, sentenced and in custody may, after three months' imprisonment, obtain his discharge under the insolvent laws, without complying with any part of the sentence.

(Decided October 4, 1886.)

CERTIORARI to the Quarter Sessions of Warren County, to review a judgment discharging a rule to show cause why an additional sentence should not be imposed. *Affirmed.*

Certiorari sur appeal from a decree of the Common Pleas of Warren County, discharging an insolvent debtor. *Affirmed.*

The facts out of which these cases arose, as they appeared by the records were as follows:

William Cook, the defendant in error and appellee, was on December 3, 1884, indicted for fornication and bastardy, was convicted December 6, 1884, and sentenced, on December 13, 1884, to pay a fine of \$100 to the overseers of the poor of Warren County, or the commissioners of the Rouse estate, and the costs of the prosecution, to give bond with one or more sufficient sureties to said overseers, in the sum of \$500, to perform such order for the maintenance of said bastard child as the court should direct, and to stand committed and in custody until the sentence should be complied with.

The prisoner was accordingly committed and remained in custody until March 16, 1885, 886

when he was discharged upon giving bond to apply for the benefit of the insolvent laws.

June 1, 1885, he presented his petition in the Common Pleas of Warren County setting forth: "That he was arrested and detained in the custody of E. A. Allen, Sheriff of Warren County, by sentence of the Court of Quarter Sessions of Warren County, and that he was discharged from such custody by order of the court of common pleas, upon giving bond to the Commonwealth, with security approved by said court, conditioned to appear at this term of said court and present his petition for the benefit of the insolvent laws of the Commonwealth; * * * that he has resided within the Commonwealth for six months immediately preceding this application; * * * that he is willing to deliver up all his property for the use of his creditors, etc.; that his petition is accompanied with a statement of all his estate, effects and property, and also a statement of debts due by him, with a statement of the causes of his insolvency."

This petition and statements were duly verified. The petition was ordered to be filed, a day was fixed for a hearing, of which notice for three successive weeks was ordered to be given, and on July 27, 1885, upon proof of publication of notice of hearing for two consecutive weeks, the petitioner applied for a final order of discharge.

The Commonwealth thereupon filed an objection to the discharge "For the reason that the said William Cook has not been in actual confinement, in pursuance of sentence for fornication and bastardy, for a period not less than three months, the prisoner never having been sentenced for same according to law."

The court overruled the objection and, after the petitioner had taken the required oath and assigned to trustees, entered a decree discharging him.

On the same day and immediately after this decree was entered the Commonwealth moved the court of quarter sessions "To pronounce sentence upon the prisoner, by directing him to pay the expenses, if any, incurred at the birth of the bastard child, and by making such order for the maintenance of the said child as the court shall direct and appoint in addition to giving bond to comply with said order to pay the fine provided by law."

A rule to show cause was granted, and afterward discharged; whereupon, the Commonwealth obtained these two writs; and upon the *certiorari* to the quarter sessions assigned as error the action of the court in discharging the rule. Upon the *certiorari sur* appeal from the common pleas, the Commonwealth assigned as error that the court had no jurisdiction, under the insolvent laws, to discharge or give relief to a person confined by sentence or order of a criminal court, save for the causes specified in the forty-seventh section of the Act of June 16, 1836, and that the petition did not set forth such a cause.

Messrs. Geo. H. Higgins, Dist. Atty., H. H. Goucher and J. H. Donly, for Commonwealth, plaintiff in error and appellant:

It was the plain duty of the court of quarter sessions to sentence the defendant in accordance with the directions of the thirty-seventh section of the Act of March 31, 1860, which is mandatory and demands a compliance therewith in

four essential particulars, viz.: a fine not exceeding \$100, payment of the expenses incurred at the birth of such child, an order for maintenance, and a bond, with sureties, for the performance of such order.

Fornication and bastardy are, so far as the punishment is concerned, two separate and distinct offenses; for the sequent offense of bastardy may or may not follow the act of fornication; hence, the Legislature prescribed a fine for fornication, and an additional punishment for bastardy. The defendant was found guilty of both of these offenses on this indictment, and he is therefore subject to the punishment prescribed for each and both. The court below imposed a fine for fornication only.

The costs, and the lying-in expenses, and the maintenance of the child, are essential parts of the sentence in such cases.

Commonwealth v. Ahl, 43 Pa. 62; *Commonwealth v. Gurley*, 45 Pa. 392.

The sentence of the court must conform to the statute.

Daniels v. Commonwealth, 7 Pa. 371.

Security may be ordered for the performance of all the sentence, except the fine and costs.

Goddard v. Commonwealth, 6 Serg. & R. 282.

The errors appearing in the sentence upon the record in this case are manifest; and this court has ample power, under the first section of the Act of June 16, 1836, to either reverse, correct or remit to the court below, with directions that the same be corrected, and the sentence pronounced according to law.

Daniels v. Commonwealth, 7 Pa. 371; *Mills v. Commonwealth*, 18 Pa. 631; *Commonwealth v. Gurley*, 45 Pa. 392.

As the prisoner was confined under a defective and illegal sentence, that sentence afforded him no ground for seeking relief under the insolvent laws.

Messrs. Brown & Stone, for William Cook, defendant in error and appellee:

The defendant was sentenced to pay the fine and costs prescribed as a punishment for the crime, and to give the bond required by law as indemnity against the expense incurred or likely to be incurred as a consequence of his crime. This bond may be for the performance of all the sentence except the fine and costs.

Goddard v. Commonwealth, 6 Serg. & R. 282.

The court was correct in refusing to resentence the prisoner, as he was not then in custody and the term at which sentence was pronounced had expired; and hence, the time within which the sentence could be changed had passed.

The common pleas had jurisdiction of the petition for the benefit of the insolvent laws and the proceedings were legal.

By the Act of June 16, 1836, the court of common pleas of any county "in which any person may be confined for nonpayment of any fine, or of the costs of prosecution, or upon conviction of fornication or bastardy, and for no other cause, shall have power to discharge such person from such confinement on his making application and conforming to the provisions herein before directed in the case of insolvent debtors; *Provided*, That when such person shall have been sentenced to the payment of a fine, or after a conviction of fornication and bastardy, he shall not be entitled to

make such application until after he shall have been in actual confinement in pursuance of such sentence for a period not less than three months."

Purd. Digest, p. 784.

By the Act of January 24, 1849, it was provided that "Any applicant for the benefit of the insolvent laws, who is or may hereafter be in confinement under sentence of any criminal court and who shall be entitled to be released from such confinement, on a compliance with existing Acts of Assembly, shall be released on giving bond as in civil cases."

Id.

And in civil cases any judge of the court of common pleas or the prothonotary of such court may make an order for the discharge of any debtor on his giving bond to appear at the next term of the court of common pleas of said county and present his petition for the benefit of the insolvent laws, etc.

Id. 778.

Per Curiam:

These two cases were argued together. They arise out of the same transaction and are somewhat blended. Some slight errors and irregularities do appear, but they are not of such magnitude as to demand a reversal of either judgment or decree. Therefore,

Judgment and decree each affirmed and the appeal dismissed, at the costs of the appellant.

John F. DAVIS, *Plff. in Err.*,
v.

COMMONWEALTH of Pennsylvania.

1. An indictment for adultery which charges that the defendant, being a married man and having a lawful wife living, did have carnal connection with a woman, naming her, not his lawful wife, is sufficient, without setting out the name of the defendant's wife. Act of March 31, 1860.
2. A conviction will not be reversed for a mere formal defect in the indictment which might have been amended in the court below or might be amended in this court.

(Decided October 18, 1886.)

ERROR to the Court of Quarter Sessions of Jefferson County, to review a judgment on conviction of defendant of the crime of adultery. *Affirmed.*

On the 20th day of May, 1885, one John B. Haugh made an information before J. W. Walker, Esq., a justice of the peace, in which John F. Davis was charged with adultery with a certain Celesta Hawk, "not his lawful wife." In pursuance therewith a warrant was issued and the defendant arrested.

On September 17, 1885, a true bill was found. On September 18, 1885, a jury was called and before the jury was sworn, a motion was made by defendant's attorneys, to quash the indictment for the reason that the name of the alleged wife of the defendant was not set forth in the said indictment.

The motion was overruled by the court, and defendant pleaded not guilty. The jury was sworn and found defendant guilty in manner and form as indicted. A motion was made for a new trial and was overruled, and on November 12, 1885, defendant was sentenced.

Defendant took this writ, assigning as error the action of the court in overruling his motion to quash the indictment.

Messrs. White & Scott, for plaintiff in error:

"Every offense, of course, must consist of certain facts and circumstances. And the general rule of pleading is that all the material facts and circumstances comprised in the definition of the offense must be stated."

Arch. Cr. Pr. & Pl. 8th ed. p. 265; *Ree v. Horne*, Cowp. 683.

"If any one fact or circumstance which is a material ingredient in the offense, as defined by the statute, be omitted, the indictment will be bad."

Arch. Cr. Pr. & Pl. p. 267.

"The omission of any fact or circumstance necessary to constitute the offense will be fatal."

Whart. Cr. Pl. & Pr. § 153.

"In the indictment nothing material shall be taken by intendment or implication."

2 Hawk, P. C. p. 314.

No material fact could be left out, to be supplied by evidence; for the law requires "that the indictment should state the facts of the crime with as much certainty as the nature of the case will admit."

1 Chitty, 140.

In the case of *Commonwealth v. Corson*, 4 Clark, 315, it was held that an indictment for adultery, against a married woman, must set forth upon the record the name of her husband.

"It is not sufficient, in an indictment for a statutory offense, to lay it in the words of the statute, unless they expressly serve to allege the act, with all the necessary additions, and without the least uncertainty or ambiguity."

Commonwealth v. Miller, 2 Pars. 480.

Offenses created by statute, as well as offenses at common law must be accurately and clearly described in an indictment, and if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent; as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true intent and meaning of the statute defining the offense.

Justice Clifford, in *U. S. v. Cruikshank*, 92 U. S. 562 (Bk. 23, L. ed. 595); citing 2 East, P. C. 1124; *Dord v. People*, 9 Barb. 675; *Ike v. State*, 23 Miss. 525; *State v. Eldridge*, 7 Eng. (Ark.) 608.

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

Justice Gray, in *U. S. v. Carl*, 105 U. S. 612 (Bk. 26, L. ed. 1135); citing *U. S. v. Cruikshank*.

hank, above referred to: *U. S. v. Simmons*, 96 U. S. 360 (Bk. 24, L. ed. 819); *Commonwealth v. Clifford*, 8 Cush. 215; *Commonwealth v. Bean*, 11 Cush. 414; *Commonwealth v. Bean*, 14 Gray, 52; *Commonwealth v. Filburn*, 119 Mass. 297.

Mr. C. C. Benschoter, Dist.-Atty., for the Commonwealth.

Per Curiam:

The indictment before us charges that the defendant "then and there being a married man, and having a lawful wife living, did have carnal connection with a woman, Celesta Hawk, not his lawful wife." As the charge here recited strictly follows the definition of the crime of adultery as found in the thirty-sixth section of the Act of March 31, 1860, we think it was sufficient without setting out the name of the defendant's wife. In fact the eleventh section of the same Act so prescribes.

And without this, if it be admitted that the omission was a defect, it was but formal, and might, therefore, have been amended in the court below, or might be so amended even here now in this court.

The judgment is affirmed, and it is ordered that the record be returned to the Quarter Sessions, for the purpose of execution.

LAKE SHORE & MICHIGAN SOUTHERN R. CO., *Pff. in Err.*,

v.

Louis ROSENZWEIG.

1. The legal presumption of knowledge of the law does not extend to the by-laws and regulations of private corporations.
2. There is no legal presumption that a person about to become a passenger on a railway knows the rules and regulations of the railway company.
3. While a passenger is bound by reasonable rules and regulations not appearing on his ticket, his ignorance of regulations may excuse his acts done in violation of regulations unknown to him, so as not to constitute him a trespasser.
4. A passenger who enters a car by mistake is not a trespasser; and while the railway company may eject him, it must not put him off at an improper place.
5. Where a conductor ejects a passenger at an improper place, the company is liable for proximate injuries, or those which were the natural and probable consequence of the act of the conductor, such as under the circumstances of the case might and should have been foreseen by the conductor as likely to flow from his act.
6. In a proper case the jury may so find that the injury was the natural consequence of the conductor's act, although the plaintiff is unable to tell what caused his injuries.

7. The question of **contributory negligence** is for the jury where the evidence is conflicting.
8. Where an injury is inflicted willfully, or with reckless indifference to the rights of others, **exemplary damages** may be recovered.
9. In determining whether a conductor on a railway acted in reckless disregard of the rights of a passenger, the **jury may consider** that in ejecting the passenger the **conductor violated an express rule of the company**, calculated to promote the safety of passengers.
10. The **declarations** as to the location of pain and suffering, made to his **physician** by a party injured, are competent evidence in an action to recover damages for the injuries. (*Lichtenwallner v. Laubach*, 105 Pa. 866.)
11. Where the **claims of each party** are **stated with equal fairness**, it is not error for the court to state that the plaintiff claimed that his ejection was wrongful, wanton and inhuman.
12. A **judgment will not be reversed** on an assignment of a single sentence of a **charge of the court** as error when from the context it is plain there was no error and that the **jury could not have been misled**.
13. A **technical defect in the pleadings** which did not and could not mislead is not ground for reversal **after a trial on the merits**. The declaration, if it does not set forth the case with accuracy, is **amendable**.
14. **Evidence testing the recollection and credibility**, or showing the bias of a witness, is **admissible as cross examination**.
15. The **exclusion of evidence** is **no cause for reversal** where it is **admitted at a later stage of the trial**.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Erie County, to review a judgment on a verdict for plaintiff for \$48,750, in an action on the case. *Affirmed*.

The declaration recited that the defendant, a common carrier, etc., sold the plaintiff a ticket worded as follows: "The Lake Shore & Michigan Southern Railway, Erie to Cleveland and return; good only for thirty days from the date of sale, and for one continuous passage each way;" that the plaintiff paid for the same and was carried to the City of Cleveland, on November 25, 1883, on said ticket; and that the defendant, on November 26, 1883, received the plaintiff into its passenger car, as a passenger, to be safely carried to the City of Erie; that after having carried him a short distance, the defendant, by its conductor and agent, refused to accept the ticket and ordered the plaintiff to get off; that the plaintiff, objecting, tendered the fare for a passage from Cleveland to Erie, which the defendant refused; and the plaintiff then and there objecting and protesting against being ejected and put off, and urg-

ing, asking and insisting that he be carried at least to the first or nearest station and place of safety, the defendant wrongfully and unlawfully compelled the plaintiff to leave his seat in said car and train, it being in the night time and the place a dangerous one; it being upon and in the midst of many railway tracks, switches, rails, where many cars, engines, locomotives and trains pass and repass, and where freight trains were and are made up, and a place strange and unknown to the plaintiff; and being, against his will and protest, by the defendant negligently, carelessly and unlawfully placed and left in a dangerous and unsafe place, while endeavoring to seek a place of safety, was struck, etc., by moving trains, etc., and tripped, thrown and felled by rails and other implements and railway tools and machinery, and cut and bruised, etc.; and that the said plaintiff was further damaged and injured by the indignities to which he was subjected, in being driven, ejected and expelled from the said public highway, train and car.

The second count alleged that on November 26, 1883, the plaintiff was accepted, admitted and received into a passenger car, as a passenger, to be carried to the City of Erie, and, being so received, tendered the lawful fare, which the defendant refused, etc.

This count then proceeded substantially as the first count, claiming damages for bodily harm, pain, medical attendance, etc. The damages were laid in \$100,000.

On the trial before Galbraith, P. J., the plaintiff offered evidence in support of the averments of his narr. The defendant showed that numerous posters had been placed in the depots at Erie and Cleveland, giving notice that mileage and round trip tickets would not be accepted for passage on limited express train No. 20, the one from which the plaintiff was ejected.

The assistant ticket agent at Erie, Williams, testified that he had a conversation with the plaintiff before he took the train, in which he read the rules to him and discussed the posters.

Jacob Loesch testified in substance that the plaintiff got on the train surreptitiously, after it was in motion. The plaintiff contradicted these witnesses in his testimony, and alleged that he had no knowledge that his ticket was not good on the train which he took, and that he had previously used a round trip ticket on this train.

The further facts appear from the opinion of the supreme court or are recited in the assignments of error.

The court charged the jury, *inter alia*, as follows:

The duties and obligations and rights of the public and railroad companies are reciprocal, and arise from the necessities and public convenience involved; these companies have the right to adopt and enforce such reasonable rules and regulations as are suggested and required for the proper management of their business, and the convenient, safe and proper running of their trains; the public, on the other hand, have a right to be accommodated and fairly treated.

The rules and regulations for the government of the passengers traveling on these great thoroughfares must be reasonable and just. The passenger who purchases a ticket takes it

subject to these reasonable rules and regulations; and it is his duty when he purchases a ticket, to inform himself as to the train he proposes to enter, and to ascertain what his ticket entitles him to.

[If he fails to do this, and without any fault or neglect or violation of their own rules on the part of the railroad company by which such error is brought about, he takes a train on which his ticket is not good, he may be obliged to leave such train, he not being subjected to unnecessary force or being put off at a dangerous or improper place.] [The forcible ejection of a passenger from a train, especially at a point away from a station, or even at a station, is such an exercise of authority as should only be undertaken in a clear case; much more when the place is not at a station, and they have no right to eject a passenger at a place of danger, or where injury is liable to result.] *Sixteenth and seventeenth assignments of error.*

[Where a person knowingly violates the rules of a railroad by intruding upon a train without a ticket, or with a ticket that he knows does not entitle him to travel on such train, such person becomes a mere trespasser and is not entitled to the same care or consideration that should be given to one who unwittingly and ignorantly and innocently gets upon a train upon which his ticket does not entitle him to ride.] *Eighteenth assignment of error.*

[You are instructed, as a matter of law in this case, that it was Mr. Rosenzweig's duty to ascertain whether his ticket entitled him to a passage on the train in question before going upon it; and if he failed to do so the Company would have a right to carry out its rule and to eject him from the car, using no more force than was necessary, and putting him off at a safe place, in accordance with its own rule, which prohibited conductors from ejecting a passenger except at a station or near a dwelling house.] *Nineteenth assignment of error.*

[If the plaintiff, knowing that he was not entitled to ride on No. 20, and in willful violation of the rules of the Company, entered the train, then he would, I take it, be entitled to less consideration than he otherwise could claim: he would be a mere trespasser; the law would not hold the Company or its officers to so careful a line of conduct as in the case of a merely negligent but well meaning person who had ignorantly or carelessly entered the wrong train;] [but if he had been carried before on this train, on the same kind of ticket, and having no knowledge or notice that his round trip ticket was not good, he entered the car without any objection being made by the employees of the Company, whose duty it was to see that the door of the car was kept locked, and that persons not having the proper ticket were not allowed to enter, he could not afterwards be treated as a wrong doer and mere trespasser, and summarily ejected at such place as suited the caprice or temper of the conductor, and in violation of the rule of the Company which requires that passengers should not be put off except at a station, or near a dwelling house; and such ejection would be wrongful.] *Twentieth and twenty-first assignments of error.*

[It was the duty of the conductor to use discrimination, and not to treat as a mere trespasser and tramp and wrong doer, a passenger

who was merely guilty at most of an error of judgment or neglect to make the inquiries he ought legally to have made.] *Twenty-second assignment of error.*

The duty of the conductor was to comply with the rules of the Company and, if the plaintiff was without a proper ticket, to put him off at a station or dwelling house; and if he chose to treat the plaintiff as a mere wanton, wrong doer and willful trespasser, by ejecting him in the Company's yard, at a distance from the station and away from dwelling houses, and at a dangerous place, he took the risk for his employer of such ejection at such improper place, afterwards turning out to be a mistake.

[In this view of the case it becomes important for you to consider and determine as to the conflicting evidence of the plaintiff and Williams, and the plaintiff and Jacob Loesch; for, if their evidence is credited, the plaintiff must stand in a somewhat different position from that which he will occupy in case you find their evidence is unreliable, and that the plaintiff was merely ignorantly and innocently on the train, instead of being there surreptitiously and knowing him to be there without right.] *Twenty-third assignment of error.*

The plaintiff requested the court to charge, *inter alia*, as follows:

1. If the jury find from the evidence that the plaintiff purchased a first class ticket entitling him to ride from Erie to Cleveland and return; that he had no notice from the defendant that his ticket so purchased did not entitle him to ride on train No. 20; that the servants of the defendant, in violation of the rule of defendant, omitted to lock the doors of the car when in Cleveland, or to notify the plaintiff that he had no right to take a seat in said car; that they permitted him to take a seat in said car; that the servants of defendant ejected plaintiff from said car after the train had left the depot, when it was passing through the yard of defendant's railway; that said yard was considered by defendant to be a dangerous place; that plaintiff, when endeavoring with care to walk through said yard back to the depot, was hurt by a car or by falling into or over some obstruction, then, and in that case, your verdict should be for the plaintiff.

Answer. This cannot be affirmed as an entirety; the plaintiff was not entitled to notice that the ticket he held did not allow him to ride on the train in question; but if he had been previously carried on the train on the same kind of a ticket, and in good faith, without notice or knowledge on his part that he had no right to a passage on the particular train mentioned, and with permission and acquiescence of the employees of defendant, the plaintiff took a seat in a car of said train, and the employees of the defendant Corporation afterwards ejected him at a dangerous place, and the plaintiff, while using ordinary care and caution, in endeavoring to make his way through the yard back to the depot, received injuries such as should have been foreseen by the conductor of the train as the natural or probable consequence of leaving the plaintiff in such a place in the night time, the plaintiff is entitled to recover. *First assignment of error.*

2. That if the jury find from the evidence that the servants of the defendant ejected the

plaintiff from its cars, not at a regular station nor at a dwelling house, as required by the rules of the Company, but at a place known to the defendant to be dangerous and unsafe, then, and in that case, if they find for the plaintiff their verdict should be for punitive damages.

Answer. This is affirmed, with the single qualification that while the jury may, under such circumstances, find punitive or exemplary damages in favor of plaintiff, they are at liberty to find compensatory damages only, if they see proper. *Second assignment of error.*

The defendant requested the court to charge, *inter alia*, as follows:

1. That plaintiff was bound to ascertain and know the rules and regulations prescribed by the defendant Company, under which passengers could ride upon that train, and that the law presumes he did know them.

Answer. The first part of this point is affirmed; but the last is refused. It is true that the plaintiff was bound to ascertain the rules of the Company as to the train on which he took passage, but there is no legal presumption that he did so ascertain them. *Third assignment of error.*

3. The plaintiff in this action admits and testifies that he did not know and made no effort to ascertain whether, under the rules of the Company, his ticket entitled him to ride on the train from which he was ejected; if, therefore, the jury shall find from the evidence in this case that (under the established rules of defendant Company) the ticket that the plaintiff had purchased did not entitle him to ride on that particular train, then the court is requested to charge, as a matter of law, that, no special contract being averred or proved, the plaintiff became and was a trespasser on that particular train, and defendant had a perfect legal right to eject him therefrom, using no more force than was necessary for that purpose.

Answer. This is for the jury. Instructions should be asked for on a hypothetical case, and not by requiring the court to affirm or negative alleged facts as having been proven. The legal proposition included in this point is covered by the answer to the next point. *Fourth assignment of error.*

4. If the jury shall find, from the evidence in this case and within the law as it shall be given them by the court, that under established rules of defendant Company the plaintiff had no legal right to be on the particular train of defendant Company from which he was ejected, and was a trespasser thereon, then the court is requested to charge you as a matter of law that defendant Company was "not required to put him off at one place rather than another; while the law will not permit a person to be exposed wantonly to peril, there is no rule which requires any consideration to be shown for the mere convenience of a wrong doer" or trespasser; and if the jury shall find from the evidence in this case that plaintiff was a wrong doer and trespasser on said train, then plaintiff cannot recover in this action without averring and proving that the act was willful and wanton, which he has not done.

Answer. This is refused. It is for the jury to find from the evidence whether the plaintiff was a mere trespasser, wantonly and knowingly intruding on the train, aware of his having no

right to be there, or whether he was there innocently and ignorantly, in good faith, and through the negligence of the servants of the Company (defendant) in omitting to obey the rule which required them to take precaution against persons without proper tickets getting upon said train. The mere fact that the ticket held by plaintiff did not entitle him to be carried on that particular train, under the rules and regulations of the Company (defendant), would not, as assumed in this point, entitle the defendant's servants to treat him as a wrong doer or relieve the Company from treating him with care and humanity. *Fifth assignment of error.*

5. Plaintiff's right to recover in this action must be measured by the averments contained in his declaration; plaintiff has, in legal effect, alleged a right to recover based upon a contract which entitled him to a ride from Cleveland to Erie on the particular train from which he was ejected. The burden of proof is upon the plaintiff to show this. The court is requested to charge as a matter of law that plaintiff has wholly failed to prove such a contract, and therefore cannot recover in this action.

Answer. This is refused. The right of the plaintiff to recover in this action does not depend entirely upon his showing a right to ride upon the train in question. *Sixth assignment of error.*

7. That if the jury find from the evidence in this case that under the rules of the defendant Company the conductor could not receive a round trip ticket nor money from the plaintiff for a ride from Cleveland to Erie upon said train, the conductor had a legal right to put him off the train when he saw fit; and unless in doing so he used more force than was necessary, and that plaintiff was injured by the use of such unnecessary force, he cannot recover.

Answer. This is refused. The conductor had no right to put the plaintiff off the train except at a proper and safe place; and it is for the jury to say from the evidence whether the place where plaintiff was ejected was a proper and safe place or otherwise. *Seventh assignment of error.*

8. That under the evidence in this case the plaintiff was unlawfully upon the train, and therefore a trespasser, and the conductor had a perfect legal right to expel him from the train at any time he saw fit, and the defendant is not liable for any injuries that he received as the result of such legal expulsion; therefore the jury cannot consider the question of whether the plaintiff was in fact injured on his way back to the depot from the place where he was so put off said train, or the question in what manner such injury occurred, if it did occur. Refused. *Eighth assignment of error.*

9. Persons about to walk upon a railroad track, whether voluntarily or involuntarily, are bound to recognize all the natural and usual hazards of the undertaking, and make use of their sense of hearing as well as sight; and if either cannot be rendered available, the obligation to use the other is stronger, to ascertain while they are on or about the tracks whether a train is in dangerous proximity, or injury from any cause is to be apprehended; and if they attempt to walk in such a place without this precaution, it will be at their own peril and

responsibility, for the consequences cannot be shifted upon the defendant. Affirmed.

10. If the jury believe, from the evidence, that the plaintiff was left by the conductor in a reasonably safe place between the tracks of the defendant Company's road, he was bound as a prudent and careful man not to leave such place until he could find another equally safe, if such another could be found with reasonable diligence and care on his part; and if he failed to use such reasonable diligence and care, he was guilty of contributory negligence, and cannot recover. Affirmed.

11. If the jury find, from the evidence, that the tracks in the defendant Company's yard were lighted, artificially or otherwise, at the time and place when and where plaintiff was put off the car, so that a man of ordinary observation could see all the surroundings with reasonable clearness, and with reasonable care and prudence in observing his surroundings could have found the safe means of escape from the tracks of the Company's road; which the evidence shows existed, and did not use such reasonable care and prudence in seeking such means of escape from any dangers that may have then existed, he was guilty of contributory negligence, and cannot recover. Affirmed.

12. That if the jury find, from the evidence, that plaintiff was put off the cars without violence, and without any personal injury to him up to the time he was so put off, but that the injuries of which he complains were all received after he was so put off the cars, and in an attempt to reach the city or the depot, the plaintiff cannot recover, unless the jury find from the same evidence that the injury he did receive was the natural and probable consequence of the act of the conductor, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the conductor as likely to flow from his act. Affirmed.

13. That even if the conductor had no right to put the plaintiff off the car as he did, if he put him off without violence or immediate injury, and under an honest belief that he had a right to do so, and the alleged personal injury was received after he was so put off the cars, plaintiff cannot recover for the injury so received unless such injuries were the natural and probable consequence of the act of the conductor; such a consequence as under the surrounding circumstances of the case might and should have been foreseen by the conductor as likely to flow from his act. Affirmed.

14. If the jury believe from the evidence in this case that at Erie Street bridge there were two safe ways by which plaintiff could have traveled south to the city, one by the platform and stairway, on the south side of defendant's tracks, and another by the well defined pathway on the north side of the defendant's tracks, then it will not do for plaintiff to say that he did not know of them, for the law made it his duty to look around and know for himself that there were such places of safe travel; and if he neglected this obvious duty and pursued his way down the tracks and yard of the defendant Company, in consequence of which an injury resulted, then he was guilty of negligence con-

tributing to the injury, and he cannot recover in this action.

Answer. This is affirmed, with the qualification that the jury should examine the evidence carefully, plaintiff being a stranger at the place, and his evidence being that the conductor pointed towards the depot as a place of safety towards which he should make his way by the tracks. *Ninth assignment of error.*

15. If the jury shall find, from the evidence in this case, that on the north side of defendant's tracks at Erie Street there was a platform and stairway ascending therefrom to a bridge from which there was a safe way to escape from the tracks and all dangers incident thereto, and that on the south side of defendant's right of way there was a well defined pathway leading to other steps ascending to Erie Street, over and by either of which plaintiff could travel in safety southward to the city, and by the exercise of ordinary care and prudence on his part he might have discovered these safe methods of travel, then he was guilty of negligence contributing to the injury, and he cannot recover in this action. Affirmed.

16. The plaintiff has testified in this action that after being ejected from the train he walked down the tracks and towards the depot, without looking for a safe way of travel by way of the platform and stairway leading to the bridge at Erie Street. His admitted neglect in this regard was a violation of the duty that the law imposed, and was contributory negligence, and the plaintiff cannot recover.

Answer. I decline to affirm the matter of fact claimed in this point. It was the duty of the plaintiff to make every effort to secure his own safety; and if by this neglect to do so he sustained injury, he cannot recover. It is not for the court to affirm alleged points of evidence; that is for the jury. The proper way is to put a hypothetical case. *Tenth assignment of error.*

17. If the jury shall find from the evidence in this case that after plaintiff was ejected from the car he walked down the tracks of the defendant Company and negligently or otherwise placed himself in front of a moving car or train, or heedlessly ran into or on to something, in consequence of which an injury resulted, then the court is requested to charge, as a matter of law, that the plaintiff was guilty of negligence contributing to the injury, and cannot recover in this action. Affirmed.

18. If the plaintiff himself cannot tell how he received his alleged injuries, whether by a blow from a moving car or engine, or by a fall over some obstacle in his path, the jury cannot guess, speculate or infer how his alleged injuries were received, nor that they were the natural and probable consequence of the act of the conductor, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the conductor as likely to occur; and the verdict should be for the defendant.

Answer. While it is true that the jury cannot guess, speculate or infer as to how the plaintiff's injuries were received, yet if they believe from the evidence that such injuries were received by the plaintiff as the direct consequence of his expulsion from the train, and were such

injuries as might have been foreseen by the conductor as the natural or probable consequence of leaving the plaintiff at such a place, and that the inability of the plaintiff to testify as to the manner in which he was hurt, results from his having been rendered insensible at the time from such injuries, the fact that he is unable to give an account of the manner of his being so hurt should not of itself have the effect of defeating his claim. The point is therefore refused. *Eleventh assignment of error.*

19. The plaintiff having testified in answer to the following question to wit:

Q. Now, in your direct examination, as I understand you, you didn't know how you were hurt?

A. I have so stated, that I didn't know the exact cause. It was a blow from the rear, or I was struck from the rear; whether it was by a car or locomotive, or whether by the projection or whether from the shove I got, or whether a trip and a fall and falling and doing it; I don't know whether it was from the rear; I don't know what did it.

Q. You don't know whether you was hit by an engine or car, or whether you were sand-bagged?

A. No sir.

Q. Then it is altogether probable that the blow was the cause of the fall?

A. It may have been. I haven't any means of knowing.

Q. What is your best impression?

A. I couldn't say; I don't know.

Q. You haven't any impressions about it?

A. No sir.

And the foregoing being the uncontradicted evidence of the plaintiff himself, the court is requested to charge the jury that there is no evidence that the expulsion from the cars was the direct cause of the injury, and that therefore the plaintiff cannot recover for any injuries sustained after he was put off the cars.

Answer. This is refused for the reason just stated in answer to the eighteenth point of defendant, and for the further reason that it is not proper to require the court to read to the jury particular portions of the evidence in a case, and thus to give it undue prominence, besides affirming its correctness. The proper method is to put a hypothetical case. *Twelfth assignment of error.*

20. It being an undisputed fact that the plaintiff did not receive the injuries complained of in the act of his ejection from the car, but afterwards, he must satisfy the jury by the evidence how he received his alleged injuries; and unless he has done so he cannot recover.

Answer. This is affirmed, but not in the narrow sense of requiring the plaintiff to show the exact manner of his being hurt, if he is unable to do so. It is sufficient if the jury find from the evidence that the injuries were such as resulted and might have been foreseen as the natural or probable consequence of ejecting the plaintiff at night at the place where he was put off. *Thirteenth assignment of error.*

21. That under all the evidence in this case the plaintiff cannot recover and the verdict must be for the defendant.

Answer. This is refused. The case is for the jury under all the evidence. *Fourteenth assignment of error.*

The court admitted the following evidence of Dr. Brandes, the plaintiff's physician:

Q. What, if anything, during the time you were treating him, was said by him in relation to his feet?

A. He complained of coldness in his feet.

Objected to—that the statements of the plaintiff to his physician are not competent unless against his interest; and also objects to this testimony of what the plaintiff said to him; that the doctor is called as a medical expert, and that he is not to state the statements of the witness.

The court: The exclamations of pain and the statements of the patient to his physician, as to his suffering and the locality from which the suffering came, is competent evidence, and the objection is overruled. *Twenty-fourth assignment of error.*

The court excluded the following question and offer on the part of the defendant:

Q. Do you know of your own knowledge where Collin's puller was when No. 20 pulled out of the Union Depot going east?

Objected to as leading.

The court: That is leading and excluded.

Defendant's counsel offers this to find out whether the witness does know where the train was, to be followed by asking him, if he answers that he does know, where it was.

The court: It is a leading question and overruled because it admits of a yes or no answer. *Twenty-fifth assignment of error.*

The court allowed the following question to be asked defendant's witness:

Q. The fare from Cleveland to Erie was the same on all express trains for one through ticket from Cleveland to Erie, as on this Limited Express?

Objected to by the defense, as incompetent testimony and not cross examination.

The court: He has testified that this ticket was not good on that train; now that opens the door for you to cross examine him as to what trains it would be good on; and I don't know but what it would as to what the fare was on other trains, as testing his recollection and credibility as to that point; the question is allowed. *Twenty-sixth assignment of error.*

The court also allowed the following question to be asked defendant's witness:

Q. Didn't you say to Policemen Shaffer and Sandusky that Dr. Brandes was in "cohoos" with him?

A. No sir.

Objected to by the defense, that Dr. Brandes isn't on trial and that it is not cross examination.

The court: It is strictly cross examination. Any question that will show the bias or prejudice of the witness is always admitted. *Twenty-seventh assignment of error.*

Messrs. Rasselas Brown, John P. Vincent, C. D. Roys and S. M. Brainerd, for plaintiff in error:

A railroad company has a right to make and enforce all needful and reasonable rules and regulations for the management and operation of its road and trains.

Johnson v. R. R. Corp. 46 N. H. 213 and cases there cited; *State v. Overton*, 14 Neb. 485; *R. R. Co. v. Bartram*, 11 Ohio St. 457; *Cheney v. R. R. Co.* 11 Met. 121.

It is the duty of persons doing business with the company to inform themselves of the rules and regulations and to conform to them.

Dietrich v. R. R. Co. 71 Pa. 432; *R. Co. v. Clark*, 72 Pa. 231; *R. R. Co. v. Green*, 86 Pa. 421; *Oranford v. R. R. Co.* 26 Ohio St. 580; *R. R. Co. v. Whittemore*, 43 Ill. 421.

In case of purchasing a ticket it is the duty of a person to know on what train it can be used; the ticket is but a part of the contract for passage, the rules and regulations being the other part.

Dietrich v. R. R. Co., *R. Co. v. Clark*, *Crawford v. R. R. Co.*, and *R. R. Co. v. Whittemore*, *supra*.

The law imposing the duty of knowledge upon the passenger, there is a conclusive legal presumption that he had the knowledge.

Horan v. Weiler, 41 Pa. 470.

There can be no recovery unless there is negligence; and there can be no negligence without a breach of duty.

R. R. Co. v. Schwindling, 101 Pa. 258; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

A railroad company has the right to forcibly eject those who refuse to comply with reasonable regulations.

Hibbard v. R. R. Co. 15 N. Y. 455; *Townsend v. R. R. Co.* 56 N. Y. 295; *R. R. Co. v. Fleming*, 18 Am. & Eng. R. R. Cas. 347; *R. Co. v. Griffin*, 68 Ill. 499; *Frederick v. R. R. Co.* 87 Mich. 342.

It is always a question of law for the court, whether the admitted or uncontroverted facts, as they stand upon the record, constitute a legal cause of action.

Paddon v. People's Ins. Co. 107 Ill. 195; *R. Co. v. Lewis*, 109 Ill. 128; *Grooms v. R. R. Co.* 67 Me. 100; *Hoag v. R. R. Co.* 85 Pa. 293; *R. R. Co. v. Schwindling*, 101 Pa. 258.

To permit a jury to pass upon a fact admitted or unquestioned is to permit it to find a fact not admitted, and therefore to find a condition of things which is denied by both parties to the suit.

Hoag v. R. R. Co. 85 Pa. 297; *King v. Thompson*, 87 Pa. 369; *R. R. Co. v. Fries*, 87 Pa. 284; *Harrisburg v. Saylor*, 87 Pa. 216; *Goshorn v. Smith*, 92 Pa. 435; *Jennings v. R. R. Co.* 93 Pa. 337; *R. Co. v. Lewis*, 109 Ill. 128; *Paddon v. People's Ins. Co.* 107 Ill. 198; *Pleasants v. Fant*, 22 Wall. 116 (89 U. S. bk. 22, L. ed. 780).

The court assumed that the acts were willful and wanton. It should have been left to the jury.

R. R. Co. v. Harwood, 80 Ill. 88; *Payne v. Reese*, 100 Pa. 306; *Gramlich v. Wurst*, 86 Pa. 78; *Baker v. Fehr*, 97 Pa. 72; *Goshorn v. Smith*, 92 Pa. 435; *R. R. Co. v. Kirk*, 90 Pa. 15; *Harrisburg v. Saylor*, 87 Pa. 216.

It has never been judicially determined that the acts specified in the instruction constituted negligence.

R. R. v. Co. Kirk, 90 Pa. 19.

There was no cause of action made out under the declaration.

Frederick v. R. R. Co. 87 Mich. 342; *Hunter v. McHoe*, 100 Pa. 38, 41; *R. R. Co. v. Marcott*, 41 Mich. 433; *R. Co. v. Stark*, 88 Mich. 714; *R. Co. v. Robinson*, 106 Ill. 142; *East St. Louis Packing, etc. Co. v. Hightower*, 92 Ill. 140.

The plaintiff is bound by his pleading and

cannot enlarge the issue. The rule is "That if the pleader, though needlessly, describe the tort and the means effecting it, with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance which will occasion a nonsuit."

1 Chitty, Pl. 15th Am. ed. p. 362; *Bloomington v. Goodrich*, 88 Ill. 558.

Plaintiff's right of recovery must be confined to the particular negligence charged in the declaration.

R. R. Co. v. Mock, 72 Ill. 141; *R. R. Co. v. Robinson*, 106 Ill. 142; *R. R. Co. v. McKee*, 43 Ill. 119.

An allegation in a petition that a railway company carelessly, negligently, wrongfully and unlawfully ran its car over and killed the plaintiff's intestate does not amount to an allegation that the carelessness and negligence were willful; and the recovery must be confined to compensatory damages only.

Jacobs v. R. R. Co. 10 Bush (Ky.) 263; *Robinson v. Stokely*, 3 Watts, 270; *Stanfield v. Phillips*, 78 Pa. 73; *Johnson v. C. P. R. Co.* 51 Iowa, 25.

"Unlawfully" states only a conclusion of law and is mere surplussage.

R. R. Co. v. Dodge, 72 Ill. 253; *Kilgore v. Furgeason*, 77 Ill. 218; *People v. Village of Crotty*, 93 Ill. 180.

In some of the States, as in New Hampshire, exemplary damages, ultra compensation, are denied, changing the rule previously existing in that State.

Fay v. Parker, 53 N. H. 342.

Where there has been no oppression, fraud, wantonness or other circumstance to call for exemplary damages, these large verdicts are a violation of the rule of compensation.

Nagle v. Mullison, 84 Pa. 48; *P. R. Co. v. Kelly*, 81 Pa. 372; *R. R. Co. v. Schwindling*, 101 Pa. 258; *Cutler v. Smith*, 57 Ill. 252; *Pullman Car Co. v. Reed*, 75 Ill. 125; *R. Co. v. Beggs*, 85 Ill. 80.

Unless the injury has been wantonly inflicted, exemplary damages cannot be given and the jury must be confined to damages strictly compensatory.

R. R. Co. v. Books, 57 Pa. 389.

The act complained of must be the proximate and not the remote cause of the injury, to entitle the injured party to recover.

R. R. Co. v. Kerr, 62 Pa. 353; *Morrison v. Davis*, 20 Pa. 171; *R. R. Co. v. Keighron*, 74 Pa. 816; *Fairbanks v. Kerr*, 70 Pa. 90; *McGrew v. Stone*, 53 Pa. 436; *Hoag v. R. R. Co.* 85 Pa. 293; *Ryan v. R. R. Co.* 35 N. Y. 210; *R. Co. v. Valley*, 82 Ohio, 345; *Henry v. R. Co.* 76 Mo. 288.

If this conductor or any other, on a prior occasion, in violation of the rules of the Company and in neglect of duty, allowed the plaintiff or anyone else to ride on this train without being provided with the proper ticket, it gives to the plaintiff no rights, and cannot be made available by the court or jury to justify the conduct of the plaintiff or establish his right to recover against the Company.

R. R. Co. v. Miller, 40 Miss. 45; *R. R. Co. v. Kendrick*, 40 Miss. 374.

Messrs. S. A. Davenport, G. A. Allen and J. Ross Thompson, for defendant in error:

It is the duty of all to know the law, but when did it become a legal duty to know the rules of a railroad company? The case of *Horan v. Weiler*, 41 Pa. 470, has reference to statutory law.

Under the facts the plaintiff was entitled to a special notice of this regulation.

R. R. Co. v. Spiker, 105 Pa. 142; *R. R. Co. v. Greenwood*, 79 Pa. 373; *Maroney v. R. R. Co.* 106 Mass. 160.

Corporations, like natural persons, are liable in exemplary damages, when the facts of the case are of a character to warrant them.

Malecek v. R. Co. 57 Mo. 17.

The master is liable for the willful and even the malicious acts of his servants in the line of his duty, and exemplary damages may be given against the corporation for injuries inflicted by its servants, willfully or maliciously, and whether authorized or ratified by it or not.

Goddard v. R. R. Co. 57 Maine, 202; *Hopkins v. R. R. Co.* 36 N. H. 9; *R. R. Co. v. Slusser*, 19 Ohio St. 157; *R. R. Co. v. Larkin*, 47 Md. 155; *R. R. Co. v. Arms*, 91 U. S. 489 (Bk. 23, L. ed. 874); *R. R. Co. v. Bryan*, 90 Ill. 126, *R. R. Co. v. Donahue*, 70 Pa. 119.

It is proper to submit to the jury the question whether the conductor in putting plaintiff off was wanton, reckless and oppressive, and therefore the proper subject of exemplary damages.

Evans v. R. R. Co. 11 Mo. App. 468.

Conceding that the defendant had a right to eject the plaintiff from the train, we think it had no right to do it elsewhere than at some regular station on the road. Any rule or regulation of the defendant that requires or allows such an act to be done between stations, to a person in the condition of the plaintiff, thus subjecting him to the trouble and expense of going a number of miles in order to take another train, savors too much of vindictiveness to be reasonable.

Maples v. R. R. Co. 38 Conn. 561.

"It is a principle too well settled to require further elucidation that a person who, by mistake, gets on a passenger train other than the one which he intended to take, is, nevertheless, a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company."

R. R. Co. v. Gilbert, The Reporter, No 14, April 7, 1886; *R. R. Co. v. Powell*, 40 Ind. 37; *Baker v. R. R. Co.* 24 N. Y. 599.

When it is alleged that an injury arose from negligence, the question of the proximate cause is to be decided by the jury.

Hoag v. R. R. Co. 85 Pa. 293; *R. R. Co. v. McKeen*, 90 Pa. 123; *R. R. Co. v. Lacey*, 89 Pa. 453; *Drake v. Kiely*, 93 Pa. 492; *R. R. Co. v. Hope*, 80 Pa. 373; *Brown v. R. Co.* 3 Am. & Eng. R. R. Cas. 444; *Scott v. Hunter*, 46 Pa. 192; *R. R. Co. v. Brannen*, 1 W. N. C. 227.

Our case is parallel with *Allen v. Willard*, 57 Pa. 374.

Mr. Justice **Trunkey** delivered the opinion of the court:

On the 25th of November, 1883, the plaintiff purchased a ticket at defendant's station in Erie, good only for thirty days, for one continuous passage each way, from Erie to Cleveland and return. The next morning, between 1 and 2

o'clock, when he was about to take the limited express train to return to Erie, an employee of the defendant directed him to the day coach; he stepped in, sat down and quickly curled up and went to sleep. After the train had started he was awakened by the conductor's call for tickets, and instantly took from his pocket the ticket and a roll of money.

The conductor reached for the ticket, immediately said: "My orders are to put you off," grabbed the bell cord, pushed the ticket back, and said: "Your ticket is no good."

Then the plaintiff vainly endeavored to show the conductor that he was mistaken, offered money in payment of the fare, which was refused, and begged not to be put off at that place but to be carried to the next station; the conductor answered: "My orders are to put you off, and off you must get. I obey orders if I break owners. Come."

Thereupon the plaintiff followed the conductor out of the car, and on reaching the ground the conductor pointed to a light and said: "That will take you to the depot." The plaintiff started towards the light, soon saw it was on a locomotive, which ran by him. He then tried to get off the tracks; came against what he supposed was a freight train which he believed was just in motion; turned to pass around the train and in doing so passed another train back of it; then believed it was safer to go northward, and as he started he noticed a light to his left, a train of cars backing, and a single car moving; about the same time another engine passed him; and when he had crossed some tracks he was struck in the rear and fell, unconscious.

The condition on the face of the ticket, that it was good only for thirty days, was the only one of which the plaintiff had knowledge. He believed it was good on every train; had used that kind of tickets on the defendant's road for five or six years; never knew there was any discrimination in its use between trains, and had traveled on the limited express from Cleveland to Erie on such ticket, in March or April preceding the date of the injury. When he purchased this ticket and attempted to use it, he did not know there was any difference, as to the right to use it, between the limited express and other trains. Neither the ticket agent nor anybody else informed him that it was not good on the limited express.

Among the facts in this case the foregoing are testified by the plaintiff; and however much in some particulars his testimony may conflict with opposing testimony, and however strange it may appear that the plaintiff knew nothing of the regulations respecting the limited express trains, his credibility and the truth of his statements were for determination by the jury. All facts which the jury were warranted in finding must be kept in view in considering the alleged errors in the rulings of the learned judge of the common pleas.

If believed, the testimony of the plaintiff shows that he entered the day coach of the limited express, in good faith, by direction and apparent assent of the defendant's employees, without notice or actual knowledge that his ticket was not good on that train, until so informed by the conductor, and that he was put off the train in the midst of railway tracks on

which were moving and standing cars and locomotives, as soon as the conductor could stop, after seeing the ticket.

The plaintiff's ticket was evidence of the payment of his fare and of his right to be carried according to its terms. It did not express the whole contract. What it does set forth may be ascertained from the reasonable rules and regulations of the defendant; and the holder of the ticket is bound to inform himself of such regulations, respecting the conduct of trains and the rights of passengers. *Dietrich v. R. R. Co.* 71 Pa. 492.

The jury were instructed that the rules adopted by the defendant, limiting the passengers on the limited express to such as purchased special tickets, were reasonable; that it was the plaintiff's duty to ascertain whether his ticket entitled him to a passage on that train before going upon it; and that if he went on without a proper ticket the Company had the right to eject him, at a safe place, using no more force than necessary.

This was substantially repeated in response to the defendant's first, second and seventh points, with addition that it was not incumbent on the defendant to bring home to the plaintiff a knowledge of its rules and regulations. But the court refused to charge that the law presumes that the plaintiff did know the regulations and that therefore the conductor, if he saw fit, had the right to eject the plaintiff at an improper and unsafe place. Whether there is a legal presumption of such knowledge is the chief question raised by the assignments of error.

At the outset the defendant supports the proposition that the law presumes that the plaintiff knew of the regulations, by a most specious and ingenious argument. It is clear that an irrebuttable presumption is meant. The result of affirmance of the proposition is indicated in the brief thus:

"The law made it the duty of the plaintiff to ascertain, before taking a seat in the car, whether his ticket entitled him to ride on that particular train. * * * But whether as a matter of fact he knew this cuts no figure in this case. In legal contemplation he did know it. The law made it his duty to know it and being a duty which the law imposed, there is a conclusive legal presumption that he did know it."

The only case cited in support of such doctrine is *Horan v. Weiler*, 41 Pa. 470, where the rule was recognized that a breach of the laws of the State is not to be presumed against anyone, and the presumption is the contrary until proof overcomes it. That case gives no sanction to the proposition claimed; and the proposition is at variance with the decision in *R. R. Co. v. Greenwood*, 79 Pa. 373.

There, a rule was adopted and published that after February 1, 1873, passengers would not be carried on freight trains, except way freight, and not on way freight trains, unless they had tickets. Mrs. Greenwood got on the train without a ticket, and offered to pay the fare to the conductor; he refused to receive it and put her off about a mile from a station. She had been accustomed to ride on that train and to pay her fare to the conductor. She had no actual knowledge of the rule. Held, that the rule was reasonable; but the plaintiff having ridden

in the car before and after the making of the rule, without a ticket and without objection, the company should not turn her out at a distance from the station, without proof of express notice or actual knowledge of the rule forbidding anyone to enter the car without a ticket. Under the circumstances, putting up a notice at the station house was not sufficient. The question of legal presumption of knowledge by the plaintiff of the rule was not raised, and probably was not then conceived.

"Ingrance of the law which everyone is bound to know excuseth no one." Every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them; for this is indispensably necessary in order to prevent greater evils. Knowledge of the laws of the State is in all cases presumed, though in no case it perfectly exists, and in multitudes of cases does not exist at all in the concrete. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. *Whart. Ev.* § 1237.

But this legal presumption of knowledge has never been extended to the by-laws and regulations of private corporations. No necessity has been shown for judicial enunciation that there is a legal presumption, or a fiction of law that a person about to become a passenger or who has become a passenger on a railway knows the rules and regulations of the railway company.

A contract was made between the parties when the plaintiff purchased the ticket. Although he neglected to inform himself of all its terms, he was bound by them unless waived by the defendant. He cannot set up ignorance of them in order to establish rights not therein stipulated and implied. If he could, the defendant had no right at all to eject him from the train. Hence, in a proper sense, he was bound to ascertain and know the regulations of the defendant entering into the contract, and he had no greater rights thereunder than if he had acquired actual knowledge of its terms. As his contract gave him no right to ride on the limited express, the Company could lawfully eject him.

But under the facts which the jury were warranted in finding, the defendant was bound to treat the plaintiff as a passenger who by mistake had got on a train not included in the contract. He was entitled to the rights and privileges of a passenger, except as to limited express trains. He promptly exhibited his ticket, the evidence of his contract, to the conductor. As a passenger he was rightfully at the station waiting for a train to take him to the place named in the ticket, and entered the car designated to him by an official as the coach for passengers to Erie. There was neither gate nor closed door nor employee, to warn him that his ticket was not good on that train.

The plaintiff was at the station, a passenger. His entering the car was not like the case of a man entering the dwelling house of another unbidden. One is a public conveyance; the other is private and the occupant's home. A passenger who enters a car by mistake is not a trespasser who may be sued as such when he commits no actual injury; he has rights other than those of a trespasser. He may so conduct

himself as to become a trespasser, after being informed of his mistake.

The defendant is a carrier, and its cars are for the accommodation of travelers. It owes a duty to every passenger who, in good faith, purchases a ticket and enters any of its conveyances. If the conveyance is not going in the direction the passenger wants to go, or is one which by the contract the passenger has no right to take, its duty is to inform the passenger and put him off at a proper place. This principle was recognized in *R. R. Co. v. Schwindling*, 101 Pa. 258.

In that case the plaintiff was a child, went on the platform of the station and was injured, but was not there as a passenger, and had no business of any kind with the defendant or any of its agents or employees. The defendant was not liable because it owed no duty to the plaintiff. In the opinion it is remarked, as conceded, that when a person goes on the platform at a railway station as a passenger, or on business connected with the company, the company owes him a duty; and if he be injured by the negligent act of the company, he may recover damages.

There is no evidence of collusion or conspiracy between the plaintiff and any of the defendant's servants, to the end that he might wrongfully ride on the limited express. As regards the plaintiff, the acts of the persons in charge of the train were the acts of the defendant. As respects his rights, it is immaterial whether the servants of the defendant violated its rules by omitting to lock the doors of the car or to give him notice that he had no right to enter and take a seat; the doors were not locked and the plaintiff was not notified; and it was submitted to the jury to find whether he entered with the consent or acquiescence of the employees of the defendant.

A passenger who has an open way to an open car, going to the place to which he bought and holds a ticket, without knowledge that the ticket is not good on such car, is not to be treated as a wrong doer endeavoring to ride without payment of fare, or to ride on a car which he knows his ticket gives no right to enter.

If the plaintiff knew that his ticket was not good on that car, and that he had no right to enter without a special ticket, he was a trespasser, otherwise he was not; and the determination of this was fairly submitted to the jury.

For the reasons stated, the third, fourth, fifth, seventh and eighth specifications of error are not sustained. Nor need much be added with reference to the first specification. The plaintiff's first point was not affirmed as an entirety; but instead, the court gave full instruction on the matters suggested in the point. What the court said in the answer was the instruction, and was free of error. That instruction did not submit whether the defendant considered the place dangerous when the plaintiff was put off, but did submit whether he was ejected at a dangerous place.

If it be true that the plaintiff was ejected a little west of the bridge, the conductor pointing to a light, remarking that would take him to the depot, it is by no means singular that the plaintiff did not see the bridge, or that the jury found that amid the numerous railway tracks

and moving cars and locomotives, in the night time, it was a dangerous place for a stranger. And if he was ejected east of the bridge, there is testimony that it was amidst railway tracks, moving trains and locomotives, and of the efforts of the plaintiff to reach a place of safety.

All the defendant's points, from the ninth to the seventeenth, except the sixteenth, both inclusive, were affirmed. These need not be repeated. The jury in that way was fully instructed respecting the requisite care and duty of the plaintiff after he was ejected, and that any negligence on his part in looking out for his safety would defeat his claim for damages. These points are referred to as aiding to understand the instructions of which complaint is made. For instance, the fourteenth point sharply defines the duty of the plaintiff with respect to the safe ways at the bridge, and instructed the jury that if he neglected his duty he could not recover. But in the sixteenth point the court is asked to determine the fact of neglect and to direct a verdict for defendant. The fourteenth point was pertinent with reference to the testimony.

The plaintiff, since he was hurt, has learned the location of the bridge, and he thinks he was put off the car east of it; he has no recollection of passing under it; did not look for it; could have seen it had he looked for it; did not then know a bridge was there, and there was nothing to call his attention to a bridge. To have affirmed the defendant's sixteenth point would have been palpable error.

The defendant's eighteenth, nineteenth and twentieth points were rightly refused, with proper instructions on the subject suggested. If he was knocked down by a blow in his rear which rendered him unconscious, it does not follow that because he cannot tell what struck him, the jury may not find the fact that his injury was the direct consequence of a particular act. It was unnecessary to find whether he was struck by a locomotive or by a car; but it was essential that the jury should find that his injuries were the natural and probable consequence of the act of the conductor; such a consequence as, under the surrounding circumstances of the case, might and should have been foreseen by the conductor as likely to flow from his act.

It is said that these points were intended to squarely present the question of remote and probable cause. If the plaintiff was put off at a safe place and he wandered to a dangerous one, the cause was remote. So would it be, had he remained in the place of safety and some agency had brought his hurt. Was the place dangerous—not alone because of the railway tracks and switches, but of their use by trains, cars, locomotives and for the making up of trains? These were the conditions present which made the place dangerous, especially dangerous for a stranger in the night time.

While the plaintiff was trying to get out of that place he received the injury. There is as little reason for inference that he was hurt by a sand bag as there would have been had the blow killed him. It is probable that the jury inferred that one of the things which made the place dangerous struck him. There is where the defendant put him, and where he was hurt; the cause and effect were closely

connected, and by prudent circumspection and ordinary thoughtfulness the conductor could have foreseen that the plaintiff's injury was likely to happen.

Under the facts and circumstances which the jury could properly find, had the court ruled that the defendant was not liable by reason of remoteness of the cause of injury, it would have been equivalent to saying that it was wholly immaterial whether the plaintiff was ejected at a safe or a dangerous place, for in either case he could not recover.

The questions raised by the numerous alleged errors in the general charge have already been considered and only two of the specifications, the fifteenth and twenty-second, will be noted. The fifteenth complains of the following sentence: "The plaintiff further claims that the place where he was put off was a dangerous and improper place for putting off a passenger, and that his ejection was a wrongful, wanton and inhuman act on the part of the conductor and wholly unjustified by the circumstances."

The defendant characterizes this as unwarranted, unjust and unfair; that there is no such averment in the declaration, nor was evidence thereof introduced at the trial; and that the statement was calculated to poison the minds of the jury. It is true that the phrase "wanton and inhuman" is not in the declaration; but each count avers that in the night time, the plaintiff urging, asking and insisting that he be carried at least to the nearest station and place of safety, the conductor compelled him to get off at a dangerous place, "it being upon and in the midst of many railway tracks, switches, trains, cars, engines, locomotives, and where trains of freight were and are made up, and where trains, cars, engines and locomotives pass and repass, and at a place strange and unknown to the plaintiff."

The plaintiff claimed that there was testimony tending to prove that averment; and very likely orally, at the trial, spoke of the act of ejecting him at such a place as wanton and inhuman. But whether he did so qualify the act or not, the court merely stated the claim, without alleging or asserting anything, or indicating that it was sustained by proof. With equal fairness the claims of each party were stated. If the averment in the declaration be true, was not the act of the conductor inhuman?

The twenty-second specification complains of the following:

"It was the duty of the conductor to use discrimination, and not to treat as a mere trespasser and tramp and wrong doer, a passenger who was merely guilty at most of an error of judgment or neglect to make inquiries he ought legally to have made."

That proposition is sound. If the jury found that the plaintiff was a passenger, merely guilty of error of judgment and neglect to make the inquiries he ought to have made, then he was not to be treated as a trespasser and wrong doer. In exercising discrimination the conductor would note his conduct, whether he had or had not a ticket, or whether he was able and willing immediately to pay the fare. If he acted as a trespasser and wrong doer, and not as a passenger who had made a mistake, he could not complain of the treatment he thus invited.

With the context, it is plain that the jury could not have understood that sentence as an instruction that the plaintiff was a passenger only guilty of error of judgment and neglect. In the sentence immediately preceding, the court charged that if the plaintiff, knowing that he was not entitled to ride on that train and in willful violation of the rules of the Company, entered the train, he was a mere trespasser. And the jury were repeatedly told they were to determine every question of fact.

There was no error in the refusal of defendant's fifth point. The second count alleges no contract other than is implied by accepting the plaintiff as a passenger, without his having a ticket, and charges that his tender of the fare was refused and that he was wrongfully ejected at a dangerous place. His right to recover, under the pleadings, did not depend on showing a right to ride on the limited express. He was bound to show and did show that he was a passenger, and as such if, by the omission of the defendant's employees to warn him that he could not rightfully enter that train without a special ticket, he entered it by mistake, he was entitled to the treatment due to a passenger, though not entitled to ride on that train. It is clear that the cause was tried on its merits; and if it be that the declaration does not set forth the case with accuracy, it is amendable. A mere technical defect, that did not and could not mislead, is no ground for reversal.

The twenty-fourth specification is not sustained, for reasons stated in *Lichtenwallner v. Laubach*, 105 Pa. 366.

Were it conceded that it was error to exclude the question made the subject of the twenty-fifth specification, there is now no cause for complaint; for, at a later stage in the trial, the defendant recalled the witness, who corrected the alleged mistake and was examined and testified fully on the very point to which the overruled question was directed.

Manifestly, there is no error in the rulings made the subjects of the last two specifications.

The remaining specification which will be remarked alleges error in the qualified affirmation of the plaintiff's second point: "That if the jury find from the evidence that the servants of the defendant ejected the plaintiff from its cars, not at a regular station nor at a dwelling house, as required by the rules of the Company, but at a place known to the defendant to be dangerous and unsafe, then and in that case, if they find for the plaintiff, their verdict should be for punitive damages."

The jury were instructed that under such circumstances they could find punitive damages or only compensatory damages. In considering other points, reference has been made to the averments and evidence touching the time, place and circumstances of the plaintiff's ejection.

It is uncontroverted that the rules referred to in the point existed, and respecting them the defendant well says: "But the rules of the Company were not established for the benefit of trespassers; they were established for the protection of the public and for the benefit of those with whom they stand in contractual relation." It is unnecessary now to consider whether the Company may put off a trespasser

to whom it owes no duty, at a place where there is probability that he will be killed.

Very little stress need be put on the existence of said rules, reasonable as they are, directing only such treatment as ought to be given to passengers were no such rules expressly adopted. That they are for guidance of the employees, in the putting off passengers who have no right to ride on the trains which they have entered, is obvious. If they had a right on the train there would be no occasion to put them off. But in determining whether the conductor acted in reckless disregard of the plaintiff's rights, the jury ought to have kept in view the fact that he violated an express rule calculated to promote the safety of passengers and those having contractual relations with the defendant.

This conductor committed no battery. He made no threats. He acted quickly. A glance at the ticket, a pull of the bell rope, the stopping of the train, a deaf ear to the plaintiff's entreaties to be carried to a place of safety, a few significant words, and the plaintiff followed him to the ground, there to be pointed to a light towards the depot, but not to a bridge or any safe way out of his peril. If there was no willful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him there could be little question that the jury would be permitted to give exemplary damages.

The liability of railway and other corporations to exemplary damages for gross negligence is well settled. The general rule in cases for negligence is that only compensatory damages can be given. Juries are not at liberty to go farther than compensation, unless the injury was done willfully or was the result of that reckless indifference to the rights of others which is equivalent to a violation of them. There must be willful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences. *R. Co. v. Arms*, 91 U. S. 489 [Bk. 23, L. ed. 374].

The Corporation is liable for exemplary damages for the act of its servant done within the scope of his authority, under circumstances which would give such right to the plaintiff, as against the servant, were the suit against him instead of the Corporation.

Judgment affirmed.

An application for reargument was subsequently made herein and refused.

William WHITE, *Plff. in Err.*,
v.

WESTERN ASSURANCE CO. of Toronto,
Canada.

Keeping a barrel of crude petroleum in a shed adjoining a foundry, to supply, through a connecting pipe, fuel to a steam boiler within the foundry, is a breach of a condition in the fire insurance policy on machinery, tools, etc., in the foundry which stipulates that the policy shall become void "if in said premises there be kept gunpowder, fireworks, nitroglycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naph-

tha, gasoline, benzine, benzole or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils, without written permission in this policy (except the use of refined coal, kerosene or other carbon oil for lights, if the same be drawn and the lamps filled by daylight)."

(Decided October 4, 1886.)

ERROR to the Common Pleas of Warren County, to review a judgment on a verdict for the defendant in an action of covenant upon a policy of fire insurance. *Affirmed.*

The facts, as they appeared at the trial before BROWN, P. J., are stated in the charge as follows:

"On the 12th day of April, 1883, the plaintiff, William White, obtained a policy of insurance from the defendant, insuring property that belonged to him, consisting of patterns, tools, shafting, machinery, etc., belonging to a foundry, against loss by fire. About a month after the insurance was effected the premises burned, and the property of plaintiff was destroyed. A portion of it, at least, was destroyed or injured. By an arrangement between the plaintiff and the defendant, which had reference only to the actual amount of the loss, it was determined that the amount was \$448.

"The defendant now makes defense, alleging that under the terms of the policy of insurance this contract of insurance was void. That is based upon this provision in the policy, which we say to you was part of the contract between the plaintiff and the defendant: 'If in said premises there be kept gunpowder, fireworks, nitroglycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils, without the written permission in this policy (except the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight), then and in every such case this policy shall become void.'

"Parties who come into court basing their rights upon a contract have a right to recover only upon the strength of that contract. And if it be that the facts in this case show that the plaintiff, in violation of the terms of the policy of insurance, has kept petroleum upon the premises in which the property insured was contained, then the policy is void.

"The evidence is that, from the making of the policy of insurance down to the time of the fire, a barrel of petroleum was kept within a distance of from five feet to six feet of the boiler that propelled the engine used in the foundry; that it was kept outside of the building itself, in a shed adjoining the building, the wall or side of which formed one side of the shed; that, by a pipe connected with the barrel, the oil was conducted to the fire pan under the boiler.

"This use appears from the evidence to have been habitual.

"[It seems to us that the storing of this oil, although it may have been outside of the building, it being in a shed adjoining and connected

with the building, is to be taken as a part of the building itself, and so made by the insured; but whether this be so or not according to the undisputed evidence, there was a continuous and habitual use of the oil, and the habitual keeping of it in the pipe at least, that led from the barrel to the fire box and upon these premises.]

"While it would please us much better to have before us a case where the plaintiff would be entitled to indemnity for his misfortune, it is our duty to lay down the law to you as we consider it to be.

"[Taking the stipulation contained in this policy, we cannot regard it as anything other than an agreement on the part of the plaintiff that if in said premises there be kept petroleum, then this policy shall be void; and we cannot, under the evidence, come to any other conclusion than that the plaintiff did keep petroleum in the premises. Although we are reluctant to take this view of it, we deem it our duty to say to you that the plaintiff is not entitled to a verdict.]"

The verdict and judgment were for the defendant; whereupon, the plaintiff took this writ and assigned as error the portions of the charge enclosed in brackets.

Messrs. Wilbur & Schnur, for plaintiff in error:

The first clause of the condition prohibits certain articles to be kept in the premises, among which is petroleum. The second clause prohibits certain articles to be kept or used. The use of petroleum is not prohibited in the terms of the second clause. Having used the term "petroleum" in the first clause, if it had been intended to include petroleum in the second clause, as one of the articles the use of which was prohibited, the term "petroleum" would have been used.

Mears v. Humboldt Ins. Co. 92 Pa. 15.

Not being prohibited, its use was permitted for such purposes as were incident and necessary to carry on the business insured; and the storage in a barrel outside the building, with a pipe leading into the building, under the boiler, to hold and conduct the oil to the fire, was absolutely necessary and incident to its use, and not a keeping of petroleum in the premises, within the prohibitory terms of the policy.

Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. 66; *Grandin v. Rochester G. Ins. Co.* 107 Pa. 26; *Citizens Ins. Co. v. McLaughlin*, 53 Pa. 485; *Harper v. N. Y. Ins. Co.* 22 N. Y. 443.

Mr. R. Brown, for defendant in error:

The prohibition being general that petroleum shall not be kept on the premises, the exception for its use should be equally broad. There is no clause which permits it to be used as fuel; and the use of it for light is coupled with stringent restrictions.

Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. 64, rules this case. The assured kept a barrel of petroleum on the premises for use in lighting his store and for retail sale; and it was held that the policy was void and that the knowledge of the agent of the insurer at the time of the insurance did not affect the condition in the policy. The fact that carbon oil was usually kept in a country store for sale did not avoid the prohibition.

To the same effect are *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. 497; *Steinbach v. Fire Ins. Co.* 13 Wall. 183 (80 U. S. bk. 20, L. ed. 615); *Whitmarsh v. Charter Oak Fire Ins. Co.* 2 Allen, 581; and *Westfall v. Hud. Riv. Fire Ins. Co.* 12 N. Y. 289.

Mr. Justice Gordon delivered the opinion of the court:

This was an action of covenant on a policy of insurance dated April 12, 1883, by which the defendant undertook to insure against loss by fire, the machinery, tools, patterns, etc., belonging to the plaintiff, in and about an iron foundry which was held under a lease from one James Lighty. The assured property, together with the foundry, was destroyed by fire on the 12th of May, just one month after the date of the policy.

The defense was that this policy became and was made null and void in consequence of a breach, by the assured, of the following condition: "If in said premises there be kept gunpowder, fireworks, nitroglycerine, phosphorus, saltpeter, nitrate of soda, petroleum," etc., "then and in every such case this policy shall become void."

The admitted facts are that petroleum was used as fuel for the engine by which the machinery of the foundry was driven, which fuel was drawn from a tank or barrel kept in a shed united with and so made to form part of the main building, and, as one of the witnesses says, some five or six feet from the furnace. The oil was conducted from the barrel by a half inch pipe to the place of consumption, an iron pan in or under the boiler; and as this fuel was drawn from the barrel, a fresh supply was furnished as necessity required.

We may here observe, *obiter*, that while there are devices by which petroleum can be and is used as a fuel for raising steam, with perfect safety, that above described is certainly not one of them. Nevertheless, it is not for us to determine whether a fuel of this kind, and so used, was more or less dangerous than wood or coal.

The only question for us is whether the keeping of a barrel of petroleum in the insured premises was such a breach of the condition in the policy as released the Company from its obligation. We are always unwilling to enforce a forfeiture when such result can be avoided; nevertheless, when the intention of the parties is plainly expressed, that intention must be regarded as the law of the contract; and we cannot lawfully ignore it, even to prevent a forfeiture. But as to the parties before us, the unequivocal agreement, as found in the policy, is that the keeping of petroleum in the premises insured shall render that policy null and void.

That petroleum was so kept is not denied; and this, not as in the case of *Mears v. Humboldt Ins. Co.* 92 Pa. 15, temporarily and for casual use, but habitually and for constant use.

Nor was it, as in the *Citizens Ins. Co. v. McLaughlin*, 53 Pa. 485, an article of such vital necessity in the conduct of the business of the insured that its use could not be ignored, and, therefore, must have been recognized as a matter not subject to the condition.

Petroleum, however convenient and economical, was certainly not a fuel without which the

foundry could not have been run, since its place could well have been supplied by wood or coal. What shall we say then? That the contract of the parties shall not stand? But on what ground can we justify a conclusion such as this? The parties were *ex jure*; no fraud is alleged, nor is the condition even unreasonable. The Company was not willing to insure against so dangerous a commodity as petroleum, and therefore expressly forbade, not only its use but even its presence on the property, and under and subject to this condition the plaintiff accepted the policy.

Under such circumstances were we to reverse the court below we must not only disregard the contract of the parties, but also overrule our own cases of *Birmingham Fire Ins. Co. v. Kroehler*, 88 Pa. 64, and *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. 497, which in principle rule the case in hand.

The judgment is affirmed.

John W. RHOADS, *Plff. in Err.*,

v.

COMMONWEALTH of Pennsylvania.

1. While a **general verdict of guilty** under an indictment will presume that

all the elements of the offense have been found, a **special verdict must find all the facts** essential to support the charge.

2. And while a **verdict of guilty of selling liquor without a license** is sufficient where the indictment charges the defendant with selling liquor without a license, generally, and as an ordinary person, it is **not sufficient where the defendant is indicted specifically as a druggist** for selling liquor without a license, to be used as a beverage; and sentence on such a verdict will be set aside.

3. Where the defendant is in jeopardy under the indictment and evidence, he **cannot be again tried under the same indictment**; and he will be discharged without day in such case, where the original proceedings are reversed.

4. The defendant in this case was **sentenced by the court below under the Act of April 12, 1875.**

(Decided October 4, 1886.)

ERROR to the Quarter Sessions of Clearfield County, to review a judgment on a verdict

NOTE.—It is an interesting question how far the Act of 1875 has modified the previous legislation in regard to the imposition of penalties.

The decisions on this point are few and the discussions of the question meager. The point was presented in *Flack v. Commonwealth*, 2 Chest. Co. Rep. 386; S. C. 3 Pennyp. 406.

In that case the defendant, who was a bottler of beer, was convicted of selling malt and brewed liquor without a license, and sentenced to a fine of \$200, under the Act of April 12, 1875. The supreme court, in a *per curiam* opinion, affirmed the judgment on the opinion of the court below. The question of the penalty, however, was not discussed in the opinion below and not referred to by the supreme court; and the point does not seem to have been discussed by counsel, although made one of the assignments of error.

The question came up again in *Seifried v. Commonwealth*, 101 Pa. 200; *Judge Trunkley* there says: "The penalty [of the Act of 1875] is expressly denounced against those who violate this law; and the indictment may properly charge that the offender sold without license." The Act of 1875 declares that none of its provisions shall authorize the sale of intoxicating liquors in any municipality having special prohibitory laws, and in the entire Act there is no sign of intentment to repeal vindictory parts of such laws.

Sifred v. Commonwealth, 104 Pa. 179, decides that the Act of 1875 did not repeal the penalty under the Act of February 26, 1855, prohibiting the sale of liquor on Sunday. *Mercur, C. J.*, says: "The Act clearly indicates an intention to present separately the different requirements of the law and to provide a specific penalty for the violation of each. Thus the punishment prescribed in section 4 was designed to apply to violations of the law under previous sections of the Act. Section 6 made certain Acts a crime and immediately provided a specific penalty therefor. In like manner section 7 created an offense and prescribed the penalty to be imposed on the offender."

"No section prior to section 11 in any manner refers to any of the offenses therein stated. We are satisfied there was no intention to subject a person guilty of the act mentioned in the 11th section to the penalties prescribed in the fourth section. The reasonable conclusion is that section 11 was added through abundance of caution to negative any presumption that the licenses granted under sections 2 and 3 would authorize the sale of liquor on any of the days mentioned in section 11."

"The Act of 1887 is not repealed by the Act of 1875. While it does repeal the Act of 1872, it does not refer to the Act of 1867. And since the Act of PA.

1867 expressly forbids the sale of liquors without license, it seems there would be no necessity of implying a prohibition in the first three sections of the Act of 1875. This Act does forbid sales on Sunday, sales to minors, sales by nonresidents, etc., but it does not forbid sales without license. If the punishment pronounced on offenders in the fourth section extends to those who offend against the eighth and eleventh sections, the fourth section has sufficient operation. And that it cannot refer to the preceding sections only, seems to follow upon these considerations, viz.: that the preceding sections could only be violated by a sale without a license. Then the penalty would be solely and only for sales without licenses.

"Now, remembering that we are endeavoring to ascertain the intention of the law maker, we see at a glance that there is a different punishment for a second offense, for those who sell with a license and those who sell without a license, for the latter class is to be imprisoned, while the former class forfeits the license. The section then intends to punish as well licensed as unlicensed offenders. But if it intends to punish licensed offenders, how can its operation be restricted to violations of the preceding sections only, which certainly do no more than, even if they do as much as, forbid sales without licenses? Druggist, too, selling as a beverage, are to be punished as unlicensed offenders. They are simply 'unlicensed offenders,' and are not to be liable to 'conviction and punishment as aforesaid,' which is the language of the twenty-eighth section of the Act of 1866, P. L. 206, which was the model for the fourth section of the Act of 1875. This departure has some significance."

In *Commonwealth v. Speck*, 1 Pa. C. C. Rep. 633; *Rowe, P. J.*, of the Thirty-Ninth Judicial District says: "The Act of 1875, repealing the Local Option Law, did not contemplate a complete system of provisions regulating the sale of intoxicating liquors. It does not seem to be a complete system, upon a general view of it; it does not, in terms, repeal any former law, and the tenth section which prescribes the condition of the bond to be given, makes it cover not only violations of the Act itself, but of 'any other law relating to selling or furnishing intoxicating drinks.' The Act of 1875 concerns itself only with sales."

Butler, P. J. of the Fifteenth Judicial District of Pennsylvania, now U. S. District Judge for the Eastern District of Pennsylvania, held that the Act of 1875 repealed the provisions of the Act of 1867 as to penalties.

Commonwealth v. Lovett, 2 Pa. C. C. Rep. 800. See also the penalties recited in *Chester Co. Law Library v. Chester Co.* 1 Ches. Co. Rep. 181. [J. M.]

of guilty, on an indictment for violation of the liquor laws. *Reversed.*

Reported below, 1 Pa. C. C. Rep. 639.

The first count of the indictment set forth "that John W. Rhoads, druggist, * * * did keep a tipling house, without any license so to do first had and obtained according to law; and then and there, without such license, commonly, willfully, unlawfully and publicly did sell, utter, trade and furnish and caused to be sold, uttered, traded and furnished to (parties named) and to sundry other persons, divers quantities of whisky, brandy, rum, gin and other spirituous and intoxicating liquors to be used as a beverage, to the evil example of all persons in like manner offending, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

The second count of the indictment charged a similar selling to minors. On the trial the court instructed the jury that the evidence was not sufficient to warrant a conviction on this count.

The jury found the following verdict: "We find the defendant guilty of selling liquor without license."

The defendant moved in arrest of judgment and for a new trial. Afterwards, by leave of court, the motion for a new trial was withdrawn. The court overruled the motion in arrest of judgment and proceeded to judgment on the verdict and pronounced the verdict as follows: "And now, March 8, 1886, sentence of the court is that you, Dr. J. W. Rhoads, pay a fine of \$300 and cost of prosecution, or give bail to do so within thirty days; and that you are in the custody of the sheriff until sentence is complied with."

The assignments of error were as follows:

1. The court erred in proceeding to judgment on the verdict, and pronouncing sentence upon the defendant as above.

2. The court erred in not discharging the defendant as having been tried and acquitted of all the offenses legally alleged against him in the indictment.

Messrs. McEnally & McCurdy, for plaintiff in error:

The Act of 1856, P. L. 200, comprises a general license law. It gives a full exemption from its provisions to a certain class of druggists and apothecaries.

Section 5 of the Act of 1856 provided "That the provisions of this Act shall not extend to druggists and apothecaries who shall sell unmixed alcohol, or compound or sell any admixtures of wine, alcohol, spirituous or brewed liquors in the preparation of medicines, or upon the written prescription of a regular practicing physician; *Provided*, That no druggist or apothecary shall sell or keep for sale any preparation or admixtures as aforesaid that may be used as a beverage; and any violation of this section shall be punished in the manner prescribed in the twenty-eighth section of this Act."

The twenty-eighth section contained this provision: "And any keeper of any drug or apothecary store, confectionery, or mineral or other fountain, who shall sell any spirituous, vinous, malt or brewed liquors, mixed or pure, to be used as a beverage, shall be deemed guilty of a

misdemeanor, and liable to conviction and punishment as aforesaid."

The Act of 1858, P. L. 367, repealed expressly section 28 of the Act of 1856. This repeal, however, did not affect section 5 of the Act of 1856 or the punishment prescribed therein.

Lackawazen Turnpike Co. v. Commonwealth, 9 Pa. 20.

The Act of 1867, P. L. 41, expressly provides that it shall not be construed to repeal the provisions of the Act of 1856 relating to sales by druggists and apothecaries.

The Act of 1875 which repealed the Local Option Law of 1872, P. L. 49, re-enacted section 28 of the Act of 1856, as follows: "And any keeper of any drug or apothecary store, confectionery, or mineral or other fountain, who shall sell any spirituous, vinous, malt or brewed liquors, mixed or pure, to be used as a beverage, shall be deemed guilty of a misdemeanor, and liable to the same conviction and punishment as unlicensed offenders."

In our view, the object of the law in respect to druggists and apothecaries was to prohibit them from selling spirituous or intoxicating liquors of any kind, to be used as a beverage or common drink, but, at the same time, to allow them to furnish such things to the public as fully as they were needed for mechanical or medicinal purposes.

There are two ways in which such druggists or apothecaries might abuse their privileges: the one was, under the false pretense of furnishing medicine, to furnish admixtures of spirituous liquors as a beverage, under the name of tonics and bitters, etc. The proviso in section 5 of the Act is intended to forbid such conduct and to provide the remedy and punishment.

The other way would be by selling intoxicating and spirituous liquors to be used as a beverage. This is forbidden by section 28 of the Act, and it also provides the remedy for its violation. We think that this provision of the law would be violated whenever the druggist sold spirituous or intoxicating liquors for the purpose of being used as a beverage or common drink, even if there was some pretense used to cover up that purpose. But under this section it would be necessary to prove beyond a reasonable doubt the purpose or intention of the druggist when he sold it; that is, that he sold it to be used as a beverage.

Section 5 of the Act of 1856 is not affected by the Act of 1875. The penalty prescribed for its violation is not to be found in the Act of 1875. This latter Act only provides for the punishment of sales that are contrary to its own provision. The only offense of the keeper of a drug store or apothecary store that could be against that law would be the sale of spirituous, vinous, malt or brewed liquors, to be used as a beverage. Under both the Acts of 1856 and 1858, the fine for the first offense is not less than \$10 nor more than \$100.

When a defendant has been once tried for an offense, upon an indictment on which he could have been legally convicted and sentenced, he cannot be legally tried again, at least where the defendant has done nothing to set aside the verdict.

Sharff v. Commonwealth, 2 Binn. 514; *Girts v. Commonwealth*, 22 Pa. 351; *Heikes v. Commonwealth*, 26 Pa. 514; *Commonwealth v. Trim-*

mer, 84 Pa. 65; *People v. Barrett*, 1 Johns. 66.

The court, under its view of the law, held that the defendant could not be convicted of selling liquor without license, if he sold without the prescription of a physician, no matter whether he did or did not sell it to be used as a beverage. If this construction was right, the count might be considered as including two offenses: 1, the offense charged, of selling liquor to be used as a beverage; and 2, the offense of simply selling without license.

The jury found the defendant guilty of selling without license. The silence of the jury in regard to the other charges is equivalent to a verdict of not guilty as to them.

An indictment for a statutory offense must pursue the words of the Act.

1 Purd. Dig. 485, pl. 11; *Updegraff v. Commonwealth*, 6 Serg. & R. 5.

It must appear that the sale of liquor by a druggist was for use as a beverage, to constitute a violation of the law.

Commonwealth v. Porter, 10 Phila. 217, and *Commonwealth v. Patterson*, 16 W. N. C. 193.

Mr. S. V. Wilson, District Attorney, for defendant in error:

Under the Act of 1875 defendant is liable as an unlicensed offender; and it matters not whether he sells in a drug store or any other place.

Under section 5 of the Act of 1856, even the mere keeping, though he does not sell, is a violation, if this law has any meaning or is capable of being understood by its words "shall sell or keep for sale."

The defendant here was indicted under the Act of 1875 for selling without license. He is to be punished under the Act of 1875, as an "unlicensed offender." The very terms used go to prove the right to indict him as selling without license. The only way that the evil recognized by the settled customs and habits of the people in buying without a prescription may be abated, is to punish the druggist as an unlicensed offender. The Act of 1856 is fully supplied by the Act of 1875.

The defendant here alleges an erroneous ruling of a judge; by setting up this position he is afterwards estopped. He affirms by his action that he never was in legal jeopardy, and that the ruling of the judge against putting him in jeopardy was not law. When he gains his point he cannot afterward plead jeopardy.

Whart. Cr. Pl. & Pr. p. 354, § 510.

When there are two good counts in the indictment and the court gives erroneous instructions to the jury as to one of the counts, and there is a general verdict against the defendant and judgment thereon, a *venire facias de novo* will be awarded;

Id. § 800; *State v. McCauless*, 9 Ired. 375.

Assuming it to be law in all cases when the application comes from the defendant, it is discretionary in the court to grant new trials in the cases in which that discretion may be exercised.

Whart. Cr. Pl. & Pr. § 792.

When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offenses, a new trial can only be granted on the count on which there has been conviction.

Id. § 895.

PA.

If this is an imperfect judgment on which no judgment could be entered a *venire facias de novo* will be awarded.

1 Chitty, Cr. L. p. 646.

Even if there be a discharge in a misdemeanor, by reason of an imperfect verdict, it would be no bar to another prosecution or to reindictment.

Mr. Justice Green delivered the opinion of the court:

If the defendant had been indicted generally and as an ordinary person, for selling liquor without license, the verdict would have sustained the sentence and there would have been no error in the judgment. But he was not so charged. He was indicted specifically as a druggist for selling liquor, without license, to be used as a beverage. The verdict found him guilty of selling liquor without license simply, saying nothing about its being used as a beverage. The difficulty in the case is that as a druggist he was not necessarily guilty of any offense in the mere selling of liquor without license. He might sell without license, if he sold it in the preparation of medicine or on the prescription of a physician.

Had the jury found a general verdict of guilty there could have been no exception to it. But for some reason they did not do that but found only a certain fact, and that fact against such a person is not of itself sufficient to convict of any crime. If the jury wished to find the facts specially, of course it was their duty to find all the facts which composed the crime charged. It is clear that under this indictment the defendant, being charged with selling liquor as a druggist, must be found to have sold it, not in the preparation of medicines and without the prescription of a physician, or at least that he sold it to be used as a beverage. Any one or all of these facts would have been presumed to be found had the verdict been generally guilty. But that not being the case and only a part of the facts being found which are necessary to make out a crime against a person charged as this defendant was, it follows that the verdict is insufficient to sustain the sentence. Of course, if the indictment had been general and the defendant pleaded that he sold as a druggist, the burden of proof would have been upon him to show all the facts which gave him exemption. But as it was, the Commonwealth, conceding the defendant to be a druggist, assumed the burden not only of charging but of proving his technical guilt as such. Failing to obtain either a general verdict of guilty or a special verdict which found all the facts essential to establish the charge, the judgment should have been arrested.

As the defendant was certainly in jeopardy under the indictment and the evidence, we do not see how he can be again tried under the same indictment.

The judgment of the court below is reversed, the sentence is set aside and the defendant discharged without day.

Appeal of Farnum T. FISH and Wife, in the Right of the Wife.

1. A surety on a guardian's bond may, on his petition for review alleging, on

oath, errors in such guardian's account, have a rehearing, within the five years mentioned in the Act of October 13, 1840, of so much of the account as in such petition is alleged to be error.

2. Where a person is both executor of a will and guardian of a minor entitled to a portion of the estate under the will, he holds such minor's portion as executor and not as guardian, until he has settled his account as executor in the probate court; until which time his sureties on his guardianship bond are not liable thereon for his neglect to pay such portion.
3. The fact that one undertakes to act in the dual capacity of executor and testamentary guardian does not lessen his duty as either. Where the funds of the estate were lost through his dereliction of duty as executor and thus never came into his hands as guardian, this does not excuse his neglect as guardian; and compensation for his time and trouble in the latter capacity cannot be allowed.

(Decided October 4, 1886.)

APPEAL from a decree of the Orphans' Court of Northumberland County, vacating a decree of confirmation of the final account of appellant's guardian and allowing a bill of review and confirming the report of the auditor to restate said account. *Reversed.*

Abraham Shipman was appointed by the last will and testament of Jesse M. Simpson as executor of the will, and guardian of Mary V. Simpson, the only child of the testator. By the terms of the codicil to his will, the guardian was required to enter into a bond, on taking letters of guardianship, in the sum of \$10,000 with one or more approved sureties. The will was probated November 3, 1871, and letters testamentary granted to the executor therein named. On March 12, 1873, Ira T. Clement became surety on the guardian's bond.

Abraham Shipman died August 8, 1878, without having filed an account either as executor or guardian under said will. August 14, 1878, Ira Shipman was appointed his administrator, and December 4, 1878, he filed the first and final account of Abraham Shipman, executor of Jesse M. Simpson, deceased, which was confirmed *nisi* January 8, 1879, and absolutely March 12, 1879. This account shows a balance on its face of \$3,517.90 in the hands of the guardian at the time of filing the same.

November 14, 1879, Ira T. Clement, surety on the guardian's bond, filed a petition in the orphans' court for a bill of review of the guardian's account, alleging the facts in the first six paragraphs of his petition substantially as above set forth, and further that he did not know that said account had been filed; that there were manifest errors in the account which ought to be corrected; that under the terms of the will of the testator no funds came into the hands of his executor for which he was bound to account as guardian.

To this petition an answer was filed by George Hill, the guardian of Mary V. Simpson, and Ira Shipman, administrator of Abraham Ship-

man, deceased, setting forth that the said account had been duly filed and regularly confirmed by the court, with actual and legal notice to the said Ira T. Clement, surety, and that there was no new evidence or matter since the filing and confirmation of the said account that could not have been had by the use of due diligence before the absolute confirmation of the same, and denying that the said Ira T. Clement had any right whatever, as a matter of law or *ex gratia*, to a bill of review.

The Honorable Franklin Bound was appointed master *pro hac vice* to take evidence, etc. He found the facts as alleged in the first six paragraphs of the petition substantially as set out above, and further reported, *inter alia*, as follows:

The matters contained in the seventh paragraph of the petition of Ira T. Clement for a review are denied by Ira Shipman and Geo. Hill, Esq., in their answer. Paragraph seven is as follows to wit:

"Seventh. Your petitioner represents that he knew nothing of the filing of the above stated account of the guardianship of Abraham Shipman until after its final confirmation; and further represents that there are manifest errors in said pretended guardian's account, which he specifically sets forth as follows:

"A. The said account is incorrect, in that the said executor as guardian is charged with the whole balance in the account of the said Abraham Shipman, as the executor of said Jesse M. Simpson, deceased, \$6,390.11; while said Abraham Shipman, executor, is charged with \$2,200.69, being for rent received during the life time of the said executor as executor of said Jesse M. Simpson, in his executor's account.

"And also the further sum of \$2,954.86, the proceeds of sale of the real estate made by the said Abraham Shipman, after the death of the testator, as executor of said testator, and which came into and remained in his hands as executor and not as guardian, until the death of Abraham Shipman, executor.

"B. For that the said account is incorrect in that the said accountant has assumed to charge in the said account, as guardian, in said balance, the sum of \$550.08, being for rents received by the said executor prior to the 12th day of March, 1873, the date of the bond upon which your petitioner is surety.

"C. For that the said account is incorrect in that the said accountant has assumed to charge in the said balance of executor's account of \$6,390.11, the sum of \$2,507.06, being the proceeds of the real estate sold by the said executor and received by him prior to the 12th day of March, 1873, the date of the bond upon which your petitioner is surety.

"D. For that the said account of Abraham Shipman, guardian, is incorrect in that his administrator, Ira Shipman, charges in the said guardian's account the sum of \$6,390.11, the balance found due from him as executor, as having been paid to himself as guardian of Mary V. Simpson, said account never having been paid, when in fact not one dollar was ever paid by Abraham Shipman, executor of the last will and testament of Jesse M. Simpson, deceased, to him as guardian under said will.

"E. The filing of the account of Abraham Shipman, executor of Jesse M. Simpson, and

the filing of the account of Abraham Shipman, guardian of Mary V. Simpson, upon the same day, to wit: the 5th day of December, 1878, is illegal and improper, the same person being executor and guardian.

"The account as executor should have been first filed and the balance in his hands as executor liquidated and determined before the account as guardian could be properly considered by the court.

"F. The account of Abraham Shipman, guardian of Mary V. Simpson, is incorrect in that the said accountant is charged with the sum of \$6,890.11, as having been received by him from the executor of Jesse M. Simpson, deceased, when no part of the same had ever been received by him as such guardian. The said Abraham Shipman, being executor and guardian under the will, could not be considered as holding any part of the assets in the capacity of guardian until his account as executor had been settled at the probate office in which he has been credited as executor with the balance which he held as guardian.

"G. For that the will of the said Jesse M. Simpson, deceased, makes the said Abraham Shipman, as his executor, a trustee under his said will, directing him in the event of the death of Mary V. Simpson, his daughter, to convert his whole estate, real, personal and mixed, into money, and to distribute the same among the legatees named in his said will; that the trust so created continues until the said Mary V. Simpson should arrive at the age of twenty-one years, or until her death; that at the time of the filing of the account of Abraham Shipman, executor, by his administrator, Ira Shipman, the said daughter was neither deceased nor of the age of twenty-one years, and that it was error in the said Ira Shipman, administrator of the said Abraham Shipman, executor, to undertake to break the said trust or to undertake to turn over money from the hands of Abraham Shipman, the executor, then deceased, into the hands of the said executor as guardian, in violation of the will of the said testator, or to assume that any money ever had been turned over by the said executor to himself as guardian under the said will.

"Your petitioner, therefore, charges and avers that there are manifest errors in the said first and final account of Abraham Shipman, guardian of Mary V. Simpson, minor child of Jesse M. Simpson, by Ira Shipman, administrator, filed and confirmed, in the above estate, and which if allowed to remain great injustice will be done to your petitioner, surety as before stated; and he further states that it was not until after the confirmation that your petitioner became aware of the existence of said errors, and therefore was not in a position to except thereto; for all of which errors and imperfections in said account and the said decree of confirmation, your petitioner has brought this his petition for a review, and humbly conceives that he should be relieved therein; to the end therefore that the petitioner may have the privilege of a rehearing of so much of said account as is hereinbefore alleged to be in error, and may have such relief as equity and justice may require," etc., etc.

Then follows a prayer for a citation upon Ira Shipman, administrator, etc., and upon all PA.

persons interested to appear in court, etc. In accordance with the prayer of the petition, November 14, 1879, a citation was awarded against said Ira Shipman, administrator, etc., of Abraham Shipman, who was the guardian of Mary V. Simpson, minor, and against Lloyd T. Rohrbach, administrator *de bonis non cum testamento annexo* of Jesse M. Simpson, deceased, and against Geo. Hill, Esq., guardian of Mary V. Simpson, etc., commanding them to appear at an orphans' court to be held at Sunbury, etc., January 5, 1880, to answer the above bill or petition, or show cause, etc. All the parties named were regularly served with notice of the citation, etc.

An answer to the petition, as already stated, was filed September 7, 1880, by Ira Shipman, administrator, and George Hill, Esq., guardian, etc. The answer admits the truth of the matters of fact averred in the six paragraphs of the petition, and goes on to say, among other things, as follows:

"First. That the said Jesse M. Simpson died on the—day of October, 1871, and that his said daughter is his only issue that survived him, and was at the time of his death and still is his only heir and next of kin, and that she was born on the second day of August, A. D. 1862, and that, after the death of the said Abraham Shipman, to wit: on the 8th day of August, A. D. 1878, your honorable court appointed the said George Hill guardian of her person and estate.

"Second. Your respondents each deny that the said Ira T. Clement knew nothing of the filing of the account of the guardianship of the said Abraham Shipman, until after its final confirmation, as is stated by the said Ira T. Clement in the seventh paragraph of said petition; but on the contrary each says that notice of the filing of the said account was duly given by advertisement, according to law, and that they have been informed, and each verily believes that he can prove if it shall be necessary or important, that he, the said Ira T. Clement, had had actual notice of the filing of the said account in sufficient time to enable him to file any exceptions thereto that he wished, before the said final confirmation of the said account; and they each also say that they are advised, by their respective counsel learned in the law, that the several pretended errors in the said account alleged in the seventh paragraph of the said petition, and respectively therein specified as A, B, C, D, E, F and G, or any of them, are not errors or mistakes of either law or of fact.

"And your respondents, further answering, each say that upon the probate of the last will and testament of the said Jesse M. Simpson on the third day of November, A. D. 1871, the said Abraham Shipman became the testamentary guardian of the said Mary V. Simpson, then between nine and ten years of age, and that the needs and duties of this trust were immediate; and there being no question as to the sufficiency of the testator's estate for both trusts, the performance by Abraham Shipman of his duties as guardian were not, by the provisions of the said will or by the law of the land, postponed to his performance of his duties as executor; and that he, the said Abraham Shipman, immediately before his death was liable as guard-

ian, as aforesaid, to account for all the estate of the said Jesse M. Simpson which he then had in his hands or possession, or which he ought then to have had in his hands or possession; and also that the said Abraham Shipman, on the 18th day of January, A. D. 1878, presented his petition to your honorable court as testamentary guardian of the said Mary V. Simpson, setting forth his appointment as such guardian by the said will of the said Jesse M. Simpson, and stating that the value of the estate willed to the said Mary V. Simpson was then about \$10,000, and praying the court to direct a suitable periodical allowance out of the said estate for her support and education, as directed in the said will, and that the truth of the facts set forth in the petition was verified by the affidavit underwritten the same; that your honorable court thereupon directed that he, the said guardian, should not expend more than the sum of \$500 for the purpose mentioned in said petition, unless otherwise directed by your honorable court—a copy of which said petition of the said Abraham Shipman, and of the order of the court, aforesaid, is attached to this answer; and each of your respondents pray that the same may be considered a part of his answer; and each of your said respondents deny that there is any other matter, cause or thing in the said petition of the said Ira T. Clement contained, material or necessary to be answered by the respondents, and which is not herein and hereby answered, confessed, traversed and avoided or denied, is true to his knowledge and belief; and they each respectfully pray, etc., that the said petition of the said Ira T. Clement be refused and dismissed," etc., etc.

The foregoing answer raises several important issues of fact and law, questions of law which have never yet been authoritatively passed upon nor decided by the Supreme Court of Pennsylvania or any subordinate court of this State, so far as we have been able to learn after careful investigation. In the seventh paragraph of his petition for a review Ira T. Clement avers "that he knew nothing of the filing of the above stated account of the guardianship of Abraham Shipman until after its final confirmation," etc., and gives this as one of the reasons for failing to file exceptions to said account," etc.

This statement is denied by Ira Shipman and George Hill, Esq., under oath, in their answer filed to said petition. In the second paragraph of their answer above quoted, they each "deny that the said Ira T. Clement knew nothing of the filing of the account of the said Abraham Shipman until after confirmation, as is stated by the said Ira T. Clement in the seventh paragraph of his said petition; but, on the contrary each says that notice of the filing of the said account was duly given by advertisement according to law, and that they have been informed and each verily believes that he can prove, if it shall be necessary or important, that he, the said Ira T. Clement, had also actual notice of the filing of the said account in sufficient time to enable him to file any exceptions thereto that he wished before the said final confirmation of the said account," etc.

Here is a square denial and a direct challenge to the proof, and if this branch of the case rested upon the petition and answer alone, the

weight of testimony would be against the petitioner. But witnesses are called; George Hill, Esq., a high minded, intelligent man, an honorable member of this bar, one of the respondents, and Ira T. Clement, the petitioner, are both examined as witnesses in regard to the fact of notice. Mr. Hill, in his testimony, after narrating the fact that Ira T. Clement and he, on at least two occasions prior to his death, went to see Abraham Shipman in regard to Mary V. Simpson's interests, and Mr. Clement's liability on Shipman's bail bond as guardian of Miss Simpson, rumors of Shipman's insolvency being afloat, testified as follows:

"Shipman died shortly afterwards and I, through the solicitation of Mary, and Judge Jordan, and others of her friends, agreed to take the appointment as her guardian. I shortly afterwards called upon Mr. Clement and urged the necessity of having an account stated by the administrator Shipman, he knowing as I did that the estate of Shipman was entirely insolvent at that time; and at various interviews I had with Clement before the filing of the account he invariably admitted his liability and agreed to settle with me as soon as the balance could be ascertained. I urged Mr. Reimensnyder, who was of counsel for the administrator to have an account filed of Shipman's guardianship, so that I might close up the matter with Mr. Clement as Shipman's bail. The account was filed. I am not sure whether it was submitted to me before filing or not. I discovered a balance according to the guardian's account in the hands of Shipman, as guardian, of \$3,517.90. After filing of this account I spoke to Mr. Clement on several occasions and urged him to settle this balance and he invariably told me that he would. The last conversation that I had with him that I recollect of was in the hall of the court house where we accidentally met, and I called his attention to the necessity of having this matter closed up. He asked me the question, how I wanted it closed. I told him that the interest on the amount would be all that would be required as long as I was her guardian, and suggested that he should give me a judgment for the purpose of closing the thing up. I am not sure whether this last conversation took place between the date of filing the account and confirmation *nisi* or between the date of the *nisi* confirmation and the confirmation absolute; but I am certain that it was before the confirmation absolute."

The testimony of Mr. Hill is objected to by counsel for petitioner, because the witness is incompetent and because irrelevant.

Your master is of opinion and so rules that the testimony of Mr. Hill is both competent and relevant to the issue before him. This testimony, therefore, standing uncontradicted in any material respect, must be accepted as the facts in regard to the question of notice. It is true that Ira T. Clement in his testimony says: "I don't recollect of any conversation with Mr. Hill in the hall of the court house; I recollect of having a talk with Mr. Hill in front of his office, etc." Mr. Hill's office is on the opposite side of the street, across the public square from the court house in Sunbury.

Surely the fact that Mr. Clement "has no recollection" of the conversation so succinctly

detailed by Mr. Hill is not such a contradiction as the law requires in so important a matter. Your master finds as facts, therefore, that Ira T. Clement, who lived within a stone's throw of the register's office at the time had not only had such legal notice of the filing of the account in question as the law contemplates by publication, but also had actual notice of the same from George Hill, Esq., the then guardian of Mary V. Simpson, at least before the final confirmation of said account and the decree of the orphans' court thereon.

In view of all the foregoing findings of fact and some others which will be noted hereafter, it is learnedly contended by counsel for respondent, on the authority of *Green's App.* 59 Pa. 235; *Hartman's App.* 86 Pa. 70, and *Stevenson's Exrs.' App.* 32 Pa. 318, that a bill of review is not allowable in this case; that a bill of review as a matter of right can be had only:

1. For errors of law appearing in the body of the decree.

2. For new matter which has arisen after the decree; and,

3. It may be allowed *ex gratia* for new evidence as to facts subsequently discovered which could not have been procured by due diligence before.

It is contended that neither of these conditions exists in this case; that there is no error appearing in the body of the decree nor on the face of the account; that the debtor side of the account consists of but two items, to the first of which there is no objection in the petition for a bill of review. The second is objected to in the whole. This is stated to be the balance of the executor's account of the estate remaining after the payment of all the debts, legacies and expenses of administration.

It becomes important therefore to know all the facts in the case including those already found upon which these contentions are predicated. The debtor side of the guardian account in controversy the master finds is as follows:

"The first and final account of Abraham Shipman, guardian of Mary V. Simpson, minor child of Jesse M. Simpson, deceased, by Ira Shipman, his administrator."

The accountant charges Abraham Shipman, guardian of Mary V. Simpson, minor child of Jesse M. Simpson, deceased, as follows:

Dr:

1878, July 14, to cash received from S. P. Wolverton, administrator of Mary Simpson, deceased, Mary V. Simpson's share of said estate.....	\$250.00
1878, to amount received from the executor of the estate of Jesse M. Simpson, deceased,.....	6,890.11
Total	\$6,640.11

That the foregoing is neither a very accurate nor satisfactory statement of account, whereby to charge the petitioner, Ira T. Clement, surety of Abraham Shipman in his guardian bond, with so large a sum of money, can hardly be questioned. Was Mr. Clement in duty bound to file exceptions to this account; and, having failed and neglected to do so, is he deprived of the right to a bill of review as prayed for by him? If he is, as contended for by counsel for respondent, both as matter of law

and fact, then no matter how great a hardship to Mr. Clement, this case is at an end.

The Act of Assembly of October 18, 1840, which authorizes a bill of review in cases of this kind, provides that "Upon petition of review being presented by such executor, administrator or guardian, or their legal representatives, or by any person interested therein, within five years, etc., alleging errors in such account which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation, said orphans' court shall grant a rehearing of so much of said account as is alleged to be error in said petition of review, and give such relief as equity and justice may require, by reference to auditors, or otherwise, except in cases where the balance found due shall have been actually paid or discharged."

In the case of *Bishop's Est.* 10 Pa. 469, Judge C. Ulter gave this Act a literal, strict and stringent construction, considering the Act peremptory on the court to grant the bill of review, without the exercise of judicial discretion.

It has since then been decided by the supreme court in a number of cases, among others, *Hartman's Appeal*, 36 Pa. 70, that the decision in that case went too far; of course it was harmless in that case "because the mistake and errors in the case were apparent on the face of the account."

It was held in *Bishop's Est.* that "Sureties for administrator may have a bill of review where the administrator has charged himself in his account with rents and profits, and the proceeds of realty; and it is no objection that the accounts have been settled by auditors, and a distribution awarded, and action brought by the creditors of the estate against the sureties."

Your master is of opinion that the case in hand is much stronger than that of *Bishop's Est.*, and that Ira T. Clement, in point of law and in justice and equity, is entitled to his bill of review. No unreasonable time elapsed from the confirmation of the account, March 12, 1879, to the time of filing his petition for a review, November 14, 1879. No person was or could have been injured by the delay in this matter. Indeed, there may have been good reasons for Mr. Clement's failure or refusal to file exceptions to the account. It cannot be doubted under the evidence, that for some time prior to Mr. Shipman's death rumors of his insolvency were afloat in the community, and that Mr. Clement was aware of these rumors, and that by the advice of counsel he endeavored to obtain some sort of security from Shipman on account of his supposed liability on the guardian bond of \$10,000, given by Shipman as testamentary guardian of Mary V. Simpson.

In fact it is in evidence, under objection by counsel for Mr. Clement, that he, Clement, in Shipman's lifetime, obtained a judgment note from Shipman dated the 9th day of July, A. D. 1878, for \$3,500 as collateral security. Mr. Clement, who is called as a witness by counsel for respondent, in speaking of this judgment note, entered in the Court of Common Pleas of Northumberland County, to No. 149 August Term, 1878 for \$3,500, testifies as follows:

"It was given for security that I had gone for him. It may have been in the Conrad matter, and it may also have been on this Simp-

son matter. I can't state now exactly. I was security for both for Shipman."

Abraham Shipman died on the — day of —, 1878. After his death, at least, it was well known that his estate was hopelessly insolvent. His estate was in progress of settlement, and it may have been considered by Mr. Clement very important to Mary V. Simpson's interests, or to those interested in Simpson's estate, that the balance due from Shipman to Simpson's estate should be ascertained and secured if possible as per the guardian's account filed by Ira Shipman, administrator of Abraham Shipman.

So far as Abraham Shipman is concerned there can be no question that the balance of \$3,517.90 as ascertained by the guardian's account filed, is justly due and owing to Mary V. Simpson, or in the event of her death before reaching the age of twenty-one years would have been due and owing to the residuary legatees named in the will. However, as it turned out, it proved to be a matter of no importance, for Mr. Clement never realized a farthing upon his judgment of \$3,500 against Shipman, and in all human probability never will.

It is evident, however, that this was not due to any fault or neglect on the part of Ira T. Clement to save himself harmless, and at the same time, if possible, to secure Simpson's estate against loss. For his vigilance in this regard Mr. Clement is to be commended, rather than censured for supineness. That Abraham Simpson's estate was utterly insolvent at the time these accounts as executor of Jesse M. Simpson, deceased, and as testamentary guardian of Mary V. Simpson, were filed by his administrator, Ira Shipman, cannot be questioned.

What is meant then by the charge on the debtor side of the guardian account, to wit: "1878, to amount received from the executor of the estate of Jesse M. Simpson, deceased, \$6,390.11?" Who received this money? Surely, Ira Shipman, the accountant, does not wish it to be understood that he received it. If he does, then he and his bail on his administration bond are liable, and not Mr. Clement. Or does Ira Shipman, the accountant, wish it to be understood that his father, Abraham Shipman, as testamentary guardian of Mary V. Simpson, received this money from Abraham Shipman, as executor or trustee for the residuary legatee? If this is meant then where is the evidence of it? No book nor account nor memorandum kept by Abraham Shipman in his lifetime, or by any person for him, has been given in evidence before the master, tending to prove the fact.

Nor is there any evidence produced of an account of moneys kept by Shipman, in his lifetime, to the credit of his ward, Mary V. Simpson. And there is no evidence going to show that any moneys belonging to the estate of Jesse M. Simpson was ever deposited by Abraham Shipman to the credit of said estate, or to the credit of his ward, Mary, or to his own credit as trustee, in any public depository, bank, or saving institution of any description. In the absence of some such proof it is fair to presume that no such account was ever kept by him, either as executor or guardian.

In this connection it is but fair to add, however, that on the 18th day of January, 1878, Abraham Shipman presented the following petition in the Orphans' Court of Northumberland County, to wit:

The petition of Abraham Shipman, testamentary guardian of Mary V. Simpson, a minor, and only child of Jesse M. Simpson, late of Sunbury, Pa., respectfully represents: That the said Jesse M. Simpson died on or about the — day of —, A. D. 1871, leaving the said Mary V. Simpson to survive him, and having first made his last will and testament, wherein he directed that, after his funeral expenses and just debts and the several bequests therein contained had been settled, the remainder of his estate, real, personal and mixed, shall go to the said minor, Mary V. Simpson. That by said will your petitioner was appointed testamentary guardian of said Mary V. Simpson. That the testator in said mentioned will made the following provisions for the support and education of his said minor child, to wit:

"Seventh. I appoint Abraham Shipman guardian of my said daughter Mary until she arrives at the age of twenty-one years, and I intrust to him her moral and religious training and education. It is my will, and I desire that my said daughter receive such an education as is fitting in her circumstances, and if the interest of the money coming into the hands of my executor and the rents of my real estate are insufficient for that purpose, it is my will and desire that as much of the principal in addition as may be necessary be expended.

"That said will has been duly proved in the register's office before the register of said county, and entered of record on the third day of November, A. D. 1871.

"That the value of the estate willed to said minor is about \$10,000.

"That the said minor is about fifteen years of age. Your petitioner therefore prays Your Honor to direct a suitable periodical allowance out of the said estate for her support and education as directed in said will, etc."

Your master finds that in accordance with the prayer of the petition, a periodical annual allowance of \$500 was decreed. There is no account stated or made part of the petition, and nothing therein contained goes to show how much, if any, money or effects were in his hands as guardian at that time. The petition simply recites that Mary is an only child, and "that the value of the estate willed to said minor is about \$10,000." Is that such a statement of account, in the absence of a decree of the orphan's court after account stated and filed in the register's office, as will fix the bail of Shipman in his guardian bond? We think not. Something more than this is required. In brief, does the petition furnish any satisfactory evidence that there was a single dollar of funds in Shipman's hands as testamentary guardian, at the time his petition was presented in court? If it does we have failed to discover it.

In the absence of an inventory of his ward's estate filed in the register's office by Abraham Shipman, in his lifetime, charging himself with moneys or effects belonging to his ward, and in the absence of any proof of an account kept by him of any money or effects belonging to his ward (except the \$250 paid to him by S. P.

Wolverton, for his said ward), and in view of the fact that no account was ever filed by Abraham Shipman in his lifetime, as executor of Jesse M. Simpson, deceased, in the register's office, showing a balance of funds, if any, in his hands as such executor, your master cannot see how his surety, Ira T. Clement, can be held in the bail bond of Shipman, testamentary guardian, etc.

That Abraham Shipman had funds in his hands as executor of Jesse M. Simpson's estate is not to the purpose. A certain portion was realized from the sale of testator's real estate, and certain other portions from the rents, issues and profits of real estate that he was not empowered to sell.

In the seventh clause of the will provision is made for the "moral and religious training and education" of his daughter, and recites that "if the interest of the money coming into the hands of my executor," not into the hands of the testamentary guardian, "and the rents of my real estate are insufficient for that purpose, it is my will and desire that as much of the principal, in addition, as may be necessary, be expended." If, then, the funds were received by Shipman, as executor, in his lifetime, in the absence of satisfactory proof that they ever passed into his hands as guardian, the presumption is a strong one that they were wasted and squandered by him as executor, and not as guardian. How then can Mr. Clement be held liable for the same as surety on Shipman's guardian bond of \$10,000?

It must be borne in mind that the account of Abraham Shipman, as executor of Simpson's estate and his account as testamentary guardian of Mary V. Simpson were both filed by Ira Shipman, his administrator, on the same day, to wit: December 5, 1878, and were both confirmed absolutely on the same day, to wit: March 12, 1879; that the balance ascertained from the executor account, to wit: "Balance paid to the guardian, \$6,390.11," as therein stated, was transferred bodily to the debtor side of the guardian account. When this was done, in point of fact, there wasn't a dollar of funds in the hands of Abraham Shipman, nor of his administrator, who stated the account belonging to the estate of Jesse M. Simpson, deceased. It had all been wasted or misappropriated by Shipman in his lifetime.

Again; it must be remembered that under the terms of Jesse M. Simpson's will his daughter, Mary, was not to come into the enjoyment of the *corpus* of her father's estate until she arrived at the age of twenty-one years; that if she died before that period, the entire estate then left was to go to certain residuary legatees named in the will; that at the date of the confirmation absolute of said account, March 12, 1879, and the decree of the orphans' court thereon, finding a balance of \$3,517.90 due to Mary V. Simpson from Abraham Shipman as testamentary guardian, the said Mary had not attained the age of twenty-one years by four years and five months, and if she had died in the meantime would not have been entitled to any portion of the *corpus* of the estate, if it had not been previously squandered. Was she entitled to such a decree, then, any more than the residuary legatees would have been?

But now it is argued that Miss Simpson is of full age and the decree of the court is all right. That is not the question that Mr. Clement is interested in. In view of such a decree at the time it was made, was Ira T. Clement entitled to his bill of review? If he was so then, he is just as much entitled now. Your master is of the opinion that the account of Abraham Shipman, as executor, should have first been filed in the register's office and the balance in his hands, as executor, if any, liquidated and determined before the guardian's account could be properly considered by the court. Without, therefore, passing upon the question raised as to the surety's liability on the guardian bond for the price of the real estate sold, and the rents, issues and profits thereof received by the executor before the guardian bond was executed and filed, your master proceeds to consider the legal status of the case as affected by our own and the decisions of neighboring courts. Was it necessary that an account should have been first stated and filed by Abraham Shipman, as executor, and a balance ascertained by a decree of the orphans' court, before the liability of Ira T. Clement became fixed as surety in the bond given by Shipman as testamentary guardian of Mary V. Simpson?

As before remarked there is no authoritative utterance by our supreme court on the subject. The nearest approach to it that we can find is a *dictum* of His Honor, Judge Paxson, in *Muscelman's App.* 18 W. N. C. 71.

"No personal action will lie against the executor of William P. Waugh, for any portion of the residuary estate or for a legacy charged thereon, until it be first shown that there is a residuary estate and that the same passed into the hands of John Waugh as trustee thereof. That John Waugh received assets of the estate of William P. Waugh is not to the purpose; he received them as executor; his responsibility for said estate is as executor and not as trustee of the residuary estate."

In *Van Dyke's App.* 31 Legal Int. 69, it is ruled that "A trustee of a portion of a residuary and unsettled estate cannot be held to account or be sued for the same by the *cestui que trust* until the estate has been sold and the fund has been set apart and received by him as trustee."

See also 2 Wms. Exrs. pp. 1506, 1507 and note M.

This whole subject has been frequently adjudicated by the Supreme Court of Massachusetts and the law well settled in that State, by a long train of decisions. The first case that we call the court's attention to is *Conkey v. Dickinson*, 13 Met. 54 *et seq.* and others. The syllabus of the case is as follows:

"When the same person is executor of a will and guardian of a minor to whom a legacy is given by the will, he holds the amount of the legacy in his capacity of executor and not as guardian, until he settles an account of his administration in the probate court, crediting himself as executor with the legacy, and charging himself therewith as guardian. Until such account is allowed by a decree of the probate court, an action cannot be maintained against him and his sureties on his guardianship bond, for neglect to pay the legacy; but

an action may be maintained against him and his sureties on the bond given by him as executor."

The parties submitted the case to the court upon an agreed statement of facts in substance as follows:

"Aaron Dickinson in 1884 was duly appointed guardian of Medad D. Smith, who was then twelve years old and who came of age in 1848. The bond declared on was duly executed by the defendants. In 1839, while the guardianship duties of the said Aaron continued, Sally S. Dickinson died, leaving a will in which, after certain legacies to divers persons, said Medad D. Smith, the ward, was made the residuary legatee; and said Aaron Dickinson, was made executor of said will, which was duly proved and allowed. Letters testamentary were issued to said Aaron, and he gave bond for the faithful discharge of his duties as such executor. On the first Tuesday of July, 1840, said executor returned his first and only account as executor of said will, from which there appeared to be a balance in his hands, as executor, of \$451.50. After this action was commenced, to wit: on the 25th of September, 1846, said Aaron filed his account of guardianship, in which he did not charge himself with said legacy; and a hearing and examination of the guardian were had, and the judge of probate passed a decree thereon, from which said guardian appealed. At this hearing and examination Sylvester Maxwell, Esq., testified in substance as follows: that he, as attorney of said Medad D., called on said Aaron, in the spring of 1845, for payment of what was due from him to said Medad D., and for his account; that said Aaron soon after presented to the witness a paper as his account of guardianship, in which he charged himself with the legacy given by Sally S. Dickinson to said Medad D., amounting to \$365.64 and interest thereon for five years, \$109.65. These sums with other items, of credit to said Medad D., in this account amounted to \$1,275.98 and the charges against him were \$624.68, leaving a balance against said Aaron of \$651.25. That the witness and said Aaron compared this account with one which the said Medad D. had made out, in which said Aaron was charged with said legacy, as \$424, and in which the balance against said Aaron was \$722.86. That said Aaron in looking at this account made out by said Medad D., said it was correct, as taken from his (said Aaron's) book. That the witness drew off the said account in proper form, and said Aaron afterwards looked at it and signed it as guardian, and took it away for the purpose of presenting it to the probate court, without suggesting that he held the funds as executor and not as guardian."

Upon this statement of facts, which are certainly much stronger in every respect than the case in hand, the court held as follows:

"It was argued in the present case for the legatee that the guardian is to be held liable to account for the legacy because it was included in a paper intended to be his account of guardianship. This intention is denied by the guardian; but we do not consider the fact material. There could be no transmutation of the assets, until the account was allowed by the probate court so as to charge the guardianship sureties. If such an account had been rendered, it may

well be doubted if it ought to be allowed, unless the guardian would give a new bond. If his sureties, on his bond as executor, were liable, it was not competent for him to transfer that liability to his sureties on the guardianship bond. And it seems clear that the former sureties were liable. The executor had a right to retain the assets for four years (R. S. chap. 66, § 3); and while he thus held them he appropriated them to his own use, which certainly made him and his sureties on his bond as executor liable. The assets have never been in possession of the guardian, and this was caused by the misapplication of them by the executor. Nor are we aware of any means by which the guardian, as such, could have obtained possession. He could not sue himself, and he is not chargeable on the ground that an executor or administrator is chargeable for a private debt which he owes the estate. [That principle is grounded on the necessity of the case, and no such necessity exists in the present instance]. The legatee might have proceeded against the executor and his sureties; and there seems to be no necessity nor reason for proceeding against the sureties of the guardian."

In *Hall v. Crushing*, 9 Pick. 395, the same court holds as follows:

"It has been argued that when the testator's debts were all paid, the duties of the executor terminated; and that thereupon, by operation of law there was a transmutation of property in the assets to the executor in his capacity as trustee to the minor children. This trust, however, was confined to the support and education of the children, and the income of the funds was alone appropriated for these purposes. The executor had a right to retain the funds for the purpose of distributing them among the children, when they should respectively become of age. If another person, therefore, had been appointed trustee, he could only have a right to demand the income of the funds from the executor."

"And again; before there could be any transmutation of property, as contended for by the defendant's counsel, the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee for the minor children. And such an allowance would not, it is to be presumed, be made by the judge of probate, without first requiring him to give bond for the faithful performance of his duties as trustee. The case of *Wyman v. Hubbard*, 13 Mass. 232, may be considered, perhaps, as somewhat opposed to this reasoning, but nothing in opposition was expressly decided in that case."

The only departure from the rule requiring an administration account to be first filed, and a decree of the probate court thereon, in order to fix the liability of sureties in cases like the present, recognized by the courts of Massachusetts, is stated in *Newcomb v. Williams*, 9 Met. 584, as follows:

"What would amount to such change of capacity when the same persons are executors and trustees, so as to exonerate the sureties on the executorship bond, would depend on circumstances. If by the constitution of the trust they were exempted from giving bonds,

* * * it would probably be held sufficient, as no actual payment can be made to one's self, to show by any authoritative and notorious act that they had elected to act in the capacity of trustee; as, for instance, if they claim a credit in their executorship account filed in the probate office for a sum held by themselves as trustees, and also file an inventory or account charging themselves with the like sum as trustees."

As already stated by the master, no such authoritative and notorious acts can be found by him under the evidence, going to show that there was a transmutation of assets from Abraham Shipman, executor to Abraham Shipman, testamentary guardian, etc., in his lifetime. In the absence of such proof of transmutation of assets, can the account of guardianship, as stated by Ira Shipman, administrator of Abraham Shipman, after his father's death, be regarded as anything more than a declaration of what he supposed was his father's intention in regard to a matter of which he is not supposed to have any personal knowledge?

In *Müller v. Congdon*, 14 Gray, 114, the same court held: "The mere determination of the executor in his own mind to appropriate property or securities in his hands as such to himself as trustee under the will, is not such a setting apart as will discharge him as executor and charge him as trustee."

Under all the circumstances of the case your master is of the opinion that Ira T. Clement, the petitioner, is entitled to his bill of review as prayed for by him.

All of which is respectfully submitted.

On exceptions by Mary V. Simpson to this report the case was heard before ROCKEFELLER, J., who delivered the following opinion:

"The learned master's report of the facts found by him and what he has said in his very able opinion, is perhaps sufficient. There was no account filed by Judge Shipman, in his lifetime, as executor of Jesse M. Simpson, deceased, showing a balance in his hands after administering the estate and payment of legacies; nor was there any evidence before the master, of any facts tending to show that he had appropriated any of the funds to himself in the capacity of guardian. Indeed, except for the purpose of education, he could not have done so, for at the time of his death Miss Simpson was only about seventeen years of age, and the absolute right to any part of her father's estate, real, personal or mixed, except so much thereof as was necessary for her education, depended wholly upon her living to attain the age of twenty-one years.

"As was said in the case of *Hall v. Cushing*, 9 Pick. 395. 'If another person, therefore, had been appointed trustee, he could only have a right to demand the income (or in this case so much of the principal in addition as was necessary for educational purposes under the will) of the funds from the executor.' It is true under the facts in the present case it was necessary to allege and show that the error complained of was apparent on the body of the decree or on the face of the account, as there was no new matter that had arisen after the decree, nor new evidence as to facts subsequently discovered, which could not have been discovered by due diligence before. The item complained of reads as follows:

1878, to amount received from the executor of the estate of Jesse M.

Simpson, deceased..... \$6,390.11

"The learned master had before him the will of Jesse M. Simpson, deceased, which showed him that the minor was not entitled to any part of the estate unless she lived to be twenty-one years of age. He also had before him the two accounts filed by Ira Shipman, administrator of Abraham Shipman, deceased, who was the executor and also testamentary guardian. Those accounts were filed on the same day. The account as executor showed a balance in the hands of Abraham Shipman of \$6,390. This balance was simply transferred by the above stated item in the debtor side of the account as guardian.

"Doubtless the administrator, who was attempting to file both the accounts of Abraham Shipman, as executor of Jesse M. Simpson, deceased, and as guardian of Mary V. Simpson, was under the impression that the latter was entitled at the time to the *corpus* of the estate, and that that was the proper way to do it. Upon the face of all these records the error was apparent, and the master treated it as appearing upon the face of the account. I am of opinion that if there was an error committed by him it was in this branch of the case. If the court can look no further than to the charge itself, then perhaps an error was committed. Looking at the whole transaction the mistake is so obvious that we are disposed to take the master's view of it. It would be against justice and equity not to rectify such a plain mistake.

"The case of *Stevenson's Errs.* Appeal, 32 Pa. 318, was decided six years after *Riddle's Estate*, 19 Pa. 431. That case was in some of its features similar to the present. John Stevenson, the guardian, had died and the account was stated and filed by his executors. It was confirmed on the 24th of March, 1856, and on the 18th of September the petitioners filed their petition for a review. They did not allege the discovery of new matter which they could not by due diligence have produced before the decree, but, *inter alia*, that certain amounts had been charged to Susan and Mary Jane Newell, two of the wards; and it having been shown that they had not received them, the supreme court struck them out. The syllabus of that case is misleading. A careful examination of the facts of the case and what was done by the supreme court, will show that in order to do justice facts *alunde* were received to show that the account was incorrect on its face. There is nothing appearing on the face of the account to show that the items complained of were erroneous, but it being apparent from the vouchers in evidence and records that the executors, who are not supposed to have been familiar with the transaction, but who, as in the present case, had been obliged to file the account, had made a mistake. In the present case the error is manifest from the will and the simultaneous accounts filed by the administrator, though, perhaps not in the item alone constituting the charge complained of as errors, nor in the formal decree of the absolute confirmation of the account by the court.

"We deeply sympathize with Miss Simpson. Doubtless her father intended, by requiring security of her guardian, to protect her interests.

The mistake was in not requiring security of the executor as such; but this was not done and it cannot be helped. Mr. Clement was only security as guardian, and can only be held responsible for money that came into the hands of the guardian as such. A word for Judge Shipman, the guardian. There was no evidence that he wasted or squandered the money of his ward in the offensive sense in which those terms are generally understood. He was a kind hearted and genial man and doubtless the ward's father esteemed him as such. He would go bail and lend his money to those who asked him. The inventory and accounts in evidence filed by his administrator show that at the time of his death he held notes, judgments and other securities against individuals who had become insolvent, and which were uncollectible, to the amount of about \$13,000. His available personal estate was only about \$1,600, and his real estate realized \$4,330. It is possible that up to the time of his death he thought himself solvent. Of course this has nothing to do with the case in hand, but may for the sake of his credit throw some light upon the subject, as relating to the allegation of his intentionally wasting or squandering his ward's funds.

"[The exceptions to the report of the master are dismissed, the report confirmed, and the account referred back to Franklin Bound, Esq., as auditor, to restate and correct the same in accordance with the report, with power to take and hear evidence and report the facts as to any, and if any what, amount of funds actually came into the hands of the guardian as such.]"

This appeal was taken by Mary V. Fish, neé Simpson, who assigned as error that portion of the foregoing decree of the court embraced in brackets.

The case came up for argument in the supreme court at January Term, 1885. When called, it appearing from the record that the auditor to whom the court below had referred the master's report for an account to be restated in accordance therewith, had not yet reported, this court refused to hear the argument until the auditor had reported, and a final decree had been made by the court.

The auditor thereafter reported, *inter alia*, as follows:

"The decree of the court sustaining the original report of the master (to which this report is merely supplementary), and dismissing the exceptions filed thereto imposes but a single duty upon the master, to wit: 'To report the facts as to any, and if any what, amount of funds actually came into the hands of the guardian as such.'

"No new facts have been produced and no additional evidence offered at the present hearing. The whole case then rests upon the facts as found by the master in his original report and evidence as disclosed in the notes of testimony accompanying the same. The only evidence before your master that any moneys charged in the accounts filed were received by Abraham Shipman, testamentary guardian of Mary V. Simpson in his capacity as guardian of said Mary V. Simpson, is the single item to wit: '1878, July 14, to cash received from S. P. Wolverton, administrator of Mary Simpson,

deceased, Mary V. Simpson, share of said estate, \$250.'

"The fact of this payment to Abraham Shipman is not disputed. It was no part of the estate he represented as executor. It was the share or interest of his ward in the estate of a deceased aunt, and he received and receipted for it as such, as her guardian. The facts found and stated in the master's report substantially show that the money received by Abraham Shipman from the testator's estate came into his hands as executor, and that the payments and disbursements made by him and credited on the credit side of the guardian account filed by his administrator, Ira Shipman, were made with money received in his capacity of executor. If your master is correct in his findings of facts and rulings in the master's report, then the item of \$250 is the only item or sum of money with which Abraham Shipman can be charged in his capacity of guardian.

"The auditor finds the following facts:

"First. That Abraham Shipman received on the 14th day of July, A. D. 1878, as the guardian of Mary V. Simpson, the sum of \$250, it being his ward's interest or share in the estate of Mary Simpson, deceased.

"Second. That the said Abraham Shipman did not receive any other item or sum of money set out in said guardian's account in his capacity as guardian; nor did he in his lifetime legally account for the item or sum of money received by him as guardian aforesaid, or any part thereof, unless the credits claimed in the guardian account filed by his administrator, Ira Shipman, viz.:

A. Shipman, guardian, time, trouble, etc.	\$300 00
Ira Shipman, administrator of guardian	25 00
Geo. B. Reimensnyder, attorney,	20 00
Lemuel Shipman, register, etc.	10 00

can be recognized as legal credits or payments out of said item or sum of money.

"Third. That the sum of \$250 was the only money or sum of money received by the said Abraham Shipman in his capacity of guardian of the said Mary V. Simpson.

"Your auditor therefore restates the said guardian's account, in accordance with the foregoing facts, as follows:

"Abraham Shipman, guardian of Mary V. Simpson, a minor child of Jesse M. Simpson, deceased, by Ira Shipman, administrator.

DR.	
To amount received from estate of Mary Simpson, deceased	\$250 00
Interest from July 14, 1878, to date of audit	115 00
	<hr/> \$365 00

By credits claimed in account filed by Ira Shipman, administrator, as follows, to wit:

A. Shipman, guardian, time, trouble, etc.	\$300 00
Ira Shipman, administrator of guardian	25 00
Geo. B. Reimensnyder, attorney, etc.	20 00
Lemuel Shipman, register	10 00

\$355 00

Cost of Audit.

Franklin Bound, auditor.....	\$ 25 00
Urias Bloom, recording report....	5 00
Urias Bloom, certificate, etc.....	8 25
	<hr/>
	\$ 38 25"

On the hearing in the court below, the exceptions of Mary V. Simpson to the above report were dismissed and appellant alleged as additional error:

1. The action of the court in making the following decree: "The principal question intended to be raised by the parties in this case has been determined in the report of the master, and the opinion of the court filed November 10, 1884, deciding that the account filed by Ira Shipman, administrator, being the guardian's account, should be reviewed and restated;—the present account being restated in accordance with the said report of the master and opinion of the court, the exceptions are dismissed and the report of the auditor confirmed."

2. The action of the court in dismissing the exceptions to the report of the auditor and the account as restated, and in confirming the same.

Messrs. J. Nevin Hill, L. H. Kase, for appellants:

A bill of review as a matter of right can be had only: 1, for error of law appearing in the body of the decree; 2, for new matter which has arisen after the decree; and 3, it may be allowed *ex gratia* for new evidence as to facts subsequently discovered, which could not have been procured by due diligence before; the plaintiff must show that he has been diligent and not negligent.

Green's App. 59 Pa. 235; Hartman's App. 36 Pa. 70; Stevenson's Exrs.' App. 32 Pa. 318.

Plaintiff's bond in evidence before the master can have no effect whatever in this cause, except to show his right to a bill of review in the proper case. This is what is decided by the case of *Bishop's Est. 10 Pa. 469*, and *Hartz's App. 2 Grant, 83*.

A guardian or executor must use the same care and management that a prudent man would exercise in his own affairs; he must act for his ward, not for himself.

Hughes' Minors' App. 53 Pa. 500; Finney's App. 37 Pa. 323; Will's App. 22 Pa. 325; Jack's App. 94 Pa. 367.

Mr. S. P. Wolverton, for appellee.

Mr. Justice Sterrett delivered the opinion of the court:

For reasons given in the report of the learned master, and which it is unnecessary here to repeat or further elaborate, there was no error in entertaining the petition for review, nor in referring the account to an auditor to restate and correct the same, and report what amount of funds, if any, actually came into the hands of the testamentary guardian.

The auditor found as a fact that in July, 1873, the guardian received \$250, his ward's share or interest in the estate of Mary Simpson, deceased, and that this was all that ever came into his hands as guardian. Charging him with interest on that sum made the entire debit side of the account \$365. There is no evidence tending to show that he should have been charged with any other or greater sum.

The only question is: What should be deducted from the fund so found to be in his hands? The credits of \$25, to the administrator by whom the deceased guardian's account was filed, \$20, to his attorney for stating account, etc., and \$10, register's fees, amounting in all to \$55, appear to be properly chargeable on the fund; but we see nothing to justify the allowance of \$300, as compensation for time, trouble, etc., of the deceased guardian. If a person other than the guardian had been executor, it would have been the duty of the guardian to see that the estate was properly settled and the share, to which his ward was entitled, securely invested. The fact that he undertook to act in the dual capacity of executor and testamentary guardian did not lessen his duty as either. True, it was through his dereliction of duty as executor that the funds of the estate were lost and thus never came into his hands as guardian, but that does not excuse his supineness as guardian. To allow compensation for time, trouble, etc., as guardian, would under the circumstances be rewarding palpable neglect of duty.

Decree reversed, and it is now adjudged and decreed that there is due from the estate of Abraham Shipman, late guardian of Mary V. Simpson \$310, with interest from March 18, 1886, and that the same be paid to said Mary V. Simpson, now Fish; and it is further ordered that the costs, including costs of audit be paid by the appellee.

Edward B. ORNE *et al.*, Heirs of Benjamin Orne, Deceased, *Piffs. in Err.*,
v.

KITTANNING COAL CO.

1. **Fraud**, which the legal owner of land might have alleged as a defense to the specific performance of a contract in relation to the land, **may be set up by the privies in his estate as a defense in an action of ejectment brought by the successors of one claiming an equitable title by virtue of the contract but never in possession.**
2. Where the **possession of the vendor of land is lawful**, his vendee cannot maintain ejectment against him, without proof of a previous tender of the purchase money; and he must maintain that tender by producing the money in court.
3. When an agreement for sale of land is fully executed in writing, the vendor thereby **assumes the character of a trustee** and holds the legal title in trust for the vendee, under the terms and conditions of the contract. The trust thus implied is of the same character as if it had been expressed in the agreement.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Blair County, to review a judgment on a verdict for the defendant in an action of ejectment. *Affirmed.*

This was an action of ejectment, begun in

1864, by Benjamin Orne against the Kittanning Coal Company for the undivided seven sixteenths of two certain tracts of land principally in Allegheny Township, Blair County, and partly in Washington Township, Cambria County, warranted in the names of John Gray and William McDougal, and containing together 800 acres.

The death of the plaintiff was subsequently suggested of record, and Edward B. Orne and his other heirs were substituted as plaintiffs. At the trial the following facts appeared:

There were three titles to the land in controversy, the oldest of which was called the Proctor title, and was the title of the heirs of Colonel Thomas Proctor and their vendees, under application for survey, warrant, survey thereunder, and return thereof, and payment by him of the purchase money to the Commonwealth before 1789. Of this title both the plaintiffs and the defendant held a part; but it was invalid as against the next title.

The next was called the Blair title; it originated in a sale and conveyance in 1806 to John Blair for unpaid taxes due the Commonwealth. Both the plaintiffs and the defendant claimed under it, and its validity and due proof were undisputed.

The youngest was called the Jackson title, but was really the mere possession of Thomas Jackson which began within twenty-one years of the suit.

On July 3, 1854, Theodore G. Pomeroy and John F. Cottrell obtained a conveyance of one fourth of the Jackson title; and on September 12, 1855, they conveyed their right, title and interest, with special warranty only, to the Allegheny Railroad & Coal Company, taking from the company on September 12, 1855, a mortgage of the land to them and to the vendors of the remaining three fourths of the title, to secure the notes given for the purchase money.

Afterward the company, discovering the worthlessness of the title, refused to pay the notes, and three suits were brought in Philadelphia County upon the notes against the company. Judgment was recovered in one suit and a *testatum* execution issued to Blair County. Thereupon, in October, 1860, Pomeroy entered into an agreement with the other holders of the notes to unite in the purchase of the tracts under the *testatum* execution, in such proportions that Pomeroy should be the owner of one undivided half and the other holders should be the owners of the other undivided half; and that Pomeroy should release and surrender to the other parties, or to the trustee taking for them, all his right, title and interest in said lands in excess of one half.

On November 26, 1860, James McCormick, Jr., bought in the land for the parties to this agreement at the sale under the *testatum* execution. In June, 1862, he conveyed his title to one Burroughs in fee, and in September, 1863, Burroughs conveyed to the defendant.

The defendant showed an undisputed title to an undivided eighth part of this Blair tax title, through H. N. Burroughs' purchase thereof, June 21, 1862, under due proceedings, from the guardian of the estate of one of John Blair's heirs, and also to one half of the remaining undivided seven eighths part thereof, the other half of which, namely: seven sixteenths part

of the whole, the plaintiffs claimed in the present ejectment, which claim the defendant disputed.

The seven eighths part of that title had passed to Pomeroy in fee as follows: one eighth by deed dated October 4, 1856, from J. Blair Walker; one fourth by deed dated November 25, 1856, from E. B. Walker and M. B. Hetherington; one fourth by deed dated October 6, 1857, from J. C. Blair; one fourth by deed dated October 7, 1857, from Thomas J. Blair, all heirs of John Blair.

On October 9, 1856, Theodore G. Pomeroy and John C. Heylman had executed the following agreement, which was recorded September 23, 1858:

"Articles of agreement made and entered into between T. G. Pomeroy, of Cresson, in the County of Cambria and State of Pennsylvania, of the one part, and John C. Heylman, of the Borough of Harrisburg, County of Dauphin, and State aforesaid, of the other part, *witnesseth*: That the said T. G. Pomeroy and J. C. Heylman hereby mutually covenants and agrees that they will purchase from the heirs of Thomas Proctor, of Revolutionary memory, and others, if necessary, the title to two tracts of land surveyed in the names of John Gray and William McDougal, located in the Counties of Cambria and Blair; also any other tracts that may belong to the said heirs of Thomas Proctor, deceased, located within the State of Pennsylvania.

"It is hereby understood that all title relative to the said tracts mentioned, shall belong equally to the said T. G. Pomeroy and the said John C. Heylman, and that all the moneys paid for the same by either party, and the expenses incurred by obtaining the title to the same shall be equally borne by the said T. G. Pomeroy and John C. Heylman; and in the event of one party advancing more money than the other party for the purpose of securing the title to said lands, the party advancing the said money shall firmly hold the party advancing his proportion for one half of the money so advanced, and in the event of the title thus purchased not proving good, then each of the parties shall bear the loss consequent upon the purchase equally; and in the event of the title proving good, then each party is to share alike in the profits.

"It is mutually agreed, between the said T. G. Pomeroy and J. C. Heylman, that the said T. G. Pomeroy shall hold the entire title obtained to the said premises, one half in trust for the use of the said John C. Heylman. And the said T. G. Pomeroy hereby agrees to convey the said one half in trust to such party as he, the said J. C. Heylman, may elect, providing the purchase money for the said J. C. Heylman's interest is paid to the said T. G. Pomeroy, his heirs or assigns, at the cost of the same, with interest from the date of payment, before the execution of said deed.

"The foregoing articles of agreement shall be binding upon our heirs and assigns."

Heylman obtained the said conveyances of seven eighths of the Blair tax title to Pomeroy, receiving the purchase money therefor from him, and giving him for his, Heylman's share thereof, and other indebtedness, his, Heylman's, and his father-in-law's three judgment notes,

together amounting to \$2,898.64, all dated September 22, 1858, which were entered up in the Court of Common Pleas of Dauphin County, November 24, 1858; upon the first whereof Pomeroy made the money by execution, and the other two were assigned by him to W. N. Wiley, September 23, 1858, and the money due thereon made partly by payment and partly by execution, in Dauphin County, and the residue, upon a transcript of the last of said judgments filed in the Court of Common Pleas of Blair County, by execution and sheriff's sale and conveyance in 1862, of all Heylman's interest in said tracts; and that title of the sheriff's vendee duly passed to the plaintiffs.

Burroughs, through whom the defendant claimed, while holding Pomeroy's right, title and interest, being an undivided half part of said tracts, on February 26, 1863, before distribution of the proceeds of said sheriff's sale of Heylman's interest in said tracts, purchased, and by writing filed had assigned to himself by Wiley the said judgment whereon said sale was had, and also the proceeds thereof in the sheriff's hands, distributable to the holder of that judgment in satisfaction of it, and subsequently received those proceeds.

Before Heylman and Pomeroy's agreement of October, 1856, Heylman had defrauded Pomeroy, as follows: on January 1, 1856, Heylman, under a letter of attorney to him, dated December 20, 1855, purporting to be executed by an heir of Proctor, named Z. P. Lea, and his wife, but whose signatures thereto were not genuine, made in consideration of \$2,000, a conveyance of the interest of said Lea and wife in the tracts to Pomeroy in fee.

Heylman afterward negotiated and obtained conveyances from the other heirs of Proctor for \$750, and these titles Heylman caused to be conveyed to Pomeroy in fee.

The judgment notes given upon the accounts settled between Heylman and Pomeroy, September 23, 1858, covered not only Heylman's half of what was furnished by Pomeroy and paid for the Blair tax titles and Proctor titles obtained subsequent to and under their agreement of October, 1856, but also \$1,051.67 as Heylman's half of what Pomeroy had previously furnished to pay Z. P. Lea, with interest, and an excess over one half of the amounts previously really paid the other heirs of Proctor as Heylman's share, indicating that Heylman had before the agreement of October, 1856, obtained from Pomeroy money as for purchase money for parts of the Proctor title previously conveyed to Pomeroy in fee, which Heylman, however, did not pay for.

There was no evidence of any written agreement between them before October, 1856, or of any oral agreement except the account settled in September 23, 1858, and Heylman's negotiating the said purchases made prior to October, 1856.

Pomeroy died in 1864. His vendees, the Allegheny Railroad & Coal Company and the defendant, had been in possession since 1855. The plaintiffs had therefore never been in possession. They brought the action, however, on the ground that Heylman's fraud, being before the agreement, did not affect his equitable title to one half the seven eighths under which, by the sheriff's sale in 1862, they claimed; and

that Pomeroy's vendees between 1860 and 1863 had mined and sold more than enough coal from the tract to pay Heylman's debt for the fraud. The defendant contended that his fraud deprived him and the plaintiffs of recourse to an equitable title to sustain the action.

The court charged, *inter alia*, as follows:

"This case, in our view of the law on this point, stands the same as if Heylman were living and in court now, asking a conveyance from Pomeroy for the half of this land under the agreement. If the conduct of Heylman was such that a court of equity would not permit him to have the half of the lands because of frauds on Pomeroy, then we instruct you that the present plaintiffs, claiming under Heylman by the sheriff's sale of his interest, stand in no better relation to the parties defending here than he would have done; and [if you find that his conduct in reference to these purchases was fraudulent towards Pomeroy, as to the amounts he alleged that these titles cost; if he made this deed as attorney in fact of Lea, knowing that the power of attorney under which he pretended to act was a forgery; if he didn't have a power of attorney; or if in any respect he acted in bad faith and fraudulently towards his partner, Pomeroy, then he could not have a court of equity decree him a conveyance of the half of these lands; and in that event your verdict should be for the defendant generally.] But if the defendant has failed to satisfy you that the conduct of Heylman was fraudulent in these respects, then the plaintiffs, having shown that their purchase money was paid in the collection of these notes, would be entitled to recover seven sixteenths of the land described in the writ, subject to the opinion of the court on the several questions of law which have been submitted by the counsel on the one side or the other. As you find this one fact, so your verdict will be, either for the defendant or for the plaintiffs for the seven sixteenths of the land described in the writ."

The court refused, *inter alia*, the following points presented by the plaintiffs:

"6. But even if you should find that Heylman was a party to or cognizant of those alleged forgeries, and did not pay over the moneys he obtained from Pomeroy, on account of these titles, to other parties, although acts highly censurable and punishable, yet they related only to the titles of those Proctor heirs, and the conveyances thereof being consummated to Pomeroy before his agreement of October, 1856, the agreement giving Heylman any interest therein, whereto these acts of Heylman had relation, must have existed at the time of those conveyances, and the defendant claims it was the same agreement in terms, in parol, as that which they subsequently executed in writing in October, 1856; but that written agreement of October, 1856, however similar in terms to their previous oral understanding (which was in law of no obligation, as it related to realty), was a subsequent, distinct agreement, so that Heylman's said alleged misconduct was in relation to a different subject matter from the Blair tax titles, and under another agreement than that of October, 1856, under which the Blair tax titles were acquired, which the taint of that alleged misconduct cannot affect, and the defense to the plaintiffs' claim upon that ground fails."

"7. That the bringing of the moneys obtained by Heylman from Pomeroy, on account of these Proctor titles, into the subsequent account made between them of their transactions as to the Blair tax titles under the agreement of October, 1856, to fix the whole amount of Heylman's then indebtedness to Pomeroy, on all accounts for settlement, does not affect Heylman's equity to the Blair tax titles, obtained under his agreement of October, 1856, with the taint of his said alleged misconduct; and the defense to the plaintiffs' claim upon that ground fails."

Verdict and judgment were for the defendant; whereupon, the plaintiffs took this writ, assigning as error the bracketed portion of the charge, and the refusal of their points.

The case was twice argued in the supreme court. Upon ordering the second argument the court specially invited the attention of counsel to the consideration whether the defendant could avail itself of the alleged fraud of Heylman upon Pomeroy, to defeat the plaintiffs' recovery.

Messrs. George L. Crawford, H. M. Baldridge and Benjamin Harris Brewster, for plaintiffs in error:

The fraud here was not in the making, but in the performance only of a previous agreement, in respect to other parts of an invalid title to the same lands; and the fraud, to defeat the specific performance of a contract, must reach the bond of the contract itself.

Fraud, to vitiate a contract, must be *dans locum contractus*, or *dans causam contractus*; that is, such a fraud as occasioned the contract, not collateral to it, as in a security accompanying a debt.

Smith v. Kay, 7 H. L. C. 750-775; *Fry*, Spec. Perf. § 434; *Nat. Exchange Co. v. Drew*, 2 Macq. 103; *Phipps v. Child*, 8 Drewry, 714; *Dart*, Vend. 5th ed. p. 1042; *Groen v. Lou*, 22 Beav. 625.

Fraud, to invalidate an assignment, must be at the time of making it, so as to have attached to it, and not in a prior transaction affecting the property passing under it.

Wilson v. Berg, 88 Pa. 167.

An unsuccessful effort at fraud will not avoid a title.

Abbey v. Dewey, 25 Pa. 416.

The rule that he who comes into equity must do equity, applies only to equities arising out of the same transaction, the same contract.

Whitaker v. Hall, 1 Glyn. & J. Bankr. 215, 216; *Hanson v. Keating*, 4 Hare, 4, 5; *Gibson v. Goldsmid*, 5 De G. M. & G. 763.

Heylman performed his part of the agreement and consideration by obtaining the Blair tax titles, as well as the other titles, and causing them to be conveyed to Pomeroy as legal holder, and also paying his half of the whole purchase money; and the remaining half thereof was more than repaid by Heylman's half of the proceeds of the lands soon after received by Pomeroy's vendees.

The plaintiffs paid their money on the faith of Heylman's recorded equitable title in the express declaration of trust in the agreement, without notice of any fraud or counter equity.

Fraud makes a contract voidable at the option of the defrauded party. There can be no rescission, so long as he retains anything under the contract which he ought to return.

2 Pars. Cont. 680, note.

To retain is incompatible with rescission. He must put the other party *in statu quo*, so far as can be done, as soon as practicable after the fraud is discovered. It is not sufficient to offer to do so at the trial.

Pearson v. Chapin, 44 Pa. 9; *Byard v. Holmes*, 4 Vroom, 125, 127; 2 Pars. Cont. 680, note a; *Filby v. Miller*, 25 Pa. 267; *Beaupland v. McKeen*, 28 Pa. 180; *Whitney v. Allaire*, 4 Denio, 554.

A purchaser for value is protected against prior equities of which there has been no notice.

Hoffman v. Strohecker, 9 Watts, 189; *Lazarus v. Bryson*, 3 Binn. 84; *Stewart v. Reed*, 91 Pa. 287.

An innocent purchaser of the legal title, without notice of trust or fraud, is peculiarly protected in equity, and chancery never lends its aid to enforce a claim for the land against him.

Price v. Junkin, 4 Watts, 87.

In Pennsylvania there is now no distinction as to this between legal and equitable title.

Cobert v. Irwin, 8 Serg. & R. 239; *Lane v. Reynard*, 2 Serg. & R. 65.

In ejectment a plaintiff must recover on the strength of his own title and not on the weakness of the defendant's. But a defendant cannot avail himself of this rule against a plaintiff whom he has fraudulently induced to purchase a weak title.

Fraud is personal and individual in its nature, and only the party injured can claim advantage of it.

An assignee of a contract cannot insist upon fraud used in the making of the contract on the party under whom he claims.

Carroll v. Potter, Walker, Ch. (Mich.) 355; *Harding v. Commercial Loan Co.* 84 Ill. 253; *Clarke v. Dickson*, Ellis, Bl. & Ellis, 148 (96 E. C. L. R. 148-154); *Urguhart v. Macpherson*, L. R. 8 App. Cas. 831-833.

A plea of fraud (as fraud does not *per se* avoid a contract but only gives an option to the defrauded party to disaffirm) includes an allegation of disaffirmance, which is traversed by traverse of the plea, and must be proved.

Daves v. Harness, L. R. 10 C. P. 166.

If any innocent third party has acquired an interest in the property, or if by delay the position even of the wrong doer is affected, it will preclude a party defrauded from exercising his right to rescind.

Morrison v. Universal Marine Ins. Co. L. R. 8 Exch. 197-204.

Mr. Samuel S. Blair, for defendant in error:

The reargument of plaintiffs in error denies the right of the defendant to avail itself of Heylman's admitted fraud on Pomeroy, and places this inability on the ground that fraud is not a merchantable commodity. But this is a total misapplication of that principle; that is the rule where no thing or estate is assigned, where nothing passes by the assignment but a bare right of action, as, the right merely to file a bill for fraud committed on the assignor. Such an assignment is void as against public policy, being champertous, as a mere right to sue for a tort is not assignable; but wherever a substantial interest passes, the assignee and those claiming under him stand in the right of the assignor.

Story, Eq. Jur. 1041 and note.

Mr. Justice Clark delivered the opinion of the court:

By the terms of the contract of October 9, 1856, it was agreed between T. G. Pomeroy and J. C. Heylman that they would purchase together the Proctor title and such other titles as might be necessary to secure to them the lands in controversy; that the legal title to said lands should be vested in Pomeroy, one half for his own use and the other half for the use of Heylman; Pomeroy, to convey the one half held in trust to such person as Heylman might designate, "providing the purchase money for said J. C. Heylman's interest is paid to the said T. G. Pomeroy, his heirs and assigns, at the cost of the same, with interest from the date of payment, before the execution of said deed."

The plaintiffs claim title to an undivided part, as purchasers of the interest of Heylman under the contract; the defendant claims as the holder of the title of Pomeroy.

The Kittanning Coal Company is admittedly invested, not only with the absolute title to Pomeroy's half interest in the lands purchased under the agreement, but with the legal title of Heylman's half, according to the terms and conditions of the contract. It is plain, then, that the Kittanning Coal Company, holding the full title of Pomeroy, is a privy in estate with him, and in this controversy stands in his stead.

It is not pretended, much less shown, that Heylman or any of those claiming under him were at any time in the possession of the premises; the Allegheny Railroad Company, and its successor in title, the Kittanning Coal Company, from the date of and indeed long prior to the inception of Heylman's equity, have admittedly held the exclusive actual occupancy of all the lands covered by this dispute.

This ejectment is one, therefore, by the holder of a merely equitable title, out of possession, against the holder of the legal title in the admitted peaceful, actual and adverse occupancy of the land. In such a case it is clear that an ejectment will not lie, to turn the trustee out of the possession, until one half of the purchase money advanced and one half of the expenses incurred by Pomeroy have been paid or tendered, in compliance with the contract.

The general rule is that in an ejectment founded on an equity only, the plaintiff, to be entitled to recover, must not only tender the money before suit brought, but to show his readiness to perform, he must also have it in court ready to be paid in the event of a verdict in his favor. *Minaker v. Morrison*, 2 Yeates, 346; *Gore v. Kinney*, 10 Watts, 139; *Eberly v. Lehman*, 100 Pa. 546.

If, however, the equitable owner by the terms of his contract is entitled to, or by consent is once fairly put into the possession under his title, and by force, fraud or other illegal means is ousted therefrom, the rule as stated does not apply. *Harris v. Bell*, 10 Serg. & R. 39; *Gregg v. Patterson*, 9 Watts & S. 197; *D'Arras v. Keyser*, 26 Pa. 252; *Chase v. Irwin*, 87 Pa. 288.

In the very recent case of *Bell v. Clark*, 17 W. N. C. 44 [*S. C. 1 Cent. Rep. 852*], the rule is thus stated: "Where the possession of the vendor is lawful, his vendee cannot maintain ejectment against him, without proof of a previous tender of the purchase money; and he

must also maintain that tender by producing the money in court."

These cases have been followed by the still more recent case of *McGrew v. Foster*, in the eastern district, not yet reported [*post*].

It is contended, however, on the part of plaintiffs, that the purchase money has been fully paid in accordance with the contract; that three certain notes which Heylman gave to Pomeroy on September 22, 1856 (one for \$997.58, at two months; one for \$950.58, at four months and one for \$950.58, at six months), were for the purchase money and expenses of this joint purchase, and for reimbursement of Pomeroy for the money advanced on the contract; that all of these notes were before the institution of this suit, fully paid, and that the contract was, on Heylman's part, thus fully complied with, by means whereof he was entitled to a conveyance and, therefore, to the possession as incident to his title.

On the other hand, however, it is alleged and the jury has so found that Heylman, in the settlement which resulted in the execution and delivery of these notes, perpetrated upon Pomeroy a most gross and glaring fraud; that by falsehood and forgery he deceived Pomeroy as to the amount he actually applied to the purchase of these titles; and that in consequence the notes did not, in fact, represent the sums which Heylman owed Pomeroy, under his contract.

In that settlement Heylman received credit for \$2,000 which he alleged he had paid for the interest of one Z. P. Lea. This money Pomeroy had advanced to Heylman upon the faith of a conveyance to him by Heylman, under authority of a letter of attorney from Lea which Heylman himself had forged. He also received credit for \$850 more than he paid, of Pomeroy's money, for the interests of Miller, Myers and Bachelor, having falsely and fraudulently altered the true consideration mentioned in the respective deeds, to accomplish this purpose.

These fraudulent transactions of Heylman are not denied; they are frankly admitted and in addition, as we have already said, they have been found by the jury. The several sums of money of which Pomeroy was thus defrauded, with the interest thereon, actually exceed the amount covered by the obligations taken at the settlement of September 22, 1878; and although the obligations were accepted as securing the full amount of Heylman's half of the purchase money, in no proper sense can it be said that the purchase money has been paid; indeed the entire amount of it remains unpaid.

It is of little consequence, we think, that some of the transactions complained of occurred prior to the agreement of October 9, 1856; for it is plain, from the subsequent settlement, either that the agreement was made upon the faith of and embracing these previous purchases, or they were afterwards brought into it, and accepted by Pomeroy as part performance thereof; and if it be assumed that the fraud of Heylman was not in the making of the contract itself, but in the performance of it only, the result is the same in this case; as, without a full and fair performance on part of the plaintiffs or a tender thereof, there can be no recovery.

The case in either event is to be determined as if the parties to the suit were the original parties to the contract; the Kittanning Coal Company stands in Pomeroy's place, as the holder of the legal title in possession; and the plaintiffs by setting up the equity of Heylman cannot deprive it of that possession, except upon showing that they are in no default under their contract. It is one of the elementary and fundamental principles of equity, that "He who seeks equity must do equity;" and another, that "He who cometh into equity must come with clean hands." The doors are shut against one who, in his prior conduct in the very subject matter at issue, has violated good conscience, good faith or fair dealing.

Therefore, if the fraud of Heylman may be considered as having entered into the contract itself, at its execution, a court of equity will not afford a remedy for its enforcement in his favor; if it affected only the performance, as the plaintiffs assume, the defendant cannot be compelled to yield the possession until the purchase money has been paid.

Fraud, it is true, is not a marketable commodity; the right to avoid or to invalidate a contract, upon the ground of fraud, unless the fraud be of such a character as to render it absolutely void, is in some sense personal. Fraud will not form the substance of an assignment so as to constitute a cause of action in the hands of the assignee. It may pass, however, as incident to a proper subject of assignment. It can only be pleaded by him whose option it is to affirm or disaffirm the contract, or by his representatives, or for his interest, or in his right; as here, by his privies in estate. *Waterman, Cont.; Story, Eq. Jur. 1041, note.*

Nor can we make any distinction in principle, in this respect, between the ordinary case (arising upon articles between vendor and vendee) and this case, which is said to arise out of an agreement containing an express super-added declaration of trust. When an agreement for sale of land is fully executed in writing, the vendor thereby at once assumes the character of a trustee, and holds the legal title as trust for the vendee, under the terms and conditions of the contract. The trust which in equity is implied is of precisely the same character as if it had been fully expressed on the face of the paper.

Upon a careful examination of the whole case we are of opinion that the judgment must be affirmed.

Judgment affirmed.

David SHANK and Wife, To Use, *Plffs.*
in *Err.*,
v.

William A. SIMPSON.

1. If plaintiff's case, as exhibited by the testimony and the rejected offers of evidence, is **fatally deficient** in the requisite kind or degree of proof, there is no error in the court's **directing a verdict** for defendant.
2. When the **interest of a judgment debtor in land** is regularly **divested by judi-**

cial sale, on a valid *bona fide* judgment against him, the **purchaser** at such sale **may** lawfully subsequently sell and convey such land to the **judgment debtor's wife**; and her title cannot be overthrown as in fraud of his creditors, without affirmative proof of such fraud.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Clinton County, to review a judgment on a verdict directed for defendant in an action of assumption on an alleged special contract. *Affirmed.*

The case was tried before *MAYER, P. J.*, who charged the jury *inter alia* as follows:

"On the 28d day of July, 1866, David Shank gave his judgment note to W. A. Simpson, the defendant, payable one day after date, for the sum of \$3,900. On the 19th day of February, 1867, judgment was entered on said note in the court of common pleas of this county to No. 22, May Term, 1867.

"On the 23d day of March, 1869, a writ of *fiert facias* was issued on the judgment, and the real estate of David Shank, the defendant in the judgment, was levied upon. This real estate consisted of a lot of ground situate in the City of Lock Haven, upon which were erected a dwelling house and other buildings.

"On the 26th day of April, 1869, the sheriff sold said real estate to William A. Simpson, for the sum of \$2,500, to whom a deed was executed and delivered by the sheriff on the third day of August, 1869. At the time of the levy and sale by the sheriff, David Shank was insolvent and had filed his petition in bankruptcy. On the 14th day of May, 1880, W. A. Simpson sold the real estate purchased by him at sheriff's sale to Mrs. Candor, for the sum of \$1,800.

"This suit has been brought by David Shank and Margaret A., his wife, for the use of said Margaret, to enforce an agreement alleged to have been made by David Shank with William A. Simpson, at the time said judgment note was given.

"The narr. filed in the case sets forth as follows: 'On or about the 23d day of July, 1866, William A. Simpson, the defendant, and brother of Margaret, proposed to said David that in order that a home might be secured to her, the said Margaret and her children, in case misfortune should occur in the business of said David, he execute to him a judgment note in such sum as would probably cover the amount such property would bring at a judicial sale; and said Shank thereupon executed and delivered to said defendant a judgment note in the sum of \$3,900, upon the specific agreement that said Simpson would hold the judgment for the use of said Margaret; and that if said above described real estate should be sold, then said Simpson would buy the same, and hold it for the same use and purposes for which he held the judgment.'

"David Shank in his testimony says: 'The purpose of that note was, Mr. Simpson thought that something might happen to me—that I might lose my property. He asked me if I would give him a judgment note on my property, and says he: "If you do give me the note I will sell the house on it, and then I will convey the title over to Margaret and you have the

title for it, and a title nobody can dispute, and the best way you can convey that house to Margaret"—that is my wife. Then I signed the note, and the agreement was that he was to convey that title over to my wife.

"Q. Was there any other consideration? A. All the consideration.

"On his cross examination he says:

"Q. When was Mr. Simpson to enter up this judgment that you gave him? A. No specified time when he was to enter it.

"Q. There was no agreement that he was to hold this until you became embarrassed, in embarrassed circumstances? A. No agreement about that.

"Q. You did not testify before the arbitrators, then, that Mr. Simpson was to hold this until you became embarrassed, and that he entered it up before you were embarrassed, and broke you up? A. I said that.

"Q. Did you testify before the arbitrators, in another case of David Shank against W. A. Simpson, that Mr. Simpson entered this judgment before you became embarrassed, and broke you up by doing so, and that his agreement was to hold it until you became embarrassed financially? A. The agreement was that.

"Q. When was he to sell the property on it? A. Why, if I failed in business, anything went wrong with me, he was to sell the property on that judgment; and I was in good circumstances when I gave him the judgment; I owed nobody.

"Q. You say he was only to sell it providing you became embarrassed? A. Well, he said 'something might happen you in your business;' said 'something might happen you, Dave.'

"Q. Were there any judgments against you at the time that he sold the property on his judgment? A. Yes, sir, there were judgments at that time.

"Q. Was this property sold on his judgment after you had filed your petition in bankruptcy? A. Yes, sir. I filed my petition in bankruptcy before the house was sold.

"Q. Did you testify that you were to notify him if you should become embarrassed, and he would hold it until then, and that you never notified him, and that he entered it up and broke you up by entering it? A. Yes, sir, I said that.

"Q. Was your testimony before the arbitrators in that respect true? A. Yes, sir, that was true.

"From this evidence of the plaintiff himself, it is clear and unmistakable that the express purpose for which this judgment note was given, was to hinder, delay and defraud the creditors of David Shank. The plaintiff swears the agreement was that the judgment note was to be held until he became embarrassed, and then to be entered and the property sold, so as to secure it for his wife and family. That such an agreement is in itself a fraud and cannot be enforced is fully settled by the authorities. Nor is it material that the defendant was not indebted at the time the judgment note was given, if, when given, the purpose of it was as stated by plaintiff, that defendant was to hold it, and use it in case of financial embarrassment. Such a device cannot be resorted to and the courts called upon to carry it into execution."

PA.

The plaintiffs took this writ, assigning as error the action of the court:

1. In sustaining defendant's objections to plaintiffs' offer to prove by Margaret Shank and other witnesses (for the purpose of showing an acknowledgment of the trust and establishing, in connection with the testimony of David Shank, the trust alleged in the narr.) that shortly after the sale by the sheriff of the property described in the deed offered in evidence, she, witness, went to Mr. Simpson at the instance of Mr. Shank, to procure a conveyance of the property to her; that she suggested the conveyance to Mr. Simpson, and also that she was afraid if the deed were made to her and she should sign papers to get money to start Mr. Shank in business, she might lose the property. He replied he thought it better not to convey it now, she could live in it all the same; that subsequently, in the spring of 1880, witness with her husband and daughter proposed to go to St. Paul, Minn., where they had three sons then living, and before starting West called upon Mr. Simpson with reference to the property. It was proposed to rent it. To this objection was made, and Mr. Simpson proposed to sell it, when witness and her husband went to see Joseph Candor, for the purpose of making sale of the property to him; that a sale was consummated and the property afterwards conveyed to the wife of said Joseph Candor, but not until after witness had gone West; that when at the cars and about to start on the journey West, Mr. Simpson said to witness that he would send the money for the house to her at St. Paul.

Defendant objected to plaintiffs' offer, on the grounds:

1. The plaintiffs have already proved by David Shank, one of the plaintiffs, that the judgment note in question was given for a fraudulent purpose.

2. It already appears from plaintiffs' testimony that the judgment note in question was entered in fraud of David Shank's creditors.

3. It has already been shown by plaintiffs that David Shank, at the time of the sheriff's sale, was largely indebted and had applied for the benefit of the United States Bankrupt Law.

4. From the whole testimony now in, and the present offer, it fully appears that the sheriff's sale, under which plaintiffs claim, was fraudulent and void as to the creditors of David Shank, and that neither David Shank nor his wife Margaret can claim anything thereunder; but the trust, if any, is for the assignee in bankruptcy of David Shank.

5. The plaintiffs have already shown by the records and papers offered in evidence that William A. Simpson, the defendant, paid in money the bid for the real estate in question, and holds the same free from any trust whatever, and therefore there was no consideration for the alleged promise to Margaret Shank contained in the last part of the offer.

6. Under the testimony now in and that offered, the judgment and the title acquired thereunder are valid between the parties to the judgment, and also as to Margaret Shank, wife of the defendant therein.

7. The plaintiffs attempt, by the evidence now in and the present offer, to establish a parol

trust in land in violation of the Act relating to parol trusts.

8. In sustaining defendant's objections to plaintiffs' offer to renew the previous offer to be followed by evidence that at the time the note or single bill already in evidence was given, plaintiff (David Shank) was not, nor about to embark, in any hazardous business; nor did he anticipate any indebtedness, but the purpose was to make a provision for his wife.

Defendant's counsel objects on previous grounds, and also:

1. Because it contradicts the evidence already in.

2. It is insufficient because it does not offer to prove that David Shank was not indebted at the time the judgment of W. A. Simpson was entered, and at the time the property was sold by the sheriff.

8. It contradicts the statement of special matter furnished us by plaintiffs of what they propose to offer in evidence at this trial.

4. In charging the jury as follows: "The jury are directed to render their verdict for the defendant."

Messrs. C. G. Furst and C. S. McCormick, for plaintiffs in error:

The law permits a husband to settle property on his wife; and the settlement will be good, although he may afterwards become insolvent. The question for the jury in such case will not be: Are subsequent creditors unpaid? but, Was the purpose of such voluntary settlement to defraud them?

Harlan v. Maglaughlin, 90 Pa. 289; *Monroe v. Smith*, 79 Pa. 461; *Snyder v. Christ*, 89 Pa. 507; *Byrod's App.* 81 Pa. 242; *Zuver v. Clark*, 104 Pa. 220.

Messrs. W. C. Kress and Charles Coraes, for defendant in error:

The transaction between the parties as claimed by plaintiffs would be fraudulent towards creditors, and equity will not lend its aid to enforce such an agreement.

Troyne's Case, 3 Coke, 80; *Bump. Fraud. Conv.* p. 81; *Williams' Admrx. v. Williams*, 84 Pa. 314; *Serfoss v. Fisher*, 10 Pa. 184; *Guggenheimer's App.* (Pa.) 2 Cent. Rep. 526; *Gill v. Henry*, 95 Pa. 398; *Rowand v. Pinney*, 96 Pa. 192; *Salter v. Bird*, 14 W. N. C. 154.

Mr. Justice Sterrett delivered the opinion of the court:

If there is anything in the testimony admitted, or in the offers of evidence rejected by the court, that would have presented a material question of fact for the jury, it follows that the learned judge erred in withdrawing the case from their consideration and directing a verdict for defendant; but on the other hand, if plaintiffs' case, as exhibited by the testimony and the rejected offers of evidence, is fatally deficient either in the requisite kind or degree of proof, there was of course no error in either of the rulings complained of.

It appears from the record evidence admitted by the court that in July, 1866, David Shank, husband of the beneficial plaintiff, gave his judgment note to defendant for \$3,900, at one day after date, on which judgment was entered about six months thereafter. By virtue of an execution issued thereon in March, 1869, Shank's real estate was levied on and sold to defendant

for \$2,500, which appears to have been paid by him and subsequently distributed by an auditor.

In May, 1880, defendant conveyed the same property to Mrs. Candor for \$1,800. We thus have, on the face of this transaction, a judgment, presumptively *bona fide* and for a full consideration, a judicial sale of real estate to defendant, and subsequently a private sale and conveyance of the same by him to Mrs. Candor. Instead of even tending to show that either of the plaintiffs has any interest in the property so sold or in the proceeds thereof, the record evidence referred to proves the contrary, and that whatever interest either of them may have had in the land was regularly divested by judicial sale.

The substance, however, of plaintiffs' contention is that the judgment did not represent any indebtedness by Shank to Simpson, but was given for the sole benefit of Mrs. Shank, to be held in trust for her by Simpson; and when the property on which the judgment was a lien was sold, it was purchased and afterwards disposed of at her instance and for her benefit; that the object of thus giving the judgment was to make suitable provision for Mrs. Shank at a time when her husband was not indebted nor about to embark in any hazardous business, and therefore not in fraud of creditors.

If plaintiffs had introduced or offered testimony that would have warranted the jury in finding the truth of their contention, they might have some reason to complain of the adverse rulings of the court; but they did neither, and, as the learned president of the common pleas has shown in his charge, it would have been error to submit the case to the jury on any evidence that was admitted or offered. In any view that can be taken of the evidence it would not have warranted the submission of plaintiffs' case to the jury.

Upon the testimony introduced in connection with the testimony embraced in the offers of evidence rejected by the court, the case of the plaintiffs is fatally defective, both in the kind and degree of proof that was necessary to sustain their contention. There was therefore no error in giving binding instructions to the jury to find for the defendant.

Judgment affirmed.

COUNTY OF LEHIGH, *Plff. in Err.*,

v.

Emerson F. SCHOCK.

1. The word "crime" is properly applicable both to a felony and to a misdemeanor.
2. The thirteenth section of the Act of September 23, 1791, which makes the costs of justices of the peace in unfounded charges of "having committed a crime" payable "out of the county stock," refers not only to felonies but to misdemeanors, such as cruelty to animals, assault and battery, malicious trespass, larceny and false pretenses.
3. In a suit against a county for costs, the

docket of a justice of the peace is conclusive evidence that the prosecution for which costs are claimed was discharged as unfounded for want of evidence.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lehigh County, to review a judgment on a verdict for the plaintiff in an action of assumpsit.

Affirmed.

At the trial before Albright, P. J., the following facts appeared from the testimony for the plaintiff:

The plaintiff was an alderman of the City of Allentown and County of Lehigh. Informations for the following criminal charges were laid before him: cruelty to animals, assault and battery, malicious trespass, larceny, false pretense, peddling without license, surety of the peace and common scold.

A day of hearing was fixed, when testimony was heard for the Commonwealth and for the defendants, and an entry was made in the official docket "Discharged for want of evidence." The plaintiff claimed his fees from the County and brought suit under the Act of September 23, 1791.

"Where any person shall be brought before a court, justice of the peace or other magistrate of any city or county of this Commonwealth, having jurisdiction in the case, on the charge of being a runaway servant or slave, or of having committed a crime, and such charge upon examination shall appear to be unfounded, no costs shall be paid by such innocent person; but the same shall be chargeable to and paid out of the county stock, by such city or county." *Purd. Dig. 491.*

The defendant offered no evidence, but requested the court to charge: "Under all the evidence the verdict must be for the defendant." *Ans. "Negatived." First assignment of error.*

"The justice had no authority to try cases and hear testimony and then dismiss them for want of evidence." *Ans. "Negatived." Second assignment of error.*

"The City of Allentown, whereof plaintiff is an alderman, is liable for plaintiff's claim." *Ans. "Negatived." Third assignment of error.*

"The docket of plaintiff is not conclusive that the cases were dismissed as unfounded." *Ans. "Negatived." Fourth assignment of error.*

The charge of the court was as follows:

"This is an action brought by Emerson F. Schock against the County of Lehigh. It appears in this case that the plaintiff is an alderman of the City of Allentown and, by virtue of his office, a justice of the peace. The claim is for certain fees of the justice in criminal cases brought before him, where he discharged the accused for want of sufficient evidence. He claims that the County is liable for those fees.

Under an Act of Assembly, approved September 23, 1791, and which was excepted from a repealing provision of an Act of 1860, known as the Criminal Procedure Act, in the opinion of the court the County is liable for these costs. That Act of Assembly provides that where a person is charged with crime and such charge upon examination shall appear to be unfounded, no costs shall be paid by the innocent person,

but the same shall be chargeable to and paid out of the county stock, by such city or county.

"[As to whether the charge brought before the justice of the peace is unfounded or not, in the opinion of the court the determination of the justice is to govern; and where he held the charge as unfounded, as he did in all these cases or charges, there it is to be taken as correct. It is not for the jury to find whether or not they were unfounded.] The cases heard by the plaintiff included two surety of the peace cases. In these cases the costs of the justice were respectively \$1.80 and \$1.95. The question has been raised whether a surety of the peace case is within the Act. The Act says: 'Where a party is charged with having committed a crime.'

"A surety of the peace proceeding is brought where a person swears before a magistrate that another has threatened him, and that in consequence of such threats he is afraid that harm will be done to his person or property. The Act says where such a complaint is made, the justice of the peace shall bind over the accused to the court. The Act does not say that he may hear the case and either bind over or discharge him; but in the opinion of the court that is implied. The committing magistrate is to exercise his own judgment, even where the charge is surety of the peace. The Act says he shall bind over. The court holds he still has discretion. If upon examination he finds the charge to be unfounded, it is his duty to discharge the accused and not send the case to court.

"The further question arises whether the charge of surety of the peace is a crime. It is not one of those charges that are prosecuted before a jury. No bill of indictment is drawn, and it is not submitted to a grand or other jury, but it is for the judge to hear. A threat is a crime at common law and is indictable; and the court is of the opinion that a charge of surety of the peace is within the meaning of the Act of 1791, and that there can be a recovery for fees in surety of the peace cases, when the accused is discharged by the magistrate. The court admits that there is a little doubt in its mind, on this matter of surety of the peace, and very probably will look into it hereafter.

"The defendant has asked the court to instruct the jury that under all the evidence the plaintiff is not entitled to recover. We decline to give such instruction, and answer that prayer for instructions in the negative.

"The only question for you is to say whether these fees are in fact owing. [The record of the justice of the peace, which is in evidence, says, in all the cases, that the accused were discharged for want of evidence. That is to be taken by you as conclusive of the fact that the charge was not sustained.]

"Before a county can be sued there must be a demand made of the county to pay. The plaintiff testified that before he brought this suit he made a demand of the commissioners, and that is not gainsaid by the County. Was a demand made before suit was brought, and are these the proper fees? That they are the fees to which the justice is entitled, if he is entitled at all, is not disputed. The whole amount of the fees of the justice is \$37.90. [If you believe the testimony: that these are the proper fees and that a demand was made,

the docket showing that such cases were heard, you will return a verdict for the plaintiff for \$37.90.] There is also evidence of \$11.54 due in some of these cases to several constables. The court is of the opinion that the plaintiff cannot recover for the constable fees. I know of no law saying that the constables' fees are to be paid to the justice. The constables themselves would have to sue."

Verdict and judgment were for the plaintiff; whereupon, the defendant took this writ. Four of the assignments of error are mentioned above. The fifth, sixth and seventh referred respectively to the three portions of the charge included in brackets.

Upon a rule for a new trial the court ruled out the claim in cases of surety of the peace and peddling without license, and plaintiff remitted for them.

Mr. C. J. Erdman, for plaintiff in error: Bouvier defines crime as "an act committed or omitted in violation of a public law forbidding or commanding it."

Bishop, as "a wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name."

Blackstone says "the word 'crime' generally denotes an offense of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor."

Webster defines crime as a "gross offense or violation of law, in distinction from a misdemeanor or trespass or other slight offense."

In the fifteenth section of this Act we find the following language used: "And although it is just and reasonable that in cases of convictions of capital offenses or where imprisonment at hard labor for a length of time is the punishment for the offense, the public should, in case of the defendant's insolvency, be at the charge of the prosecution," the county "where the crime hath been or shall be committed shall pay the costs of prosecution."

The word "crime" is used to denote an offense of graver character than malicious trespass, common scold, cruelty to animals, etc.

Under the Act of May 1, 1861, the alderman could have assumed jurisdiction of the offense enumerated and with the aid of a jury disposed of them. But in no event could the County have become liable for costs. He arrogated unto himself all the powers of the court of quarter sessions. He tried and acquitted the defendant and directed the County to pay the costs.

On a preliminary hearing the defendant is not entitled to call witnesses, and the magistrate is to hold the defendant for trial in every case where there is a probable case of guilt made out.

Whart. Crim. Law, § 2979.

The City of Allentown is liable, for these costs.

By "county stock" is not meant the county treasury, for it would not do to give cities the privilege of putting their hands into county treasuries.

By holding that by "county stock" is meant "public fund or treasury" the Act would thus read: "shall be chargeable to and paid out of the treasury by such city or county."

The docket of the alderman is not conclusive of the fact that the charges were unfounded, and that the defendants were discharged for want of evidence.

Lancaster Co. v. Mishler, 100 Pa. 624.

Messrs. Levi Smoyer and Jas. L. Schaadt, for defendant in error.

Mr. Justice Trunkley delivered the opinion of the court:

It is highly improbable that a magistrate would so conduct himself at the hearing and discharge of persons accused of crime that his docket would not be conclusive that the cases were dismissed as unfounded. No evidence was offered by the defendant; nothing impeaches the good faith of the plaintiff in the performance of his official duty; and therefore the fourth, fifth and sixth assignments are not well taken. Nor is there anything in the case to require notice of the third assignment.

The eleventh section of the Act of 1791 provided that cost on bills returned *ignoramus* by the grand jury should be paid out of the county stock, and not by the party charged with any felony, breach of the peace or other indictable offense.

Section 13 of that Act, still in force, provides that when any person shall be brought before a court, justice of the peace or other magistrate, on the charge of having committed a crime, if such charge shall appear unfounded, the cost shall be paid out of the county stock, and not by such innocent person. The word "crime" is used in its general sense and means all indictable offenses, just as it is used and means in section 64 in the Criminal Procedure Act of 1860.

The context in the Act of 1791, as well as in the Act of 1860, shows that the word "crime" includes indictable misdemeanors. Properly speaking, "crimes" and "misdemeanors" are synonymous terms; in common usage the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye, while smaller faults are comprised under the gentler names of "misdemeanors." 4 Blackstone, Com. 5.

The word "crime" is not a synonym of "felony." In the Criminal Procedure Act some provisions are made respecting costs in all prosecutions, except felony. Some crimes are felonies, others are commonly called misdemeanors; and often infamous crimes—as forgery and perjury—are called misdemeanors, thereby distinguishing them from felonies in our statutes relating to costs in criminal cases. The provision respecting costs "in all cases of conviction of any crime" applies to felonies and misdemeanors.

Section 13 of the Act of 1791 applies to every case where a person is before a magistrate on a charge of having committed a crime, and the charge appears unfounded. No difference is made between crimes that are felonious and those that are not felonious, or by reason of some being infamous and others not, or because some are of a deeper dye than others. The innocent person shall not pay costs.

Prosecutions made in good faith are not discouraged by permitting the magistrate to impose the costs on the party who made com-

plaint. This statute has stood for nearly a century and still seems in accord with the wise policy of the Commonwealth.

If it be true, as alleged, that the justices of the peace in Lehigh County, until recently, imposed the costs of unfounded prosecutions upon the complainant, or some other private person, it is well that they have at last learned not to violate the statute.

Judgment affirmed.

Joseph CULLMANS *et al.*, *Piffs. in Err.*,
v.

James LINDSAY *et al.*

1. A written agreement may be modified, explained, reformed or altogether set aside, by parol evidence of an oral promise or undertaking material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing and which induced the other party to put his name to it.
2. The fact whether or not the parol promise was the inducing cause of the execution of the written contract, especially when the mental purpose is not at the time expressed, is in general an inference to be drawn from the facts by the jury.
3. A defendant who, in an action upon a written contract of sale, alleges as a defense a contemporaneous parol contract which contradicts the terms of the written contract can not, for the purpose of proving that the parol contract was an inducement to the written contract, testify to the influence of the parol contract upon his mind in inducing him to enter into the written contract.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lancaster County, to review a judgment on a verdict for the plaintiffs in an action of assumpsit. *Reversed.*

The facts, and the only assignment of error upon which stress was laid, are fully set forth in the opinion of the court.

Mr. J. L. Steinmetz, for plaintiffs in error:

On the trial plaintiffs endeavored to materially vary and contradict the written or printed contract, by evidence of a contemporaneous parol agreement. There is no allegation in the narr. that the written contract was executed on the faith of the parol agreement; and it is, therefore, doubtful whether the terms and conditions of the written contract could be attacked at all.

Callan v. Lukens, 89 Pa. 184; *Parsons v. Adler*, 8 W. N. C. 72.

If plaintiffs will insist on the benefit of a contemporaneous parol agreement, they must declare on it.

Hunter v. McHose, 100 Pa. 88.

Before plaintiffs can recover in this action they must set aside the written contract and
PA.

show a delivery. To set aside the written contract there must be clear, precise and indubitable evidence of fraud or mistake; and it is error to submit the question of fraud to the jury upon slight, trivial parol evidence.

Stine v. Sherk, 1 Watts & S. 195; *Miller v. Smith*, 33 Pa. 386.

When parties without fraud or mistake have put their engagements in writing, that is not only the best but the sole evidence of their agreement.

Martin v. Berens, 67 Pa. 459.

It was incompetent for Mr. Lindsay to testify what was the inducement that led him to sign the written contract. The jury is to determine what induced the parties to sign the instrument from what was said and done before the time of signing; and it is improper to allow the witness to state the intention or purpose that was in his mind at the time of the execution.

Spencer v. Colt, 89 Pa. 314.

Mr. George Nauman, for defendants in error:

"That a written agreement may be modified, explained, reformed or altogether set aside, by parol evidence of an oral promise or undertaking material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion."

Walker v. France, 17 W. N. C. 313; *S. C. 2 Cent. Rep. 781*; *Moore v. R. R. Co.* 94 Pa. 324.

Mr. Justice Clark delivered the opinion of the court:

This suit was brought to recover the contract price of a certain lot of tobacco, sold by the plaintiffs to the defendants. At the time of the purchase an agreement, partly printed and partly written, was executed as follows:

"April 18, 1883."

"This is to certify that I have this day sold my interest in two acres of tobacco to A. S. Rosenbaum & Co.

First Wrappers at 14 cents.

Second " " 4 "

Seconds " " 4 "

Fillers " " 8 "

To be well selected and free of all damage, such as hail cut, shed burnt, fat stems, ragged tobacco, or water casing; and to be delivered in merchantable order, not before the 24th day of April next, at their warehouse.

"N. S. Lindsay."

In the making of this contract, Robert K. Lindsay represented the plaintiffs, and William Morin the defendants. It is alleged, and at the trial evidence was introduced to show, that this instrument did not contain the precise agreement of the parties.

It is contended on the part of the plaintiffs that the written agreement was made by filling up a printed form, generally used in the purchase of tobacco upon the poles, in the process of curing; whereas, the transaction in hand was in fact a purchase of cured tobacco, stored in a cellar, where every facility was afforded for inspection of the article, as to its quality and condition; that the whole lot was thrown open to examination, and was actually

purchased upon inspection; that the clause in the contract relating to its quality and condition was objected to, on the part of the plaintiffs' agent, and the contract was subsequently signed upon the express promise and agreement of the defendants' agent that the clause in question should not affect the transaction, but that upon delivery of the tobacco, as it then was, the money would be paid at the prices expressed in the contract.

"No principle is better settled," as we said in *Juniata Building Assn. v. Hetzel*, 103 Pa. 507, "than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract."

"That a written agreement may be modified, explained, reformed or altogether set aside, by parol evidence of an oral promise or undertaking material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion. *Walker v. France*, 17 W. N. C. 818; [*S. C. 2 Cent. Rep. 781*]. See *Greenwalt v. Kohne*, 85 Pa. 389; *Barclay v. Wainwright*, 86 Pa. 191.

It was competent, therefore, for the plaintiffs in this case to introduce evidence to show that it was the parol promise referred to which induced Robert K. Lindsay, their agent, to put his name to the contract; although the effect of the evidence undoubtedly is, by parol proof, to alter the terms of a written instrument. For although the original design of the defendants' agent may have been honest, it is a fraud in the defendants, in order to procure an unfair advantage, subsequently to deny the parol qualification, upon the faith of which the contract was made. Evidence as to the real intent of the parties at the time, therefore, becomes admissible. *Lippincott v. Whitman*, 83 Pa. 244.

The parol evidence, however, which will be effective to reform a written instrument in such a case must, it is said, be clear, precise and indubitable; that is to say, it must carry clear conviction to the minds of the jurors that the witnesses are credible, that the facts are distinctly remembered and are truly and accurately stated, and to the mind of the court that, if the facts alleged are true, the matters in issue are definitely and distinctly established. *Spencer v. Colt*, 89 Pa. 314.

The testimony in this case was certainly such as justified the submission; if the facts are as they are stated by Robert K. Lindsay and James Lindsay, it is clear that the written paper did not contain the contract of the parties, and that the writing was signed under the inducement of the accompanying parol promise. The veracity and accuracy of the witnesses and the conflict in the evidence were, of course, wholly for the jury.

But the fact, whether or not the parol promise was the inducing cause of the execution of the written contract, especially when the mental purpose is not at the time expressed, is, in general, an inference to be drawn from the facts. These facts are to be exhibited in the proofs; and the work of inference is for the jury. Where a party is charged with the commission

of an act with a particular intent, he may testify what his intention was; but he cannot testify to the undisclosed purpose of his mind, or declare a mental reservation to nullify the express words of his contract. *Juniata Build. Assn. v. Hetzel*, 103 Pa. 507.

Or, as was said in substance in *Spencer v. Colt*, 89 Pa. 314, the unexpressed intent, motive or belief existing in one party's mind at the execution of a contract cannot aid the jury in ascertaining whether the language or conduct of the other party had been such as to create that intent, motive or belief. The parties may often have different impressions as to its effect upon their respective interests, and therefore the thoughts of one cannot be proved to bind the other.

At the trial, the following question was propounded by the plaintiffs, to Robert K. Lindsay, their own witness.

Q. Were his declarations, that this contract amounted to nothing and meant nothing and that the tobacco would be paid for as he bought it on sight—was that an inducement to you to sign the contract?

Objected to; objection overruled, and exceptions.

Q. The witness said that he would accept nothing under that contract; and Morin said: this contract means nothing; I bought this tobacco on sight, and you will be paid for it; was that an inducement to you to sign the contract?

A. That was the only inducement he could have bought it on, or anyone else; no other way.

The answer to this question may have had but little effect on the determination of the cause by the jury; we cannot know certainly what did influence the jury in the finding; but, as it was received against the objection of the defendant, and is assigned for error here, we cannot disregard it, upon the mere supposition or conjecture that it did no harm.

The admission of this answer was clear error, and upon this ground the judgment must be reversed. We find no other error upon this record, but upon the second assignment the judgment is reversed, and a venire facias de novo awarded.

John FERNAU et al., Plffs. in Err.,
v.

Henry C. BUTCHER et al.

1. Where, in an attachment under the Act of March 17, 1869, the defendant gives a bond according to section 3 of the Act for the release of the goods attached, and subsequently the attachment is dissolved for want of sufficient evidence of fraud, the plaintiff cannot, after proceeding in personam to judgment and ineffectual execution, maintain an action of debt on the bond.
2. The bond does not dissolve the attach-

NOTE.—To the same effect is *Dienelt v. Aronia Fabric Co.* 2 Pa. C. C. R. 206, where Common Pleas No. 4 of Philadelphia, in dissolving on its merits an attachment under the Act of 1869, entered an *exoneretur* on the bond which the defendant had given in accordance with section 3 of the Act. (J. M.)

ment. It is superadded security, and falls with the attachment.

3. Query, whether attachment under the Act lies when the affidavit for the writ charges fraud as to only part of the debt for which the writ issues.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Luzerne County, to review a judgment for the plaintiffs in an action of debt. *Reversed.*

This was an action of debt by Henry C. Butcher and others trading as Washington Butcher's Sons, against John Fernau, Charles Thomas and three others, on a bond for \$1,100 given by Fernau and Thomas as principals, and the other defendants as sureties, to the plaintiffs, to release, according to section 3 of the Act of March 17, 1869, goods which had been attached in a suit under the Act, in which the plaintiffs were the plaintiffs in this suit and the defendants were Fernau and Thomas.

By agreement the case was referred to L. H. Bennett, Esq., in accordance with the Act of April 6, 1869 and its supplements.

The facts found by the referee are stated in the opinion.

The referee directed judgment for the plaintiffs for \$665.23. The court below overruled the defendants' exceptions, and confirmed the report; whereupon, the defendants took this writ and assigned as error the action of the court in overruling their exceptions and confirming the report.

Mr. John Lynch, for plaintiffs in error:

The giving of the bond to retain the property attached does not preclude defendants from subsequently moving to dissolve the writ.

Garbutt v. Hanff, 15 Abb. Pr. 189; *Bowen v. First Nat. Bank*, 34 How. Pr. 408; *Aet. v. Albo*, 21 La. Ann. 849; *Kneeland, Attach.* 524; *Perry v. Somerby*, 57 Me. 552; *Tyler v. Safford*, 24 Kan. 580.

The attachment having been dissolved on motion, all the proceedings in attachment become of no effect; and the condition in the delivery bond in this case was not forfeited.

Sedgwick's App. 7 Watts & S. 263; *Hastings v. Quigley*, 2 Clark, 431; *Lantz v. Worthington*, 4 Pa. 153; *Bain v. Lyle*, 68 Pa. 60; *Hagan v. Lucas*, 10 Pet. 400 (85 U. S. bk. 9, L. ed. 471); *Rowles v. Hoare*, 61 Barb. 266; *Excelsior Cork Co. v. Lukens*, 38 Ind. 488; *Guss v. Williams*, 46 Ind. 253; *Lehman v. Berdin*, 6 Rep. 611.

The judgment against Fernau and Thomas, in the action upon which the execution issued, was not a judgment in the attachment, that having been dissolved by the court.

The appearance of Fernau and Thomas made the suit, in addition to the attachment proceedings, a personal suit. Suppose the defendants Fernau and Thomas died after the seizure and before judgment, the judgment could be taken *in rem* on the attachment. Could a personal judgment then be entered against the defendants?

Holman v. Fisher, 49 Miss. 478, 479; *Erwin v. Heath*, 50 Miss. 795, 801.

In Mississippi, attachments may be obtained in the same manner and upon the same grounds as are provided in our Act of 1869.

Kneeland, Attachment, 531.

PA.

Messrs. F. C. Sturges and George K. Powell, for defendants in error:

The mere order of the court, either in sustaining or dissolving the attachment, is not a judgment. It is a mere interlocutory order.

Sharpless v. Ziegler, 92 Pa. 470; *Wetherald v. Shupe*, 42 Legal Int. 426; *Blystone v. Blystone*, 51 Pa. 375.

Giving the bond dissolves the attachment, and from that time the proceeding was a mere personal action against the defendants, with a right to bring an action on the bond taken by the sheriff, if the goods were not returned according to the condition of the bond.

Brenner v. Moyer, 98 Pa. 278; *Dallett v. Feltus*, 7 Phila. 627; *Hildeburn v. Watch Co.* 7 Phila. 450; *Conway v. Butcher*, 8 Phila. 272; 1 Trickett, Liens, p. 497; *Kneeland, Attachments*, pp. 468, 545; *People v. Cameron*, 7 Ill. 470; *Dierolf v. Winterfield*, 24 Wis. p. 143; *Haggart v. Morgan*, 5 N. Y. 422; *Bildersee v. Aden*, 62 Barb. 175.

The bond was good as a common-law obligation, regardless of the statute.

Olaasen v. Shaw, 5 Watts, 468; *Koons v. Seward*, 8 Watts, 888; *Stroop v. Gross*, 1 Watts & S. 139; *Wright v. Keyes*, 15 W. N. C. 75.

A defendant may in all cases apply to the court to dissolve the attachment; but he may waive that right, as by delay or by some other proceeding, as in this case, which will be an estoppel.

Poor v. Colburn, 57 Pa. 415; *R. R. Co. v. Wilcox*, 48 Pa. 161; *Loewenstein v. Sheetz*, 7 Phila. 361.

Mr. Chief Justice Mercur delivered the opinion of the court:

This suit was against the principals and sureties in a bond given under the Act of March 17, 1869, which provides for the commencement of actions by attachment.

On the first of March, 1881, the defendants in error made and filed an affidavit under that Act setting forth that Fernau and Thomas (two of the plaintiffs in error) were indebted to them in the sum of \$509.74, and that a portion thereof, to wit: \$279.78, had been fraudulently contracted. They gave bond and caused an attachment to be issued for the whole sum, against Fernau and Thomas. By virtue thereof the sheriff attached certain goods, which had already been levied on by former executions, and also attached some book accounts and other claims.

On the 10th of March the defendants in the attachment filed their affidavit denying that they had fraudulently contracted any part of said debt, and obtained a rule to show cause why the attachment should not be dissolved. On the hearing thereof the court thought the fraud averred was not sufficiently proved, and made the rule absolute on the 25th of April. This action of the court has never been reversed. It stands as a conclusive judgment that the attachment was improperly issued.

On the aforesaid 10th of March the bond in suit was executed by the defendants in the attachment as principals, and by the other plaintiffs in error as sureties. It recites the attachment suit instituted and the action of the sheriff on the writ. It then proceeds to declare: "Now

the condition of this obligation is such that if the plaintiffs in said attachment recover judgment in the same; and if the said Fernau and Thomas, defendants in said attachment, will pay the debt and costs at the expiration of the stay of executions on sums of like amount given to freeholders, or surrender up the said property in as good condition as when attached, to any officer having an execution against said party defendant, on any judgment rendered in said attachment in favor of the said plaintiffs, then and in such event the said obligation to be void, otherwise to be in full force and virtue."

The legal arbitrator, by whom the present case was decided, found as a fact, that the existence of this bond was not known to the court when it dissolved the attachment.

A personal service of the writ having been made, the dissolving of the attachment did not operate as a discontinuance of the whole suit. *Sharpless v. Ziegler*, 92 Pa. 487; *Biddle v. Black*, 99 Pa. 380; *White v. Thielen*, 106 Pa. 173.

Relieved from all the security acquired under and by virtue of the attachment the suit, in the words of the statute, shall proceed "as in a case of summons for debt regularly issued and duly served." The plaintiffs did proceed and obtain a judgment against the defendants for the whole amount of their claim. Failing to collect it, they brought suit on this bond. The contention now is whether the dissolution of the attachment destroyed the vitality of the bond.

This leads us to consider the design of the Act and the language of the bond.

1. The manifest purpose of the statute was not to supersede the usual forms of action for the recovery of debts. It provides a mode of proceeding only when the debtor has committed or is about to commit some fraudulent act. Then and then only does it give a creditor the right to forthwith seize the property of his debtor and to hold the same as security for the payment of a judgment to be thereafter recovered. Without fraud of the debtor his property cannot be thus seized nor held for the security of the creditor. When seized under the allegation of fraud its release may be procured, either by dissolving the attachment or by giving security conditioned for the payment of the judgment which may be recovered "in said attachment," or for the return of the property attached.

Under the view we take of this case it is not necessary to decide now whether an attachment under this Act will lie, when the affidavit charges fraud as applicable to only a part of the debt for a recovery of which the suit is brought. The writ goes out claiming the whole debt as an entirety. If it can be so used as to obtain possession of property to pay a debt, concerning a large portion of which no fraud is alleged, the whole purpose and spirit of the statute will be perverted.

The intent of the Act is not to take from an unfortunate but honest debtor his property, before judgment rendered against him. If the fraud averred is not sufficiently proved, the attachment falls. When it does fall the plaintiff loses all the security which he temporarily held thereunder. Whether that security existed by virtue of the writ of attachment alone or by the superadded bond of the defendant and his sureties based thereon, a dissolution of the at-

tachment strikes down the security. Without fraud of the defendants the plaintiffs were not entitled to demand either form of security. When the attaching power was stricken down, the bond of the defendants fell with it.

2. The language in the condition of the bond strengthens the conclusion at which we have arrived. It is to secure the payment of a judgment to be recovered "in said attachment."

It is based on the fact that property is held under the attachment, and assumes that it may legally be so held. It promises to surrender "the property attached" to an officer having an execution against said defendants on any judgment rendered "in said attachment" in favor of said plaintiffs.

The judgment for the payment of which the obligors bound themselves was to be one that should be rendered in and by virtue of the attachment, and not one that might be obtained "as in the case of a summons for debt regularly issued and duly served." That language does not indicate any enlarged right flowing from the issuing of an attachment and the seizure of property thereunder. On the contrary it clearly imports a summons in the usual and ordinary form. When the attachment was dissolved, the suit was stripped of all the properties and incidents applicable to the attachment.

We think the bond was not intended to cover and does not cover the case of a judgment recovered on an ordinary summons for debt.

The learned judge therefore erred in confirming the report of the referee and in entering judgment in favor of the plaintiffs below.

Judgment reversed, the report of the referee set aside, and judgment in favor of the plaintiffs in error.

Merrill R. SKINNER, *Plff. in Err.*,
v.

David McALLISTER.

1. If land is **seated** when **assessed** and **sold** for taxes as **unseated** land, the **sale** is **void**.
2. If land is **seated** when assessed, after the collector's return it is the commissioner's duty to cause it to be **sold as seated**.
3. When a **jury** is **misled by the charge** of the court, the verdict will be reversed.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Erie County, to review a judgment on a verdict for defendant in an action of ejectment. *Reversed.*

The facts of the case as they appeared in the court below are sufficiently stated in the charge to the jury by GALBRAITH, P. J.:

Gentlemen of the Jury:

The plaintiff claims to be the owner and entitled to the possession of the land described in the writ in this case, which land is in the occupancy of the defendant, David McAllister, who claims on the other hand that he is the lawful owner and entitled to remain in possession as such.

The evidence shows that this land was originally owned by Mr. Huidecooper, who, on the 18th of July, 1853, agreed to sell it to Isaac

Babbitt by article. Babbitt thus became the owner of the equitable title and entitled to a deed of the same from Mr. Huidecooper when he had paid for it.

For the purposes of this case Babbitt may be treated as the legal owner at the time he took possession under the purchase by him for Mr. Huidecooper. On the 8d of January, 1857, Isaac Babbitt assigned his article, the article between him and Huidecooper, to Lucy B. Lillie, who by her will devised the land to Juliette Irene Babbitt, the devise being conditioned, but for our present purpose to be treated as an absolute devise, as the question of law arising upon this condition will be reserved for argument and decision hereafter, in case you should find for the plaintiff.

The whole case rests, as you will perceive, upon the validity of the treasurer's title acquired by Caleb Thompson under the deeds executed to him by the county treasurer in 1862.

It is claimed on part of the plaintiff that the land was not the subject of sale by the treasurer, and that the sale was therefore void, and that no title therefor vested in Caleb Thompson, and that the defendant, in consequence, had no ownership.

Your close attention must be given to the rule of law governing treasurers' sales, as well as the evidence on part of the plaintiff and defendant as to the question as to the character of the land in dispute; that is, whether seated or unseated, and whether it became unseated by abandonment after having been seated. If the land was actually seated in 1860, that being the year for the tax of which the land was sold, then the sale by the treasurer would be void; and the sale by the treasurer would give no title, and the case for the plaintiff must fail.

Lucy B. Lillie died in 1884. The claim of the plaintiff, as you see, rests upon the one hand upon the title acquired of Babbitt from Huidecooper and by him assigned to Lucy B. Lillie and by her devised to Juliette I. Babbitt, to whose rights the plaintiff succeeded by his marriage to her.

The claim of the defendant, David McAllister, to the ownership of the land rests upon two deeds of the treasurer of Erie County, by which the land in controversy was conveyed to Caleb Thompson, who bought it at treasurer's sale for taxes, in 1862. Thompson died in 1868, having made his will by which he empowered his executors, C. L. Thompson and David Wilson, to sell and convey any land of which he was seized, by deed dated. The executors, C. L. Thompson and David Wilson, conveyed the land to the defendant, David McAllister, who went upon the land and still occupies it.

That the land became seated after Babbitt's purchase is shown by the evidence. It is not a fact in dispute. There was a small clearing, a dwelling house was put up, and a log stable; and there was some ground cultivated and some crops raised. Babbitt resided on the place from 1854 until 1856, when he moved away and the place was unoccupied until 1859 when Calvin Snow went into the house and, according to some of the evidence, was there until the following winter; that would be the winter of 1859 or the spring of 1860. There is some evidence that he was there later than the spring of 1860, but about that there is controversy.

There is a good deal of controversy as to the length of time that Snow was there, some of the witnesses putting it a very short time and others having him there from some time in 1859 until the following winter.

In 1860 the collector of the township made return to the commissioners of the county that the land was unseated, and that there was no personal property on the premises out of which the taxes could be collected. The book kept in the commissioner's office shows that the land was put on the unseated list and so reported to the treasurer, and he proceeded in due time to sell the same as unseated land.

Now the whole case narrows down to this sale, as I view it; and it involves questions of fact which are for you. As I have already stated, the uncontroverted evidence shows that the land was on the seated list and was seated land after the possession of Babbitt commenced, say in 1854. It remained seated, for all legal purposes, unless its character was changed in one of two ways: either by its being put on the unseated list of the assessor, or by its being abandoned by the owner and becoming actually unseated again. That it was not put on the unseated list by the assessor appears from the evidence, or at least there is no evidence that the assessor did put it on the unseated list; but it is claimed that the collector, and that is shown to be a fact, made return that the land was unseated and that there was no personal property out of which he could make the tax, and that the commissioners then put it on the unseated list in their office, and the treasurer then proceeded to sell it.

You are instructed as a matter of law that that proceeding was a mere nullity, unless the land was actually unseated, unless it had become so. The collector could not by returning it unseated, and the commissioners by putting it on the unseated book, make this sale anything but a void sale if the land was actually seated. There had been cultivation there, and building there, and the remnants of a barn; [but if the land had been abandoned by the owner so that it became again unseated, then this action of the collector in returning it to the commissioners and the commissioners to the treasurer, then the sale would assume an entirely different phase and the sale made under these circumstances, the land having lapsed into its original unseated state by the abandonment—if you find that fact—the sale would be good and vest the title in the purchaser, without notice.]

[There is no evidence of any notice having been given to the owner; and the commissioners could not by their act give this the character of unseated land without notice to the owner, unless you find that in point of fact the owner had abandoned this property and left it for such time as will satisfy the minds of the jury that he intended to leave and abandon it permanently, thus avoiding personal liability for the tax.]

Now you see this presents a question with which the court has nothing to do; it is a question entirely for you, it is for the judge to endeavor to give you, as best he can, the law as bearing on this, which is that where property has once become seated, the presumption is that it remains seated; and by seated land we mean that kind of permanent occupancy or

possession, with the means afforded thereon for the collection of taxes. There may be cultivation without residence or residence without cultivation; either will give the land the character of seated land. The main purpose of the law is that there shall be something on the land to collect taxes from, but that is not indispensable; if the land is occupied either for cultivation or residence so that it shows an intention to reclaim it from its wild condition, that is seated land—whether it is for manufacturing, cutting lumber, or anything else that shows that it is to be occupied.

But having become seated it may again become unseated by the act of the owner in giving it up, in leaving it and going away and abandoning it and showing an intention not to continue his occupancy.

The evidence is that Mr. Babbitt left in 1856. The sale may be taken into consideration in connection with the abandonment; that the sale didn't take place from him to Mrs. Lillie until 1857, which was the following year, so that it wouldn't have so much bearing on his going away as though it had been contemporaneous with the leaving.

Now it is alleged on part of the plaintiff that even if this property was left in this way, it was again occupied by Mr. Snow and that his occupancy would stop the operation of this abandonment, and restore its quality of seated land. That depends upon all the circumstances, and these are for your consideration. The mere temporary occupancy of land for a temporary purpose, by a person not pretending to have any claim to the land and having no intention of making himself liable for the taxes, would not give a seated character to the land, if the jury believe from the evidence that it had been abandoned by the owner. The mere camping out or the mere temporary use of an abandoned building would not be sufficient; but if a man went in there, even as an intruder, and had property, and with the intention of making it a residence remained some time, and had property there in the very year, sufficient out of which the tax might be made, it would be different.

[It is for you to judge. It is impossible to make a rule that will apply to each case, because there is such a variety of circumstances. It is for the jury to use their common sense and determine under the rule we have given you whether this was an abandonment by Babbitt, or whether, he having abandoned it (if you find he did), Mr. Snow went there in such a way as to change that and restore its character of seated land, or prevent the operation of the abandonment, so that it was seated in 1860.]

Was Snow living there with a view of making it his residence for anything more than a casual and temporary purpose; or was he there, although an intruder—there is nothing to show that he went in under anyone—with the intention of residing for some time? He stayed, it seems, for a number of months. Was he making it his residence, or was it a mere camping out and temporary shelter, and did he have property there out of which the tax could be made? If he was living there and making it his residence it would make him liable for the tax, and in that way the land would become seated again. That is entirely for you.

Now if this property was seated, either from Babbitt not having abandoned it and the character of seated property continuing to adhere to it as given by him in 1854, or if Snow went in there and made it his residence, with property there out of which the tax could have been collected in 1860—then the sale by the treasurer—notwithstanding the fact of its having been put on the unseated book, would be void; [but if you find that Babbitt really had abandoned it and gone away without any intention of returning, and the place growing up to briars and the house tumbling down and the barn, originally a flimsy structure, in ruins, not fit for occupancy for any purpose for which it was intended, and you find that the occupancy of Snow was merely temporary and casual, without the intention of making it his residence, then this property was unseated, and then the collector did right in making the return that he did, and the commissioners had a right to put it on the unseated book and the treasurer had a right to sell, and Mr. Thompson would acquire a title, and his title would be good; the time having elapsed without the property having been redeemed.] Mere irregularities about a treasurer's sale are cured by the Act of 1815, but the Act of 1815 doesn't cure the fact that this property was seated—if you find that it was seated under the rules we have given you.

Now the whole case hinges upon your finding upon this question of fact; what else remains to be said to you is included in the points. One of these points, the last one put by Mr. Sproul, involves a question of law which (by understanding upon both sides) will be reserved in the shape of a special verdict; so that if you find for the plaintiff you will find this additional special verdict, which will raise and bring before the court the legal question which was argued last night as to whether Juliette I. Babbitt ever acquired any title at all; there being no proof here that this forfeiture occurred by which she would under this devise become the owner. But you have nothing to do with that; the whole question for you is whether this was unseated or seated, and whether abandoned or not.

The jury rendered a verdict for defendant, upon which judgment was entered; and plaintiff took this writ, assigning as error the portions of the charge of the court embraced in brackets, also the answer of the court to the plaintiffs' first point, which point and answer were as follows:

1. "That the testimony in the case shows that the land in dispute was assessed as seated, and therefore there could be no transfer of it by the collector, or the county commissioners, from the seated to the unseated list, and the sale by the treasurer, June, 1862, of the land as unseated, to Caleb Thompson, passed no title."

Ans. "The evidence shows that the land in dispute was unseated prior and up to the time of its purchase by Isaac Babbitt from H. J. Huidecooper in 1858; that after that time the land was assessed to Isaac Babbitt, among the seated lands, up to and including the year 1860; that in 1860 the land was returned by the collector as unseated, and put upon the list of unseated lands in the commissioners' office; and,

the tax remaining unpaid, the land was sold by the county treasurer on June 9, 1862. Whether the sale passed the title to Caleb Thompson, the purchaser at treasurer's sale, will depend upon the view the jury may take of the case under the evidence, and the point is refused.

Messrs. Elijah Babbitt, E. L. Whittelsey, Henry Southar, for plaintiff in error:

The payment of taxes, or the possession, did not help the title. This can only be done to help out the Statute of Limitations, as was done in *McCall v. Neely*, 3 Watts, 69.

In case of unseated land where the taxes were paid for thirty years, and no taxes paid or other acts of ownership exercised by the adverse claimant, it was held to be equivalent to the running of the Statute of Limitations in favor of the payor.

Sergeant, Land Law, 228; *Read v. Goodyear*, 17 Serg. & R. 350.

A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent use; and that occupation may be said to commence with the moment of entry for the purpose of clearing the land.

Campbell v. Wilson, 1 Watts, 508; *Wallace v. Scott*, 7 Watts & S. 248; *Mülliken v. Benedict*, 8 Pa. 169; *Kennedy v. Daily*, 6 Watts, 269; *Harbeson v. Jack*, 2 Watts, 124; *George v. Mesinger*, 73 Pa. 418; *Jackson v. Stoetzel*, 87 Pa. 302; *Earley v. Ewer*, 102 Pa. 338; *Stoetzel v. Jackson*, 15 W. N. C. 260.

The intention of Snow had nothing to do with making the character of the land either seated or unseated. It was a fact that he lived upon the premises with his family, and had sufficient personal property there out of which the taxes could be collected. There had been a cultivation of the land so as to make it seated.

George v. Mesinger, 73 Pa. 418; *Stoetzel v. Jackson*, 15 W. N. C. 260; *Sheaffer v. McKabe*, 2 Watts, 421; *Rosenburger v. Schull*, 7 Watts, 390; *Jackson v. Sassaman*, 29 Pa. 106.

Mr. J. W. Sproul, for defendant in error:

The court left to the jury the question whether this land was seated or unseated at the time of the assessment. This was proper under the authority of *Altamose v. Hufsmith*, 45 Pa. 121; *Rosenburger v. Schull*, 7 Watts, 390; *Watson v. Davidson*, 87 Pa. 270.

The facts on which it is claimed that land is seated, and the extent and character of any alleged occupancy, are for the jury.

Watson v. Davidson, *supra*; *Lackawanna Iron Co. v. Fales*, 55 Pa. 94.

If Snow was on the land in 1860, he was there as an intruder or trespasser. There is no evidence that he entered as an owner, or under anyone claiming as owner.

Jackson v. Stoetzel, 87 Pa. 306.

Under the Act of April 12, 1842, "All records of the county commissioners charging lands as unseated with arrears of taxes shall be evidence of an assessment."

But suppose the land was assessed on the seated list for 1860, but its character undesignated, and the land was actually unseated, and the collector so returned it, and the commissioners then put it on the unseated list charged with this tax and the commissioners certified it to the treasurer, who sold it as un-

seated for the taxes; then we say the sale was regular and the purchaser took title.

Laird v. Hiester, 24 Pa. 452; *Arthur v. Smathers*, 38 Pa. 40; *Alby v. Kennedy*, 9 Pittsb. Legal Jour. 356. See also *Owens v. Vanhook*, 8 Watts, 260; *Frick v. Sterrett*, 4 Watts & S. 269; *Bechdel v. Lingle*, 66 Pa. 41.

If there was any irregularity in the assessment, it was cured by the Act of March 13, 1815, § 4, which provides, *inter alia*: "And that no alleged irregularity in the assessment or in the process, or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal."

Hubley v. Keyser, 2 Penr. & W. 502; *Hess v. Harrington*, 73 Pa. 446; *McReynolds v. Longenberger*, 75 Pa. 13.

This is ejectment by the original title against the tax title, commenced October 27, 1875, more than thirteen years after the tax sale, during all of which time the purchaser at the tax sale was in actual possession of the land. The suit is barred by the Statute of Limitations of April 30, 1804, which enacts that "No action for recovering of said land shall live unless the same be brought within five years after the sale thereof for taxes, as aforesaid."

This limitation is in full force.

Ash v. Ashton, 3 Watts & S. 510; *McCall v. Himebaugh*, 4 Watts & S. 164; *Bayard v. Ingalls*, 5 Watts & S. 465; *Robb v. Bowen*, 9 Pa. 71; *Sheik v. McElroy*, 20 Pa. 25-81; *Burd's Exrs. v. Patterson*, 22 Pa. 219; *McReynolds v. Longenberger*, 57 Pa. 29; *Rogers v. Johnson*, 87 Pa. 43.

Mr. Justice Trunkey delivered the opinion of the court:

It is somewhat difficult to ascertain from the paper books the mode of assessing unseated lands in Erie County. Not all the evidence has been printed; and defendant alleges that some of the matter relating to the assessment is incorrectly printed. One thing is admitted, namely: the land was sold as unseated for the taxes of 1860; and the record shows no sale for the taxes of 1859. As the case comes it is necessary to notice only the instructions to the jury touching the assessment, on which depends the validity of the sale.

Babbitt had resided on the land and it had been assessed to him as seated. The court told the jury that after 1855 the land was assessed to Babbitt among the seated lands up to and including the year 1860, and that in that year the land was returned by the collector as unseated and put upon the list of unseated lands in the commissioners' office. And they were instructed that unless the land had actually become unseated, the sale was a nullity; also that if the land had been abandoned so long as to become again unseated, and the collector returned it to the commissioners as unseated, and they made the proper entry thereof in the unseated land book, the sale was valid.

It was clear that the land was assessed, either as seated or unseated, for the year 1860; that the rate had been fixed, the amount of tax ascertained, and the same put into the hands of the collector. From the peculiar method of keeping the books it may be impossible to ascertain how it was assessed; but it was assessed with the other lands in the township. That assessment was made in the fall of 1859, or early

in 1860. If it was assessed as seated, then the jury were rightly told that "If Snow went in there and made it his residence, with property there out of which the tax could have been collected in 1860, then the sale by the treasurer, notwithstanding the fact that it had been put on the unseated book, was void." But if the land was assessed as unseated, although Snow resided on it in 1860, with personal property, what right had the collector to touch such property? If the officers chose to make it a land tax, without personal liability of the land owner, the personal property of the lessee, or of an intruder, could not be seized and sold in satisfaction of the tax.

It was incorrect to say to the jury, as set out in the fifth assignment, that if the land was seated in 1860, and Snow was residing on it, his property was liable for the tax, in case it was assessed as unseated. The instruction, in connection with other parts of the charge, was that if Snow went on the land in 1860, to reside permanently, his property was liable for the tax, even if it had been assessed as unseated because of Babbitt's abandonment. And with the answer to the plaintiff's first point, the jury would understand that the point of time was December, 1860, to determine whether the land was seated at that date, instead of the date of assessment prior to fixing of the amount of tax.

If the land was seated when the assessment was made, the sale was void; if unseated, the sale was valid. If the assessor found Snow residing on the land in the fall of 1859, he had good reason not to change the assessment. In that case it matters not where Snow resided in the summer of 1860. If he moved away after the making of the assessment and laying of the tax, the collector and commissioners had no authority to change the tax for that year. Instead of so pointedly directing the minds of the jury to the time of the collector's return in December, 1860, the court should have directed their inquiry to the date of the assessment. Nor would it have been amiss to inform them that if the land was seated when assessed, after the collector's return it was the commissioner's duty to cause it to be sold as seated.

Nearly all the rulings and instructions of the learned judge at the trial are unexceptionable. But we think the jury were misled on the matter indicated. It may or may not have affected their conclusion. Snow was assessed in that township for the years 1859 and 1860. It is not shown that he resided elsewhere than on this land; and had the jury been advised that the inquiry whether the land was seated must be with reference to the time of assessment, perhaps the verdict would have been the other way.

Judgment reversed and venire facias de novo awarded.

Robert P. DECHERT, Controller of the City and County of Philadelphia, *Plff. in Err.*,

v.
COMMONWEALTH, *ex rel.* T. P. SMART.

1. **Mandamus** will not lie to compel the performance by public officers of acts and duties necessarily calling for the exercise of judgment and discretion on their part.

2. The **City Controller of Philadelphia** possesses all the powers of county auditors; his jurisdiction in the exercise of these powers is as full and complete as that of the courts; and he is entitled to exercise them without interference.

3. The court may, in a proper case, correct an error in judgment on part of the controller, but it will not by **mandamus interfere, in advance, with that discretion** which it is his right and duty freely to exercise, or dictate the decision which, in a given case, he must reach.

4. Where a contractor, having agreed with the City of Philadelphia to build a sewer, to receive payment in **assessment bills** against fronting properties, to make no claim on the city for payment and that the city shall not "in anywise guaranty any of said bills to be good and collectible," builds the sewer, receives the assessment bills and brings suits against property owners who resist the liens, and afterward the city councils by ordinance direct the chief engineer to draw, and the City Controller to countersign, in payment for the work, a warrant for \$600, against a survey department appropriation, the court will not, upon the Controller's refusal, compel him by **mandamus to countersign the warrant.**

(Decided October 4, 1886.)

ERROR to Common Pleas No. 2 of Philadelphia County, to review a judgment sustaining a demurrer to a return and awarding a writ of peremptory *mandamus*. *Reversed.*

The facts as they appeared by the pleadings are stated in the opinion.

Messrs. Henry T. Dechert, Robert Alexander and Charles F. Warwick, for plaintiff in error:

The duties of the Controller of the City and County of Philadelphia in relation to warrants, are laid down in the Acts of February 2, 1854, § 12, P. L. 80, West, Dig. 68; April 21, 1855, § 21, P. L. 269, West, Dig. 64; May 18, 1856, § 24, P. L. 572, West, Dig. 120; *Id.* § 29, P. L. 573, West, Dig. 64; June 11, 1879, P. L. 130.

The Controller has succeeded to all the duties and powers of county auditors, which are as full and complete within their jurisdiction as are the powers of courts.

Runkle v. Commonwealth, 97 Pa. 328; *Taggart v. Commonwealth*, 102 Pa. 354.

The powers conferred by the Acts have been clearly recognized in the ordinances of councils: Ordinance of November 6, 1862, § 4, West, Dig. 66; *Id.* § 5, West, Dig. 66.

The Controller has all the extensive powers of the county auditors; besides that, he must countersign every warrant for a municipal expenditure; must countersign no warrant for any object not authorized by law under penalty of punishment for misdemeanor; must examine all bills presented to him, and if no appropriation has been made or the appropriation is exhausted, or if "from any other cause he cannot give his approval" to it, he must refuse to countersign the warrant; may call and examine parties and witnesses, require the produc-

tion of books and papers, and is given the greatest latitude in inquiring into "whatsoever matter he may deem needful to protect the interests of said city." By the Act of 1879, he is directed in certain contingencies to stop all municipal expenditure.

Every one of these powers implies judicial action, the exercise of discretion and official independence.

The relator bases his claim on an ordinance of councils, which shows no appropriation for the object which he claims was intended, no direction but a simple authority to the Controller to countersign, and a glaring mistake in local reference; and even if his construction of the ordinance be correct, it shows open questions of law and fact. The Controller must then determine: Is the warrant proper and right? Has the city received consideration therefor? Has a proper appropriation been made to meet it?

These questions were at once acted upon and, answering all in the negative, the Controller refused to countersign the warrant. He has thus exercised the judicial and discretionary power of his office, firmly established in Pennsylvania.

Where a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion, *mandamus* will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, although in fact the decision may have been wrong.

Republica v. Clarkson, 1 Yeates, 46; *Commonwealth v. District Court*, 5 Watts & S. 272; *Drezel v. Man*, 6 Watts & S. 886; *Commonwealth v. Hultz*, 6 Pa. 469.

Mandamus will lie to the secretary of the land-office, to compel him to make calculations of purchase money and interest on lands sold, if he has omitted or wholly refused to do it; but it will not lie to command him in what manner to make such calculations, that act not being merely ministerial; nor, if he has already made the calculations in an erroneous manner, will it lie to compel him to make them in a proper manner.

Griffith v. Cochran, 5 Binn. 87.

So where county commissioners were directed to draw an order for the amount of a school-master's bill for teaching poor children, if they approved thereof, and they disapproved, although for bad reasons, *mandamus* will not lie.

Commonwealth v. County Comrs. 5 Binn. 534-537.

A rule of the court of common pleas and a similar rule of the supreme court provided that an applicant for admission to the bar should have served a regular clerkship for three years with a practicing attorney or gentleman of the law, of known abilities. The Common Pleas of Cumberland County refused to admit to its bar the son of Judge Brackenridge of the supreme court, on the certificate of the latter. It was held by the court, that while the reason for the refusal was absurd, *mandamus* would not lie, the act having been a judicial one.

Commonwealth v. Judges, 8 Binn. 273.

The power of county commissioners to appoint collectors of taxes was discretionary and would not be interfered with by *mandamus*.

Commonwealth v. Perkins, 7 Pa. 42.

Mandamus will not lie to compel school directors to exonerate a property owner from a school tax assessed by them. Exoneration is a discretionary power with them, and they exercised it by refusing to grant the relief sought.

School Directors v. Anderson, 45 Pa. 388.

The mayor of Philadelphia having refused to execute a coal lease of Girard lands, because he believed improper means had been taken to secure it and that it was disadvantageous to the city, could not be compelled by *mandamus* to execute it.

Commonwealth v. Henry, 49 Pa. 580.

The discretion of a license board will not be interfered with by *mandamus*.

Schlaudecker v. Marshall, 72 Pa. 200.

The action of a board in refusing to entertain a proposal for public work or grant a contract is discretionary and will not be modified by *mandamus*, although erroneous.

Commonwealth v. Mitchell, 82 Pa. 343; *Commonwealth v. Douglass*, 42 Legal Int. 837.

But it was argued that the ordinance was an absolute appropriation to Smart; and as such it was not for the Controller to approve or disapprove the warrant, but to countersign it without looking further than the intention of councils. Assuming for the sake of argument that the theory is correct, the answer is that the case of an appropriation by councils alleged to be void especially calls for the exercise of the Controller's discretionary power.

An injunction will lie against a municipality, at the instance of taxpayers, and its accounting and disbursing officers, to restrain the drawing, countersigning and paying of warrants under an appropriation illegally made.

Dil. Mun. Corp. § 914, 3d ed.; *Sank v. Philadelphia*, 4 Brewster, 133.

There is nothing in the various Acts of Assembly, defining the duties and powers of the Controller, which would seem at all to limit his power of approval to warrants other than those drawn directly by order of the councils. On the contrary, it is made a misdemeanor for him to pass any bill or order for any object not authorized by law; and he may inquire as to whatsoever matter he may deem needful to protect the interests of said city.

In *Commonwealth v. Mayor of Lancaster*, 5 Watts, 152, the councils had, by an ordinance passed in regular form, voted a certificate of loan to one of its members for services rendered by him; such an appropriation was prohibited by the Act of incorporation; the mayor refused to issue the certificate, and a *mandamus* to compel him to do so was refused.

In *Faas v. Warner*, 9 W. N. C. 412, S. C. 96 Pa. 215, an Act of Assembly had directed the Controller of Allegheny County to examine and the county commissioners to pay the claim of a contractor who had furnished bread to a deceased sheriff for the use of prisoners in the county prison; the Controller refused to examine the claim, and on proceedings in *mandamus* it was held by this court that the Act was unconstitutional and the Controller had properly refused to act.

An appropriate instance of the exercise of the discretionary power of the Controller, in a case where the right claimed is doubtful, is shown also in the case of *Runkle v. Commonwealth*, 97 Pa. 323.

It is the duty of the courts, therefore, to uphold the Controller in the exercise of the powers conferred on him by law, and to leave parties who believe themselves unjustly affected thereby to their remedies at law or in equity, which are ample for their protection.

Commonwealth v. Page, 18 W. N. C. 582.

The Controller cannot be elected by councils, and it has never been decided that councils may impose duties on him other than those conferred by statute.

Taggart v. Commonwealth, 12 W. N. C. 465; *S. C.* 102 Pa. 354.

The relator has a specific remedy at law; and therefore *mandamus* should have been refused, even where the act sought to be compelled is ministerial.

Commonwealth v. Rosseter, 2 Binn. 360; *Commonwealth v. Councils of Pittsburgh*, 34 Pa. 496.

The Ordinance of June 9, 1885, in its terms does not make an appropriation to Smart. Smart's name does not appear in any place as the person in whose favor the warrant is to be drawn, and no way is pointed out for determining the beneficiary. The object stated in the ordinance is not connected with anything that Smart had done. It is stated that the object is for the construction of a sewer in Sixty-Third Street, etc. This means only for the contemplated or future construction of a sewer.

But even if it could be shown that councils intended the appropriation to be for the alleged purpose, the object of the appropriation is not stated as required by law. "No appropriation shall be made of the moneys of the city without an ordinance therefor expressing the objects thereof and the amount appropriated for each object."

Act of April 21, 1855, § 21, P. L. 269, West, Dig. 93.

It is not contended by the relator that the city was in any way liable to pay Smart for the sewer. That point was definitely settled in two recent cases, in which it was held that the contractor, where he had released the city from any liability on the assessment bills, "cannot make the city liable to pay him," where the bills had been held to be invalid in suits properly brought upon them.

Horter v. City, 18 W. N. C. 40; *Dickinson v. City*, 14 W. N. C. 367.

The foundation of Smart's claim in this case, by his own allegation, is the invalidity of the assessment bills, and the consequent appropriation. "With this full knowledge and means of knowledge, the plaintiffs voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement and make the city liable to pay them."

Horter v. City and *Dickinson v. City*, *supra*.

Slighter circumstances of acquiescence on the part of property owners have been held to estop them from raising the question of their nonliability for municipal improvements.

Bidwell v. Pittsburgh, 85 Pa. 412; *McKnight v. Pittsburgh*, 91 Pa. 278.

Even if the question raised in defense in the suits on the liens, namely: that the property was rural, was decided as a matter of fact in favor of the property owners, that would not be a good defense as matter of law. The sewer built by Smart was not an improvement, from

which property clearly proven to be rural would be exempt from liability, under any of the decisions.

Hammett v. Philadelphia, 65 Pa. 146; *Washington Avenue*, 69 Pa. 352; *Seely v. Pittsburgh*, 82 Pa. 360; *Kaiser v. Weise*, 85 Pa. 366; *Craig v. Philadelphia*, 89 Pa. 265; *Philadelphia v. Rule*, 93 Pa. 15.

The ordinance of June 9, 1885, sought, under the assumption that the relator's construction is correct, to pay for work authorized by the councils four years before, to be done without expense to the city and actually completed at that time.

This is within the letter and the spirit of the prohibition of the Act of June 11, 1879, § 3, P. L. 181, *Purd. Dig.* 1610.

The city had made a contract in 1881 which was to cost it nothing; the attempt to pay a full price for it in 1885 is absolutely void, because there had been no appropriation made previous to the making of the contract.

The ordinance would be void because it is making a gratuity, not only to Smart but also to the Grandom Institute, in relieving it from the claims now existing as liens against its property.

There is no consideration for such a gift. The sewer was of no general benefit and was beneficial only to the adjoining properties.

Section 7 of article IX of the Constitution of 1874 confines municipal expenditures to public objects. The word "appropriate" is new, and expanded the effect of the amendment of 1857 so as to embrace money in the treasury itself.

Speer v. Directors, 50 Pa. 150; *Wilkesbarre Hospital v. Luzerne Co.* 84 Pa. 55.

Under this section no city can be authorized to appropriate money for any corporation, association or individual.

Re Northern Home for Friendless Children, 2 W. N. C. 349.

Where a county had contracted with the sheriff to board prisoners, and the sheriff had died leaving unpaid a bill for bread, and an Act of Assembly directed the Controller to ascertain the amount due and the commissioners to pay it, it was held that the Act was unconstitutional.

Faas v. Warner, 9 W. N. C. 412; 96 Pa. 215.

Whenever a municipality attempts to exercise powers not within the proper province of local self government, whether the right to do so be claimed under express legislative grant or by implication from the charter, the act must be considered as altogether *ultra vires* and therefore void.

Cooley, Const. Lim. 211; *Smith v. Commonwealth*, 41 Pa. 341; *Wimer v. Overseers of Poor of Worth*, 41 *Legal Int.* 281.

A tax levied for the support of a private charity, however meritorious, is unconstitutional.

Phila. Relief Assn. v. Wood, 39 Pa. 73; *Washington Co. v. Berwick*, 56 Pa. 466; *Tyson v. School Directors*, 51 Pa. 9.

Messrs. Emil Rosenberger and David W. Sellers, for defendant in error:

Although the contractor could not have adversely recovered from the city for this work, because of his agreement (*Horter v. City*, 18 W. N. C. 40), yet the city did pass an ordi-

nance, the effect of which was to pay for the work done and to reimburse the city treasury when the sewer should be used by the property; this being the system in common use relative to water pipes, and which has met the approval of this court in *Philadelphia v. Cooke*, 30 Pa. 56.

The ordinance appropriated a specific sum to pay for public work done, and the Controller had no auditing or discretionary duties relative thereto. His public duty was only ministerial as to this, because a check on the city treasurer was not good without his signature.

Appeals of Philadelphia, 86 Pa. 186.

As the city could apply the same system in the construction of sewers which it always has adopted for water pipe—that is, pay for the work in the first instance and itself collect the charges—so it could modify any contract after it was made.

City v. Hays, 93 Pa. 72.

Where a teacher's rights are established by law and an appropriation made, the law makes it the duty of the Controller to countersign her warrant.

Commonwealth v. Lyndall, 7 Phila. 29.

Mr. Justice Clark delivered the opinion of the court:

This writ of error is taken to the order and decree of the Court of Common Pleas No. 2 of Philadelphia, awarding a writ of peremptory *mandamus*. The relator, T. P. Smart, was a contractor of the said city, and the respondent, Robert P. Dechert, Controller of the City and County of Philadelphia. The alternative writ recited that under authority of an ordinance passed June 24, 1881, the relator had constructed a sewer for the city; that certain property on the line was not subject to assessment, or municipal charge for the construction, and that by an ordinance approved June 9, 1885, the chief engineer and surveyor was directed to draw, and the city controller authorized to countersign a warrant for \$600, to pay for the construction of said sewer in front of the property referred to; that the chief engineer had drawn the warrant as directed, but the Controller had refused to countersign it and had returned it to the chief engineer, and that the relator had a specific remedy at law for the grievance thus sustained. The Controller was therefore commanded to countersign the warrant, or show cause why he should not.

The Controller made a formal return to the alternative writ, and to that return the relator filed a demurrer. All matters, therefore, sufficiently set forth in the return must be taken for true; and these, with the material allegations of the writ, not traversed by the return, constitute the substantial facts upon which this case is to be determined.

The respondent in his return to the writ, as the Controller of the City and County of Philadelphia, claims to exercise a discretionary power, under the law, in refusing to countersign the warrant referred to, and that in the exercise of that discretion he was not subject to the direction of the court; further, that under the provisions of the ordinance of city councils, and by the terms of the contract under which the work was done, the construction of the sewer had been fully paid for; that

the city owed no debt and was under no obligation whatever to the contractor therefor; that the appropriation was therefore not authorized by law, and that in the proper exercise of his duties as Controller he was required to withhold his signature from the warrant.

It is well settled that *mandamus* will lie to compel the performance, by public officers, of duties purely ministerial in their character; but it is equally well settled that as to all acts and duties necessarily calling for the exercise of judgment and discretion on their part *mandamus* will not lie. While the writ may, perhaps, be awarded to set the latter class of officers in motion, and to compel action upon the particular matters over which they may have jurisdiction, it will in no manner interfere with the exercise of that discretion, nor control or dictate the judgment or decision which shall be reached.

It is unnecessary to quote authorities in support of this plain and well established principle of the law; such has been the uniform course of all the decisions, and in this case we do not understand the doctrine to be denied.

The question for our consideration, therefore, is whether or not the Controller of the City and County of Philadelphia, in the exercise of his office, when called upon to countersign a warrant, is invested with a discretionary power in the performance of that duty, or whether his duty in this respect is merely ministerial.

On May 12, 1866, a general ordinance of councils was approved, providing for the construction of sewers in said city; that the owners of ground, on the line thereof, should pay at the rate of \$1.25 per foot front; and that bills of assessment at this rate in each case should be prepared by the city. The ordinance provides further, as follows: "It shall be a condition of the contracts awarded under the provisions of this ordinance that the contractor shall accept assessment bills as so much cash paid by the city on the said contracts, and that he shall collect the same at his own cost without recourse to the city in any event." By ordinance approved February 16, 1869, the rate was increased to \$1.60 per foot front.

On June 24, 1881, an ordinance was approved authorizing and directing, *inter alia*, a sewer to be constructed on Sixty-Third Street, between Market and Arch, and providing "That it should be a condition of the contract, entered into on behalf of the city for the construction of the several sewers thereon authorized, that the contractor should accept the sums assessed upon and charged to the properties, lying on the line of said sewers, in manner and form authorized by ordinance, entitled, etc., approved May 12, 1866, and the supplement thereto approved February 16, 1869."

On August 19, 1881, T. P. Smart, the relator, under a written contract with the city, agreed to construct the sewer on Sixty-Third Street, as authorized by the ordinance of June 24, 1881; the price and mode of payment were agreed upon as follows: "For sewer three feet in diameter, per lineal foot, and manholes, the sum of the assessment bills given by the survey department against the properties or premises, fronting on the streets on which the sewer forming the subject of this contract is to be constructed, which said bills the said party of the

second part agrees to accept, in full, for all work done under this contract. The said party of the second part further agrees to make no claim whatever upon the City of Philadelphia, excepting upon bills against city property, it being distinctly understood and agreed that the City of Philadelphia does not in anywise guaranty any of the said bills to be good and collectible.

* * * Payments for the entire work shall be made by the chief commissioner of highways, upon estimates signed by the chief engineer and surveyor, in assessment bills prepared as specified in section 2 of ordinance 'Regulating the Assessment upon Property for the Construction of Sewers,' approved May 12, 1866, and warrants upon the city treasurer to an amount as authorized by ordinance approved April 3, 1868, in payment for the street intersections, manholes and legal deductions. All of which payments shall be received as so much cash, and be collected without recourse to the City of Philadelphia; but for the purpose of better enabling the contractor to collect the same, the name of the said city may be used, and all her legal remedies, whether by bill or otherwise, employed."

Smart constructed the sewer, and it is admitted, received the assessment bills in full for the work, according to contract, including two against the Grandom Institute, the property on the east side of Sixty-Third Street extending along the whole length of the sewer. He, subsequently, on February 1, 1882, filed in the name of the City of Philadelphia, to his own use, two claims for the construction of the sewer against the Grandom Institute and the said property; which claims are entered in Court of Common Pleas No. 4 of Philadelphia.

Having issued writs of *scire facias*, the Grandom Institute pleaded *non assumpsit*, and that the property was rural; the relator replied that the property was not rural. The relator ordered the cases on the trial list, but no further proceedings appear of record, and the suits remain pending and unsatisfied. By the express terms of the general ordinance of May 12, 1866, as well as by the ordinance of June 24, 1881, under and subject to which the contract was made, as well as by the conditions of the contract itself, payment was to be made in assessment bills, which were accepted as cash, to be collected at the contractor's cost and without recourse to the city in any event; it was expressly provided also that the city did not "in anywise guaranty any of the said bills to be good and collectible."

It is plain, therefore, that the city owed Smart nothing for the construction of the sewer; he had been paid in full, four years before the ordinance was passed authorizing the warrant, and paid precisely as the contract provided.

It is not pretended that there remained any obligation on the part of the city, moral or otherwise, to pay to Smart in any other way. There was no mistake, no change of circumstances, or any other intervening matter which caused the contract to operate oppressively on the contractor; the parties stood on equal ground; no advantage was taken in the contract, and the law, as well as the facts, was presumably as well known to one party as to the other.

When this warrant was presented to the Controller for his signature, what was his duty

with reference to it? The duties of the Controller, in this respect, are defined in various Acts of Assembly, as follows:

Act February 2, 1854, § 12, P. L. 30: "He shall countersign all warrants on the city treasurer, and shall not suffer any appropriation made by the city councils to be overdrawn, and shall perform all the duties now enjoined by law on the county auditors. He shall superintend the fiscal concerns of the city in such manner, and make reports thereon at such times, as shall be prescribed by ordinance."

Act April 21, 1855, § 21, P. L. 269: "It shall be a misdemeanor in office for the controller of the city to pass or the treasurer of the city to pay any bill or order for any object not authorized by law."

Act May 18, 1856, § 24, P. L. 572: "It shall be lawful for the city controller, and his duty, whenever required by any citizen, to administer an oath or affirmation to any person presenting a bill against the city, as to its accuracy, the prices actually paid or contracted to be paid therefor, whether others and who are interested therein, and as to whatsoever matter he may deem needful to protect the interests of said city."

Act May 18, 1856; § 29, P. L. 573: "The city controller shall be and he is hereby required to keep separate accounts for each specific or separate item of appropriation made by city councils, to each and every department of the city, and shall require all warrants to state particularly against which of said items the said warrant is drawn; and he shall at no time permit any one of the items of appropriation to be overdrawn, or the appropriation for one item of expense to be drawn upon for any other purpose, by any one of the departments, than that for which the appropriation was specifically made; he shall, upon receiving a bill of warrant from any one of the departments, proceed immediately to examine the same, and if the said bill or warrant contains an item for which no appropriation has been made, or the appropriation for which is exhausted, or to which, from any other cause, he cannot give his approval, it shall be his duty immediately to inform such department; and the warrant therefor shall not be issued unless by special authority from the city councils."

By the Act of June 11, 1879, P. L. 180, the Controller is directed not to countersign any warrant until councils have passed the appropriations necessary for each department, and the total of all appropriations, estimates and obligations, is within the estimate of the income of the city; he is also forbidden to countersign "any warrant for the expenditure of money without a previous appropriation."

It will be observed that the warrant was from one of the departments of the city government, the department of surveys; it was drawn by the chief engineer and surveyor, against a particular item in the annual appropriation. It was issued, it is true, pursuant to an ordinance of councils; but all warrants may be said to be so drawn. The power to raise money for city purposes, and also the power to disburse it, subject to certain restrictions, is vested in the city councils; and the warrants which issue from the several departments are drawn under such regulations of the councils as may best

serve the public convenience and promote the dispatch of business.

It will also be observed that the ordinance of June 9, 1885, did not in terms authorize the issue of a warrant to Smart, the relator; it directed the chief engineer and surveyor to draw "a warrant to the amount of \$600, for the construction of a sewer on Sixty-Third Street," etc.; it did not name the contractor, or other person to whom the money was owing; it simply authorized the application of a portion of item 83 of the annual appropriation to a particular purpose, but did not designate the party or parties entitled to receive it.

Upon receiving this warrant from the department of surveys, it was the Controller's duty to "proceed immediately to examine the same," and if it contained an item for which no appropriation had been made, or for which the appropriation was exhausted, "or to which from any other cause" he could not give his approval, it was his duty immediately to inform such department; and the warrant therefor could not again be issued from the department, and presented for his signature, unless by special authority of councils.

It was his duty in any case, before countersigning the warrant, to know that the appropriation necessary for each department had been made, and that the total was within the estimate of the income, as required by the Act of 1879; to be satisfied that the warrant covered items for which appropriations had been made, and that these appropriations had not been exhausted, as required by the Act of 1856. These inquiries, as they involved no particular exercise of discretion, are perhaps of a clerical and therefore of a ministerial character only. But other duties devolved upon him, as the superintendent of the fiscal affairs of the city; Act February 2, 1854; it was his duty to do what he might "deem needful to protect the interests of the said city." Act May 13, 1856.

To this end (Act February 2, 1854) he was invested with all the powers, and directed to perform all the duties, enjoined by law on county auditors; and as a legal sanction to the just and full performance on his part of these duties, in the interest of the city, it was declared (Act April 21, 1855) to be a misdemeanor in office, and to subject him to the pains and penalties of the criminal law, if he should pass any bill or order for any object not authorized by law.

It is plainly then the duty of the Controller, with due discrimination, to determine what objects are authorized by law for appropriation of the city moneys; he is guilty of a misdemeanor in office if he does not, and the discharge of this duty necessarily calls for the exercise of judgment and discretion on his part. It is his duty, of course, to respect the contracts lawfully made on the part of the city, and to discharge the legal obligations of the city by countersigning warrants regularly drawn in payment thereof; but it must be conceded that he was not bound to do what in his judgment was by the law positively forbidden.

Possessing all the powers of the county auditors, it was his duty to audit, settle and adjust the accounts of the city; and in so doing he could not, with propriety or consistency, reject a claim which he had previously approved.

His jurisdiction as Controller, in the performance of the duties of the county auditors, was as full and complete as that of the courts, and he was entitled to exercise these important functions free from all interference. The court might when a proper case was presented correct an error in judgment on part of the Controller; but it would not by *mandamus* interfere in advance with that discretion which it was his right and duty freely to exercise, or dictate the decision which, in a given case, he must reach.

In the event of the Controller's refusal to countersign any warrant, the courts of the Commonwealth are open for vindication of the claimant's rights as against the city; and if these alleged rights are submitted to the decision of a court of competent jurisdiction, and are there finally adjudicated in his favor, either the neglect of councils to provide for payment, or the refusal of the Controller to countersign a warrant in discharge of a legally ascertained liability of the city, would present a different question here.

In *Runkle v. Commonwealth*, 97 Pa. 328, the specific question was as to the duties of controllers of cities of the third, fourth and fifth classes, under the Act of May 23, 1874; yet that case and the case in hand are precisely alike in this: that the city controller in both instances was expressly authorized to perform all the duties enjoined by law on county auditors. In delivering the opinion of the court in that case, our brother Gordon says:

"Upon him also is imposed 'all the duties now enjoined on county auditors by the laws of this State, and he shall scrutinize, audit and settle all accounts whatever in which the city is concerned.' But the powers of county auditors are as full and complete, within their jurisdiction, as are the powers of courts. They may issue subpoenas for parties and witnesses; they may compel the production of books and papers, administer oaths, compel the attendance of witnesses, and punish contempts by attachment. With all this judicial and deliberative power the Controller of the City of Reading is clothed, and of necessity he must be left free to exercise his own judgment. But how can he exercise these important functions if he is to be controlled in his judgment by the court of common pleas, or by any other court? In the present case, Controller Runkle, for reasons satisfactory to himself, refused to approve the warrants drawn in favor of Keppelman; this he had a right to do; this it was his duty to do, if he believed the interests of the city would be protected by the refusal of such approval; and we know of no power in the common pleas to substitute its judgment for that of this officer. Had the Controller refused to act in the matter at all, the court by its *mandamus* might have compelled him to act; but this was all it could do; but after he had acted and had refused to sanction the warrants, it was a mere piece of usurpation on the part of the court, to attempt to compel him to revise his decision and adopt its judgment in preference to his own. The rule governing cases of this kind may be stated as follows: where a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers according to his or its discretion, *mandamus* will

not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, although in fact the decision may have been wrong. *Griffith v. Cochran*, 5 Binn. 87; *Commonwealth v. Perkins*, 7 Pa. 42; *Commonwealth v. Mitchell*, 82 Pa. 848."

The office of the city controller is certainly one of the gravest importance and responsibility; it is not to be supposed that the powers conferred will be prostituted to any purpose of injustice or oppression, but will be exercised in good faith for the protection of the people. We think the office was designed to operate, in the manner indicated, as a check upon the city councils in the appropriation of the public moneys. The city corporation holds its moneys in trust, to be used for legitimate corporate purposes only; there is no authority to apply them otherwise or to bestow them upon those to whom the city was under no obligation whatever.

It is the Controller's plain duty, as the representative of the people, and of the city in its corporate capacity, to see to it that it is not applied to any object not authorized by law; and if in his judgment the warrant in question was so issued, he was justified in refusing to countersign it.

The judgment is reversed, and judgment is now entered upon the demurrer in favor of the respondent.

Sarah C. ROWLAND, Admr., etc., *Plff. in Err.*,
v.

Harriet E. MARTIN.

1. A mortgage given by the grantee of land and accepted by the grantor, in furtherance of the specific purpose of putting the land out of the reach of the grantor's creditors, will not be enforced.
2. Courts will not relieve a party from the consequences of his intentional, fraudulent act.
3. In such a case equity will leave the parties in the position where they have knowingly and willfully placed themselves. Public policy forbids the intervention of the courts to relieve a fraudulent actor.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Warren County, to review a judgment for defendant ordered on a special verdict in a *scire facias* *our mortgage*. *Affirmed.*

Defendant pleaded coverture "And for further plea she saith that the said pretended indenture of mortgage is not her deed, and that she is not indebted to the plaintiff's decedent, nor was she so indebted at the impetration of the writ of *scire facias*."

To this plea the plaintiff replied that the mortgage was given by defendant for the consideration of real estate conveyed to her at the time of its execution.

The jury rendered a special verdict, upon which the court, Wetmore, P. J., ordered judgment for the defendant, which action of

the court in ordering judgment for defendant and not ordering judgment for plaintiff, plaintiff assigned as error.

The following is the special verdict:

"On the 27th of July, 1875, the defendant, Harriet E. Martin, a married woman and wife of John G. Martin, executed and acknowledged the mortgage in suit, her husband not joining in the mortgage, but named in the body thereof. The mortgage is for the sum of \$1,000, payable \$150 and interest on the whole sum in one year from date, and \$150 and interest on the whole sum unpaid, annually thereafter until the whole sum is paid; with proviso in said mortgage that in case of default in the payment of the interest or of any payment on the said mortgage, the mortgagee or his representatives might sue out forthwith a writ of *scire facias*, upon which judgment may be entered in favor of the mortgagees, and against the mortgagor, for the whole amount of the mortgage debt, together with 5 per cent on the whole sum as attorney's fees for collecting the same. The said mortgage thus executed was on the day of its date delivered by the said Harriet E. Martin to George W. Rowland, plaintiff's intestate. Said mortgage was given by defendant under the following circumstances: the plaintiff's intestate, being involved in difficulty with third parties, for the purpose of putting this land out of his hands and beyond their grasp, and thereby inducing them to settle their difficulties and demands, made a deed of the same land described in the mortgage to the defendant, said deed bearing even date with the mortgage, and the deed and mortgage constituting one transaction. Nothing was paid by the defendant to plaintiff's intestate as a consideration for the deed to her save the mortgage in suit, and an understanding between defendant and plaintiff's intestate that defendant should reconvey to plaintiff's intestate some thirty-five acres. That defendant took the deed and gave the mortgage at the request of the plaintiff's intestate, who was her brother, and with knowledge of his purpose and intention. That plaintiff's intestate was indebted at the time of the transaction to his father to the amount of \$200 or \$300 and had no property except the real estate covered by the mortgage. If the court should be of opinion on these facts that plaintiff is entitled to recover, then judgment for the plaintiff for the sum of \$1,326 and costs of suit, as of this date. If the court should be of opinion that the 5 per cent attorney's commission is not recoverable, the judgment is to be \$50 less than the amount above stated. If the court should be of opinion that the plaintiff is not entitled to recover, then judgment for the defendant."

Messrs. L. R. Freeman and D. I. Ball, for plaintiff in error:

The mortgage of a married woman given for the purchase money of real estate will be enforced, although her husband does not join her in the mortgage.

Glass v. Warwick, 40 Pa. 140.

The obligation of a married woman, whether by bond, note or mortgage, will be enforced against the real estate, the purchase money of which it is given to secure, although her husband is not a party to the instrument.

Patterson v. Robinson, 25 Pa. 81; *Ramborger's Admrs. v. Ingraham*, 38 Pa. 146; *Sawelle's*

App. 84 Pa. 806; *Shnyder v. Noble*, 94 Pa. 286; *Mumma v. Weaver*, 2 Pears. 173.

The fact that George W. Rowland gave a deed to Harriet E. Martin, and the latter gave him a mortgage upon the land so deeded to her, for the purpose of hindering and delaying those parties with whom the former had become involved in difficulty, is no defense to Mrs. Martin upon her mortgage. She cannot unravel the fraudulent transaction, or set it up as a defense against her mortgage.

Williams' Admrz. v. Williams, 84 Pa. 812; *Gill v. Henry*, 95 Pa. 888; *Bonesteel v. Sullivan*, 104 Pa. 9; *Sherk v. Endress*, 3 Watts & S. 255; *Evans v. Dravo*, 24 Pa. 62; *Hendrickson v. Evans*, 25 Pa. 441.

Messrs. Charles H. Noyes and Watson D. Hinckley, for defendant in error:

Cited *Quinn's App.* 86 Pa. 447; *Glidden v. Strupler*, 52 Pa. 400; *Evans v. Dravo*, 24 Pa. 67.

Per Curiam:

The specifications of error are not sustained. The plaintiff has no equity to invoke. The mortgage was given and accepted in furtherance of the specific purpose of putting the land out of the reach of the vendor's creditors.

Courts will not relieve a party from the consequences of his intentional fraudulent act. In such a case equity will leave the parties in the position where they have knowingly and willfully placed themselves. Public policy forbids the intervention of the courts to relieve a fraudulent actor.

Judgment affirmed.

William L. ELKINS, *Plff. in Err.*,

v.

SUSQUEHANNA MUTUAL FIRE INSURANCE CO.

1. An agent of an insurance company who is authorized to receive applications for insurance, to forward the applications to the company, to deliver the policies to the insured and to collect the premiums from him, and who is responsible to the company for the payment of the premiums or the return of the policies to the company, **has power to waive a condition in a policy** that the company shall not be liable until the premium is actually paid.
8. Where the insured applied through a broker to such an agent for a policy of fire insurance and the agent upon receiving the policy delivers it with several others for the insured to the broker, **charges the broker in a running account with the premium**, receives from him at once partial payment, and the balance of the premium after a fire has occurred, the company cannot, in an action on the policy, **set up as a defense the failure of the insured to comply with the condition.**

(Decided October 4, 1886.)

ERROR to Common Pleas No. 2 of Philadelphia County, to review a judgment of PA.

compulsory nonsuit in an action of assumpsit. *Reversed.*

This was an action of assumpsit by William L. Elkins, trading as William L. Elkins & Co., against the Susquehanna Mutual Fire Insurance Company of Harrisburg, Pennsylvania, on a policy of fire insurance.

At the trial before Hare, P. J., it appeared that about December 1, 1880, the plaintiff, through his broker, Thomas J. Lancaster, applied to Robert Crane, agent of the Insurance Company, for an insurance against fire, amounting to \$1,575.

A policy was made out by the Company, and sent by them to Crane, who delivered it to Lancaster.

On March 8, 1881, Lancaster paid Crane \$100 in response to a bill rendered for \$200.82, for three premiums, one of which was the premium upon the policy in suit.

On March 9, 1881, before the expiration of the policy, a fire occurred in the insured premises.

On March 15, 1881, Lancaster paid to Crane the balance due, \$100.82, who receipted for it.

The policy contained a condition that the Company should not be liable upon the policy until the premium therefor was actually paid.

On the grounds that Crane was not the Company's agent and that this condition had not been complied with, the Company refused to pay the loss.

The testimony as to Crane's relation to the Company is fully set forth in the opinion.

At the close of the testimony for the plaintiff the court, on motion of the counsel for the defendant, entered a compulsory nonsuit. The subsequent action of the court in overruling a motion to take off the nonsuit was assigned as error by the plaintiff below who is also the plaintiff in error.

Messrs. Charles B. McMichael and Alex. P. Coletberry, for plaintiff in error: The extent of the agent's authority is a question for the jury.

Sheldon v. Conn. Mut. Ins. Co. 25 Conn. 207; *Hough v. City Fire Ins. Co.* 29 Conn. 10; *Farmers Ins. Co. v. Taylor*, 78 Pa. 342.

As an insurance company may waive any condition of policy inserted therein for its benefit, or may at any time, at its option, give authority to its agents to make agreements or to waive forfeitures, it is not bound to act upon the declaration in its policy that they have no authority.

Ins. Co. v. Norton, 96 U. S. 284 (Bk. 24, L. ed. 689); *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 577 (Bk. 24, L. ed. 291); *Miller v. Ins. Co.* 12 Wall. 803 (79 U. S. bk. 20, L. ed. 398).

The rule laid down in *Marland v. Royal Ins. Co.* 71 Pa. 396; *Schaffer v. Mut. Ins. Co.* 89 Pa. 296, and *Pottsville Mut. Ins. Co. v. Minnequa Spring Co.* 11 W. N. C. 507, does not apply here, because in none of those cases was there payment of the premium to the company or its agent.

Where a policy was forwarded to the insured by mail, by the agents, with a bill for the premium, in which the insured was set down as debtor to the agents, the premium was not remitted until after the loss. The policy stipulated that it should not be binding until payment of premium. The agents claimed that they were personally liable to the company for

the premiums. The agents were accustomed to delivering policies without payment of premium, with the apparent consent of the company. Held, that payment was waived by delivering the policy, and the company was liable for the loss.

Miller v. Ins. Co. 12 Wall. 285 (79 U. S. bk. 20, L. ed. 898); *Commercial Ins. Co. v. Union Ins. Co.* 19 How. 818 (60 U. S. bk. 15, L. ed. 636); *Ins. Co. v. Colt*, 20 Wall. 560 (87 U. S. bk. 22, L. ed. 423); *Trankle v. Pa. Fire Ins. Co.* 12 Ins. Law Jour. 1888, p. 616.

In *Riley v. Commonwealth Mut. Fire Ins. Co.* 1 Cent. Rep. 120, the facts are almost identical with those of the present case. See also *Universal Fire Ins. Co. v. Block*, 43 Legal Int. 46.

Mr. James C. Sellers, for defendant in error:

Where a policy of insurance requires the premium to be actually paid before the liability of the insurer shall attach, the insurer will not be liable for a loss occurring before the premium is so paid.

Mariand v. Royal Ins. Co. 71 Pa. 393; *Schaffer v. Mut. Fire Ins. Co.* 89 Pa. 296; *Greene v. Lycoming Ins. Co.* 91 Pa. 387; *Pottsville Mut. Ins. Co. v. Minnequa Springs Improvement Co.* 100 Pa. 137.

The part payment of the premium would not render the Company liable. A policy of insurance is an entire contract. Until the whole consideration passed to the insurer, its liability would not attach. A person cannot recover for part performance of an entire contract where he has failed in the performance on his part.

Martin v. Schoenberger, 8 Watts & S. 367; *Shaw v. Turnpike Co.* 2 Pen. & W. 454.

A waiver can take place only in the manner stipulated in the policy.

Waynesboro Ins. Co. v. Conover, 98 Pa. 384; *Pottsville Mut. Ins. Co. v. Minnequa Springs Improvement Co.* 100 Pa. 137; *Universal Ins. Co. v. Weiss*, 106 Pa. 20.

So far as an insurance agent acts as an insurance broker, he is agent for the insured and not the insurer.

Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

A party who avails himself of the acts of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of proof lies on him to establish the agency and the extent of it.

Hayes v. Lynn, 7 Watts, 524; *Moore v. Patterson*, 28 Pa. 505; *American Underwriters Assn. v. George*, 97 Pa. 238.

The Company defendant was a mutual Company. Persons insured in a mutual insurance company are bound to become informed of its by-laws.

Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348; *Mitchell v. Lycoming Ins. Co.* 51 Pa. 402; *Diehl v. Adams Co. Ins. Co.* 58 Pa. 443.

Where an application or other paper is made by the policy a part of the contract, as in this case, the policy is inadmissible without the paper referred to.

Lycoming Ins. Co. v. Sailer, 67 Pa. 108; *American Underwriters Assn. v. George*, 97 Pa. 238; *Lycoming Ins. Co. v. Storrs*, 97 Pa. 354; *Crawford Co. Ins. Co. v. Cochran*, 88 Pa. 280.

438

No evidence was offered to show that the plaintiff had forthwith given written notice of his loss to the secretary of the Company, as was required by the policy. Without proof of such notice the plaintiff was not entitled to recover, and the judgment of nonsuit was right.

Trask v. State Ins. Co. 29 Pa. 198; *Edwards v. Lycoming Ins. Co.* 75 Pa. 378.

There was also no evidence that the plaintiff had complied with the provision requiring a particular account of the loss, containing proofs of loss, to be furnished to the secretary within thirty days after the loss. Compliance with this condition, unless waived by the Company, was also a condition precedent to recovery.

Commonwealth Ins. Co. v. Sennett, 41 Pa. 161; *Beatty v. Lycoming Ins. Co.* 66 Pa. 9; *Mueller v. South Side Ins. Co.* 87 Pa. 399.

No testimony was offered to show a waiver, or excuse for nonperformance, of either of these conditions.

Mr. Justice Clark delivered the opinion of the court:

The policy of fire insurance upon which this suit is brought contained the following express stipulations:

"This Company shall not be liable by virtue of this policy or any renewal thereof, until the premium therefor be actually paid," etc.

It was competent, however, for the Company to waive this provision; it was not bound to adhere to this clause of its contract, inserted solely for its protection, if it chose to dispense with it. Whether or not the Company did dispense with it was perhaps the question in the cause; whether there was evidence from which that fact might fairly be inferred is the question for consideration here.

That Robert Crane, at the time the policy was applied for, was the defendant's agent, for some purpose, is plain; what power he possessed to bind his principal, with reference to the payment of the premium, must be ascertained from an examination of the testimony. The court below having entered a compulsory nonsuit, the plaintiff's evidence must be taken as true—not only the facts directly established, but every reasonable inference therefrom.

Crane, having been called as a witness, testified on this branch of the case as follows:

"I was, in December, 1880, the agent of the Susquehanna Mutual Insurance Company for certain purposes; to receive applications, forward them to the Company, and, if approved, it to write the policies and send me the policies. I to make record of the policies, and to deliver to the assured or his agent. I collected the premiums and remitted the same to the Company, less my commissions. I received this policy from the Company direct by mail, and delivered it to Thomas J. Lancaster. I had a running account with Mr. Lancaster. In March, the day before the fire at the Elkins property, he paid me \$100 on account."

Upon cross examination, he said:

"I commenced business with the Susquehanna Insurance Company April 20, 1880; my appointment was in writing. I did not have a certificate under seal. I got permission from it to send it business, and it resulted in an agency for certain purposes. I sent the business as agent, and signed my name as such in

communications to it. There were a good many other details. I did not always sign my name as Robert Crane, Manager. Ninety-nine times out of one hundred I signed as agent."

Being recalled and examined by the trial judge, Crane testified:

"I charged myself in the day book with the premium. I was responsible for the premium. It looked to me for the payment of the premium or the return of the policy. I often advanced the money to the Company. I was obligated to pay the Company the premium after I had received and delivered the policy, as agent of the Company."

From this it appears that Crane had power, on receipt of a policy, to deliver it to the assured or to his agent, and to collect the premiums. The Company looked to Crane, either for the return of the policy, or for the premiums. Upon delivery of the policy, he was obligated to pay the premium, as for his own debt. He, therefore, kept an account with the Company, and charged himself with the premiums, as the policies were delivered, and took credit with any remittances he might make.

Now if it be true that an arrangement to this effect existed between the Company and Crane, and that may be fairly inferred from the evidence, the arrangement would seem to indicate that the Company was content to accept the responsibility of its own agent for such sums as he might receive, or otherwise provide for, on delivery of the policies, and to substitute the personal liability of the agent in the place of the security which the suspension clause in its contract afforded.

This implication is greatly strengthened by the course of business which the agent pursued in the conduct of the Company's business. He delivered such policies as he chose, and charged the premiums in an account which he kept. He had a running account with Lancaster, and the premiums for this insurance were charged up to Lancaster when the policy in suit was delivered to him. The effect of such a course of business, as respects Crane, certainly was to substitute the liability of Lancaster for that of the assured; and Lancaster says he usually rendered bills to Mr. Elkins once in three months.

In view of the course of business pursued by this Company with Crane, and by this agent in the consummation of their contracts, we think the implication might fairly arise that any absolute requirement of the policy as to the actual prepayment of the premiums had been dispensed with, and that the obligation of the agent to pay the premium was in effect the payment of it by the assured.

If Crane had advanced the money to the Company, and delivered the policy, no one can doubt that it would have taken immediate effect; and in what respect can there be any difference in principle, if Crane with the Company's consent assumed the payment, thus substituting his personal liability in the place of the money? Lancaster became debtor to Crane and Crane to the Company; and this, in view of the course of business pursued by the Company, would, as between the insurer and the insured, we think, be equivalent to actual payment.

PA.

We think there was enough in this case to require its submission to the jury.

The judgment is therefore reversed and a venire facias de novo awarded.

Augustus REED *et al.*, *Plffs. in Err.*,
v.

FIDELITY INSURANCE, TRUST &
SAFE DEPOSIT CO., Trustee.

1. **Owely**, decreed by the common pleas in partition proceedings in equity and charged on the land allotted, is **subject to the lien of a mortgage** of the undivided interest for which it is payment; and the cotenant to whom the land is allotted must either make application to pay the money into court or else pay the mortgage debt.
2. A **release of the land by the mortgagor**, in accordance with the decree upon payment of the owely to him, does not prevent the mortgagor from afterwards recovering the mortgage debt from the cotenant to whom the land was allotted.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 4 of Philadelphia County, to review a judgment for the defendant upon a demurrer to a plea in an action of trespass on the case. *Reversed.*

This action was brought by Augustus Reed and others against the Fidelity Insurance, Trust & Safe Deposit Co., Trustee, to recover money claimed by the plaintiffs and alleged to have been paid out by the defendant negligently and without authority. The declaration contained also counts in assumpsit for money had and received. The facts as they were spread on the record by the declaration, pleas and demurrer, are stated in the opinion.

The court below gave judgment for the defendant; whereupon, the plaintiffs took this writ and assigned as error the entry of the judgment.

Mr. H. G. Harris, for plaintiffs in error:
Liens against shares of cotenants in real estate are, by proceedings in partition, discharged from the *corpus* of the estate inherited or devised, and attach to the individual shares. *Bavington v. Clarke*, 2 Pen. & W. 115; *Wright v. Vickers' Admrs.* 81 Pa. 124-130.

Where proceedings in partition result in a sale of the land held by cotenants, the character of the cotenants' interest as land is not changed by the partition and sale. A mortgage of a cotenant's share is discharged from the ground, but adheres as a lien to the cotenants' share as land, in whatever new form it may actually assume.

Wright v. Vickers' Admrs. supra. See also *Commonwealth v. Pool*, 6 Watts, 33; *Stewart v. Allegheny Bank*, 101 Pa. 348.

It is well established that where proceedings in partition result in a sale of the property to be divided, the parties, the court and the sheriff, are bound in apportioning or distributing the fund to regard the lien creditors of the cotenants.

Diermond v. Robinson, 2 Yeates, 329; *Lucas' App.* 53 Pa. 404.

Mr. J. Cooke Longstreth, for defendant in error:

A decree awarding the premises to one of the heirs, at the appraisement, divests the title of the other heirs, and of all claiming under them.

Merklein v. Trapnell, 34 Pa. 42.

Mr. Justice Trunkley delivered the opinion of the court:

Charles H. Egner, being the owner of the undivided one seventh part of certain real estate, mortgaged the same to the plaintiffs. Afterwards he filed a bill in equity against his cotenants for partition, in which proceeding, on January 25, 1877, a decree was made, allotting the whole of the real estate to the defendant, charged with owelty, of which charge the sum of \$4,796.02 became payable to said Egner for his interest; "and by said decree the said trustees were authorized to raise from the sale of personal securities sufficient money to pay off said charges, and upon payment of the same to the said Charles Egner for owelty of partition, it was ordered that the said Charles Egner should execute a full release of said premises of and from said charge for owelty of partition and of all estate, right, title and interest therein."

In pursuance of said decree the defendant afterwards paid to Egner the whole of the charge, and Egner gave a release and conveyance of all his interest in the premises.

The right of tenants in common to make partition, and enjoy all its incidents, is paramount to the right of the lien creditor against any one of the tenants. If necessary to effect the legitimate purpose of the partition, the lien must be shifted to the part allotted to the debtor, or if none be allotted to him, the lien against the land becomes divested. If the whole or part of the land be allotted to the debtor and charged with owelty, it is a prior lien to the lien he had given for his undivided interest. *McCandless' App.* 98 Pa. 489.

Where a proceeding for partition results in a judicial sale of the land, the lien which had been created by one of the tenants is divested from the land, but continues on the money raised by the sale. "Money raised incidentally, by process of partition, is land in another form, and attended with inheritable qualities." *Wright v. Vickers' Admrs.* 81 Pa. 124.

Section 49 of the Act of March 29, 1832, provides that in partition in the orphans' court, where the share of an heir shall be converted into money, either by owelty due him or by virtue of a sale, before confirmation of the partition or sale the court may appoint an auditor to ascertain whether there are any liens or other incumbrances on such real estate; and if liens appear, the court may order the amount of money which is payable to the party against whom the lien exists to be paid into court to be distributed among creditors or others entitled.

That Act was applied in *Lucas' App.* 53 Pa. 404. There the sale was by administrators, under an order of court, and they neglected to move for the appointment of an auditor to ascertain liens. They were compelled to pay the money to judgment creditors according to prior-

ity. It was said that they were simply officers of the court to make sale and receive the proceeds, with no power to pay part of the fund to whom it did not belong. The share of the tenant belonged to his judgment creditors, and neither he nor the administrators could divert it from them.

This case is in the common pleas, and not within the Act of 1832. The money does not arise from sale. The court decreed that it should be paid to Charles Egner. Owelty is somewhat in the nature of purchase money for land, and the party who pays it the purchaser. The paramount rights of tenants in common may compel conversion, and then the mortgage becomes a lien on the proceeds of sale; or on the owelty, if no sale. While it is true that the tenants in common derived title from Charles Egner, each knew that his cotenants could create liens on their respective interests. Where one acquired title to all the land, he acquired the titles that had been vested in his cotenants. The decree determined the value of the respective shares, and the sum to be paid for owelty; and it deprives the mortgagee of all remedy on his mortgage, if the lien on the money is discharged. Without a statute similar to the Act of 1832, courts of equity are not prone to despoil persons who have had no opportunity to be heard; nor will such effect be given to their decrees, unless in obedience to plain rules of law.

The mortgagee was not a party; notice was not given to him of the proceeding for partition. He was resting on his recorded security, and no person could acquire the title of Charles H. Egner without notice of that security. It is the duty of a tenant who takes the land divested of a lien against his cotenant, either to make application to pay the money into court because of the lien, or pay the lien itself. He holds the money subject to the lien. It is not a good answer to the lien creditor to say: "I paid the money to your debtor on a decree in a suit where he and I were parties, without notice to you, and without advising the court of your lien."

It is alleged that the partition was at the instance of Charles Egner, that the mortgage was by Charles H. Egner, and therefore the record of the mortgage is not notice to purchasers. But it is not alleged that in fact Charles H. Egner was the plaintiff in the partition. His name appears in the plea as printed, the person to whom the money was owing for his interest in the premises. A search for liens against Charles H. Egner, devisee of Charles Egner, deceased, was all that was necessary. The omission of a letter from his name, by mistake or design, in the partition proceeding, did not change his name, as devisee or heir, in the line of title.

Judgment reversed, and new judgment for the plaintiffs for \$1,304.50.

Wilson D. SNYDER and Cyrus Jacoby,
Plffs. in Er.,
v.
Morris BERGER.

1. A judgment is final and conclusive between the parties thereto, as to the facts

necessarily adjudicated, and cannot be impeached except for fraud, in a collateral proceeding.

1. Although the record of a judgment is evidence for a particular purpose, yet if offered, not for that purpose but for other purposes for which it is not admissible, and rejected, such rejection is not error.

1. Although fraud is never to be presumed, but must always be proved, great latitude is allowed in the admission of testimony that may serve to shed light on the alleged fraudulent transaction.

1. Where facts and circumstances proper for the consideration of the jury on the question of actual fraud are testified to by the witnesses, it is error to withdraw that subject from the consideration of the jury.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Northampton County, to review a judgment in favor of plaintiff in an action of trespass to recover the value of certain chattels. *Reversed.*

The facts upon which the questions presented were raised are set out in the opinion.

Defendants assigned as error 1 and 2, the action of the court in refusing to allow in evidence the record in the case of *Jacoby v. Shafer*.

8. In rejecting defendants' offer to show (by the justice of the peace before whom the case of *Jacoby v. Shafer* was tried, and witnesses) that Berger assented to the defense of want of jurisdiction made by Shafer before the justice. The offer was as follows: "Defendant proposes to show that on December 8, 1883, Morris Berger and Edward Shafer were both present at the hearing before the justice, and that Morris Berger did not claim the property in dispute; but that Shafer, through his counsel, defended on the ground that the justice had no jurisdiction, in a sum exceeding \$100, under the Act of 1879; that the defendant disclaimed any fraudulent intent, but that Morris Berger was not called as witness by the defendant Edward Shafer to show that there was no fraudulent intent, although Berger was present at that time; nor did Berger offer himself as a witness in corroboration."

4. In charging the jury as follows: "It is sufficient if the purchaser of the property assume such control over it in pursuance of the purchase as to reasonably indicate the change of ownership; and if you believe that the plaintiff in this case did take control of this property that he swears to, and which his hired man corroborates him in, then I say to you as a matter of law that that would be a sufficient taking of control to make the sale a valid one, even as against creditors."

5. In charging as follows: "I therefore take that branch of the case from you and say to you that there is no evidence in this cause to warrant you in finding that there was a scheme or combination between Shafer and Berger, for the purpose of covering up this property in order to hinder, delay or defraud the creditors of Shafer in general, or to hinder and delay Mr. FA.

Jacoby in the collection of his debt in particular."

6. In answering defendants' first point with a qualification.

The point and answers are as follows:

First point. "If the jury are satisfied that the alleged sale by Shafer to Berger was merely a scheme between Shafer and Berger to prevent Mr. Jacoby from reaching the property of his debtor under proceedings then begun before a justice of the peace, the property in question remained the property of Shafer, and the verdict must be in favor of the defendants."

Ans. "That is sound law and I would affirm the point without qualification, if there was any evidence in the case going to show that there was a scheme such as the point assumes. I have already instructed you, gentlemen, that I find no such evidence in the case; and therefore I withdraw that question from your consideration."

7. In the answer to defendants' second point.

The point and answer are as follows:

Second point. "The evidence being that Snyder acted as a constable, under a writ regular on its face, he is justified; and there can be no recovery against him as a joint *tortfeasor* with the plaintiff in the execution."

Ans. "I cannot so instruct you."

Mr. W. E. Doster, for plaintiffs in error: The judgment of the court in the case of *Jacoby v. Shafer* is conclusive in this case as to the ownership of the property.

Billings v. Russell, 28 Pa. 189; *Hazelett v. Ford*, 10 Watts, 101.

An agreement void as against a *bona fide* creditor is good between the parties.

Yocum v. Kehler, 28 Legal Int. 63.

An arrangement, fraudulent as to creditors, is binding on the parties.

Dannels v. Fitch, 8 Pa. 495; *Telford v. Adams*, 6 Watts, 429.

"The court looks behind the nominal party and treats as the real party him whose interests are involved in the issue, who conducts and controls the action of the defense."

Peterson v. Lothrop, 34 Pa. 223. See also *McDonald v. Simeoz*, 98 Pa. 623; *Sloan v. McKinstry*, 18 Pa. 120; *Hauer's App.* 5 Watts & S. 473; *Tarbox v. Hays*, 6 Watts, 898; *Postens v. Postens*, 8 Watts & S. 127; *Bennett v. Cadwell's Exr.* 70 Pa. 253; *Emery v. Nelson*, 9 Serg. & R. 12; *Breading v. Boggs*, 20 Pa. 83.

A wife may intervene in an attachment and defend *pro interesse suo*.

Nat. Bank of Republic v. Tasker, 62 Am. Dec. 332; *Doyle v. Commonwealth*, 16 W. N. C. 157; *Sessions v. Stephens*, 1 Fla. 233; 46 Am. Dec. 339 and notes; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181 and note.

Whether there was such a delivery as the subject matter was capable of and whether it was *bona fide* are questions for the jury; that the vendor was employed about the premises in a capacity, holding out no *indicia* of ownership, is such concurrent possession as renders the transaction fraudulent *per se*.

Evans v. Scott, 89 Pa. 136; *Adams Exp. Co. v. Lyons*, 7 W. N. C. 421; *Smith v. Crieman*, 91 Pa. 428; *Barr v. Boyles*, 96 Pa. 31; *Rothermel v. Marr*, 98 Pa. 285; *McPherson v. Kiernan*, 12 W. N. C. 40.

A concurrent possession in the vendor and

vendee is not sufficient; the change in possession must be both actual and continued.

Miller v. Garman, 2 Pennyp. 71; *S. C.* 69 Pa. 184; *Snyder v. Shuh*, 11 W. N. C. 186; *Crowby v. Irwin*, 1 Pennyp. 227; *McKibbin v. Martin*, 64 Pa. 359.

Mr. Robert L. Cope, for defendant in error:

The record offered in evidence could not have availed the defendants below unless it amounted to an estoppel of record. The judgment was not between the same parties or their privies; nor was the question in controversy in the case at bar directly decided or material to the decision in the former suit.

Greenl. Ev. § 524; *Giltinan v. Strong*, 64 Pa. 246; *Worman v. Wolfersberger's Exrs.* 19 Pa. 59; *Hutchinson v. McClure*, 20 Pa. 68; *Scott v. Heilager*, 14 Pa. 238.

"There is no rule of law which compels the real owner of attached property, on notice of the suit, to intervene and defend *pro interesse suo*, on pain of forfeiting his rights of property, or of action."

Megee v. Beirne, 39 Pa. 51.

The charge of the court, specified as the fourth assignment of error, is correct.

Crawford v. Davis, 99 Pa. 576; *Bear's Est.* 60 Pa. 430.

"One cannot be prejudiced by the fraud of another, of which he had no notice."

Reehling v. Byers, 94 Pa. 316.

When a purchaser of property pays a full consideration therefor, he cannot be deprived of it on a vague suspicion that it was sold to him for the purpose of defrauding the vendor's creditors. "The fraud alleged must be clearly and distinctly proved." *Id.*

Fraud is not to be presumed, but must be proved; and in most cases it is the most dangerous kind of question to be submitted to a jury without proof.

Bradley v. Grosh, 8 Pa. 45.

It has been often ruled that it is error to submit a fact or question to the jury, of which there is no evidence.

Id.; *Sartwell v. Wilcox*, 20 Pa. 117.

It is true, fraud may be inferred from facts proved. But such facts must tend to prove fraud. "If there is no sufficient evidence to justify an inference of the disputed fact, the court has the right and it is its duty to withhold it from the jury."

Battles v. Laudenslager, 84 Pa. 446.

Mr. Justice Sterrett delivered the opinion of the court:

This action of trespass was brought by Morris Berger against Snyder and Jacoby, plaintiffs in error, to recover the value of a horse sold on a constable's execution as the property of Edward Shafer, together with damages for the seizure and detention of another horse and a wagon, all of which he claimed were his property at the time of the alleged trespass.

It is conceded that prior to December 8, 1883, the horses and wagon belonged to Shafer. On the following day, by virtue of proceedings under the Fraudulent Debtors' Act of 1842, instituted by Jacoby against Shafer, the horses and wagon were attached; and the case was so proceeded in before the justice of the peace that judgment was rendered in favor of the

plaintiff in the attachment; and subsequently Snyder, by virtue of an execution, issued on the judgment and directed to him as constable, sold one of the horses.

The only defense set up before the justice was want of jurisdiction. On that question the case was before us and the judgment of the justice was affirmed. *Jacoby v. Shafer*, 105 Pa. 610.

As against Shafer it was definitively settled in that case that he was indebted to Jacoby in the sum for which judgment was entered, and that he was about to assign and dispose of his personal property with intent to defraud his creditors. That judgment is final and conclusive as to the facts necessarily adjudicated, and cannot be impeached except for fraud, in this or any other proceeding. But Berger, the plaintiff below in this case, was not a party to that suit, and therefore not precluded from showing what he alleged, viz.: that in good faith and for a full consideration he purchased and had exclusive possession of the horses and wagon the day before the attachment issued.

Having introduced testimony tending to sustain his allegations, it was competent for the defendants to rebut and prove if they could that he was a party to the fraud committed by Shafer. While the record of the former suit was not evidence of such participation on the part of Berger, it was admissible for the purpose of showing the fraudulent purpose of Shafer, under whom Berger claimed, to be followed by evidence of the latter's active participation therein; but we do not understand that it was offered for any such purpose, and hence, as the case stood there was no error in rejecting the offers. The record was also evidenced for other purposes, but for the broad purposes for which it was offered it was not admissible. The first and second specifications are not sustained.

In connection with other evidence tending to impeach the *bona fides* of Berger's alleged purchase of the horses and wagon, the circumstances recited in the offer covered by the third specification were proper for the consideration of the jury. While it is true that fraud is never to be presumed, but must always be proved, great latitude is allowed in the admission of testimony that may serve to shed light on the alleged fraudulent transaction.

What was said by the learned judge in that part of his charge specified in the fourth assignment of error was doubtless intended to apply to a *bona fide* purchase, untainted by actual fraud. He was then speaking to the subject of transfer of possession from the vendor to vendee. The jury doubtless so regarded it. Thus understood, what was said by him was not objectionable.

The subjects of complaint in the fifth and sixth specifications, are: instructing the jury that there was no evidence of actual fraud on the part of plaintiffs below, and withdrawing that subject from their consideration. In that we think there was error. An examination of the testimony satisfies us that facts and circumstances proper for the consideration of the jury on the question of actual fraud, on the part of both the alleged vendor and vendee, were testified to by several witnesses. Indeed, the transaction between Shafer and defendant in

error, especially the conduct of the latter, was more than suspicious.

There was no error in refusing to affirm defendant's second point as presented.

Judgment reversed and a venire facias de novo awarded.

Effie C. HULETT et al., Plffs. in Err.,
v.

MUTUAL LIFE INSURANCE CO. of New York.

1. In a *scire facias* on a mortgage or judgment, a *terretenant* is one who became seised or possessed of the debtor's land, subject to the lien thereof.
2. A conveyance by a husband to his wife, which was not recorded until after a mortgage was executed on the same land, is, under the Act of March 18, 1775, void as to the mortgagee without notice; hence, the children of the mortgagor, who claim title through the wife by deeds subsequent to the mortgage, are *prima facie terretenants* in a *scire facias* upon the mortgage and are properly made parties to it.

(Decided October 4, 1886.)

ERROR to the the Common Pleas of Bradford County, to review a judgment for plaintiff in an action of *scire facias sur mortgage*. *Affirmed.*

This was an action brought to foreclose a mortgage under the following state of facts, as disclosed at the trial:

On February 12, 1878, R. K. Hulett, who was then the owner of two farms in Bradford County, conveyed the same to one Kiff by deed duly acknowledged. On the same day Kiff conveyed these properties to Effie C. Hulett, wife of R. K. Hulett. These conveyances were not recorded until April 4, 1881; and the possession of the property was unchanged.

On January 21, 1881, Rufus K. Hulett borrowed from the defendant in error the sum of \$3,500, and gave as security a bond and mortgage upon the above mentioned real estate, the title to which had been previously placed in his wife, Effie C. Hulett, without her uniting in the mortgage. The interest was paid upon the same, to March 1, 1884.

On May 22, 1883, Effie C. Hulett and her husband conveyed the 108 acre farm to their son, Gilbert E. Hulett, one of the plaintiffs in error, by deed acknowledged the same day, which recited the conveyance from Horace A. Kiff to Effie C. Hulett, of February 12, 1878; and May 7, 1883, they conveyed the 78 acre farm to their daughter, Alice J. Hulett, afterwards intermarried with Walter G. Patterson, now deceased.

June 21, 1884, a *scire facias sur mortgage* was issued against Rufus K. Hulett, with notice to Effie C. Hulett and Rufus K. Hulett, her husband, Alice J. Patterson and Walter G. Patterson, her husband, and Gilbert E. Hulett, *terretenants*, and all other *terretenants*. Pleas were filed by Gilbert E. Hulett and W. G. & Alice J. Patterson that they had no land bound by

the lien of the mortgage, and by Effie C. Hulett, *non est factum* and coverture.

Judgment was taken by default against Rufus K. Hulett and Effie C. Hulett, which was afterwards taken off as to Effie C. Hulett.

The case came on for trial at September Term, 1885, when by direction of the court below, Mayer, J., the jury gave a verdict against all of the defendant, *terretenants*, for the amount of plaintiff's claim. Under their application a new trial was granted, which was tried at December Term, 1885, when, by direction of the court below, the jury were discharged as to Effie C. Hulett without a verdict or nonsuit in her favor, and gave a verdict against the other defendants for the amount of plaintiff's claim.

Defendants took this writ, assigning for error the action of the court as above stated.

Messrs. J. F. Shoemaker and Rodney A. Mercur, for plaintiffs in error:

The Act of 1705, § 8, 1 Sm. 59, 1 Purd. 596, pl. 149, does not require that *terretenants* or purchasers under the mortgage should be made parties to the *scire facias* on the mortgage; but the better and general practice is to make them parties.

Mather v. Clark, 1 Watts, 491; *Mevey's App.* 4 Pa. 80; *Tryon v. Munson*, 77 Pa. 260.

If, however, the *terretenant* be admitted to make defense to the *sci. fa.* he is concluded by the judgment.

Schnep's App. 47 Pa. 87.

"Those only are *terretenants* who claim by a conveyance subsequent to a judgment."

Chahoon v. Hollenback, 16 Serg. & R. 425. See also *Mitchell v. Hamilton*, 8 Pa. 491; *Dengler v. Kiehn*, 13 Pa. 41; *Fox v. Hempfield R. Co.* 79 Pa. 66 (note).

Defendants, not claiming title from their father but through their mother, have a paramount title to that of the mortgagor and are not *terretenants* and hence cannot be brought in on the *scire facias*.

Chahoon v. Hollenback, *supra*; *Jarrett v. Tomlinson*, 3 Watts & S. 114; *Catlin v. Robinson*, 2 Watts, 379.

A writ of *scire facias quare executio non* is not a writ for the trial of titles; nor was it intended that a judgment creditor should not be bound by the Act of 1807, which declares that two verdicts and judgments in ejectment alone shall conclude the right, or that he should be allowed to settle in this way, not only the question of lien between himself and the debtor but also a question of title between the purchaser and an adverse occupant.

Mitchell v. Hamilton, *supra*.

Messrs. B. M. Peck, D. A. Overton and D. C. Robinson, for defendant in error:

The first section of the Act of March 18, 1775, provides: "All deeds and conveyances which from and after the publication hereof shall be made and executed within this province of or concerning any lands, tenements or hereditaments in this Province. * * * shall be recorded in the office for recording of deeds in the county where such lands or hereditaments are lying and being, within six months after the execution of such deeds and conveyances; and every such deed and conveyance that shall at any time after the publication hereof be made and executed, and which shall not be proved and

recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; unless such deed or conveyance be recorded as aforesaid before the proving and recording of the deed or conveyance under which such purchaser or mortgagee shall claim."

Hence, the conveyance to Effie C. Hulett was fraudulent and void as to this mortgagee.

Although it is not necessary to make the *terretenants* parties to the *scire facias*, yet it is the better practice to do this.

Mather v. Clark, 1 Watts, 491.

Kennedy, J., in this case said: "The only difference that a want of notice to the *terretenant* makes is that he will be permitted to make any available defense against the purchase of the land at sheriff's sale that he might have set up on the trial of the *scire facias* in case it had been served upon him; see *Nace v. Hollenback*, 1 Serg. & R. 548; but if it has been served upon him he can make no such defense against the sheriff's vendee.

Id. 540; *Blythe v. McClintic*, 7 Serg. & R. 841.

But the circumstance of his having become a *terretenant* of the land after the execution of a mortgage which was valid in its original concoction and has been duly recorded will form no defense whatever either upon the trial of the *scire facias* or that of the ejectment brought against him by the sheriff's vendee."

See also *Mevey's App.* 4 Pa. 80; *Evans v. Meylert*, 19 Pa. 411; *Wallace v. Blair*, 1 Grant, 81; *Schnep's App.* and *Speer v. Evans*, 47 Pa. 87, 141.

Titles similar to the plaintiffs here were tried in actions of *sci. fa. sur mortgage* in the late cases of *Cohell v. Easley*, 88 Pa. 81, and *Brown v. Henry*, 106 Pa. 262.

Mr. Justice Clark delivered the opinion of the court:

A *terretenant*, in a general sense, is one who is seised or actually possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment a *terretenant* is, in a more restricted sense, one other than the debtor, who becomes seised or possessed of the debtor's lands, subject to the lien thereof. Those only are *terretenants* therefore, in a technical sense, whose title is subsequent to the incumbrance. *Chahoon v. Hollenback*, 16 Serg. & R. 425.

"Strictly speaking" says Chief Justice Gibson, in *Mitchell v. Hamilton*, 8 Pa. 491, "only the debtor's subsequent grantee of the fee simple is a *terretenant*."

So in *Dengler v. Kiehnor*, 13 Pa. 41, the same learned judge says: "Who is a *terretenant*? Not everyone who happens to be in possession of the land; there can be no *terretenant* who is not a purchaser of the estate, mediately or immediately from the debtor, while it is bound by the judgment."

444

To the same effect is *For v. Hempfield R. R. Co.* 79 Pa. 66 and many other cases.

In this case the title of Rufus K. Hulett was conveyed to his wife on February 12, 1878, but the deed was not recorded until April 4, 1881; the possession of the land was unchanged; it was continued, after the execution of the deed, just as it had been before. The mortgage was executed on January 21, 1881, and was recorded on the same day, and there is no evidence whatever of any notice of the conveyance, either actual or constructive, on the part of the mortgagee.

As to the mortgagee, therefore, the deed was fraudulent and void, by the express terms of the Act of March 18, 1775; as to him the deed was as if it had never been made.

On May 22, 1888, Rufus K. Hulett and his wife joined in a conveyance of the land to their son, Gilbert E. Hulett; the mortgage was then a valid and subsisting lien on the land, and Gilbert E. Hulett took title under this deed subject to the incumbrance.

It is true that the conveyance, upon its face, was of the title of Effie C. Hulett, but as the husband joined in the assertion and conveyance of the wife's title, the deed would be effective as a conveyance of his own.

Prima facie, at least, Gilbert E. Hulett was a *terretenant*, and the mortgagee had a right to name him as such in the *scire facias*. It was competent, of course, for him to defend under the plea that the mortgage was not then, and never was, a lien upon his land. *Cohell v. Easley*, 88 Pa. 8.

Under that plea he might have shown that, although the deed to his mother was not recorded, the mortgagee either had actual notice or was somehow affected with notice of it. But there is no such evidence in the case, nor was any offered.

Under the pleadings the question was whether or not the mortgage was or ever had been a lien upon the lands of Gilbert E. Hulett and Alice J. Patterson, as *terretenants*. *Prima facie*, we say, they were *terretenants*, but it was competent for them to show that they were not.

The judgment on the *scire facias* is against them. As to the effect of this judgment in a subsequent ejectment for the land, we are not now called upon to decide; by all the cases the defendants are certainly concluded as to all matters which as *terretenants* they might have made matters of defense, on the *scire facias*; such as payment, release, or efflux of time. *Schnep's Appeal*, 47 Pa. 37; *Dengler v. Kiehnor*, 13 Pa. 37.

But whether the judgment is conclusive that they are *terretenants* is a question not raised upon the record, and it will be time enough to decide it when it arises.

The judgment is affirmed.

NEW YORK.
COURT OF APPEALS.

Re Probate of WILL OF John WILSON,
Deceased.

1. A legatee may, by releasing his interest in the will, remove his incompetency under section 829, Code Civ. Proc., to testify, on the probate of the will, in relation to personal conversations and transactions with the testator.
2. An executor is not, as such, incompetent under section 829, Code Civ. Proc., to testify, on the probate of the will, as to personal conversations and transactions with the testator, on the ground that he is a party to the proceeding or interested by way of commissions.
3. Under section 2589, Code Civ. Proc., the general term has no power, on appeal from a surrogate's court, to award costs to an unsuccessful contestant of the probate of a will.

(Decided October 26, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a decree of the Surrogate's Court of Orange County admitting to probate the will of John Wilson. *Affirmed in part, reversed in part.*

Memorandum of decision below, 88 Hun, 643.

The facts are stated in the opinion.

Mr. Henry Bacon with *Mr. Joseph Merritt*, for the heirs and next of kin, appellants:

The burden is upon the proponent to establish, to the full satisfaction of the conscience of the court, not only a full compliance with the statutory requirements but that the instrument itself was prepared in accordance with the unsolicited and uninfluenced instructions of the testator, its contents fully made known to the testator and understood by him before its execution, and that the beneficiaries were of his free selection and the amounts donated in accordance with his wishes; that he was so far in possession of his faculties as to be able to grasp and comprehend the whole scheme of distribution and did so comprehend it.

Delafeld v. Parish, 25 N. Y. 86; *Ford v. Harrington*, 16 N. Y. 285-288; *Boyd v. De La Montagne*, 78 N. Y. 498; *Nebit v. Lockman*, 34 N. Y. 167; *Seare v. Shafer*, 6 N. Y. 269; *Marr v. McGlynn*, 88 N. Y. 371; *Nexsen v. Nexsen*, 2 Keyes, 232; *Re Will of Smith*, 95 N. Y. 523.

The admission of Hart's testimony as to personal transactions and communications with testator was erroneous.

Code Civ. Proc. § 829; *Lane v. Lane*, 95 N. Y. 494; *Cadmus v. Oakley*, 3 Dem. 824.

The release by Hart was ineffectual to make him competent to testify to personal transactions or communications with deceased against the heirs and next of kin. It is invalid for want of a consideration moving to Hart or from any person or party to it. It never was delivered to anybody representing the estate so as to become effectual. Without either consideration or delivery it amounted to nothing. Even if delivered it would not remove his incompetency.

Genet v. Lawyer, 61 Barb. 211.

If the release were effectual, still the witness was incompetent because he still remained a party, to wit: the proponent in this proceeding, and was testifying in his own behalf. Two classes of persons are disqualified: a party to the record and a person interested in the event. The party is always incompetent whether interested or not.

Code Civ. Proc. §§ 828, 829; *Church v. Howard*, 79 N. Y. 415; *Nearpass v. Gilman*, 16 Hun, 121; *Schoonmaker v. Wolford*, 20 Hun, 166; *Wilkins v. Baker*, 24 Hun, 82; *Smith v. Hathorn*, 25 Hun, 159; *Price v. Price*, 33 Hun, 69; *Poucher v. Scott*, 38 Hun, 223.

That Hart's testimony was material to the proponent's case is apparent. Its admission was erroneous; and for that error the decree appealed from must be reversed.

Re Will of Smith, 95 N. Y. 516.

Three of the appellants are infants, for whom the surrogate appointed a special guardian.

There can be no question as to the power of the supreme court to award costs to unsuccessful contestants of a will.

Code Civ. Proc. §§ 3280, 3240.

Under section 2589 of the Code of Civil Procedure the appellate court has the discretion to give costs to unsuccessful contestants.

Lawrence v. Lindsey, 70 N. Y. 566.

This section of the Code has wrought no material change in the law as it stood prior to the adoption of the Code of Civil Procedure.

Throop's note to section 2589.

The supreme court has uniformly exercised the discretion given as to costs in such cases, and has directed in cases similar to this that costs of all the parties be paid out of the fund.

Chipman v. Montgomery, 68 N. Y. 221, 237, 298; *Smith v. Edwards*, 88 N. Y. 92-110; *Finley v. Bent*, 95 N. Y. 364-369.

The court has the power, independently of any express provision of law or rule of court, to allow a reasonable compensation to the special guardian of the infant parties; and this compensation is not limited to the taxable costs.

McQue v. O'Hara, 5 Redf. 336; Rule 50 Supreme Court.

Mr. B. R. Champion, for John L. Hart, executor, respondent:

All the requirements of the statute were observed as to the execution of the will. Besides, the attestation clause is full.

Rugg v. Rugg, 83 N. Y. 592; *Re Will of Ootrell*, 95 N. Y. 329.

Hart, the executor and proponent, was competent as a witness. Section 829 of the Code of Civil Procedure does not cover his case.

Childrens Aid Society v. Loveridge, 70 N. Y. 387; *Rugg v. Rugg*, 83 N. Y. 592; *Re Will of Peter Huestis*, 23 N. Y. Week. Dig. 224; *Whelpley v. Loder*, 1 Dem. 368, affirmed by the supreme court, May, 10, 1886; Redf. Am. Cas. on Law of Wills, p. 177, citing English Cases.

"The competency of a witness, disqualified by interest, may always be restored by a proper release."

1 Greenl. Ev. §§ 426, 428, and cases cited.

To the same effect are *Burritt v. Silliman*, 18 N. Y. 98; *Stall v. Catskill Bank*, 18 Wend. 406; *Utica Ins. Co. v. Cadwell*, 8 Wend. 296; *Coffin v. Coffin*, 23 N. Y. 9; *Meehan v. Rourke*, 2

Bradf. 888, and *Reece v. Crosby*, 8 Redf. 74, holding that an executor, although a party and receiving a legacy as compensation, is a competent witness to prove the execution of the will without releasing.

The fact that the release was made for the purpose of enabling the releasor to testify, did not render him incompetent.

Vasseur v. Livingston, 4 Duer, 285, affirmed by this court, 18 N. Y. 248; *Doyle v. Daniels*, 2 E. D. Smith, 385-387, 496; *Nelson v. Smith*, 8 Abb. Pr. 117.

Nor did the fact that it was not executed until after the beginning of the hearing.

1 Greenl. Ev. § 426; *Tallman v. Dutcher*, 7 Wend. 180; *Doty v. Wilson*, 14 Johns. 378; *Clark v. Carter*, 4 Moore, P. C. 207.

The allowance of costs to the unsuccessful adult contestants was error.

Re Will of Budlong, 100 N. Y. 208, 205, 1 Cent. Rep. 286; *Van Gelder v. Van Gelder*, 84 N. Y. 658.

Ruger, Ch. J., delivered the opinion of the court:

One Hart was executor under the will of John Wilson, deceased, and also a legatee therein. He presented the will for probate and offered himself as a witness to prove personal conversations and transactions had by him with the testator at the time of its preparation, in relation to its contents and execution.

It was objected that he was incompetent, under section 829 of the Code of Civil Procedure, to testify to such transactions and conversations, both as a party to the proceeding and also by reason of his interest in the event. The proponent, therefore, put in evidence a release to the administrator of his interest as legatee under the will. The objection was thereupon overruled by the surrogate, and this is now alleged as error.

We think the questions presented have been settled by authority against the contention of the appellants.

The interest which the witness might have taken as legatee under the will was effectually discharged by the release. It was an instrument under seal importing a consideration, and its effect was to swell the residuum of the estate and increase the amount to be distributed under the provisions of the will.

The residuary legatee took nothing thereby in the right of the legatee, and did in no sense succeed to the sum derived from, through or under any right of the legatee.

Neither was the witness incompetent by reason of being a party to the proceeding, or as being interested by way of commissions as executor. It was held in the case of *Children's Aid Society v. Loveridge*, 70 N. Y. 387, that an executor was not such a party to the proceedings to prove a will as would preclude him from testifying to personal transactions with the deceased testator, within the spirit and meaning of section 399 of the Code of Procedure. Neither did his right to compensation as executor render him incompetent by reason of interest to testify to such transactions. This ruling was approved and followed in *Rugg v. Rugg*, 83 N. Y. 592.

The same question was decided in a similar manner in *Reece v. Crosby*, 8 Redf. 74.

In *McDonough v. Loughlin*, 20 Barb. 238, the proposed witness was an executor and trustee under the will, as well as a subscribing witness. The question was whether the execution of the will could be proved by him without working a forfeiture of his appointment as executor and the devise to him as trustee, under 2 R. S. p. 65, § 50, avoiding any beneficial devise, legacy, interest or appointment to subscribing witnesses. It was held that it could, inasmuch as the devise to him was in trust, he taking no beneficial interest therein, and his appointment as executor was fiduciary and not for his own benefit. It was said that the commissions were given by statute as compensation for services and did not accrue to the executor as a gratuity by force of the will. The claim and appointment were not beneficial, within the meaning of the statute. It is said in the same case that the doctrine of the English courts is to the same effect, citing: 1 Mod. 107; *Lowe v. Jolliffe*, 1 W. Bl. 865; *Tyrell v. Holt*, 1 Barn. K. B. 12; *Bettison v. Bromley*, 12 East, 250.

We find no cases in this State conflicting with the principles laid down in those referred to. In *Lane v. Lane*, 95 N. Y. 494, the proposed witness was not only an executrix but also a legatee; and it was properly held, she not having released her claim as legatee, that she was an interested party.

There are no other objections made by the contestants appearing in the record which are open to consideration in this court.

The executor, however, has appealed from so much of the judgment rendered by the general term as awards costs to the unsuccessful contestants.

We are of the opinion that under section 2589 this appeal must prevail. That section lays down an express rule, by which costs of appeal in that court must be regulated; and it authorizes costs to a successful party only. This was distinctly adjudged by this court in *Re Budlong*, 100 N. Y. 203 [S. C. 1 Cent. Rep. 286]; and accords with sound policy.

Sections 8230 and 8240 refer only to such cases as are not otherwise provided for in the Code.

The judgment of the General Term is affirmed as to the probate of the will, and reversed as to the award of costs to the contestants, with costs to the executor to be paid out of the estate.

All concur.

PEOPLE of the State of New York, *Repts.*,
v.

Roxalana DRUSE, *Appt.*,

1. The evidence in a case of homicide examined and found sufficient to support a conviction of murder in the first degree.
2. After evidence has been given by a defendant, tending to show that the homicide was committed in self-defense, he may follow it by proof of the general reputation of the deceased for quarrelsomeness and violence; but evidence of specific acts of violence towards third persons is inadmissible.
3. When the voluntary confession of a de-

defendant is otherwise admissible against him on trial for the crime, it is immaterial that he was under arrest when the confession was made.

(Decided October 26, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Fourth Department, affirming a conviction at the Herkimer Oyer and Terminer, of the crime of murder in the first degree. *Affirmed.*

The facts in relation to the defendant's confession to the witness McDonald, referred to in the opinion, are as follows: Daniel McDonald, a witness in behalf of the People, testified that he was a justice of the peace; that he was at Eckler's (a neighbor's, where the defendant and her son George and daughter Mary were, in charge of a constable) on the night of January 15, 1885, and saw the defendant and had a conversation with her.

The witness testified: "I didn't tell her she had better tell what there was of it, it would be better for her; I did not tell her anything on that subject; I wouldn't say whether I was asked to talk with her about it by anyone or not; I think not, though; I did not threaten her if she did not tell, not at any time; I am sure of that; I didn't hear anyone else threaten her. * * * I could not tell how many conversations I had with Mrs. Druse in all; perhaps three or four. At the time I had the first conversation with her I said to her that George and Frank and Mary had told us all about it, and she might as well tell us too; I didn't add that it would be better for her; I think I didn't say anything further. The reason that I told her that George and Frank and Mary had told all about it was that before she had talked of her own accord and said she hadn't any hand in it, for what she was arrested, and denied it at that time, and I told all about it."

The defendant's counsel objected to the conversation held by the witness with the defendant, on the grounds: "First, because it was made while defendant was under arrest; and second, because the statement that Frank, Mary and George had told all about this transaction was an inducement for her to tell, was unfair, unjust, and the very evidence he states was calculated to lead her to believe that it would be best, would be a favor to her to tell."

The objections were overruled, and an exception taken; and the witness was allowed to give the admissions and declarations of the defendant, made to him on the occasion spoken of.

The evidence in relation to the other questions raised on appeal is stated in the opinion.

Mr. H. D. Luce, for appellant.

Mr. Eugene E. Sheldon, District Attorney, for respondents.

Andrews, J., delivered the opinion of the court:

The defendant was convicted at the Oyer and Terminer in Herkimer County, on the 6th day of October, 1885, of the murder of her husband, William Druse, in the Town of Warren in that county, on the 18th day of December, 1884.

The general term has affirmed the conviction, N. Y.

and the only questions cognizable in this court are those arising upon exceptions taken in the course of the proceedings. *People v. Boas*, 92 N. Y. 560; *People v. Gurdick*, 100 N. Y. 508 [S. C. 1 Cent. Rep. 721].

It is not disputed that the deceased came to his death by the act of the defendant. The only defense attempted to be made on the trial was justifiable homicide.

The history of the transactions at the house of Druse on the day of the homicide, as narrated by the witnesses on the part of the People, discloses one of the most remarkable tragedies to be found in the annals of crime. The deceased was a farmer and lived with his wife and their two children (Mary, of the age of about nineteen years, and George, of the age of about ten years), on a small farm in the Town of Warren. Frank Gates, a nephew of the defendant about fourteen years of age, was also, at the time of the homicide, a member of the family. The husband and wife had frequent altercations, and their relations for several years prior to the homicide had been very unpleasant. He was a shiftless farmer, a poor provider, often abusive to his family, and the contracting by the wife of small debts at the stores for clothing and supplies for herself and her children was the occasion of frequent quarrels between them.

The homicide occurred on the morning of the 18th of December, in the kitchen of the house. The sole evidence of eye witnesses of the transaction is that of Frank Gates and George Druse and his sister Mary. The two boys were sworn on the part of the People, and Mary Druse, upon whose testimony alone the defense of justifiable homicide was sought to be supported, was sworn in behalf of the defendant.

The testimony of the two boys, who differ as to some of the details, but who agree in the main facts, may be briefly stated. It appears from their story that the deceased, after having done his chores, came in to his breakfast and sat down at the table in the kitchen, with his back to the stove. The defendant, the two boys and Mary Druse were in the room, but were not at the table. The deceased commenced finding fault with the tea, addressing his wife in harsh and profane language, and complaining of the store bill. The defendant went into the buttery or pantry and came out with a revolver, which she held under her apron. She then spoke to the boys in a low tone and told them to go out doors. They went out and George testified that he heard two or three shots. Frank Gates heard a noise as of chairs being tipped over, but heard no shots.

The defendant then called Frank Gates into the house. He came in and found Druse sitting in his chair with a rope around his neck, and the defendant required Frank to take the pistol and fire at Druse, using at the same time threatening language. He took the pistol and fired as directed, and after that the defendant took the pistol and fired again at her husband. He fell, or was thrown from the chair, and the defendant then took an ax and hit him on the head, and he said, "Oh Roxey, don't!" She then severed the head from the body and rolled it up in a newspaper or a skirt, and carried it into the parlor. She then directed the

boys to go up stairs and bring down a straw tick, which they did, and placing the body upon that, it was dragged into the parlor. She then sent the boys down to a brush lot to get a sharp ax, which they brought. She had newspapers placed over the kitchen windows, and set Frank Gates and her daughter Mary to watch them. She afterwards sent the boys out after wood. They brought in dry shingles in a clothes' basket, and they were taken into the parlor. She then sent Frank Gates to a neighbor's for matches.

The day was apparently spent by the defendant, assisted by her daughter, in cutting to pieces, and burning the body of her husband, while in the afternoon the boys amused themselves by playing checkers. The next day the refuse in the stoves, containing the unconsumed portions of the body, was collected and put into a box, which was placed in a cutter and taken by the defendant, Mary, Frank and George, and dumped among some bushes in a swamp. Subsequently Frank Gates, by her direction, threw the ax and revolver into a pond, where they were found after the arrest of the parties.

The defendant represented to neighbors that her husband had gone to New York, and to divert suspicion she telegraphed to a friend, asking: "Is William there?"

The testimony of Mary Druse, who was jointly indicted with her mother for the murder, was introduced to show that her father at the time of the homicide had attacked her mother with a knife, under circumstances which justified the killing. It is sufficient to say that her narration was very improbable, and was inconsistent with some of the conceded facts, and that the jury disbelieved her. The testimony of the two boys was confirmed as to the main facts, by the confession of the defendant to the witness McDonald.

It will be seen from this *résumé* of the principal facts that there was abundant evidence to justify the conviction. The evidence on the part of the People supplied the elements necessary to the crime of murder in the first degree. The general term, in a careful opinion, has examined the case upon the facts and the law, and reached the conclusion that no error was committed on the trial; in which we fully concur.

We shall content ourselves with a reference to a few of the exceptions, although all of these seem to be unsubstantial, and none of the questions raise any doubt as to the correctness of the rulings.

1. The court in its discretion properly permitted the district attorney to call the attention of the witnesses Frank Gates and George Druse to particular facts, after they, without interruption, had gone through the story of the incidents of the 18th of December. We think the judge carefully guarded and protected the legal rights of the defendant in their examination.

2. The court properly excluded the defendant's offer to show by the witness Van Evera that the deceased treated his domestic animals with cruelty. The rule is that after evidence has been given by a defendant, tending to show that the homicide was committed in self-defense, he may follow it by proof of the general reputation of the deceased for quarrelsomeness

and violence. But a defendant is confined to proof of general reputation, and evidence of specific acts of violence towards third persons is inadmissible. *People v. Lamb*, 2 Keyes, 371; *Eggle v. People*, 56 N. Y. 643; *Thomas v. People*, 67 N. Y. 218.

This principle plainly excludes the evidence offered.

3. The confession of the defendant, to the witness McDonald, was properly admitted. It was not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, and was therefore admissible, within the general rule prescribed by section 395 of the Code of Criminal Procedure.

It is immaterial that when made the defendant was under arrest. The confession was voluntary, and was not within the rule recently applied in the *Case of Mondon* [ante, 357], excluding confessions made by an accused prisoner, as a witness who has not been informed of his legal rights.

4. The court properly excluded evidence to show that the deceased robbed his father, when in his coffin, of his grave clothes and wore them at the funeral. It was wholly irrelevant and immaterial.

We leave the other exceptions without special notice. Most of them are considered in the opinion below, and are satisfactorily answered. There was no exception to the charge. It fully stated the facts and the law applicable to the case.

We see no reason for disturbing the judgment. It should, therefore, be affirmed.

All concur.

Anton SCHWARTZ, *Appt.*,

o.

Louise WEBER, *Admr.*, *Reopt.*

A party appealing from a judgment entered upon the decision of the court upon a trial without a jury is not required to make and serve a case under section 997, Code Civ. Proc., but may file exceptions under section 994; and his time to do this, or to make a case under Rule 82 of the supreme court, does not begin to be limited until service upon his attorney of a copy of the decision of the court, with notice of entry of judgment thereon. The service of notice of entry of judgment, without a copy of the decision, has the effect of limiting the time to appeal only.

(Decided October 24, 1896.)

A PPEAL from an order of the Supreme Court at General Term in the Second Department, dismissing an appeal from a judgment of the Kings Special Term. *Reversed.*

The question presented and the facts connected therewith are stated in the opinion.

Mr. Henry Wehle, for appellant.

Mr. Alex. S. Bacon, for respondent.

Earl, J., delivered the opinion of the court: This was an equitable action to remove the cloud of a mortgage from certain property of

the plaintiff situated in Brooklyn. The action was tried at a special term of the supreme court, and judgment was ordered in favor of the defendant, which was entered on the 28th day of April, 1886. On the same day copies of the judgment and the order dismissing the complaint, and notice of the entry of each, were served upon the plaintiff's attorney.

On the 28th day of May the plaintiff served upon defendant's attorney a notice of appeal from the judgment thus entered to the general term. The defendant's attorney noticed the appeal for argument and also gave notice of a motion that he would move for an order dismissing the appeal, and that the cause be stricken from the calendar and his judgment be affirmed, with costs, on the ground that no case had been made and served.

The motion was opposed, upon affidavits of plaintiff's attorney that the decision, consisting of findings of fact and conclusions of law, made by the judge presiding at the special term, had been filed with the clerk, but that a copy thereof had never been served upon him, and that thus plaintiff's time to serve a case had not expired.

The general term granted the motion dismissing the appeal, with costs of motion, and ordered that the judgment be affirmed, with costs of appeal, unless within twenty days thereafter the appellant should apply to the special term for leave to make and serve a case on appeal, and that if such application should be granted, the appeal should not be dismissed but the cause should go over the term and be argued at the next general term.

We are of opinion that the learned general term misapprehended the practice. The notice of the entry of judgment which the defendant's attorney served upon the plaintiff's attorney limited the right to appeal to thirty days, under section 1851 of the Code, which provides that an appeal to the general term "must be taken within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof," and it had no other effect; and within the time limited the appeal was brought.

The plaintiff was not obliged to prepare a case to be settled as required by section 997 of the Code, but he could file exceptions under section 994 of the Code, to the findings of the trial judge upon questions of law, and could have his appeal heard upon those exceptions without any case, as provided by section 998 of the Code.

At the time plaintiff's appeal was dismissed at the general term, the time for filing exceptions to the findings of law had not expired. According to section 994 those exceptions could be taken and filed any time before the expiration of ten days after service upon plaintiff's attorney of a copy of the decision of the court and a written notice of the entry of judgment thereupon.

A copy of the decision has never been served upon plaintiff's attorney, and hence, his time for filing exceptions to the findings of the judge has not been limited and has not expired.

The court at general term, therefore, had no right to dismiss his appeal, conditionally or otherwise. The defendant must serve upon the plaintiff's attorney a copy of the decision of the

court, and then, unless plaintiff's attorney files and serves his exceptions within the time limited by law, his appeal may be dismissed.

Nor has the plaintiff's time to make a case been limited as required by Rule 32 of the supreme court. That rule provides that if the trial is before the court or a referee, a case may be made and a copy thereof served upon the opposite party, "within ten days after the service of a copy of the decision or report, and written notice of the entry of judgment thereon."

It would, therefore, appear that at the time plaintiff's appeal was dismissed he was not in default for not filing his exceptions or making a case.

The order of the General Term should, therefore, be reversed, with costs of appeal to this court and \$10 costs of opposing the motion at the General Term.

All concur.

Nathan HUTKOFF, *Respt.*,
v.

William J. DEMOREST *et al.*, *Appts.*

Emily R. CALDWELL *et al.*, *Respts.*,
v.

Franklin J. WALL, *Appt.*

Gotthelf GREINER, *Respt.*,
v.

Jettel H. HAMBURGER, *Appt.*

Chapter 418, Laws of 1886, does not authorize appeals from judgments of the City (late Marine) Court of New York directly to the Court of Appeals. Such judgments must still be first reviewed by the Court of Common Pleas.

(Decided October 20, 1886.)

MO TIONS to dismiss appeals from judgments of the General Term of the City Court of New York. *Granted.*

Mr. David Leventritt, for the motion.

Mr. Jas. R. Marvin, contra.

Rapallo, J., delivered the opinion of the court:

Article VI. of the Constitution of the State was adopted by the People at the November election in 1869, and declared adopted by the board of state canvassers, December 6, 1869.

One of its provisions was that the Superior Court of the City of New York, and the Court of Common Pleas of the City and County of New York, the Superior Court of Buffalo and the City Court of Brooklyn, were continued with the powers and jurisdiction they then severally had, and such further civil and criminal jurisdiction as might be conferred by law (art. VI. § 12).

In the case of *Popfinger v. Yutte*, 102 N. Y. 38 [S. C. 3 Cent. Rep. 291], we decided this provision superseded section 12 of article 14, which declared that those courts should remain *until otherwise directed by the Legislature*, with their then present powers and jurisdiction; that after the adoption of article VI. it was beyond the power of the Legislature to take from those courts any of the powers or jurisdiction which

they had at the time of the adoption of the article, and that consequently subdivision 5 of section 263 of the Code of Civil Procedure, which purported to confine their jurisdiction in judgment creditor's actions to cases where the judgment on which the action as founded was recovered in the same court, was inoperative and void because at the time of the adoption of article VI. those courts had general jurisdiction in equity within their territorial limits, coextensive with that of the Supreme Court, and subdivision 5 purported to take away part of that jurisdiction by limiting it in judgment creditor's suits to judgments recovered in the same court.

At the time of the adoption of article VI. the jurisdiction and powers of the Court of Common Pleas of the City and County of New York, were declared and enumerated in title V. of the Code of Procedure, sections 33, 34. Section 34 is in the following words: "§ 34. The Court of Common Pleas of the City and County of New York shall also have power to review the judgments of the Marine Court of the City of New York and of the Justices' Courts in that City."

By the Act of 1883, chap. 26, the name of the Marine Court was changed to the City Court, but it still remained the same court with the same judges and officers and the same jurisdiction; and the power to review its judgments continued in the Court of Common Pleas under its original grant of power.

By chapter 418 of the Laws of 1886 it was sought, indirectly and by language the full effect of which would not readily be observed by a casual reading, to take from the Court of Common Pleas the important power of reviewing the judgments of the Marine Court, now the City Court, and to authorize an appeal from those judgments direct to the Court of Appeals, without requiring that they should first be subjected to review by the Court of Common Pleas.

The enactment is as follows: "§ 1. Subdivision 2 of section 191 of chap. 448 of the Laws of 1876 entitled: 'An Act Relating to Courts, Officers of Justice and Civil Proceedings,' is hereby amended so as to read as follows: '2. An appeal cannot be taken in an action commenced in a court of a justice of the peace, or in a District Court of the City of New York, or in the City Court of Yonkers, or in a justice's court of a city, unless the court below allows the appeal by an order made at the general term which rendered the determination, or at the next general term after judgment is entered thereupon. An action, discontinued because the answer set forth matter showing that the title to real property came in question, and afterwards prosecuted in another court, is not deemed to have been commenced in the court wherein the answer was interposed, within the meaning of this subdivision. The City Court of New York shall be deemed a superior city court within the meaning of section 190 of the Code of Civil Procedure.' § 2. This Act shall take effect immediately, but shall not apply to any actions now pending in which the time to appeal has not already expired."

If the Act were construed literally it could not have any operation whatever, for it would have no application to any actions pending at the time of its passage in which the

time to appeal had not then already expired; and it is difficult to suppose any case to which under that restriction it could apply. But reading it as if the word "not" were omitted, it is still subject to the fundamental objection that it contravenes section 12, of article VI. of the Constitution by depriving the Court of Common Pleas of its jurisdiction and power to review the judgments of the Marine (City) Court which it possessed at the time of the adoption of the article, and which were thereby rendered permanent and placed beyond the power of the Legislature to take from that court.

The Act authorizing appeals to this court from the decisions of the General Term of the City Court of Brooklyn (Laws of 1871, chap. 282), and its recognition by this court by entertaining such appeals, are relied upon by the appellants as giving support to their position in the present cases. But we do not see that they affect the question. There is no provision in the Constitution in relation to the Supreme Court which could be construed as restraining the Legislature from taking from that court the appellate jurisdiction over the judgments of the City Court of Brooklyn which it possessed in 1869 and 1870; and the question now presented could not arise in respect to the Act of 1871 before referred to.

The motions to dismiss the appeals in the above entitled cases should be granted, but as the question is new no costs should be allowed to either party.

All concur.

PEOPLE, *ex rel.* Frank B. SMITH, *Appt.*,
v.

COMMISSIONERS of the Department of Fire and Buildings OF BROOKLYN, *Resp'ts.*

1. An order quashing a writ of *certiorari* is appealable to the court of appeals when it adjudicates upon the validity of the proceeding reviewed.
2. A "detailed" fireman is within the provisions of the charter of Brooklyn permitting removals of members of the fire department by the commissioners only on conviction of an offense specified; and the removal of such fireman without notice or trial is illegal.

(Decided October 26, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming an order of the Kings Special Term quashing a writ of *certiorari* and affirming proceedings of defendants in removing relator from the Department of Fire and Buildings in Brooklyn. *Reversed.*

Memorandum of decision below, 37 Hun, 643.

Mr. Edward F. O'Dwyer, for appellant.
Mr. Almet F. Jencks, for respondents.

Rapallo, J., delivered the opinion of the court:

The order of the general term in this case is appealable. It affirms a judgment rendered at special term on *certiorari*, which was in the fol-

lowing words: "It is ordered and adjudged that the respondents have judgment on the return, and that their action in removing relator from said Department of Fire and Buildings is in every respect affirmed, and that said writ of *certiorari* be quashed, with \$10 costs."

An order which simply quashes a common-law *certiorari* has often been held not to be appealable to this court, because the issuing of the writ rests in the discretion of the court; and consequently it can in its discretion recall or quash the writ without passing upon the validity of the proceeding sought to be reviewed.

The case of *People v. Stilwell*, 19 N. Y. 581, fell within that principle. There was no hearing upon the return and no adjudication upon the merits, but the decision was rendered on a motion to quash the writ, which motion was granted. In the opinion, it is true, the validity of the proceedings sought to be reviewed was considered, and the court held that the writ had been improvidently issued. But the order simply quashed the writ and did not adjudicate upon the validity of the proceeding.

The cases of *People v. Hill*, 58 N. Y. 547; *People v. Board of Police Comrs.* 82 N. Y. 506; and *People v. Board of Tax Comrs.* 85 N. Y. 655, were of the same description. But in the case of *People v. Board of Assessors*, 89 N. Y. 88, although the order concluded by directing that the writ be quashed, that conclusion was preceded, as in the present case, by an adjudication that the proceeding brought up by the writ was valid and free from error; and the judgment quashing the writ was not rendered in the exercise of the discretion of the court, and on the ground that the proceeding ought not to be reviewed by the writ, but on the ground that the allegations of error were not sustained. This decision was held to present a question of law reviewable in this court. To the same effect was the case of *People v. Knowles*, 47 N. Y. 415, 420.

We must, therefore, consider the question of the validity of the proceeding of the board in removing the relator. If he was legally appointed a member of the Fire Department, it is not disputed that his removal was illegal, inasmuch as the power of the Commissioners to remove a member of the Department can only be exercised on conviction of the member of some of the offenses specified in section 14 of title XIII. of the Charter of the City of Brooklyn (Laws of 1873 chap. 863), and in the case of the relator there was no such conviction. He was removed by a simple resolution without trial or notice, or even any charge having been made against him. The only ground upon which the board claim that their action should be sustained is that his appointment was invalid for the reason that he was appointed as "a detailed fireman" and as no such office existed he was dismissed by the board. That position was sustained by the general term in their opinion, and they held that consequently the removal was regular and proper.

We think that the case of *Pennie v. Brooklyn*, decided by the City Court of Brooklyn and affirmed in this court [97 N. Y. 654], determines the question adversely to the respondents. The appointment of Pennie was precisely the same as that of the present relator. Both were appointed by resolution, "detailed"

firemen, and both were removed by resolution, without other cause than the alleged invalidity of such an appointment. Pennie sued out a writ of *certiorari* and the opinion of the general term of the second department, a copy of which is among the appeal papers in the case of *Pennie v. Brooklyn*, on file with the clerk of this court (Vol. 62), states: "The relator, Henry Pennie, was removed by resolution because he was appointed a detailed fireman, a position not known to the law. This is quite frivolous; if he were a fireman his office was known to the law; and detailed here means nothing more than selected."

The proceedings were thereupon reversed, and Pennie afterwards brought an action in the City Court of Brooklyn for his salary during the time of his exclusion. The same point was urged on the trial of that action, and a motion for a nonsuit was made on the ground as stated in the case on appeal "that the position of detailed fireman is a position unknown to the law and that the resolution of the commissioners removing the plaintiff is effectual." The motion was denied and exception taken, and a verdict for the plaintiff was directed, and on appeal to this court the judgment entered on the verdict was affirmed. *Pennie v. Brooklyn*, 97 N. Y. 654.

The cases are identical and we see no ground upon which the proceedings of the board can be sustained.

The judgments of the General and Special Terms should be reversed and the proceedings of the respondents reversed and annulled, with costs to the relator in this court and the court below.

All concur.

Sarah SOLOMON, Admrx. of Joseph SOLOMON, Deceased, Appt.,

v.

MANHATTAN R. CO., Resp't.

1. In an action to recover damages for the death of plaintiff's intestate the evidence showed that deceased, who was well acquainted with the station and its surroundings and the manner of operating the trains, endeavored, together with two other persons, to board an elevated railway train after it had begun to move from the station. The two other persons, who were slightly in advance of deceased, either pushed back the car platform gate or it was drawn back for them by the conductor, the gate having either been closed or was then being closed by the conductor, and succeeded in boarding the train. Deceased took hold of the stanchions of the car, placed one foot on the platform, and was in the act of passing on to the car, when the conductor closed the gate, and deceased, clinging to the car, was carried a few feet until he came in contact with a projection from the station platform and received injuries from which he died. Held, that deceased was guilty of contributory negligence, and that a nonsuit was properly directed.
2. The presumption of negligence in the

case of one attempting to board a moving train is stronger even than in the case of one attempting to alight from a moving train.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit Court dismissing the complaint in an action to recover for the death of plaintiff's intestate alleged to have been caused by negligence of defendant in operating an elevated railway in the City of New York. *Affirmed.*

The action has been twice tried. Upon the first trial plaintiff obtained a verdict. Upon appeal the general term reversed the judgment in her favor for error of law, such error being the refusal to nonsuit the plaintiff or to direct a verdict for defendant. 31 Hun. 5.

From this order plaintiff appealed to the court of appeals and the appeal was dismissed. 95 N. Y. 672.

Upon a second trial the complaint was dismissed, and the judgment in defendant's favor was affirmed by the general term, for the reason that the evidence presented by both parties was similar to that given on the former trial of the cause.

From this judgment of the general term plaintiff appealed to this court.

The facts of the case are sufficiently stated in the opinion.

Mr. Geo. Putnam Smith, for appellant: "It cannot be said, as matter of law, that it is always negligent for a person to get upon a street car while in motion."

Eppendorf v. R. R. Co. 69 N. Y. 195.

The reasoning in this case applies with equal force to cars impelled by steam, and the decisions cited to sustain it are those concerning steam cars.

Doss v. R. R. Co. 59 Mo. 87; *Swigert v. R. R. Co.* 75 Mo. 475; *Price v. R. Co.* 72 Mo. 414; *Filer v. N. Y. Cent. R. R. Co.* 49 N. Y. 47.

The speed of the train when the attempt is made is in all cases to be considered.

Brooks v. N. Y. L. E. & W. R. R. Co. 21 N. Y. Week. Dig. 464; *Nelson v. A. & P. R. R. Co.* 68 Mo. 595.

Deceased was not guilty of negligence in stepping on the moving car unless he knew, or was bound in law to know that it was in motion. The evidence clearly shows that when Mr. Solomon reached the train the gate was open.

Evans v. Utica, 69 N. Y. 166.

The acts of the other passengers at the time were properly shown, to disprove negligence.

Townley v. R. R. Co. 56 N. Y. 158; *Coulter v. Am. Exp. Co.* 56 N. Y. 585.

"The speed of the train, the conduct of the conductor, the darkness of the hour, the age and activity of deceased, all these circumstances are for consideration in determining whether plaintiff's intestate was prudent."

Price v. St. L. K. & N. R. R. Co. 72 Mo. 414; *Brooks v. Boston & M. R. R. Co.* 185 Mass. 21.

Deceased was not guilty of negligence in failing to guard against a danger which, under the circumstances, he had no reason to expect.

204

Langan v. R. R. Co. 72 Mo. 392; *Fowler v. R. R. Co.* 18 West Va. 580.

By its own misconduct defendant placed deceased in peril, and it cannot complain if he erred in judgment.

Voak v. R. R. Co. 75 N. Y. 320; *Ouyler v. Decker*, 20 Hun. 173.

"The contributory negligence on the part of the plaintiff that has been held to defeat his right of recovery has entered into the creation of the cause of action, and not merely supervened upon it by way of aggravating the damaging results."

Wilmot v. Howard, 39 Vt. 458; *Stebbins v. R. R. Co.* 54 Vt. 464.

To prevent a recovery in this action, Mr. Solomon's negligence, even if it existed, must have been contributory.

Haley v. Earle, 30 N. Y. 208; *Savage v. Corn Ex. etc. Ins. Co.* 36 N. Y. 655.

"The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury."

Milwaukee, etc. R. R. Co. v. Kellogg, 94 U. S. 475 (Bk. 24 L. ed. 256).

Notwithstanding any negligence on the part of deceased, if defendant's employees, by the exercise of reasonable care or skill, could have done anything, after they saw him in his perilous position, whereby the chance of injury might have been averted, it is liable.

Austin v. Steamboat Co. 43 N. Y. 76; *Swigert v. Han. & St. Jo. R. R. Co.* 75 Mo. 475; *Isbell v. N. Y. & N. H. R. R. Co.* 27 Conn. 406; *Price v. St. L. K. & N. R. R. Co.* 72 Mo. 414; *Meeks v. S. P. R. R. Co.* 56 Cal. 513; *Jamison v. San Jose R. R. Co.* 55 Cal. 593.

Mr. Edward S. Rapallo, with whom was **Mr. Robert E. Deyo**, for respondent:

The plaintiff failed to prove in this instance that the attempt of the intestate to board the moving train, to which attempt and acts of the intestate the accident was at least in part due, was not, under the circumstances, negligent.

The general rule to be gathered from the decisions of this and other courts appears to be that the boarding or alighting from a moving train is presumably and generally a negligent act per se.

Burrows v. Erie R. Co. 63 N. Y. 556; *Morrison v. Erie R. Co.* 56 N. Y. 302, 307; *Filer v. N. Y. Cent. R. R. Co.* 49 N. Y. 47; *Nichols v. Sixth Ave. R. R. Co.* 38 N. Y. 131; *Gavett v. Manchester, etc. R. R. Co.* 16 Gray, 507; *Hickey v. R. R. Co.* 14 Allen, 429; *Harvey v. Eastern R. R. Co.* 116 Mass. 269; *Harper v. Erie R. Co.* 32 N. J. L. 88; *Secor v. Toledo, etc. R. Co.* 10 Fed. Rep. 15.

Andrews, J., delivered the opinion of the court:

It is undisputed that the train was in motion at the time the plaintiff's intestate attempted to enter it. It had been brought to a stop, according to the usual custom, on reaching the Chatham Square Station, for the purpose of discharging and receiving passengers, and had started again before the deceased and the two men in front of him, hurrying from the Third Avenue train across the bridge and down the steps to the station platform of the Second

Avenue road, had reached the rear of the first car. It is also undisputed that the conductor, who was standing on the platform between the first and second cars, had given the signal to start the train and had closed or attempted to close the gate before the first of the three men reached the car. The train at this time as we have said, had started and was slowly moving, but with a constantly accelerated speed. The two men in advance of the intestate, succeeded in safely boarding the train. The intestate was a few feet behind them. He attempted to get on to the platform of the car after the others.

The evidence tends to show that he took hold of the stanchions of the car with both hands and placed one foot upon the car platform, and was in the act of passing on to the car when the conductor closed the gate against the deceased, who, clinging to the car or possibly being caught in some way by the gate, was carried along a few feet, until his body came in contact with a water pipe extending horizontally at the end of the station platform, and received the injuries of which he subsequently died.

There is a conflict of evidence as to whether the gate had been fully closed before the two men in front of the intestate reached the car. The conductor testified that it was closed at that time and was pushed open by them. Witnesses for the plaintiff testified that the conductor was closing the gate as the two men approached the car, and opened it for them to enter, and then closed it as the intestate was attempting to get on.

There is also some discrepancy in the evidence as to the distance from the car platform to the water pipe at the end of the station platform, when the intestate reached the car. One of the plaintiff's witnesses, who saw the whole transaction, testified that the distance was four or five feet, and other witnesses testified that it was ten feet.

Wilson, a witness for the plaintiff, testified: "Although my glance was momentary, I saw him (deceased) constantly from the time he put his foot on the car until he struck the projection; in my best judgment that may have been five feet, but I think it was about four feet, the distance."

Haller, also a witness for the plaintiff, was asked: "The whole occurrence from the time the conductor pulled the bell to start the car, until Mr. Solomon struck against the projection and fell, occupied but a very short space of time, did it not?" He answered: "A very little time, quicker than I can tell you."

In view of the undisputed fact that the car was moving when the deceased attempted to enter it, it is evident that the obstruction against which the deceased was carried was perilously near, and that a collision was inevitable if the deceased should fail to get on to the car and should be carried along a few feet in the position in which he was when the gate was closed.

The station platform was lighted and "everything was clear." The deceased had been accustomed to take the train in the evening at this station for more than a year. His son, who usually accompanied his father, testified that "the train stops very sharp and goes off very quick." The trains ran every five minutes. There can be no doubt that the deceased was

familiar with the surroundings and was acquainted with the manner of operating the trains.

We are of opinion that the nonsuit was properly directed. It must be assumed that the deceased when he attempted to enter the car, knew that it was in motion. We cannot know what was passing in his mind, or of what existing facts he was actually cognizant, except by inference. But what others saw and knew in respect to matters equally open to his observation, must be presumed to have been seen and known by him; especially is this presumption a reasonable one in respect to matters which common prudence required him to know and observe before he attempted to enter the car. Knowing then, as must be inferred, that the train was in motion, he took the risk of the attempt to board it. The movement of the train was itself notice to him that the time for receiving passengers had passed. He undoubtedly thought he could board the train in safety, and except for the act of the conductor in closing the gate, the attempt would probably have been successful.

It does not appear that the deceased knew of the attempt of the conductor to close the gate before the two men who preceded him entered the car. But he was in a position to have seen it, and the act was observed by the other witnesses. We are of the opinion that the attempt of the deceased to enter the train, under the circumstances disclosed, was in law a negligent act which contributed to his death.

It is we think the general rule of law established by the decisions in this and other States, as claimed by the learned counsel for the respondent, that the boarding and alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was by the act of the defendant put to an election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.

McIntyre v. R. R. Co. 37 N. Y. 287, and *Filer v. R. R. Co.* 49 N. Y. 47, were cases of injury sustained by passengers, in the one case by going from one car to another by direction of one of the train men to get a seat, while the train was in motion, and in the other by leaving a moving car at a station by direction of a brakeman, who directed the plaintiff, a woman, to get off, saying that the train would not stop.

In *Burrows v. Erie R. Co.* 63 N. Y. 556, the court reversed a judgment recovered for an injury to a passenger in alighting at his station from a moving car; and in *Morrison v. Erie R. Co.* 56 N. Y. 302, the court reversed a verdict for the plaintiff under very similar circumstances.

It is said by Rapallo, J. in *Burrows v. Erie R. Co.*, that "The cases in which a recovery has been allowed, notwithstanding that the passenger undertook to leave the car while in motion, are exceptional and depend upon peculiar

circumstances." In short, as we now understand the rule established by the decisions, it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and it is not sufficient to rebut the presumption, that the trainmen acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience; but that to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment.

Negligence no doubt is usually a question of fact of which the jury must inquire, but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict.

The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion, now generally accepted, that it is in law a dangerous and therefore a negligent act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train; but this is an inconvenience merely, which does not justify exposing himself to hazard.

In *Phillips v. R. R. Co.* 49 N. Y. 177, the plaintiff was thrown against a platform in attempting to board a train while in motion, and a nonsuit was sustained in this court. In the present case the intestate was familiar with the situation. He must have known that according to the ordinary rules the time for receiving passengers had passed and that the greatest celerity and promptness was required on the part of those entrusted with the management of trains.

It is said that the opening of the gate by the conductor was an invitation for him to enter and that if the conductor had not closed the gate upon him he would have boarded the train in safety. It is true that the opening of the gate to admit the two men in front of the deceased, and their safe entrance, may have given the intestate confidence that he could enter also. But the act of the conductor, as the sequel shows, was not intended as an invitation to the intestate, and the conductor's misjudgment or negligence was one of the hazards which the intestate ran. It did not relieve him from the imputation of negligence because he did not foresee the obstruction which would be interposed, or that without the negligence of the conductor the accident would not have happened. One of the very dangers of the situation arose from the fact that all the contingencies upon which the success of the effort to enter the car depended, could not be anticipated. If men will take such hazards, they must bear the consequences of their own rashness; and it is no just reason for visiting the

consequences upon another, that his negligence co-operated in producing the result.

We think the judgment should be affirmed.

Ruger, Ch. J., Earl and Finch, JJ., concur. Miller and Danforth, JJ., dissent, Rapallo, J. taking no part.

Angeline C. JOHNSON, Admrx., *Reapt.*,

v.

Maria J. MYERS, Exrx., *Appt.*

Angeline C. JOHNSON, Admrx., *Reapt.*,

v.

Maria J. MYERS, *Appt.*

1. Evidence as to the value of services and as to whether they were rendered as partner or as employee examined.
2. The question "What proportion of A's time was devoted to B's business?" asked of one who had abundant opportunity to know, is not objectionable as calling for an opinion.
3. When the duty to be done requires a high degree of judgment, skill and ability, and is largely of a confidential character, and not such as has a common or general market value, the character and ability of the person who performed the duty are properly considered in arriving at the value of his services.

(Decided November 23, 1886.)

APPPEALS from judgments of the Supreme Court at General Term in the Fifth Department, affirming judgments in favor of plaintiff entered on the report of a referee in actions to recover the value of services rendered by plaintiff's intestate. *Affirmed.*

Memorandum of decision below, 35 Hun, 666.

Mr. Wm. G. Tracy, for appellant.

Mr. Chas. A. Hawley, for respondent.

Finch, J., delivered the opinion of the court:

The plaintiff as administratrix recovered compensation in two separate actions for services rendered by Johnson to Myers in his life time, and to his executrix after his death.

Myers appears to have been an able and successful though somewhat illiterate business man, whose enterprises were varied and extensive, widely scattered as to locality, and involving heavy risks of capital, and obstructed by adverse interests and the frequent hostility of litigation. In executing his plans he found it both necessary and wise to secure and use intelligent and trained assistance. To some extent he obtained the aid of Johnson by joining him as an associate in his enterprises; but beyond that he employed him largely in his own affairs, putting confidence in the ability and honesty of the chosen agent. Necessarily, the line between the partnership work of Johnson and that performed by him for the benefit of Myers individually was extremely difficult to draw, and after the death of both parties it has made an accurate and precise separation impossible, and to be accomplished only approximately and by a careful judgment founded

upon such evidence as the nature of the case permitted.

No person was so likely to know in a general way the amount of service rendered by Johnson as his wife. His coming and going, his telegrams and letters, the litigations calling him abroad, the meetings and conversations of the parties, would be within her knowledge to some considerable extent; not always accurately in detail, but generally as a whole. She testified that in the summer of 1870 Myers, complaining of his arm and saying that Johnson knew more about his business than any man living, sought his help to "settle up his business," and Johnson entered upon the work and furnished the assistance.

That she told the exact truth in this respect is put beyond dispute by the letters of Myers written mainly by his then secretary and agent, Yoe. Under date of July 6, 1870 the latter writes that Myers is sick and adds: "He wishes you to look after his affairs generally until he is able to return." Under date of July 14, 1870, Yoe writes again that Myers is still sick and "He desires you to look after his matters and that if you desire anyone to counsel in his affairs you will confer with T. B. Fitch, Esq., and if necessary come to Syracuse to see him."

Then follow thirty-four letters running down to the middle of October, when Myers went to New York, where he died a few weeks later.

The burden of Myers' letters is the detail of his business to be attended to. Much of it concerned the sale of the Trenton Arms Company to De Muir. While it is true that Johnson and Myers were joint owners of that property, the title stood in the name of Myers, who sold the whole of it to De Muir as early as December 1869, and from that time on owed Johnson his proportion of the purchase price. Further subjects are the collection of mortgages, the discharge of judgments, the sale of houses and the difficulty with Randall and Williams in which Johnson seems to have had no personal interest.

Beyond any question the statement of Mrs. Johnson was true. She further testified to an arrangement made with Fitch after Myers' death, for the rendition of services to the estate. How entirely true that is becomes evident from the multitude of Fitch's letters calling upon Johnson in every conceivable shape for information advice and service; from the account of moneys received by Johnson and paid over by him running to about \$100,000; and from numerous vouchers in which the estate is found paying Johnson for his expenses and returning to him moneys advanced.

Mrs. Johnson further said that from 1864 her husband was more or less occupied with the affairs of Myers and his estate. This also was undeniably true. The defendant drew from her on cross examination the fact that in 1864 while they lived in Trenton, Johnson came to Syracuse every week during six weeks at the request of Myers and that she knew it was on Myers' individual business; that he went to Brooklyn, attended to litigations and consulted with lawyers.

Many letters during this period tend to corroborate her statement. But what is quite as conclusive as a detailed examination of the services is the defendant's own request to find, N. Y.

marked number 6 and couched in this language: "That said William Johnson rendered *some* services for said Austin Myers *during his lifetime*. That the services so rendered by him were reasonably worth the sum of \$3,600 and no more, and that said item is a proper charge on this accounting in favor of the estate of said Johnson." In the face of this admission it requires some nerve to insist that Johnson's services rendered all related to the joint property.

Mrs. Johnson, swearing to this knowledge shown to be correct, and with abundant opportunity to know and that the best of any living person, was then asked what proportion of Johnson's time was devoted to Myers' business. To this it was objected that the witness was incompetent to give an opinion and that it appeared that Johnson and Myers were partners. The objection was overruled and an exception taken. The witness answered: "One half from 1864 to the time of Johnson's death." The objection was not sound. The question called for a fact within the witness' knowledge and not for an opinion. If a person familiar with the character of Myers' business had been asked how much of one man's time it would have taken to conduct or transact it, that would have called for an opinion, but if asked how much time it did take, no opinion would be sought but a fact founded upon knowledge.

That was the character of the question put to Mrs. Johnson. A fact was asked for of which she had some knowledge and which she could answer to the extent of that knowledge. How gravely inconsistent it would be for us to hold the admission of this question error is apparent from our own ruling in a much more debatable case, *Hallahan v. N. Y. L. E. & West. R. R. Co.* 102 N. Y. 195 [S. C. 2 Cent. Rep. 924]. There the witness who saw the passenger answered: "I should judge" that plaintiff's elbow was not out of the window from the position that he held in the car. A motion to strike out the answer was denied, on the ground that if the answer seemed an opinion it was in effect not one, but at least was admissible as an opinion founded upon knowledge.

Estimates of time and value thus founded are always admissible and no objection was taken in this case that Mrs. Johnson had not sufficient knowledge. She swore that she had, the opportunity was certainly hers, and the facts corroborate and support the truth of her answer. Bearing upon them, as we have said, was a voluminous correspondence read in evidence, the details of the defendant's own account against Johnson which show a large mass of business done by him for Myers and his estate resulting in the receipt and payment of very considerable sums of money, and the evidence of other witnesses as to services rendered, and the value of the same. The finding of the referee upon the subject was not unreasonable, or outside of the inferences which were possible from the proof.

An exception was taken to a question put to Jewett, which was this: "Have you ever been with Col. Johnson when he was professedly in Capt. Myers' business?" The ground of the objection was that the question called for the declarations of Johnson in his own favor. That was not the object or effect of the evidence. The purpose was not to prove by Johnson's state-

ments that he was at work for Myers, but to show that the witness was acquainted with the kind of business in which Johnson was engaged and which by other evidence it was claimed to have been shown was that of Myers, with a view of obtaining from the witness his estimate of the value of Johnson's services. This is made quite apparent by what immediately preceded the objection. Jewett had said that he saw Johnson engaged in work which the latter represented to be that of Myers. A motion was made to strike out Johnson's declarations in the absence of Myers, and the motion was granted. The referee, therefore, certainly did not understand the word "professedly" used in the question as calling for a class of evidence just held by him to be inadmissible, and must have understood the inquiry as merely preliminary to the proof of value afterward given. It may be added that the answer was harmless. It showed the intestate ostensibly engaged in services for Myers, but not that he was so engaged or what the services were. The referee quite certainly understood that those facts were not proved by Jewett.

The plaintiff was permitted to show what the value of the services of such a man as Col. Johnson was, and to this there was an exception. It is now argued that his character and ability had nothing to do with the value of the services. We think it had much. The duty to be done required the best of judgment, a skill and ability beyond the average, and was largely of a confidential character. It had no common and general market value. The work was not merely ministerial or a service which anybody could render. The business was varied and complicated and in many directions responsible, and the man chosen to perform it by reason of his capacity and ability had a right to be paid upon the standard of the capacity which entered into the work and formed the principal and essential value of the services.

The remaining questions argued respect the counterclaims of the defendant which were disallowed upon the trial. In the main they depended upon pure questions of fact involving the credibility of witnesses and the drift and effect of items in the books of account. They were argued exhaustively before us, leaving upon our minds a conviction, which a careful subsequent examination has strengthened, that they furnish no ground for a reversal of the judgments. The reasons given by the referee and the General Terms substantially cover the ground and meet our approval, and a renewed discussion of them is neither necessary nor suitable.

Each of the two judgments should be affirmed; that against the defendant as executrix without costs, and that against her as an individual with costs.

Miller, Earl and Danforth, JJ., concur.
Ruger, Ch. J., Rapallo and Andrews, JJ., dissent.

Angeline C. JOHNSON, Admrx., *Respt.*,

v.

Maria J. MYERS, Exrx., *Appt.*

Held, on the facts, where a judgment for money only had been recovered against
208

an executrix in an action against her in her representative capacity, and where the plaintiff's claim had been duly presented before suit brought, that the defense of the action was reasonable and proper, and that therefore costs should not have been awarded. (Code Civ. Proc. §§ 1835, 1836.)

(Decided November 23, 1886.)

A PPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order granting costs and an additional allowance to plaintiff in an action against an executrix on a claim for services rendered to defendant's testator in his life time. *Reversed.*

Memorandum of decision below, 85 Hun. 666.

Mr. Wm. G. Tracy, for appellant.

Mr. Chas. A. Hawley, for respondent.

Finch, J., delivered the opinion of the court:

An order was made in this case granting costs to the plaintiff and an additional allowance. It is resisted upon this appeal, on the ground that the plaintiff's demand was not presented to the executrix for payment before the commencement of the action, and that such payment was not unreasonably resisted or refused. Both questions turn upon disputed facts, as to which it is the general rule of this court to follow the conclusions of the court below unless for some very obvious and sufficient reason. *Field v. Field*, 77 N. Y. 294.

The statute (3 R. S. 5th ed. p. 175, §§ 39, 40), authorizes publication of a notice to creditors "requiring all persons having claims against the deceased to exhibit the same with the vouchers thereof, to such executor or administrator," etc., and allows the latter upon such presentation to require production of vouchers and an affidavit of the claimant.

The proofs on the part of the plaintiff show that her claims, with the books and vouchers on which they rested, were fully "exhibited" to the authorized agent of the executrix before the commencement of the action, and were examined and rejected by the assertion of counterclaims sufficient to extinguish them, and all ultimate liability denied. This fact is no further disputed than by an affidavit of the defendant's attorney that no "formal claim" was ever made, though he admits "informal negotiations for a settlement."

But while the courts below were justified in holding that the plaintiff's claim was duly exhibited and properly presented, the examination we have made of the facts in controversy very strongly impresses us with the conviction that the defense of this action was reasonable and proper; and while the defendant estate was unsuccessful in the end, there was abundant reason in the complicated nature of the accounts, in the great amount of business transacted and in the supposed and actual existence of grave counterclaims, to justify the defense actually made and prevent us from holding it to have been unreasonable.

Judgment was demanded for more than \$60,000, with a large amount of interest. Judgment was rendered for a sum very materially less and still further reduced by a deduc-

tion of the general term of more than \$10,000. We discover no trace of bad faith in the defense interposed but much to justify the inquiry and examination which it compelled.

For this reason, we think, costs should not have been awarded, and we therefore reverse the order appealed from.

All concur.

Emily D. JEX *et al.*, Executrices of Josiah Jex, Deceased, *Appts.*,
v.

Mayor, Aldermen and Commonalty of the CITY OF NEW YORK, *Resp't.*

1. An assessment for repaving in the City of New York, although valid on its face, is void for want of jurisdiction where the proceeding was not based upon a petition of a majority of the property owners, as required by the charter.
2. Chapter 312 of Laws of 1874, amending chapter 838 of Laws of 1858, and confining the remedy for the vacation of assessments in New York City to "the proceedings under the Act hereby amended," only applies where there is an existing lien created by the assessment, and does not affect the right of action to recover money unlawfully exacted under an illegal assessment.
3. An assessment imposed without jurisdiction need not be first vacated in order to enable one to recover money paid thereon.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term sustaining a demurrer to a complaint in an action to recover money paid by plaintiffs' testator on an alleged illegal assessment for street improvement. *Reversed.*

Memorandum of decision below, 38 Hun, 688.

The facts are sufficiently stated in the opinion.

Mr. Herbert A. Shipman, for appellants:

The commissioner of public works let the contract for this work at a private letting. For an improvement, performed under such a contract, no valid assessment could be imposed.

Re Emigrant Sav. Bank, 75 N. Y. 389; *Re Well*, 88 N. Y. 543.

An action of this nature can be maintained. *Strusburgh v. Mayor*, 87 N. Y. 452; *Delano v. Mayor*, 32 Hun, 144.

The Act of 1858 (chap. 838) as amended by the Act of 1874 (chap. 312) is only applicable when the lien of the assessment exists.

Re Lima, 77 N. Y. 170; *Re Hughes*, 93 N. Y. 513.

If the construction of the prohibitory clause of the Act of 1874, claimed by the defendant, is the true one, then the Act is unconstitutional. It is competent for the Legislature to deprive a court of equity of the power of giving a particular remedy, but it cannot deprive a party of all remedy.

Cooley, Const. Lim. 3d ed. p. 239; *Lennon v. Mayor*, 55 N. Y. 361.

N. Y.

The case is governed by the case of *Bruecher v. Port Chester*, 101 N. Y. 240, 2 Cent. Rep. 90, in which the court says: "Where an assessment is in fact utterly void, on the ground that the assessors had no jurisdiction to impose the same, then an action may be maintained to recover back money paid in satisfaction thereof without first having the assessment set aside or vacated. And so it has been held. *Newman v. Supra. Livingston Co.* 45 N. Y. 676; *Strusburgh v. Mayor*, 87 N. Y. 452; *Horn v. New Lots*, 88 N. Y. 100."

This is not a "suit or action in the nature of a bill in equity or otherwise" "for the vacation of any assessment in said City, or to remove a cloud upon title." This action is not therefore barred by the Act of 1874 (chap. 312), for suits or actions of the nature named in the Act only are affected by the Act. The assessment has been paid; therefore there remains no assessment to vacate. By the payment of the assessment the cloud upon the title (which was created by and only existed while the assessment remained unpaid) has been removed.

In reply:

The work of repaving Broadway was performed under a contract made in direct and open violation of the mandatory requirements of the Act of 1873, chap. 385 § 115.

Re Manhattan R. R. Co. 102 N. Y. 304, 3 Cent. Rep. 329.

Messrs. E. Henry Lacombe and D. J. Dean, for respondent:

Prior to the year 1858, the manner by which assessments for local improvements in the City of New York were vacated was by a suit in equity to remove a cloud upon title.

By Laws 1858, chap. 838, a new and summary method was provided, by which assessments might be vacated by petition to the supreme court.

Miller's Case, 12 Abb. Pr. 121.

From the passage of that Act until the year 1874, two methods of procedure existed, viz.: a suit in equity or an application by petition under chapter 838 of the Laws of 1858, either of which might be resorted to by persons aggrieved by fraud or substantial error committed in the imposition of any assessment for a local improvement.

By chapter 312 of the Laws of 1874, amending the Act of 1858, it was provided that:

"Hereafter no suit or action of the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said City, or to remove a cloud upon title; but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the Act hereby amended."

This provision was incorporated in the Consolidation Act of 1882, as section 897.

After the passage of the Act last mentioned, no such suit as has been brought by the plaintiffs in this case could be maintained.

Heckman v. Mayor, 23 Hun, 591; *Re Gants*, 85 N. Y. 539; *Knapp v. Brooklyn*, 97 N. Y. 720; *Astor v. Mayor*, 7 Jones & S. 129; *aff'd* in 62 N. Y. 580.

The Act of 1874 does not deprive the court of jurisdiction; it simply prescribes the method which the plaintiff shall pursue in attacking illegal or voidable assessments. That the Legislature has ample power to do this is held in

Lennon v. Mayor, 55 N. Y. 866; *Dolan v. Mayor*, 62 N. Y. 472; and *Bank of Chenango v. Brown*, 26 N. Y. 467.

The present contention of the respondent is not in conflict with the opinion of this court in *Bruecher v. Port Chester*, 101 N. Y. 240-245, 2 Cent. Rep. 90, in which *Strusburgh v. Mayor* is cited. For in the *Bruecher Case* it appeared: 1. That the assessment was "utterly void on the ground that the assessors had no jurisdiction." 2. That the same assessment had been adjudged utterly void in a prior suit of other parties against the same defendant. 3. The action was for a money judgment only, as in *Peyser v. Mayor*, 70 N. Y. 497, and did not require an adjudication as to the validity of the assessment.

An action at law may be maintained to recover back money paid for an assessment or tax which is void upon its face, for lack of jurisdiction in the assessor, without having first set aside the tax or assessment.

Horn v. New Lots, 88 N. Y. 100; *Newman v. Superiors Livingston Co.* 45 N. Y. 676; *Chapman v. Brooklyn*, 40 N. Y. 372.

But an action cannot be maintained to recover back money paid for an illegal assessment, which is not void upon its face, so long as the assessment remains unvacated and unreversed.

Swift v. Poughkeepsie, 87 N. Y. 511; *Bank of Commonwealth v. Mayor*, 43 N. Y. 184; *Peyser v. Mayor*, 70 N. Y. 497; *Purcell v. Mayor*, 85 N. Y. 380; *Wilkes v. Mayor*, 79 N. Y. 621.

The statute in question is not unconstitutional as depriving plaintiff of all remedy; it simply and only deprives him of the remedy by action in equity in which, as plaintiff, he may invoke the equitable jurisdiction of the court.

Lennon v. Mayor, 55 N. Y. 866.

See also *Dolan v. Mayor*, 62 N. Y. 472; *Astor v. Mayor*, 62 N. Y. 580; *Bank of Chenango v. Brown*, 26 N. Y. 467.

Andrews, J., delivered the opinion of the court:

Upon the facts averred in the complaint, the assessment imposed upon the lands of the testator, for regulating and paving Broadway, although valid on its face, was nevertheless void for want of jurisdiction. It was an assessment for repaving, and the ordinance of the Common Council directing the improvement was not based upon a petition of a majority of the property owners, as required by the charter. Laws of 1873, chap. 335, § 115.

The work also involved an expenditure exceeding \$1,000, and was not let by contract; nor was it authorized by a vote of three fourths of the members of the Common Council, which is essential to justify a departure from the general rule requiring work involving an expenditure exceeding that amount, to be done by contract founded upon sealed bids and proposals.

The presentation of the proper petition is the basis of the jurisdiction of the Common Council to incur an expense for repaving reimbursable by local assessment. The statute requiring the presentation of a petition was designed for the protection of property owners. The initiation of the improvement without a petition was not an irregularity merely, but was fundamental. It was a condition precedent

to the right to make an assessment for the improvement, that it should have been petitioned for by the requisite number of property owners. See *Re Emigrants Sav. Bank*, 75 N. Y. 889; *Re Weil*, 88 N. Y. 543; and *Re Manhattan R. R. Co.* 102 N. Y. 802, 3 Cent. Rep. 329.

It is alleged in the complaint that the testator, being ignorant of the defects in the proceedings, was required to pay, and did pay under coercion of law, an assessment against his lands, for the improvement, amounting to \$1,487.02, and that the claim to have the money repaid had been duly presented to the comptroller and was rejected; and the complaint demands judgment vacating the assessment, and also for the amount paid thereon by the plaintiff's testator, with interest. It is not controverted that if the assessment was illegal, a case was presented by the complaint, which under the general rule of law entitled the plaintiff to relief. *Strusburgh v. Mayor*, 87 N. Y. 452.

It is contended, however, that the vacation of the assessment must precede or accompany the remedy to recover back the money paid, and that the remedy by action to vacate the assessment has been taken away by chapter 312 of the Laws of 1874, amending chapter 338 of the Laws of 1858, which declares that "Hereafter no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the Act hereby amended;" and that this remedy being taken away, the right to the other relief is gone.

The Act of 1858 provided an easy and expeditious remedy for the vacation of an illegal or irregular assessment which constituted a cloud upon title, without subjecting parties affected thereby to the necessity of resorting to the dilatory and expensive remedy by action. The amendment of 1874 made this remedy exclusive. But the statute only applies where there is an existing lien created by the assessment. When the lien is removed by payment or otherwise, the Act has no application. *Re Lima*, 71 N. Y. 170; *Re Hughes*, 93 N. Y. 513.

The Act of 1874 did not in terms and could not have been intended to take away all remedy to recover back money wrongfully extorted under color of an illegal assessment. It confines owners of property to the remedy given by the Act, "in such cases;" that is, where the remedy sought is the vacation of an assessment and the cancellation of an existing lien.

The right of action in this case arises out of the unlawful exaction of money from the plaintiff's testator under illegal process, which, on being paid, operated to cancel the lien. It is not touched by the Act of 1874. See *Strusburgh v. Mayor*, *supra*.

The assessment having been imposed without jurisdiction, it was not essential that it should be first vacated in order to enable the plaintiffs to recover back the money paid thereon. A void assessment, like a void judgment, is a nullity, and when its collection has been enforced, the money may be recovered back, although the assessment has not been formally vacated. *Bruecher v. Port Chester*, 101 N. Y. 240, 2 Cent. Rep. 90.

If, however the vacation of the assessment was necessary, that relief may be had in this action, in connection with relief for the recovery of the money which the plaintiff's testator was illegally compelled to pay.

The judgment should therefore be reversed, with leave to the defendant to answer on payment of costs.

All concur.

Re Claim of Jane WRIGHT, *Appt.*,

in

PEOPLE of the State of New York

v.

KNICKERBOCKER LIFE INSURANCE CO.; Charles H. Russell, Receiver, *Reept.*

1. Where a "non-forfeiture" policy of life insurance provided (in case of failure to keep up the premiums after the payment of two or more) for the issuance of a new policy for an amount proportionate to the number of annual premiums paid, subject to the payment of interest on outstanding premium notes, —held, that the insertion in such new policy of a clause of forfeiture thereof for nonpayment of interest annually on outstanding premium notes on the original policy was authorized and valid.*

A PPEAL from an order of the Supreme Court at General Term in the First Department, affirming an order of the Special Term sustaining Receiver's exceptions and denying a motion to confirm referee's report in favor of a policy claimant in a proceeding to wind up the affairs of a Life Insurance Company. *Affirmed.*

Statement by **Andrews, J.:**

The original policy contained a provision "that if after the receipt by the Company of two or more annual premiums, the policy should cease in consequence of the nonpayment of premiums, the Company on the surrender of the same will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years have been made, it will issue a policy for two tenths of the sum originally insured; if for three years, three tenths; and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy."

The claimant allowed the policy to lapse after paying, partly in cash and partly in notes, six annual premiums. Thereafter she surrendered it and the Company issued a new policy for six tenths of the amount of the original policy, which contained a recital that it was issued in consideration of the surrender of the old policy and of the representation made in the application therefor, and of the payment of interest annually every 22nd day of November, on all notes or credits given for premiums on

the original policy. The outstanding notes or credits amounted to \$1,620 and were charged against the policy. The new policy also contained this clause: "If the interest upon said notes or credits shall not be paid on or before the day or days above mentioned for the payment thereof * * * then and in every such case the Company shall not be liable to pay the sum assured or any part thereof, and said policy shall cease and be null and void, without notice to any party or parties interested herein." The claimant paid interest on the notes for three years after the new policy was issued, until 1877, and then ceased to pay interest and made no further payments.

In 1883 the Company became insolvent and a Receiver was appointed. It is claimed that the claimant had no actual knowledge that the new policy contained the clause of forfeiture, above quoted, and that it was fraudulently inserted by the Company.

Mr. John C. Freeman, for appellant:

The old policy was entitled a "Non-Forfeiture Policy." The title was a part of it. "All that is printed or written on the face of it and on the back of it are parts of the policy and constitute the contract (*Jennings v. Chenango Co. Mut. Ins. Co.* 2 Denio, 75; *Patch v. Phoenix Mut. Life Ins. Co.* 44 Vt. 481)."

Douglas v. Knickerbocker Life Ins. Co. 88 N. Y. 492-508.

"The non-forfeitable condition was inserted in the policy to meet the case of those who, after payment of three or more premiums, became unable or for some cause unwilling to continue the payment of premiums, and for that reason permitted the policy to lapse."

Douglas v. Knickerbocker Life Ins. Co. supra.

The title, red clause and penalty clause, are to be read together; and so read, giving due effect to each, they are harmonious.

Holly v. Met. Life Ins. Co. 17 N. Y. Week. Dig. 842.

Interest was merely incidental to the principal of the annual premium note, and if failure to pay the principal did not work a forfeiture, failure to pay interest did not either, unless there was an express and special contract that it should.

Fake v. Eddy's Exr. 15 Wend. 76; *Cutter v. Mayor*, 92 N. Y. 166.

This will appear more plainly if the case be regarded as arising upon the old policy reissued for six tenths, with the provisions for paying further premiums stricken out. This was what the parties were entitled to.

Hay v. Star Fire Ins. Co. 77 N. Y. 235.

Where this has been done the courts have adopted these views.

Coules v. Cont. Life Ins. Co. 1 New Eng. Rep. 247. See also *Bruce v. Cont. Life Ins. Co.* 1 New Eng. Rep. 635.

In the latter case the court refused to follow or be bound by the earlier case in the same court of *Patch v. Phoenix Mut. Life Ins. Co.* 44 Vt. 481; *S. C.* 3 Big. Ins. R. 777, which, in an action at law on the policy, held contrary.

If the language will bear a different construction, or if it is ambiguous, the policy must nevertheless be construed against the right to forfeit it.

McMaster v. Ins. Co. of North America, 55 N.

*See *Holman v. Continental Life Ins. Co.* (Conn.), 2 New Eng. Rep. 838.

Y. 222; *S. C. 3 Ins. L. J.* 278; *Griffey v. N. Y. Cent. Ins. Co.* 100 N. Y. 417, 1 Cent. Rep. 528; *Union Cent. Life Ins. Co. v. Pottker*, 38 Ohio St. 459, 462. See also *Helme v. Phila. Ins. Co.* 61 Pa. 107; *S. C. 1 Big. Ins. R.* 685-8; *Hull v. North West Mut. Ins. Co.* 39 Wis. 897; *Bliss, Life Ins.* 2ded. § 186, pp. 292, 298, § 190, p. 802; *White v. Hoyt*, 78 N. Y. 605; *Barlow v. Scott*, 24 N. Y. 40; *Thompson v. St. Louis Mut. Life Ins. Co.* 52 Mo. 469; *S. C. 2 Ins. L. Jour.* 422; *Bruce v. Continental Life Ins. Co. supra*; *Laws* 1876, chap. 341; *Laws*, 1877, chap. 321; *Laws*, 1879, chap. 347.

The new policy was issued solely in compliance with the obligation created by the old one. The old policy has never been released, and there was neither a consideration for nor an assent to any change in its terms.

The penalty clause in the new one was *nudum pactum*.

Seybolt v. N. Y. L. E. & W. R. R. Co. 95 N. Y. 562; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Cole v. Knick. Life Ins. Co.* 63 How. Pr. 442.

The rights and obligations of both parties are to be determined by the dealings of the Company and the insured alone.

Baker v. Union Mut. Life Ins. Co. 43 N. Y. 288.

It was the insured who took the old policy to the Company to be exchanged for the new one. The Company did not call his attention to the proposed change. He never knew or understood that the penalty of forfeiture was in until after the Company failed. Nothing was said about forfeiture on either side, and he got the new policy by mail and put it in his safe without reading it.

It has been repeatedly held in such cases that such a forfeiture clause could not be enforced.

Ohde v. N. W. Mut. L. Ins. Co. 5 Big. Ins. R. 145; *Little v. Same, Id.* 187; *S. C. 5 Ins. L. J.* 149; *Montgomery v. Phœnix Mut. L. Ins. Co.* 8 Ins. L. J. 300.

Equity affords relief in such cases where a fraud has been practiced by one party and the other acted under a mistake.

Gillespie v. Moon, 2 Johns. Ch. 585; *Wheeler v. Conn. Mut. Life Ins. Co.* 82 N. Y. 543; *Hay v. Star Fire Ins. Co.* 77 N. Y. 236; *Brink v. Hanover Fire Ins. Co.* 80 N. Y. 108; *Allen v. Ad-dington*, 7 Wend. 9; *S. C.* on appeal, 11 *Id.* 374; *Zabriskie v. Smith*, 13 N. Y. 822, 831; *Brown v. Montgomery*, 20 N. Y. 287; *Devos v. Brandt*, 53 N. Y. 462; *Welles v. Yates*, 44 N. Y. 525, 528, 531; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Barlow v. Scott*, 24 N. Y. 40, 42, 43; *Mathews v. Terwilliger*, 3 Barb. 60.

The relief claimed was unjustly refused. There were no laches.

Albany City Sav. Inst. v. Burdick, 87 N. Y. 40-48; *Phœnix Fire Ins. Co. v. Gurnee*, 1 Paige, 278, 280; *Barlow v. Scott*, 24 N. Y. 40; *DePeyster v. Hasbrouck*, 11 N. Y. 582; *Hay v. Star Fire Ins. Co.* 77 N. Y. 235; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Bartlett v. Judd*, 21 N. Y. 200.

Messrs. Edward H. Hobbs and Leslie W. Russell, for respondent:

It is well settled that a provision as to the payment of interest on premium notes and avoiding the policy, if not paid, is valid and proper, and that in the absence of fraud or some special equity the court will not and may

not relieve the claimant after he has broken his contract.

Atty-Gen. v. North America L. Ins. Co. 38 N. Y. 172, 189, 190; *Roehner v. Knickerbocker L. Ins. Co.* 68 N. Y. 160, 164.

The referee found fraud in the provisions of this new policy. The special term declined to adopt that finding. The report of the referee was not binding and was merely to inform the conscience of the court.

Marshall v. Meech, 51 N. Y. 140; Supreme Court Rule, 30.

No cause for the reformation of the contract is shown. In cases of mistake the proof thereof must be clear and unquestionable to warrant a reformation.

Bartholomew v. Mercantile Marine Ins. Co. 84 Hun, 263.

It must be so clear and convincing as to leave no room for doubt.

Mead v. Western Ins. Co. 64 N. Y. 453.

Andrews, J., delivered the opinion of the court:

The words "Non-Forfeiture Policy" were conspicuously printed on the original policy. But a reference to the body of the policy shows that it was not intended to make the policy non-forfeitable, except in a limited sense. The assured was not relieved from the obligation to pay the premium annually, on the day specified. By the express terms of the contract an omission to pay the premium, on the day it became due, avoided the policy; but if at the time of such omission he had paid two or more premiums, the Company bound itself to issue a new policy for as many tenths of the original insurance as there had been premiums paid. This was the only sense in which the original policy was non-forfeitable. The assured would not lose all benefit from premiums paid, if the policy should become void by an omission to pay subsequent premiums. An omission to pay the premiums when due terminated the original contract; but the assured, if he had paid two or more premiums, would on a surrender of the policy be entitled to the substituted contract as provided.

In case of a breach of any of the conditions of the policy other than the omission to pay the premiums when due, the assured was in no way protected against an absolute forfeiture of the policy. It is claimed that the insertion in the new policy, of the clause of forfeiture for nonpayment of interest annually on the outstanding premium notes given for premiums on the old policy, was unauthorized by the terms of the original policy.

We think this claim is not well founded. The Company did not undertake to give a new policy free from all conditions. It was expressly provided that the new policy should be "subject to any notes that may have been received on account of premiums." The intention to impose upon the assured, in case a new policy should be issued, an obligation to pay the interest annually on premium notes outstanding is clearly shown by the further provision in the original policy, that the assured, to whom a new policy should be issued, was not to be subjected "to any subsequent charge except the interest annually on all premium notes remaining

unpaid on this policy." If the premiums had been paid in cash, no further payment would have been necessary. If paid in part in notes, only the annual interest thereon would be required to be paid, and the principal would remain a charge on the policy, to be settled on the final liquidation.

It is true that the original policy did not provide for the insertion in the new policy of a clause of forfeiture for nonpayment of the interest. But it was made forfeitable on the nonpayment of the premiums at the day, with a provision for a substituted contract, and it was also subject to forfeiture for breaches of other conditions. Causes of forfeiture were contemplated. The new contract was to be made subject to the payment by the assured of annual interest on the outstanding notes, and the right of the Company to insert a clause of forfeiture as a means of enforcing this obligation and of protecting the Company against the accumulation of unpaid interest was, we think, implied.

The successful prosecution of the business of life insurance requires prompt payment by policy holders of their obligations. "It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment." *Bradley, J., N. Y. Life Ins. Co. v. Statham*, 93 U. S. 30 [Bk. 23, L. ed. 791].

The policy of following breaches of conditions by forfeiture was indicated in the original policy, and the fair construction of the agreement to give a new policy subject to the annual payment of interest on outstanding notes, authorized the insertion in the new policy of the usual provision of forfeiture on nonpayment.

We are of opinion that the new policy conformed to the agreement in the original policy, and it is therefore unnecessary to determine whether the claimant could be permitted, after having accepted the policy and held it for years without objection, to now insist that the forfeiture clause was inserted without authority, and excuse himself on the ground that he did not know of its existence until after the insolvency of the Company.

The cases of *Conley v. Continental Life Ins. Co.*, decided by the Supreme Court of New Hampshire [1 New Eng. Rep. 247], and of *Bruce v. Same Company*, decided by the Supreme Court of Vermont [1 New Eng. Rep. 635], involved the construction of clauses in original policies dissimilar to those in question. The clauses considered in those cases, so far as the reports show, did not provide that the new policy should be subject to the payment by the assured of annual interest on the outstanding notes.

The order should be affirmed.
All concur.

Jennie E. GARDINIER, Admrx., *Respnt.*,
v.

NEW YORK CENTRAL & HUDSON
RIVER R. R. CO., *Appt.*

In an action to recover damages from a railroad company for the death of a person found mortally injured on the track, under a highway bridge built by the company and which it was re-

quired to maintain, the negligence of the company was alleged to consist in the unsafe condition of the approach to the bridge; there was, however, no evidence that the deceased was on the bridge or was seen going in that direction before his injury. Held, that there was nothing to connect the injury with the condition of the bridge or with the failure of the company to perform its duty to restore the highway to a proper state or to make the passage of the bridge safe, and hence, that a verdict against the company could not be sustained.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Third Department, affirming a judgment of the Montgomery Circuit, on a verdict in favor of plaintiff in an action to recover damages for negligently causing the death of plaintiff's intestate. *Reversed.*

Memorandum of decision below, 86 Hun, 647.

The complaint alleged "That at the Village of Fonda, in the County of Montgomery, at a point where the public highway, leading from Fultonville to Fonda, and between the Mohawk River and the Mohawk Turnpike, crosses the railway track of defendant, is a bridge, erected and maintained by defendant, for the purpose of and for the use of the traveling public, crossing defendant's railway track over the same upon said highway, and which said bridge it was the duty of the defendant to keep, maintain and have, for the use of the public to travel, in a safe and proper condition, properly protected and guarded, for the safe passage of all persons desiring to cross the same; that the span of said bridge, crossing over said railway track, rests at either end thereof upon stone abutments raised from the level of said railway track, nearly perpendicular or vertical, to a height sufficient to admit of the engines of defendant to pass under said bridge, at least from ten to twenty feet high; that the width of said span of said bridge is less than the full width of said highway, so that in the approach to said bridge, upon said highway, on either side thereof, where said highway meets the floor of said bridge, there is a space of several feet between the corner of the bridge and the side of said highway, and a wing wall, nearly perpendicular, extending either way from the floor of said bridge; that at the northwest corner of said bridge, at the time hereinafter stated, the defendant carelessly and negligently left said wing wall, for several feet where the said highway approached said bridge, without any proper or sufficient guard fence or railing to prevent persons approaching said bridge from falling over said wall, and down towards and upon said railway track, and left the same, and carelessly and negligently permitted the same to remain in an unsafe, unguarded and dangerous condition."

The complaint further stated, "upon information and belief, that the plaintiff's intestate, John H. Gardinier, deceased, in his life-

time and on the 17th day of December, in the year 1881, in the evening of said day, was at Fonda, in said county, and started to go from said Village of Fonda, by the way of said highway and bridge, to Fultonville, where he resided, and in attempting to approach and cross said bridge, in the night time, did, without any want of care and without any fault or negligence on his part, accidentally walk over and fall over said wall of said bridge, down to and upon the stone, iron and earth below, whereby he was injured, in his person, insomuch that from said injury he died, and his death was caused solely by the injuries received in said fall; and said fall and injury was caused solely by the negligence and carelessness of defendant in keeping said abutment and wing wall unguarded, and unprotected, and in such unsafe and dangerous condition."

The question presented on appeal and the evidence bearing thereon are stated in the opinion.

Mr. C. D. Prescott, for appellant:

There was no sufficient legal evidence that the defendant was guilty of negligence that would authorize a recovery. Negligence is an affirmative fact, and must be proved by the plaintiff. It must be made to appear from the plaintiff's case, that the defendant's negligence alone caused the injury.

Holbrook v. Utica, etc. R. R. Co. 12 N. Y. 236; *Johnson v. Hudson River R. R. Co.* 20 N. Y. 71; *Ernst v. Hudson River R. R. Co.* 39 N. Y. 66; *Kelsey v. Jewett*, 28 Hun, 52; *Held v. N. Y. C. & H. R. R. Co.* 12 N. Y. Week. Dig. 168; *Lamb v. Camden & A. R. Co.* 46 N. Y. 271; *Heinemann v. Heard*, 62 N. Y. 448.

There was no evidence that the plaintiff's intestate was free from negligence. To entitle plaintiff to recover, it must appear that there was no negligence on the part of the plaintiff's intestate that in the slightest degree contributed to the injury.

Shearm. & Redf. Neg. pp. 23-26, chap. 3, § 25; Wilds v. Hudson River R. R. Co. 24 N. Y. 480; *Cordell v. N. Y. Cent. & H. R. R. Co.* 75 N. Y. 332; *Hale v. Smith*, 78 N. Y. 488; *Reynolds v. N. Y. Cent. & H. R. R. Co.* 58 N. Y. 248; *Gaynor v. Old Colony, etc. R. Co.* 100 Mass. 208; *Murphy v. Deane*, 101 Mass. 466; *Park v. O'Brien*, 23 Conn. 339; *Glendening v. Sharp*, 22 Hun, 78; *Schappert v. Ringler*, 18 Jones & S. (45 N. Y. Superior Rep.) 345; *Becht v. Corbin*, 92 N. Y. 658; *Tolman v. Syracuse, etc. R. R. Co.* 98 N. Y. 198.

Mr. R. B. Fish, for respondent:

The defendant was negligent in leaving the place in question in so unguarded and unsafe a condition. Its liability to maintain, keep in repair and in a safe condition, the bridge in question, together with its approaches, was not disputed on the trial, and under the facts proved it could not be successfully disputed.

People v. N. Y. Cent. etc. R. R. Co. 74 N. Y. 302; *Gale v. Same*, 76 N. Y. 594; *Hayes v. Same*, 9 Hun, 63; *Morrell v. Peck*, 88 N. Y. 398.

The approaches to the bridge are part thereof, and the same duty is imposed to repair and maintain them as exists in regard to the bridge itself.

Hayes v. N. Y. Cent. etc. R. R. Co. supra.

The traveler ordinarily may presume all parts of the highway safe; and even when he may

have noticed a defect he is not chargeable with negligence because he fails to have it at all times in mind.

Weed v. Village of Ballston Spa. 76 N. Y. 329.

The plaintiff's case is fully sustained by *Johnson v. Hud. Riv. R. R. Co.* 20 N. Y. 65.

See also *Hart v. Hud. Riv. B. Co.* 80 N. Y. 622; *Jones v. N. Y. Cent. & Hud. Riv. R. R. Co.* 28 Hun, 864, affirmed without opinion, 92 N. Y. 628; *Dorland v. N. Y. Cent. & Hud. Riv. R. Co.* 19 N. Y. Week. Dig. 76.

Danforth, J., delivered the opinion of the court:

We have evidence from one side only, and on that it is not difficult to find that the defendant failed in its duty to restore the highway across which its track was constructed, to such a state as not unnecessarily to have impaired its usefulness, or to make the passage to its bridge safe for the public. But we do not discover from the record or the argument of counsel that plaintiff's intestate was affected by its negligence, or that his injuries were caused by any default on its part.

The complaint states that he was on the evening of the 17th of December, 1881, at Fonda, "and started to go from thence to Fultonville where he resided, and in attempting to approach and cross the bridge in the night time, fell over the wing wall of the bridge and was killed."

The evidence shows that he was found between eleven and twelve o'clock of the night of that day, lying on the track under and near the bridge, badly hurt. The physician who was soon in attendance discovered slight, superficial scalp wounds, no broken bones, but "he was suffering from shock concussion," and from this cause soon after died. He was hardly able to make a sound, soon became unable to speak, and gave no explanation of the circumstances which led to his condition. The same witness testified that the injury was such as might have been caused by falling from the abutment of the bridge on the railroad track or from a car or by a blow, "but the probability was, from the general condition of the man, that it was a fall."

It is evident that the jury supplied an important but unproven fact by mere surmise, and not on inference. They assumed that the deceased was at the wing wall going towards, or was on the bridge when the accident occurred. But of this there is no evidence. He was not seen at the bridge, or upon or at its approaches. The record does not show that he was during the evening even going towards the bridge or his home, which lay beyond the bridge, or that he was intending to do so. There was literally no evidence to show how the deceased came to the place where he was found. He was seen at the Montgomery Hotel in Fonda, between five and six o'clock in the afternoon; at eight or half past eight he was at Snell's Hotel, in Fonda, "which," the witness says, "was on the road going from Fonda to Fultonville, by the street railroad." Another witness says: "About eight or half past eight, I saw him up street in the Village of Fonda. * * * I saw him go down street toward the Montgomery Hotel." And on the same evening about a quarter before nine, he

was seen "at the meat market at Fonda." Nothing more appears as to the whereabouts or the intentions of the deceased on the evening or night of his death.

We find therefore that the appellant's counsel is right in the assertion that there is no evidence that the deceased was "on the bridge that night, or that he was seen going in that direction." It could therefore only be conjectured that the intestate was upon the wall or bridge, but there was no basis in the evidence to support the conclusion, and without that fact established, the condition of the bridge becomes unimportant.

The judgment appealed from should therefore be reversed, and a new trial granted, with costs to abide the event.

All concur.

PEOPLE of the State of New York, *Respts.*,
v.

Charles A. BUDDENSIEK, *Appt.*

1. An indictment under sections 198 and 195 of the Penal Code, charging manslaughter in causing the death of a human being, **by culpable negligence in the construction of a building**, held good.
2. Where one summoned as a juror on the trial of such indictment said, on his examination as to his qualifications, that he had read about the occurrence in the newspapers, but had formed no opinion as to the guilt or innocence of the defendant, but **was of opinion** from what he had read that the catastrophe was the result of **culpable negligence on the part of someone**, and that it would require evidence to remove the impression; and another juror said that from reading the newspapers he had **formed an opinion** as to the guilt or innocence of the defendant which it would require evidence to remove, but each also testified that he could nevertheless render an impartial verdict on the evidence—**challenges on the ground of bias were properly overruled**.
3. A piece of brick and mortar from the fallen wall of the alleged defective building was **properly admitted in evidence**, as confirming the opinion of a competent witness as to the quality of the mortar and to enable the jurors to understand the difference in effect between the mortar used by the defendant and that properly prepared.
4. The rule that a new trial ought not to be granted even where an exception is well taken, **unless the jury could draw from evidence admitted under it, some unfavorable inference, nor when the party excepting has by his own course of examination destroyed the force of his objection**—applied to the admission of "unsafe reports" made by the official examiner in the course of construction of the building.
5. Photographs, proved to be accurate representations of an actual scene, are

admissible in evidence, as appropriate aids to the jury in applying the evidence, whether it relates to persons, things or places.

6. **Alleged errors in the charge are not open to review unless excepted to at the trial. A stipulation by counsel "that a general exception should give the defendant the benefit of a particular exception to any part of the charge" will not avail.**

(Decided November 23, 1886.)

A PPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Court of General Sessions of the Peace, on conviction of defendant of manslaughter in the second degree. *Affirmed.*

Memorandum of decision below, 40 Hun, 640.

The indictment in the case is as follows:

"The Grand Jury of the City and County of New York, by this indictment, accuse Charles A. Buddensiek, Charles Franck, Thomas W. Dailey, whose real Christian name is to the grand jury aforesaid unknown, and Robert V. Mackey, of the crime of manslaughter, committed as follows:

"Heretofore and prior to the thirteenth day of April, in the year of our Lord 1885, the said Charles A. Buddensiek and Charles Franck each late of the City and County of New York, aforesaid, did erect and construct and cause and procure to be erected and constructed, and did act and assist and were concerned in the erection and construction of a certain building within the said city and county, the same being designed and intended to be used and occupied upon its completion by human beings for dwelling purposes, they, the said Charles A. Buddensiek and Charles Franck, at the time of the erecting and constructing of the said building having the entire care, charge and control and supervision of the same. And the said Charles A. Buddensiek and Charles Franck, so having the entire care, charge, control and supervision of the constructing and erecting of the said building, it thereupon became and was their duty, at the time of such erection and construction and until the said building should be completed, to cause the walls thereof to be properly bonded and solidly put together, and to be built to a line, and be carried up plumb and straight with close joints; and to cause all joints in the said walls to be well filled with mortar of good quality, and to cause mortar of good quality to be used in the construction of the said walls, in order that the same should be properly and solidly put together; and to cause bricks, stones, iron work, planks, timbers, beams, boards and materials of good quality and of sufficient strength, to be used in the construction of the said building; and to prevent from being used in such construction any bricks, stones, iron work, planks, timbers, beams, boards or other materials which were not of good quality and of sufficient strength; and to use and exercise every care and precaution in their power to render the said building and every part thereof safe and secure, as well during its construction as upon the completion of the same.

"And the said Charles A. Buddensiek and Charles Franck, well knowing the premises, but being wholly unmindful and neglectful of their duty in that behalf, at the time of the erection and construction of the said building, and on divers days and times up to the said thirteenth day of April, in the year aforesaid, at the city and county aforesaid, did feloniously and willfully neglect and omit to cause the walls of the said building to be properly bonded and solidly put together, and to be built to a line and carried up plumb and straight with close joints; and did then and there willfully and feloniously neglect and omit to cause the joints in the said walls to be well filled with mortar of good quality; and did then and there willfully and feloniously neglect and omit to cause proper mortar to be used in the construction of the said walls; and did then and there willfully and feloniously neglect and omit to cause bricks, stones, iron work, planks, timbers, beams, boards and materials of good quality and of sufficient strength to be used in the construction of the said building; and did then and there willfully and feloniously neglect and omit to prevent from being used in such construction divers bricks, stones, iron work, planks, timbers, beams, boards and other materials which were not of good quality nor of sufficient strength, and did then and there willfully and feloniously neglect and omit to use and exercise every care and precaution in their power to render the said building and every part thereof safe and secure during its construction and upon the completion thereof; and the said Charles A. Buddensiek and Charles Franck, on the days and times aforesaid, at the city and county aforesaid, did then and there willfully and feloniously cause, suffer and permit the walls of the said building to be improperly bonded, and loosely and flimsily put together; and did then and there willfully and feloniously cause, suffer and permit mortar of a grossly poor and inferior quality, and mortar chiefly composed of loam to be used in the construction of the said walls; and did then and there willfully and feloniously cause, suffer and permit divers bricks, stones, planks, beams, timbers, iron work and other materials of poor quality and insufficient strength to be used in the construction of the said building.

"In consequence of which said most culpable negligence, acts and omissions on the part of them, the said Charles A. Buddensiek and Charles Franck, the said building afterwards, to wit: on the said thirteenth day of April, in the year aforesaid, did fall to the ground there. And the said Charles A. Buddensiek and Charles Franck, by the falling of the said building in manner aforesaid, on the day and in the year aforesaid, at the city and county aforesaid, with force and arms, in and upon the body of one Louis Walters, in the peace of the People of the State of New York, then and there being in the said building before and at the time of the falling of the same, willfully and feloniously did make an assault and him, the said Louis Walters, down upon and against the bricks, stones, planks, timbers, beams, iron work and other component parts of the said building did then and there, with great force and violence, willfully and feloniously cast and throw, thereby giving unto him, the

said Louis Walters, then and there, in and upon the head, neck, breast, belly, back, sides and other parts of the body of him, the said Louis Walters, divers mortal bruises and contusions, of which said mortal bruises and contusions he, the said Louis Walters, from the said thirteenth day of April, in the year aforesaid, until the fourteenth day of April, in the same year aforesaid, at the city and county aforesaid, did languish, and languishing did live, on which said fourteenth day of April, in the year aforesaid, the said Louis Walters, at the city and county aforesaid, of the said mortal bruises and contusions, died.

"And the said Thomas W. Dailey and Robert V. Mackey, each late of the city and county aforesaid, at the time of the committing of the felony and manslaughter aforesaid, in manner and form aforesaid, at the city and county aforesaid, were then and there willfully and feloniously concerned in the commission of the same, and did then and there willfully and feloniously aid and abet in the commission of the said felony and manslaughter.

"And so the grand jury aforesaid do say that the said Charles A. Buddensiek, Charles Franck, Thomas W. Dailey and Robert V. Mackey, him, the said Louis Walters, in manner and form aforesaid, and by the means aforesaid, willfully and feloniously did kill and slay; against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity."

The questions presented are stated in the opinion.

Messrs. Richard S. Newcombe, William F. Howe and A. H. Hummel, for appellant:

I. An indictment must allege the place where the offense was committed, with such directness that the judgment thereon rendered may be pleaded in bar to any second indictment for same offense.

State v. Cotton, 24 N. H. 144; *McBride v. State*, 10 Humph. 615.

The allegation in the indictment that "he feloniously and willfully neglected to use," etc. is in excess of the requirements of the Code. It is well settled that the duty imposed in such cases is the exercise of such care as a prudent man would ordinarily take under the circumstances; he need not exercise "every care and precaution within his power."

Gerlach v. Edelmeier, 15 Jones & S. 296.

The indictment should not be *contra formam statuti*.

State v. Casey, 45 Maine, 435; Penal Code, § 718, subd. 1.

The indictment is fatally defective in regard to the times alleged as to the commission of the offense. It charges the offense to have been committed "on divers days and times" up to the said 13th day of April, 1885.

State v. Ingalls, 59 N. H. 88.

Time and place must be stated with certainty. When an averment as to time and place is uncertain the indictment is bad.

People v. Stocking, 50 Barb. 573; *State v. Munson*, 40 Conn. 475; 2 Green, Crim. Rep. 493; *Jane v. State*, 3 Mo. 61; *Cowley v. People*, 83 N. Y. 464.

The indictment charges more than one crime in violation of section 278 of the Code of Criminal

Procedure. Each of the acts of negligence therein specified may have been the means of the crime itself. It should therefore have been charged in separate counts.

Code Crim. Proc. § 279; *Rosekrans v. People*, 5 Thomp. & Cook, 487; *Harris v. People*, 6 Thomp. & Cook, 206.

State v. Leavitt (N. H.) 1 New Eng. Rep. 289, holds that an averment which charges the sale of intoxicating liquor in language equally applicable to the offense discussed in General Laws, chap. 109, § 13, and that described in section 15 of the same chapter, is insufficient.

See also *State v. Messenger*, 58 N. H. 348; *State v. Sherburne*, 58 N. H. 159; *State v. Narramore*, 58 N. H. 273, 275; *State v. Adams*, 51 N. H. 568.

In criminal pleadings there can be no joining of separate and distinct offenses in one and the same count.

See *State v. Weil*, 89 Ind. 286.

The indictment does not charge any association with or presence of the two defendants, Dailey and Mackey, and the other defendants therein, at any time and in any connection with the commission of the offense charged. Their joint connection is not in any way indicated.

See *Elliot v. State*, 26 Ala. 78.

II. The ruling of the court on defendant's challenges to the three jurors was erroneous.

One who has formed an opinion from the reading or report of the testimony against the prisoner on a former trial, however strong his belief and purpose to decide on the evidence and give an unbiased verdict, cannot be readily received.

Greenfield v. People, 74 N. Y. 277. See also *Stokes v. People*, 53 N. Y. 164; *People v. Casey*, 96 N. Y. 116; *People v. Tyrrell*, 8 N. Y. Crim. Rep. 142; *Rogers v. Rogers*, 14 Wend. 182; *Jackson v. Commonwealth*, 23 Gratt. 919; *Freeman v. People*, 4 Denio, 9; *Loewenberg v. People*, 5 Park. 419; *Sanchez v. People*, 22 N. Y. 147; *Scranton v. Stewart*, 52 Ind. 68; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Smith v. Eames*, 3 Scam. 76; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 565, 567; *S. C. 96 U. S. 640* (Bk. 24, L. ed. 648); *Conway v. Clinton*, 1 Utah, 215.

In the above cases, it will be observed, the decision of the triers on challenges for favor was final. All challenges are now tried by the court.

Code Crim. Proc. § 382. See also *Thomas v. People*, 67 N. Y. 218.

Now the decision of the court is subject to review.

Dew v. McDivitt, 17 Am. Law Reg. N. S. 621; 31 Ohio St. 139, 142.

Hence the cases above cited no longer apply to the existing laws on this subject.

It is a ground of challenge to favor, in an action for libel on the manager of an opera and involving an examination of the conduct of the manager, that a juror declares himself opposed to theatrical representations or performances.

See *Maretzek v. Cauldwell*, 5 Robt. 660; *S. C. 2 Abb. Pr. N. S. 407*.

A juror, challenged for favor, should be rejected unless the triers find that he stands impartial and indifferent.

See *Smith v. Floyd*, 18 Barb. 522; *Maretzek v. Cauldwell*, *supra*.

N. Y.

If there is a doubt concerning his indifference he should be rejected.

Smith v. Floyd, *supra*; *Freeman v. People*, 4 Denio, 85.

The court erred in overruling the challenge to the juror Weil, who had an opinion as to the defendant's guilt which he would require evidence to remove, but who said he could, he believed, render an impartial verdict.

Oliver v. State, 11 Neb. 1; *People v. Casey*, 96 N. Y. 115.

III. The admission in evidence of the specimen of brick and mortar exhibited to the jury by the witness D'Oench, and his testimony regarding it, against defendant's objection and exception, was error. The specimen objected to was probably introduced so that the witness and the jury might compare it with the samples from the fallen buildings. But such comparison is not warranted either by principle or precedent.

People v. Muller, 32 Hun, 209, 213; *affd.* 96 N. Y. 408; *Kelley v. Michigan Cent. R. R. Co.* 28 Hun, 480; *Walworth v. Barron*, 54 Vt. 677; *Odiorne v. Winkley*, 2 Gall. 51; *Peach v. Utica*, 10 Hun, 477; *People v. Carney*, 29 Hun, 47; *Petrie v. Howe*, 4 Thomp. & C. 85.

Questions of value of property, services, etc., are closely analogous to the issue as to quality of work in this case; but such questions are not to be determined by comparison with collateral matters.

Siegel v. Lewis, 54 N. Y. 651; *Gouge v. Roberts*, 53 N. Y. 619; *Dolan v. Etna Ins. Co.* 22 Hun, 396; *Blanchard v. New Jersey Steamboat Co.* 59 N. Y. 292; *Color Printing Attachment Co. v. Brown*, 5 Jones & S. 433.

Upon questions of the genuineness of handwriting comparison of disputed with genuine writings is allowed; but under very close restrictions, and only with prescribed standards.

Laws 1880, p. 141, chap. 36; *Peck v. Callaghan*, 95 N. Y. 78; *Miles v. Loomis*, 75 N. Y. 288, 292; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 456; *Dubois v. Baker*, 80 N. Y. 355, 361; *Moore v. United States*, 91 U. S. 270 (Bk. 23, L. ed. 846); *Doe v. Newton*, 5 Adol. & El. 514; *Doe v. Suckermore*, 5 Adol. & El. 703; *Jackson v. Phillips*, 6 Cowen, 94, 112.

When comparison is permitted, the genuineness of the standard admitted for that purpose must be shown beyond question. Even under the Act of 1880, the writing offered must be "proved to the satisfaction of the court to be genuine."

Laws 1880, p. 141, chap. 36; *Peck v. Callaghan*, 95 N. Y. 78.

The witness, whatever his qualifications as an expert upon the subject in general, had not sufficient knowledge of the immediate subject matter of the comparison to qualify himself to testify as an expert and express an opinion thereon. Such opinion, founded upon testimony of other witnesses or upon anything less than previous knowledge of the expert himself, is incompetent, unless given upon a hypothetical state of facts.

People v. Lake, 12 N. Y. 258; *Carpenter v. Blake*, 2 Lans. 206; *Reynolds v. Robinson*, 64 N. Y. 539; *Guiterman v. Liverpool, New York & Philadelphia Steamship Co.* 83 N. Y. 358; *Allison v. Scheeper*, 9 Daly, 365.

Even an expert in handwriting was held in-

competent to testify from an immediate comparison of hands made by him at the trial without adequate knowledge previously acquired by the handwriting of the party.

Doe v. Suckermore, 5 Adol. & El. 703; *Hynes v. McDermott*, 82 N. Y. 41, 48.

And if the knowledge of the witness is derived from specimens, although genuine, which have been selected by the party calling the witness, or by the witness himself, to enable him to qualify himself to testify, his testimony cannot be received.

Hynes v. McDermott, 82 N. Y. 41, 52; *Stranger v. Searle*, 1 Esp. 14; *Fitzwalter Peerage Case*, 10 Cl. & F. 193; *Tome v. Parkersburg R. R. Co.* 39 Md. 36.

The admission in evidence of the "Weekly Reports" of the condition of the buildings and the testimony of the witness D'Oench in regard to them was also error. These reports were not evidence as against the defendant for any purpose.

Swift v. State, 89 N. Y. 52.

These reports were not admissible as evidence of the facts stated in them. They were not records required by law to be kept, and kept accordingly by a public officer in the discharge of his duty.

Brennan v. Mayor, 62 N. Y. 365, 369; *Erwin v. Neversink Steamboat Co.* 88 N. Y. 184-192.

When objection to the competency of evidence arises upon the examination of a witness, the objector has a right to interpose with a cross examination upon the facts material to the question of competency.

First Nat. Bank of Easton v. Wirebach, 14 Rep. 606.

Expert witness; held error to refuse such preliminary cross examination.

Trussell v. Scarlett, 18 Fed. Rep. 217, note; *Abb. Trial Brief*, pp. 55, 56; *Commonwealth v. Howe*, 9 Gray, 110.

It is not possible for the court to say in any case that the evidence for the prosecution, illegally admitted, such as that objected to here, had no effect upon the minds of the jury and did not contribute to a conviction. Technical errors in other respects may be shown not to have affected any substantial right; but error in the admission of illegal evidence cannot be disregarded on that ground, since it cannot be shown that the jury disregarded the illegal evidence admitted.

Boland v. People, 19 Hun, 80; *Lambert v. People*, 76 N. Y. 220, 229; 6 Abb. N. C. 181, 192; *Petrie v. Howe*, 4 Thomp. & C. 85; 19 Hun, 88; *Foote v. Beecher*, 78 N. Y. 155, 158; *N. Y. Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503, 514, 515; *Baird v. Gillett*, 47 N. Y. 186; *Betz v. Davis*, 13 N. Y. Week. Dig. 547; *Anderson v. Rome, W. & O. R. R. Co.* 54 N. Y. 334. See *Ayers v. Water Comrs.* 22 Hun, 297 and cases cited; *Waring v. U. S. Tel. Co.* 4 Daly, 233; 36 N. Y. 639; 35 N. Y. 49; *People v. Gonzalez*, 35 N. Y. 49; *Coleman v. People*, 58 N. Y. 555, 561; *Ray v. Smith*, 2 Hun, 597 and cases cited.

It is a humane principle of the law that a prisoner shall have the benefit not only of doubts upon the fact, but doubts also upon the law.

Lambert v. People, 76 N. Y. 220.

The admission in evidence of the photographs taken by the witness Chandler, against defendant's objection, was error.

Code Crim. Proc. § 411.

Photographs at best, are but the secondary evidence, mere "hearsay of the sun;" and when the lack of better evidence compels a resort to them, the correctness of the photographic copies offered must be shown by proof that the process of taking them was conducted with skill and under favorable circumstances, as well as that the result has been a fair resemblance of the object.

Taylor Will Case, 10 Abb. Pr. N. S. 300, 318; *Hynes v. McDermott*, 82 N. Y. 41, 50; *Cowley v. People*, 83 N. Y. 464, 478.

On the trial of an issue involving the condition, appearance or identity of a person, place or thing at a previous time, a photograph at the time in question is competent upon proper evidence of its fidelity.

Ruloff's Case, 11 Abb. Pr. N. S. 245; *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 451; *Cowley v. People*, 83 N. Y. 478.

In all cases photographs have only been competent when they represented the condition of the article at the time involved in the issue. Photographs have never been allowed as competent evidence when the article itself could be seen in the same condition as represented by the photograph.

Cowley v. People, 83 N. Y. 478; *Hynes v. McDermott*, 82 N. Y. 41, 48-51; *Taylor Will Case*, 10 Abb. Pr. N. S. 300, 317; *Marcey v. Barnes*, 16 Gray, 161; *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 451.

Messrs. Randolph B. Martine, Dist. Atty., and DeLancey Nicoll, Asst. Dist. Atty., for respondents:

The opinion that the fall of the buildings was attributable to someone's negligence did not disqualify the jurors Bloom and Meyer, for they both stated that they had no opinion as to the guilt or innocence of the defendant.

Hagadorn v. Conn. Mut. Life Ins. Co. 22 Hun, 249; *Louvenberg v. People*, 27 N. Y. 336; *Dew v. McDixitt*, 31 Ohio St. 139; *Carpenter v. People*, 4 N. Y. Cr. Rep. 39.

They were qualified persons to serve as jurors in the case, upon the authority of *People v. Casey*, 96 N. Y. 115; *People v. Crowley*, 4 N. Y. Crim. Rep. 168, 2 Cent. Rep. 896; *People v. Carpenter*, 4 N. Y. Crim. Rep. 177, 3 Cent. Rep. 179.

The admission in evidence and exhibition to the jury of a piece of brick and mortar, which the expert witness D'Oench claimed to be good brick and mortar, was not error.

Steph. Dig. art. 50, Chase, ed. p. 107; 1 Greenl. Ev. § 52; *Scattergood v. Wood*, 79 N. Y. 263; *Eidt v. Cutter*, 127 Mass. 522; *Booth v. Cleveland Rolling Mill Co.* 74 N. Y. 15.

The papers "unsafe reports" admitted in evidence upon the redirect examination of the witness D'Oench were properly received.

It is the rule in this State that the cross examination must be limited to the matters stated in the examination in chief. If the party cross examining inquires as to new matter he makes the witness so far his own.

People v. Oyer and Terminer, 83 N. Y. 436.

The principle that the introduction by one party of part of the evidence upon which a conclusion of a witness rests, as part of a series of writings relating to the same subject, entitles the other party to give in evidence so much of

the remainder as tends to explain or to qualify, to rebut or to destroy, the part which has been received, is an elementary principle which is recognized by the following authorities:

Phill. Ev. 4th Am. ed. from 10th Eng. ed. p. 416; *Prince v. Samo*, 7 Adol. & Ell. 627; *Rouse v. White*, 25 N. Y. 170; *Gildersleeve v. Landon*, 73 N. Y. 609; *Grattan v. Met. Life Ins. Co.* 92 N. Y. 274.

The photographs of part of one of the walls, showing a great crack therein from different points of view, were competent.

Cowley v. People, 88 N. Y. 476.

Danforth, J., delivered the opinion of the court:

The appellant draws in question: 1, the sufficiency of the indictment; 2, the competency of jurors; 3, the rulings of the learned recorder upon questions of evidence; 4, his charge and his refusals to charge as requested by the prisoner's counsel, and he does so upon propositions which appear to have been presented to the learned judges at general term, and by them so fully considered and answered as to make it apparent that a different result would have been little better than a miscarriage of justice.

The indictment is under title IX, chap. 2, section 193, subd. 3, and section 195 of the Penal Code, and in substance charges that the prisoner by certain culpable negligence, acts and omissions in the selection and use of materials for and in the construction of a certain building which he was erecting in the City and County of New York, and which acts are specified, killed and occasioned the death of one Walters.

One crime only is alleged: manslaughter in the second degree. Both sections of the Code above referred to define a number of unlawful acts, including those set out in the indictment, as constituting that crime. The case comes within those sections, and the form of the indictment is in substantial, if not literal, compliance with the provisions of section 284 of the Code of Criminal Procedure. Neither time, place nor circumstance was omitted. The time was stated to be the 18th of April and days prior thereto during the erection of the buildings, the place within the jurisdiction of the court, and the circumstances those enumerated in the statute as constituting the offense. We discover no imperfection therefore in it, either in form or substance; and those alleged against it by the appellant, if not wholly unfounded do in no respect tend to his prejudice, so far as substantial rights upon the merits are concerned, and hence, they cannot affect either the indictment or judgment. Code Civ. Proc. § 285.

It follows that the trial court did not err in denying the defendant's motion in arrest of judgment. Upon such a motion only two objections are available: 1, to the jurisdiction of the court over the subject of the indictment; 2, that the facts stated do not constitute a crime. Code Civ. Proc. §§ 467, 331.

The first was not presented to the trial court, nor are either now relied upon. The other objections are unimportant on such a motion.

It is next argued that the trial court erred in overruling the challenges to three jurors: 1, John Bloom, on examination by the district attorney, testified that he knew of no reason

why, if sworn upon the jury, he could not render an impartial verdict upon the evidence; and in answer to the prisoner's counsel he said that he had read in the newspapers about the occurrence in question, but had formed no opinion as to the guilt or innocence of the prisoner; that his mind was free from any impression in regard thereto or the charge contained in the indictment, but was of the opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it would require evidence to remove the impression; 2, the condition of Meyer's mind was disclosed in substantially the same way, while 3, Weil said that from reading the papers he had formed an opinion as to the guilt or innocence of the defendant, which it would require evidence to remove.

The challenge was upon the ground of actual bias existing in the minds of those proposed jurors, but each also testified in substance that he could nevertheless go into the jury box and render an impartial verdict upon the evidence submitted from the witness stand, without being influenced by the opinion or impression derived or formed from what he had read. There remained therefore no sufficient ground of challenge or reason why the trial court could not, in the exercise of a sound discretion, determine that these several persons could try the issue impartially and without prejudice to the substantial rights of the party challenging. They were therefore competent within the letter of the Code of Criminal Procedure relating to such questions, and the defendant's objections were properly overruled. *People v. Otto*, 101 N. Y. 690, 2 Cent. Rep. 899; *People v. Crowley*, 102 N. Y. 234, 2 Cent. Rep. 896; *People v. Carpenter*, 102 N. Y. 238, 3 Cent. Rep. 179.

There are many exceptions to evidence. The first noticed by the appellant relates to the admission in evidence of a piece of brick and mortar produced by the witness D'Oench. He was Inspector of Buildings for the Fire Department and testified as to the condition of the fallen wall, its want of solidity, the materials of which it had been constructed, and among other things produced in evidence specimens of the mortar taken from the buildings, some of it from between two bricks, part of the fallen walls.

The case of the People turned in part upon the inferior quality of the materials, and anything to show how they in fact differed in their characteristics from good, sufficient and suitable substances in general and approved use for like purposes, was competent. That the mortar in fact used by the defendant in the construction of the walls was of "a poor and inferior quality and chiefly composed of loam" was a distinct and important allegation. That it is the admixture of clear grit, sharp sand with lime, which gives it the character of cement, was proven. That the last is binding while the other is not; that bricks laid with mortar of lime and sand will resist the influence of the rain, while a composition of lime and loam will be washed out, was established so far as it could be by opinion and the result of observation and experience. The testimony came from one qualified to speak upon that subject, but the conditions illustrated by the

various specimens of mortar, and mortar and bricks taken from the ruins, and the specimen from another building, were some evidence of the truth of his assertion, and they could properly be received, not only as confirming his opinion but to enable the jurors the better to understand and appreciate the difference in effect between the mortar used by the defendant and that properly prepared. That one was strong and solid, the brick firmly imbedded in the mortar, and the other disjointed and with no coherence, was some evidence that the differences pointed out were substantial.

The evidence as to the quality and component parts of the mortar used by the defendant was indispensable as part of the accusation; and the evidence, as to the proper ingredients, of mortar used by others and in other buildings, and its quality and effect, was not less competent as tending to show the cause of the falling of the walls. The defendant's mortar the expert pronounced bad, the other good. The object of using the mortar was the same in both cases; the specimens tended to prove the truth of his assertion. Indeed, the argument of the appellant goes to the weight of the evidence, rather than to its admissibility. The learned counsel states that if the witnesses had explained and pointed out the difference between the two specimens, the reason why one was good and the other bad, "the specimens might have been shown to the jury as illustrating the testimony of the witnesses." If there was any lack of such testimony, and it seems to us there was not, it would only show that further use might have been made of the pieces of brick and mortar, but would in nowise support the general objection that their exhibition to the jury was "incompetent or inadmissible for any purpose." The cases cited by the appellant upon this branch of the case have been examined, but we find none in point.

During the cross examination of this witness (D'Oench) at the request of defendant's counsel, he stated that he superintended the general work of the office of inspectors of buildings, and that official examiners were his subordinates, and their duty, to make reports among other things of the condition of buildings, the violation of building laws, and unsafe buildings, and also if improper materials were used in construction to notify him; that they did report the buildings in question as unsafe. He was then asked by defendant's counsel: "What are those reports you have in your hands?" and answered: "'Unsafe reports' in reference to those buildings." They bore date January, 1885, and were read in evidence as defendant's exhibit No. 1. Five other reports relating to buildings adjoining that mentioned in exhibit No. 1 were upon like request received in evidence and marked defendant's exhibits Nos. 2, 3, 4, 5 and 6, showing the buildings at the time of the reports to be unsafe.

Upon redirect examination the district attorney offered in evidence certain other reports, made subsequently and in successive weeks up to the 13th of April, concerning the same buildings and their safety. The defendant's counsel said: "Before they are put in evidence, I have a right to examine this witness upon them;" and doing so he showed that the reports exhibited the condition of the buildings

on the day the reports were made, whether they had remained unsafe or had been changed, and calling attention to one he said: "What do the words 'nothing done' on that report mean?" and received for answer: "That nothing has been done, that the order of the department has not been complied with." He also showed that there was no record of any unsafety save that reported in January.

The general contents of these reports, and a condition of the buildings substantially as therein stated, was also disclosed by parol evidence, coming either upon examination by defendant's counsel, or upon examination by the district attorney in answer or explanation of that so obtained. It is manifest therefore that their admission could in no respect tend to the defendant's prejudice; and while it is important in all cases that evidence should be free from exception, a new trial ought not to be granted even where one is well taken, unless the jury could draw from evidence admitted under it some unfavorable inference (Code Crim. Proc. § 542); nor when the party excepting has by his own course of examination destroyed the force of his objection.

Both rules apply here.

The next exception brought to our attention is the use in evidence of a photograph of the premises. It was taken during the trial, but it appeared that the part represented was in the same condition as when first seen by the witness on the 25th of April, or soon after the structure fell. No objection was made that the person taking the picture was not competent or skilled in his art, nor that the then condition of the ruins was unimportant as throwing light upon the manner of the construction of the buildings. It exhibited the surface condition and state of the wall, and it no doubt carried to the minds of the jurors a better image of the subject matter concerning which negligence was charged than any oral description by eye witnesses could have done. Its accuracy as a faithful representation of the actual scene was proven and in such a case it must be deemed established that photographic scenes are admissible in evidence as appropriate aids to a jury in applying the evidence, whether it relates to persons, things or places. *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 451; *Cowley v. People*, 88 N. Y. 484; *Durst v. Masters*, L. R. 1 Prob. Div. 373, 378.

No doubt the court might in its discretion have allowed the jury to visit and view the premises, as it was asked to do by the prisoner's counsel, but it was not bound to do so. Code Crim. Proc. § 411.

There are many other propositions submitted by the appellant in relation to rulings upon evidence. They are less important than the foregoing. They seem indeed, in view of the general course of the trial and the conclusive character of the testimony unobjected to, and which justified the conviction, to have no merit, even if the exceptions upon which they are submitted were technically well taken. We do not think they were, nor do they seem to involve any question which requires discussion.

The next point brings before us several allegations of error in the instructions under which the evidence was given to the jury. The record does not show that any exception to

the charge was in fact taken, and there is therefore no question for us to review.

We find in the printed brief of the appellant a statement that a stipulation was made by counsel to the effect "that a general exception should give the defendant the benefit of a particular exception to any part of the charge." This will not avail. *Briggs v. Waldron*, 88 N. Y. 582.

An exception is not alone for the benefit of the litigant, but is required for the sake of justice and fair dealing, and in order among other things that the attention of the trial judge being called to the supposed error, he may if he thinks proper correct it before the jury are called upon to consider their verdict.

There were, however, numerous requests to charge; some were refused, and the exceptions to the refusal are now said to have been "well taken." No argument is presented in support of that assertion, and our own examination discloses no error. The learned recorder so conducted the trial as to give the defendant the benefit of every doubt; his instructions to the jury were confined to the testimony and their attention directed to the very right of the case as it might appear to them upon the evidence. His rulings have been approved by the general term after a most deliberate and minute examination of the law and the facts: and that the case has been in both courts well and properly decided, we find no reason to doubt.

The result necessarily follows that *the judgment appealed from should be affirmed.*

All concur.

James B. LOCKWOOD, Sole Testamentary Trustee, et al., Appts.,

v.

William T. BRANTLY, Admr. of Wm. T. Brantly, Deceased, Impleaded, etc., Resp't.

After the lapse of more than twenty years there is a **presumption** that the **apparent title of the assignee of corporate stock is the real title**; and where all parties interested on the part of the assignor acquiesced in the assignee's title, and neglected to assert the contrary for that length of time, they should **not be permitted, after the assignee's death, to maintain the claim that the stock was assigned as collateral only, without the fullest measure of proof.**

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, affirming a judgment of the Westchester Special Term, dismissing the complaint in an action to compel the transfer of corporate stock and the amount of dividends paid thereon. *Affirmed.*

Memorandum of decision below, 38 Hun, 642.

The original transfer of the shares of stock sought to be recovered in this suit was accomplished by the following agreement in writing:

"Know all men, that I, William T. Brantly, of the City of Philadelphia, have this day received of Benjamin F. Cooper, of Utica, New

York, six shares of the stock of Utica Steam Cotton Mills, of \$100 each, the same having been transferred on the books of the said company by the said Cooper, for the purpose of giving collateral security for a loan of \$500 made by me, the said Brantly, to said Cooper, on the first day of March, 1859, on the security of his promissory note for that sum, in two months thereafter, which said note was renewed on the 12th day of May thereafter, and still with the interest thereon remains due and unpaid.

"Now, know all men, that in consideration of the premises, that I, said William T. Brantly, do hereby agree with the said Cooper, that when I shall have received the said \$500, with 7 per cent interest thereon, from March 1, 1859, then this instrument is to be void and the said stock reassigned to the said Cooper, or to such person as he shall direct, the said Cooper, by his signature, manifesting his assent hereto.

May 15, 1861.

W. T. Brantly,

Benj. F. Cooper."

Said Brantly and Edmund A. Graham were named as trustees in the will of said Cooper.

The facts are further stated in the opinion.

Mr. Henry Cooper, for appellants:

The agreement recites in *hac verba* "When I shall have received the said \$500 with 7 per cent interest, then this instrument is to be void." The law required the dividend to be applied on the note, *a fortiori*, an express contract.

Wheeler v. Newbould, 16 N. Y. 392.

The court found as a fact for plaintiffs that the dividends drawn by intestate, Brantly, satisfied and discharged the note February 1, 1870.

Mr. Howard R. Bayne, for respondent:

The agreement of May 15, 1861, was made to afford Brantly collateral security for the loan of \$500, and not to pay the note by the dividends on the stock. It would have taken ten years or more to pay the loan by the dividends, and no creditor is to be presumed to have agreed to wait so long for his money. He is not bound to receive a part of his debt.

2 Pars. Cont. 640; *Roberts v. Sykes*, 30 Barb. 173.

"The court will not, for the purpose of relieving a pledgee from the Statute of Limitations, assume, in the absence of any allegation or proof on the subject, that there was an agreement between the parties that the pledgee should keep the stock until he should have repaid himself out of the dividends and proceeds."

Roberts v. Sykes, 30 Barb. 173. See also 11 Abb. Pr. N. S. 42, 161; 4 Hun, 110; 4 Rob. 229; 1 Jones & S. 361; 6 Thomp. & C. 177, 396; *Waterman v. Brown*, 31 Pa. 161; *Greene v. Dispeau*, 14 R. I. 575; Jones, Chat. Mort. § 687.

In *Perry v. Craig*, 3 Mo. 516, 525, relief was refused after a delay of sixteen years.

In *Waterman v. Brown*, 31 Pa. 161, after eleven years.

In *Greene v. Dispeau*, 14 R. I. 575, a very recent case on the subject, after six years.

In *Wagner v. Baird*, 7 How. 258 (48 U. S. bk. 12, L. ed. 692), after eighteen years.

In *Sullivan v. Portland & K. R. R. Co.* 94 U. S. 811, 812 (Bk. 24, L. ed. 324), after seventeen years.

In *Brown v. Buena Vista County*, 95 U. S. 180 (Bk. 24, L. ed. 422), after eight years.

In *Marsh v. Whitmore*, 21 Wall. 185 (88 U. S. bk. 22, L. ed. 482), after twelve years.

In *Godden v. Kimmel*, 99 U. S. 210 (Bk. 25, L. ed. 431), after fourteen years.

Whether there has been an actual purchase or not, equity presumes one after a lapse of twenty years—a presumption based not on the fact, but in the face of evidence to the contrary.

Gilca v. Baremore, 5 Johns. Ch. 545; *Bean v. Tonnele*, 94 N. Y. 881; *Edw. Bailm.* p. 269; *Lockwood v. Ewer*, 2 Atk. 303; *Story, Ballm.* §§846, 304, 347, 348; *Story, Eq. Pl.* §813; *Ellison v. Moffatt*, 1 Johns. Ch. 46; *Arden v. Arden*, 1 Johns. Ch. 313; *Ray v. Bogart*, 2 Johns. Cas. 432; *Story, Eq. Jur.* §1520; *Havens v. Patterson*, 43 N. Y. 218; *Loder v. Hatfield*, 71 N. Y. 103, 104; *Story, Eq. Jur.* §1520a; *Kane v. Bloodgood*, 7 Johns. Ch. 111; *Beaubien v. Beaubien*, 23 How. 207 (64 U. S. bk. 16, L. ed. 484); *Re Nielly*, 95 N. Y. 889; *Bruce v. Tison*, 25 N. Y. 194, 202; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 199; *Smith v. Clay*, 3 Bro. Ch. 639; *Bowman v. Wathen*, 1 How. 193 (42 U. S. bk. 11, L. ed. 98); *Piatt v. Vattier*, 9 Pet. 416 (34 U. S. bk. 9, L. ed. 177); *Wagner v. Baird*, 7 How. 258 (48 U. S. bk. 12, L. ed. 691); *Sullivan v. Portland & K. R. R. Co.* 94 U. S. 811, 812 (Bk. 24, L. ed. 326); *Brown v. Buena Vista Co.* 95 U. S. 160 (Bk. 24, L. ed. 423); *Godden v. Kimmel*, 99 U. S. 210 (Bk. 25, L. ed. 434); *Jenkins v. Pyc*, 12 Pet. 254 (37 U. S. bk. 9, L. ed. 1075); *Maczrell v. Kennedy*, 8 How. 222 (49 U. S. bk. 12, L. ed. 1055); *McKnight v. Taylor*, 1 How. 168 (42 U. S. bk. 11, L. ed. 88); *Hall v. Clagett*, 48 Md. 243; *McDonnell v. Mulholland*, 56 Md. 548; *Landsdale v. Smith*, 106 U. S. 392 (Bk. 27, L. ed. 219); *McCoy v. Poor*, 56 Md. 197.

But the plaintiffs are estopped from setting up the contrary, after their acquiescence and silence for twenty-two years, and after the receipt and enjoyment by all the beneficiary plaintiffs of the entire value of the stock in suit.

2 Pars. Cont. 795, § 8; *Niren v. Belknap*, 2 Johns. 573; 2 Pom. Eq. Jur. § 809; *Morgan v. Chicago & A. R. R. Co.* 96 U. S. 720 (Bk. 24, L. ed. 744); *Storrs v. Barker*, 6 Johns. Ch. 166; 2 Pars. Cont. 799; *Coles v. Bank of England*, 10 Adol. & Ellis, 437; 2 Pom. Eq. Jur. § 809; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Kirk v. Hamilton*, 102 U. S. 76 (Bk. 26, L. ed. 81); *Tilton v. Nelson*, 27 Barb. 595; *Continental Bank v. Bank of the Commonwealth*, 50 N. Y. 581.

But on the theory of the plaintiffs their claim has been substantially complied with. They have gotten the dividends on the stock for years, and the shares were turned over to them one by one.

Smith, Manual Eq. 28, 29; 1 Pom. Eq. Jur. § 420, 849; *Texas v. Hardenburg*, 10 Wall. 89 (77 U. S. bk. 19, L. ed. 839); *Tyson v. Mickle*, 2 Gill, 376; *York Co. v. McKenzie*, 8 B. P. Cas. 42; *Duncomb v. N. Y. H. & N. R. Co.* 84 N. Y. 197, 199; *Garland v. Bank*, 9 Mass. 408; *Citizens' Bank v. Grafflin*, 31 Md. 507; *Levelen v. Garrett*, 58 Ind. 442; *Stanley Rule & Level Co. v. Bailey*, 45 Conn. 464; *Snell v. Atlantic Fire & Marine Ins. Co.* 98 U. S. 90 (Bk. 25, L. ed. 52).

Danforth, J., delivered the opinion of the court:

This action was commenced May 12, 1883. It appears from the record that Benjamin F. Cooper died at the City of Utica on the 6th of May, 1864, after devising all his property in trust, first, for the support and benefit of Mary A., his wife, and Helen, his daughter, and if there should be any surplus, then, second, for the support of his sons William and Henry. The persons named as trustees and his son William B. were appointed executors, but Graham and William B. alone qualified as such. The will was admitted to probate in June, 1864, and the above named executors and Graham as trustee continued to act in their several capacities until December 20, 1880, when, upon proceedings instituted in the supreme court by Graham, Mary A., Helen, William B., and Henry Cooper, an order was made discharging Graham from his office of executor and trustee, and from that time Brantly continued sole executor until his death in 1882, when James B. Lockwood was appointed in his place.

At the commencement of this suit therefore, William B. Cooper was the sole executor of the will of Benjamin, and Lockwood sole testamentary trustee. William B. Cooper refused to join as plaintiff, either as an individual or as executor, and was therefore made codefendant, in both capacities, with William T. Brantly, who was sued as the administrator of the Brantly before mentioned. The plaintiffs are Lockwood, who sues as trustee of the estate of Benjamin F. Cooper, and Mary A. Cooper, Helen Cooper and Henry Cooper, beneficiaries under his will.

The object of the action is to compel the defendant Brantly to transfer to the defendant William, as executor, or to the plaintiff Lockwood as trustee, certain shares of the capital stock of the Utica Cotton Mills, and \$1,600.37 with interest, being the amount of dividends paid thereon since the first day of August, 1871. The defendant Brantly alone answered, denying certain material allegations of the complaint, and setting up several affirmative defenses. At special term the issues were decided in favor of the defendant, and the complaint dismissed. Upon appeal by the plaintiffs the general term affirmed that decision, and against the judgment then rendered they appeal to this court.

The present controversy brings in question the title to the stock above referred to. It is undisputed that six shares were owned by the testator; that on the 15th day of May, 1861, he duly transferred those shares to William T. Brantly, the respondent's intestate, as collateral security for a loan of \$500 theretofore made to him, and at that time with the interest thereon unpaid and due.

For a time Cooper, under a power of attorney from Brantly, collected the dividends and applied them to his own use. Afterwards Brantly assigned the stock to "William B. Cooper, Trustee," and on the 3d of February, 1864, they were so transferred on the books of the company and a new certificate issued to the assignee. He collected the dividends until February 1, 1865, and after that, until August, 1866, they were collected by Graham and paid

over by Brantly's direction to Mrs. Cooper and Helen Cooper. It is also found by the learned trial court upon evidence before him, that upon the 7th of July, 1886, Cooper, as trustee, for value received, transferred the stock to Brantly, who thereafter until his death in March, 1888, held, claimed and treated the stock as absolutely his own, and received the dividends thereon.

The plaintiffs' contention is, in substance, that notwithstanding this new and absolute assignment, Brantly afterwards held the stock either as he had first received it, as collateral security, or the dividends having amounted to the sum for payment of which it was pledged, as depository, without a lien upon or interest of any kind in it; in either event as trustee.

It certainly does not appear upon what actual consideration the final transfer to Brantly was made; but the fact of transfer and the claim of ownership were known to every one of the parties interested long before the death of Brantly, and to William B. Cooper and Graham at the very time of the transfer, for both were actors in the transaction. They were trustees and executors, they knew of the terms of the original assignment by way of pledge or collateral security, and of the subsequent absolute conveyance. So did Henry Cooper, one of the beneficiaries under the will, and Mary E. and Helen Cooper, whose meager support was derived from an estate insufficient for that purpose and was eked out by the frequent benevolence of Brantly, avowedly founded upon his possession and ownership of the stocks in question.

Not one of these persons disputed the title of Brantly, and although in 1880 Graham on their petition was relieved of his trust, no claim was made by either that the stock formed part of the estate of B. F. Cooper, with the management of which he had been charged. Not then nor till after the death of Brantly did this contention arise. Had it been otherwise it may be presumed some fuller explanation might have been had from him. If it be now scant the plaintiffs cannot complain. On the part of Brantly there was no concealment; on the part of everyone interested there was perfect acquiescence.

From these facts it would seem to follow that at the time of Lockwood's appointment as testamentary trustee, the estate entrusted to him was in no way concerned or interested in the stock in question. The defendants' intestate had acquired a good legal title to it, and we agree with both courts whose judgments are before us, that there is in evidence nothing which would justify any tribunal in depriving his estate of its benefit. Indeed there is no reason to believe that this action would have been brought, except for the death of Brantly; and that circumstance should not relieve the plaintiffs from giving the fullest measure of proof, and repelling by evidence the presumption which after a lapse of more than twenty years requires us to hold that the apparent title was the real title.

Here is not only lapse of time and negligence in asserting the contrary, but acquiescence, three objections to the plaintiffs' claim, which upon the testimony are wholly unexplained except upon the theory that so long as Brantly lived

all parties interested recognized his title as unassailable. There would be great danger of an unjust advantage, if, he being dead, the same parties should now be allowed to question it. It is difficult to find good faith in the plaintiffs' claim; there has certainly been no diligence in asserting it. We think there is no equity in the suit and that the complaint was properly dismissed.

The judgment appealed from should be affirmed, with costs.

All concur.

Phebe ANGEVINE, *Resp't.*,

John M. JACKSON, *Appt.*

1. A general exception to a surrogate's decree rendered upon the trial of an issue of fact is useless.
2. By section 2545 of the Code of Civil Procedure the practice upon appeals from a surrogate's decree upon the trial of an issue of fact is assimilated to that upon appeals from a judgment by a court or referee; and specific errors are required to be pointed out in order to be available on appeal.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the Second Department, reversing a decree of the Surrogate's Court of Queens County admitting a will to probate. *Reversed.*

Memorandum of decision below, 85 Hun, 668.

The facts are stated in the opinion.

Mr. Jno. J. Armstrong, with whom was Mr. H. E. Sickels, for appellant:

The appeal of the appellant in the court below was not well taken. No exceptions were taken to any of the rulings made on the findings either of facts or law, nor was there any exception to the refusal of the surrogate to find the facts as requested.

Code Civ. Proc. § 2545; *Reese v. Boese*, 94 N. Y. 628; *Briggs v. Waldron*, 88 N. Y. 582.

The exceptions to the decree and "each and every part thereof" is unavailing. It is too general and is insufficient to raise any specific question and is practically of no avail.

Ward v. Craig, 87 N. Y. 550; *Hepburn v. Montgomery*, 97 N. Y. 617.

If then the general term did not have the facts before it, it was powerless to reverse the decree or review the facts upon which the surrogate based his decision. And as further proof that the reversal was not upon the facts, we submit that the order of reversal was not upon a question of fact.

Code, §§ 1388, 2588.

This court in *Weyer v. Beach*, 79 N. Y. 409, says: "The order of reversal, however, does not state that it was made on questions of fact, and it must therefore, pursuant to section 1388 of the Code, be deemed to have been made, not on any questions of fact, but of law only. The respondent cannot therefore avail himself of the facts taken by the court at general term, but

must abide by the findings of the referee, they having some evidence to support them."

See also *Sutton v. Ray*, 72 N. Y. 482.

Where it does not appear in an order of the general term, reversing a judgment entered upon the report of a referee, that the reversal was upon questions of fact, the only inquiry upon appeal from the order to the court of appeals is whether it rests upon any questions of law.

Code, § 1888; *Davis v. Leopold*, 87 N. Y. 620.

If the order of reversal states that it was granted upon questions of law, or if it is silent as to the grounds upon which it was granted, the court of appeals will consider questions of law only.

Rider Life Raft Co. v. Roach, 97 N. Y. 878; *Davis v. Leopold*, 87 N. Y. 620; *Wallace v. Drew*, 54 N. Y. 678.

We therefore submit that this court, on this appeal, will not find any fact on which to justify the order of reversal, and will assume that the conclusions of law upon the facts found will be assumed to be correct, and the findings of the surrogate and the judgment entered thereon will be sustained.

Reese v. Boese, 94 N. Y. 623.

Messrs. Benj. W. Downing and James W. Covert, for respondent.

Finch, J., delivered the opinion of the court:

Probate of the will of Oliver Mott was resisted, upon the grounds of mental incapacity and undue influence. After listening to numerous witnesses and taking a large amount of testimony the surrogate rendered his decision, finding, as facts, that the decedent was a capable testator and the will was his free act and unaffected by any improper agency; and, as a conclusion of law, that the will should be admitted to probate. No exception was taken to any of these findings. The case recites an exception to the surrogate's decree and each and every part of it. We have repeatedly pointed out the uselessness of such an exception. *Ward v. Craig*, 87 N. Y. 550; *Hepburn v. Montgomery*, 97 N. Y. 617.

It indicates no specific error; it directs attention to no finding; and leaves the court and counsel in the dark as to the precise cause of complaint.

The case further shows a series of findings which the surrogate was requested to make and which requests were refused. There was no exception to the refusal. The contestants appealed, and upon this case, which contained no exception raising any question of fact or law, and in which no errors in the admission or rejection of evidence are even claimed to exist, the general term reversed the decree of the surrogate and ordered issues to be tried by a jury, entirely disregarding the provisions of the Code. The provisions point out the practice to be followed, with care and precision. § 2545.

The surrogate is required to file in his office his decision, stating separately the facts found and the conclusions of law. Either party may except to the findings of fact or of law, and upon the settlement of the case may request findings and take exceptions to a refusal, and the appeal brings up for review in the appellate court any question of fact or law thus raised by exceptions taken. The purpose was to as-

similate the practice upon appeals from a surrogate's decree in the prescribed cases to that which regulated appeals from a judgment rendered by the court or a referee, and to substitute a system which would point out specific errors, and evolve the exact questions intended to be reviewed. Nothing of this kind was before the general term, and without some exception to some ruling or determination that tribunal was powerless to reverse.

For this reason the judgment and order of the General Term must be reversed and that of the Surrogate affirmed, with costs.

All concur.

Re ACCOUNTING OF Elbridge T. GERRY,
as Trustee under the Will of Peter P. Goelet, Deceased.

1. Where the securities (government and municipal bonds and real estate mortgages bearing fixed rates of interest) belonging to a trust fund created by a will which provided that the "annual interest, income and dividends thereof" should be paid to a certain person for life, with remainder to others, were sold after the death of the life beneficiary, for more than the original amount of the trust fund, held, that the accretion or increase so arising belonged to the remaindermen and not to the representatives of the life beneficiary.
2. Held also, that the fact that the trustee had invested the fund in securities other than those authorized by the will (such action having been ratified by the parties interested), did not change the rule of distribution of the fund.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Special Term directing the distribution of a trust estate.

Affirmed.

Memorandum of decision below, 36 Hun, 643.

The facts are stated in the opinion.

Mr. E. L. Fancher, with *Messrs. Miller & MacFarlane*, for Elbridge T. Gerry, as executor of Jean B. Goelet, appellant:

When, as in this case, the clear intention of the testator, distinctly expressed in his will, is to give to the remaindermen a certain sum of money, and to his daughter, during her life, all income from the money, it is not equity to enlarge the gift in remainder by the accretion of thousands of dollars which has come to the hands of the trustee through his use and investment of the moneys, at times many years later than the creation of the trust.

The case would be different had the capital been inseparable from the accretion; as, for example, had the capital bequeathed been shares of stock.

Such were the cases of *Clarkson v. Clarkson*, 18 Barb. 646; *Johnson v. Bridgewater Iron Mfg. Co.* 14 Gray, 274; *Woodruff's Est.* 1 Tucker, 58; and others.

Dividends, whether ordinary or extraordinary

ry, belong to the life tenant; though if shares be given they are capital and belong to the remaindermen.

Clarkson v. Clarkson, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Est. of Woodruff*, 1 Tucker, 58; *Riggs v. Cragg*, 26 Hun, 89-103; *Earp's App.* 28 Pa. 368; *Willbank's App.* 64 Pa. 256; *Vinton's App.* 11 W. N. C. 246; *S. C.* 99 Pa. 434; *Lord v. Brooks*, 52 N. H. 72; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Scovel v. Roosevelt*, 5 Redf. 121; *Peirce v. Burroughs*, 58 N. H. 302; *Miller v. Guenard*, 21 Am. Law Reg. 881; *Bates v. MacKinley*, 31 Beav. 280; *Barclay v. Wainwright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 473; *Johnson v. Johnson*, 5 Eng. Law & Eq. 164; *Murray v. Glasse*, 17 Jur. 816; *Hooper v. Rossiter*, 1 McClel. 527; *Norris v. Harrison*, 2 Madd. 268; *Plumbe v. Neild*, 6 Jur. N. S. 529.

In *Bergen v. Valentine*, 68 How. Pr. 221, the trustee was directed to invest \$100,000, and pay over the income to the widow of testator for life, and on her death to pay over the principal to two legatees. The action was for construction of the will.

The court, among other things, said: "But in the event that the funds are held until their maturity, it is not likely that anything more than the principal sum of \$96,700 will be received for distribution. In cases of this character it is equitable that the loss, if any, in this manner sustained, should be borne equally as near as may be by the life tenant and the remainderman."

There are authorities which show the care courts have exercised to preserve intact the entire principal for the tenant in remainder; but the same authorities confer on the tenant for life the benefits arising from use of the principal and all income from it.

Hill, Trustees, 385, 386; *Covenhoven v. Shuler*, 2 Paige, 122, 131; *Clark v. Clark*, 8 Paige, 152, 160; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Rapalye v. Rapalye*, 27 Barb. 610, 615; *Calkins v. Calkins*, 1 Redf. 337 and authorities cited; *Perry, Trusts*, § 547; *Howe v. Dartmouth*, 7 Ves. 137, and *White & T. Lead. Cas.* 4th Am. ed. 676 *et seq.* and notes; *Kinmouth v. Brigham*, 5 Allen, 276.

Looking to the intent of the testator, and to the circumstances of this case, it seems clear that there should be a judgment awarding the principal sum to the remaindermen, and the profits gained therefrom by the trustee's use of it, to the life tenant. The judgment below should be accordingly modified, as hereafter stated. The following authorities support this proposition:

Harvard College v. Amory, 9 Pick. 446; *Balch v. Hallet*, 10 Gray, 402; *Reed v. Head*, 6 Allen, 174; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Earp's App.* 28 Pa. 368; *Willbank's App.* 64 Pa. 256; *Moss's App.* 88 Pa. 264; *Londesborough v. Somerville*, 19 Beav. 295; *Maclaren v. Stainton*, 3 De G. F. & J. 202; *Plumbe v. Neild*, 6 Jur. N. S. 529; 29 L. J. N. S. Ch. 619; *Dale v. Hayes*, 40 L. J. N. S. 244, 246; *Re Chesterfield's Trusts*, 49 L. T. N. S. Ch. Div. 261; *Re Hopkins' Trusts*, L. R. 18 Eq. Cas. 698; *Johnson v. Johnson*, 15 Jur. 714; 5 Eng. Law & Eq. 646; *Price v. Anderson*, 15 Sim. 473; *Leland v. Hayden*, 102 Mass. 550.

N. Y.

Mr. George G. Kip, for Robert Goelet and Ogden Goelet, respondents:

The increase realized from the conversion into money or other securities, of securities constituting the investments of a trust fund, belongs, on the termination of the trust, to the remainderman.

Clarkson v. Clarkson, 18 Barb. 646; *Schoonmaker v. Van Wyck*, 31 Barb. 457; *Re Pollock*, 3 Redf. 111-116; *Scovel v. Roosevelt*, 5 Redf. 121; *Townsend v. U. S. Trust Co.* 3 Redf. 220; *Bergen v. Valentine*, 68 How. Pr. 226.

Mere advance in value in no sense constitutes the gains, profits or income specified by the statute. It constitutes and can be treated merely as increase of capital.

Gray v. Darlington, 15 Wall. 66 (82 U. S. bk. 21, L. ed. 45).

The investments were directed to be made for the testator's daughter and representatives. The testator used the word "representatives" to mean such of his grandchildren or children as may take as remaindermen.

See *Phyfe v. Phyfe*, 3 Bradf. 53.

The investment of the trust was to inure to the benefit of both life beneficiary and remaindermen, and such has been the case. The life tenant has profited by the increased income received from the investment of the gain realized and invested in the lifetime of the first trustee, making the case parallel to that of an increase in value of real estate held in trust, where the life beneficiary received the advanced rent resulting from the increase in value.

Cogswell v. Cogswell, 2 Edw. Ch. 240.

The words which denote the estate of the life beneficiary are "interest, income and dividends." These words have already received a judicial construction. In no case can increase in market value be adjudged to be interest, income or dividends, which presupposes the profits realized from the use of trust funds."

Townsend v. U. S. Trust Co. 3 Redf. 223.

The advance in the value of property during a series of years can in no just sense be considered the gains, profits or income of any one particular year of the series.

Gray v. Darlington, 15 Wall. 65 (82 U. S. bk. 21, L. ed. 45).

In no case could increase in market value be adjudged to be net annual income.

Re Pollock, 3 Redf. 114

The estate of the life beneficiary was capable of being apportioned as it accrued *de die in diem*.

Clapp v. Astor, 2 Edw. Ch. 388.

Does the fund in question represent earnings from the use of capital, or is the fund the representative of increased capital or of additional value in capital? The disputed fund which comes within the limit of the first test belongs to the life beneficiary, and that which comes within the second test belongs to the remainderman.

Clarkson v. Clarkson, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Cragg v. Riggs*, 5 Redf. 82; *Riggs v. Cragg*, 26 Hun, 89; *Knight v. Lidford*, 3 Dem. 88.

Ruger, Ch. J., delivered the opinion of the court:

The matter here in controversy arises between

the representatives of the life estate and certain remaindermen, with reference to the proper distribution between them of an increase in the amount of the trust fund discoverable upon a sale of the securities in which it was invested, after the life estate terminated.

The fund was created in the year 1828 under the will of Peter P. Goelet devising to his executors as trustees the sum of \$50,000 to invest "in funded stock of the United States or of the State of New York or in good bonds and mortgages on real estate," with directions to pay "the annual interest, income and dividends thereof" to his daughter Jean B. Goelet during her life, and upon her death leaving no issue, to divide the "principal or capital sum aforesaid, * * * among my other children in equal proportions." A codicil to said will made in the same year increased the said fund by an additional sum of \$20,000, which upon the death of said Jean B. Goelet without issue was also directed to be paid to her surviving brothers and sisters or to their respective representatives.

During the existence of this trust which extended for fifty-four years to the death of Jean B. Goelet in 1882, the annual interest collectible upon the sum invested was duly paid to her by its trustees. It does not appear affirmatively in the case in what securities the capital sum was originally invested or when any investment or conversion of them occurred; but the evidence shows that in 1880 it was represented in unequal proportions by United States bonds, bonds of the Cities of New York and Brooklyn, bonds and mortgages on real estate and the sum of \$3,424.95 in cash. The cash seems to have been the result of an increase in the value of some securities exchanged or converted by the trustee prior to 1880.

In April, 1880, an order was made by the supreme court in a proceeding instituted by Robert Goelet and Ogden Goelet, who with Elbridge T. Gerry had succeeded to the said trusteeship under the will of Peter Goelet, who died in 1879, to ascertain the amount of said fund and the securities in which it was invested, and to obtain their discharge from the duties and obligations of said trusteeship upon the delivery of said trust funds to their associate Mr. Gerry. Jean B. Goelet and Mr. Gerry were both parties to this proceeding and acquiesced in the order of the court appointing Mr. Gerry sole trustee and defining the securities and capital of the trust fund as it then existed.

It may fairly be assumed from the evidence that this fund has always been kept invested in securities upon which there was a fixed rate of interest payable annually determinable by the provisions of the security, and that it has never been possible for the trustee to receive or secure therefrom any extra dividends or any greater annual income than that producible by fixed rates of interest. A sale of these securities by the trustee after the death of the life tenant resulted in a surplus of nearly \$23,000, over the amount of the original investment, and this sum is claimed respectively by the representatives of the life tenant and by the remaindermen.

The primary rule for the determination of questions arising upon the construction of wills is the ascertainment of the intent of the testator

from a consideration of its provisions. In the case in hand the will provides specifically for the interest which the legatee for life was to take in the fund, and it is limited to the "annual interest, income and dividends thereof." All beyond this must from necessity have been intended to go to the remaindermen, for there are no other persons who could lawfully take it.

This case is not analogous to and presents none of the questions or embarrassments attending the division of gain or profits arising upon investments in trade or the stock of corporate business enterprises and which are usually represented by dividends, either regular or extra payable in cash, stock or scrip, or remaining undivided in the hands of the corporation.

The authorities in such cases are very numerous, and show that it is often a matter of great difficulty to distinguish with precision between those gains constituting an accretion to the fund, and those which legitimately may be termed the earnings of the investment properly distributable by way of dividends to the stockholders of the corporation. In this case, however, the investment is directed to be made in securities bearing a fixed rate of interest which can neither be increased by the prosperity nor diminished by the misfortunes of the debtors and are eventually to be satisfied by the repayment of the principal sum of the obligation.

At the time of the conversion of this fund by the trustee he held in his hands obligations which upon their face called for the repayment to him of the sum of \$70,000 only, and the purchasers from him received obligations which at maturity were redeemable by the obligors at that sum. The causes occasioning the increase in question seems to have been a depreciation in the rate of interest effected by natural causes, and which gave an increased value to securities bearing the higher rates of former times. This constituted in no sense a profit upon the investment, but was an accretion to the fund itself arising from natural causes and was liable to be altogether lost by the approximation of the securities to the period of their maturity. The benefit derivable from this condition was enjoyed annually by the beneficiaries of the fund in the increased value of the income derivable therefrom. Had the life tenant lived to the maturity of the bonds she would have received in annual interest the entire difference, if any existed at any time prior thereto, between the face and market value of these securities.

The theory of the will did not contemplate any traffic in securities by the trustee but a permanent investment in interest bearing obligations subject to be sold or exchanged only when the exigencies of the trust required it to be done.

It is quite clear that the life tenant could not have compelled the trustee to sell or convert securities lawfully purchased and held by him, upon the ground that their market value had appreciated in his hands, any more than he could have compelled her to make good any depreciation in the value of such securities. The acquisition and retention of such securities was one of the objects contemplated by the will of the testator, and was essential to execute his design; and a proceeding to compel a sale of the securities would plainly have been contrary to his intent in creating the trust.

If the will had required trustees to invest in real estate, the rents, income and profits of which were made payable to the life tenant with remainder over, it cannot be questioned but that any increase of the value of the land from natural causes would have been an accretion to the capital and inured to the benefit of the remaindermen; *Perry, Trusts*, § 545, p. 486; *Cogswell v. Cogswell*, 2 Edw. Ch. 240; and we can see no difference in principle between this case and the one supposed.

The question here presented was up in the cases of *Townsend v. U. S. Trust Co.* 3 Redf. 222, and *Whitney v. Phoenix*, 4 Redf. 180, before the Surrogate of New York, and it was there held that an enhancement of the value of United States bonds held in trust went to the remaindermen and not to the legatee for life. These decisions accord with our views.

The cases cited by the learned counsel for the appellant may all be classified as cases where the terms of the trust authorized investments in the stock of private corporations or trading enterprises whose profits are largely affected by the vicissitudes of business and trade, and the disposition of whose gains and profits is largely if not wholly left to the discretion of the managers of the enterprise. In such cases it was plainly the intention of the settlor of the trust that the life tenant should have the advantage of any extraordinary profits realized from the investment.

As we before said, these cases are not analogous. The circumstance that the trustee in this case at sometime invested a portion of the funds in unauthorized securities would not seem to have effected any change in the respective rights of the life tenant and remaindermen in the corpus of the trust. When the fact came to their knowledge in 1880 they each and all seem to have acquiesced in and approved the action of the trustee in making the investment; and it cannot now be objected on the part of either of them that any interest of theirs was thereby varied or changed. It was optional with those parties at that time, by taking appropriate proceedings for that purpose, to have required the defaulting trustee to invest the fund in the securities specified in the will or to have made compensation in some other form for the damages, if any, occasioned by his wrongful act; but it was also competent for them to ratify and approve the action of the trustee by accepting the securities held by him as representing the trust fund, and this we think was determined by the proceedings taken to release Robert and Ogden Goelet from the duties of trustees under the will. The action of the trustee in making the investments in question was sagacious and inured to the benefit of all of the parties concerned, and they should not after long acquiescence in such dealing be allowed to obtain an advantage by questioning its legality.

But further than this we think the securities in which the funds were actually invested by the trustee until changed by some proceedings taken for the purpose, so far as the beneficiaries were concerned, represented the trust fund, and their earnings, income and increase would, as between the several parties interested therein, be subject to the same rules of division and distribution as though it had been invested and kept on interest in accordance with the terms of the

N. Y.

will. The remaindermen could not thereby be deprived of a natural accretion to the fund, however invested, or the life tenant become entitled to an increase, which if the fund had been lawfully invested would not have accrued to her. Indeed, in prosecuting this proceeding the representatives of the life tenant have ratified the acts of the trustee in making the investment in question by treating the unauthorized securities as the corpus of the fund and claiming their increased value as income earned by the employment of the capital. In other words: while claiming the advantage to be derived from the unauthorized act of the trustee, they insist that such act was the efficient cause of transforming what was otherwise an accretion to the fund, going to the remaindermen, into profits accruing to the life tenant.

The life tenant was not the sole party interested in the determination of this question, and inasmuch as she during her lifetime and the remaindermen also acquiesced in and approved the conduct of the trustee in making the investment, her representatives should not now be allowed to acquire an advantage by denying the lawfulness of his proceeding.

The judgment of the court below should be affirmed, without costs to either party.

All concur.

Nellie CARD, Exrx., *Respt.*,

v.

MANHATTAN R. CO., *Appt.*

In an action against an elevated railway company for damages for the death of an intending passenger, the evidence showed that after the car platform gate was closed and the train in motion, the deceased had hold of the platform stanchions and clung to them as the gateman was pushing him away, and was injured while thus clinging to the car. Held, that the plaintiff should have been nonsuited.

(Decided November 23, 1886.)

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit Court, on a verdict for plaintiff in an action to recover damages for the death of plaintiff's testator, caused by alleged negligence of defendant in operating an elevated railroad in New York City. *Reversed.*

Memorandum of decision below, 87 Hun, 644.

The following facts appeared by the testimony of plaintiff's witnesses:

Mr. Card, with his wife and Sarah A. Hull, his sister, went to the easterly side of the Houston Street Station, on the Third Avenue Elevated Railroad in New York City, on the day of the accident, to take a train going north. When they arrived at the ticket office Mr. Card was in advance of the two ladies, and purchased three tickets, receiving some change from Mrs. Hull for that purpose; they then passed through the passage way in front of the ticket office to the station platform in the same order, Mr. Card dropping the tickets in the ticket box provided for that purpose; a train of cars was

227

about leaving the station when they reached the ticket office. They did not attempt to board this train but remained on the station platform in close proximity to and conversing with each other for several minutes, waiting for the next train; when such train arrived and stopped the deceased and the two ladies were standing about midway between the ends of the second car from the locomotive; Mr. Card stood nearest the front end; all three started toward the rear end of the second car for the purpose of entering it; the gate was opened at the end of said car by a gateman on the train and the two ladies stepped on board while the train was standing still; Mr. Card, who was immediately behind them, approached the same gateway intending to enter it, but before he could step on the car, the gate was closed against him by the gateman who was then standing on the car platform; at about the same instant, the usual signal was given for the train to start and it started. Mr. Card walked along the platform with the moving train, evidently talking with the gateman, but what he said to him was not testified to by any witness; while he was thus walking he had a satchel and cane in one hand and may or may not have taken hold with the other of an iron bar or rod which extends from the floor of the car platform to the roof, and to which the car gate is attached by hinges; while he was thus walking and when he was making no effort to board the train, he was pushed by the gateman so that, from that cause alone, he fell and went under the cars, and received the injuries from which he died.

The evidence on the part of the defendant given by the persons in its employment is in decided hostility to plaintiff's evidence. According to their statement the deceased approached the train with very great rapidity, alone and unattended, there being not only no persons in company with him, but no persons on the platform at the time he made his appearance. Indeed one of the witnesses, the brakeman who was charged with having pushed the deceased, testified that he had not only pushed the gate but announced in both cars, north and south of where he stood, that Ninth Street was the next station, and that he saw the deceased only when he had seized the iron stanchions which he is by some of the witnesses said to have taken hold of, while he was moving along with the cars, either expostulating with the brakeman, or requesting that he should be admitted to the car.

The defendant moved to dismiss the complaint and requested a verdict, upon the ground that it was not shown that it, or its employees, or any of them, were guilty of negligence, and that the deceased was guilty of contributory negligence; which motion the court denied and verdict was rendered for plaintiff and judgment was entered thereon. On appeal to the general term the judgment was affirmed and defendant appealed to this court.

Mr. E. S. Rapallo, for appellant.

Mr. S. W. Fullerton, with whom was **Mr. E. W. Simmons**, for respondent:

Courts cannot properly nonsuit in actions of

this nature where any possible inference can be drawn from any of the testimony which would relieve the deceased from the charge of contributory negligence.

Kellogg v. N. Y. Cent. & Hud. Riv. R. R. Co. 79 N. Y. 72; *Casey v. N. Y. Cent. & Hud. Riv. R. R. Co.* 78 N. Y. 518; *Voak v. N. Y. Cent. & Hud. Riv. R. R. Co.* 75 N. Y. 320; *Dolan v. Del. & Hud. Canal Co.* 71 N. Y. 285.

To justify a nonsuit on the ground of concurring negligence the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts would have warranted a contrary conclusion, and that a verdict the other way would have been set aside as against the evidence.

Kain v. Smith, 89 N. Y. 375.

Finch, J., delivered the opinion of the court:

The opinion recently delivered in the case of *Solomon v. Manhattan R. Co.* [ante, 775] substantially covers all the questions raised by this appeal and makes it our duty to reverse the judgment of the courts below.

In both cases, after the gates were shut and the intending passenger was excluded and the train was in motion, the injured party clung to the moving cars and was thereby killed. In the one case the deceased had his foot upon the car step, and was obviously making a physical effort to get upon the train; in this case the trial court deemed it debatable, whether the deceased was endeavoring to get upon the car or was merely walking along by the side of the moving train expostulating with the gateman. But disregarding all the evidence of the defense and taking as true the plaintiff's proofs, two facts remain undisputed. After the gate was closed and the train in motion the excluded passenger had hold of the stanchions of the platform, clinging to them as the train moved while the gateman was pushing him away.

Three witnesses for the plaintiff saw the accident. The wife and sister observed only the gateman pushing the deceased at a moment when they are unable to say whether the train had started or not; but the third witness, a passenger in an adjoining car and apparently wholly disinterested, testifies distinctly that after the gate was slammed and the train in motion the deceased was holding on to the iron standard supporting the roof of the platform while the gateman was trying to push him away, and that this continued until the deceased disappeared from sight.

It is not material whether the act of the deceased should or should not be deemed a physical effort to get upon the car. It was an interference with the moving train obviously dangerous and imprudent, from which the injury resulted, and for which there was no necessity or excuse. The motion for a nonsuit should have been granted.

Judgment reversed, new trial granted, costs to abide the event.

All concur, except **Danforth, J.**, not voting, and **Rapallo, J.**, taking no part.

NEW JERSEY.

COURT OF ERRORS AND APPEALS.

CAMDEN & ATLANTIC R. R. CO., *Plff. in Err.*,
v.

MAYS LANDING & EGG HARBOR CITY
R. R. CO.

- *1. When a transaction is complete and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot upon rescission be restored to his former status.
2. The State may interpose its authority at any time and compel an abandonment of the act in excess of power, and if need be revoke the charter of the company for its usurpation.
3. When the State challenges the legality of the transaction, the paramount and only question is whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed.
4. The liability of the company does not rest upon the doctrine of ratification, which in ordinary legal acceptance applies to such contracts as a party has authority to make, but upon acquiescence, on which the other party has acted, so that he cannot be restored to his former status, and thereby the company is precluded from interposing its own infirmity as a defense.
5. Under the circumstances presented by this case, the agreement must be dealt with as a contract executed substantially on both sides.

(Decided ——— 1886.)

ERROR to the Supreme Court, to review a judgment in favor of plaintiff in an action of debt to recover rent. *Affirmed.*

The facts are stated in the opinion.

Messrs. P. L. Voorhees and Wayne MacVeagh, for plaintiff in error.

Mr. S. H. Grey, for defendant in error.

Van Syckel, J., delivered the opinion of the court:

This was an action of debt brought in the supreme court to recover the rent alleged to be due from February, 1881, to June 1, 1882, on a lease of its road executed in 1873, by defendant in error to the plaintiff in error, for the term of 999 years.

The Mays Landing & Egg Harbor Road was built under a charter obtained in 1871, and since its completion in 1872 it has been in the possession of the Camden & Atlantic Company as lessee until February, 1881, at which time

the latter Company ceased to operate it, and refused to recognize the validity of the lease.

The defense to the action is rested upon the want of power in the lessee Company to execute the lease.

The Camden & Atlantic Railroad was completed from Camden to Atlantic City in the early part of 1862, under a charter granted in 1852. This road I will hereafter for brevity style the main line, and the Mays Landing & Egg Harbor Road the branch road. The branch road rests its own authority to make a lease, and the authority of the main line to accept a lease, upon the seventeenth section of the charter of the branch, which provides that the said branch road is authorized to lease its railroad to (or consolidate with) any other railroad company, which is thereby authorized to take such lease and operate the same for such time or times, and on such terms, as the said parties may agree upon.

This language is unquestionably broad enough to confer upon the companies the power requisite to enter into a valid contract for a lease; and no doubt could arise in this case, if the powers of one railroad company can be amplified by provisions in the charter of another.

The title of the Act incorporating the branch road is "An Act to Incorporate the Mays Landing & Egg Harbor City Railroad Company."

Under the clause of our State Constitution which provides that "To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title," can the seventeenth section of the branch road charter be upheld so far as it purports to confer additional franchises upon other railroads?

It seems to me very clear that this question must be answered in the negative.

This charter manifestly embraces two distinct objects; it confers power upon the branch road to construct its line and to lease it, and attempts to enlarge the authority of all other railroad corporations by permitting them to accept a lease. There is no indication in the title that such legislation was contemplated.

The constitutional restraint could not be revoked for a more salutary purpose than to suppress a scheme to amplify corporate powers in a way which effectually conceals the intention to do so. *Jersey City v. Elnendorf*, 18 Vroom, 293.

So far as the grant of authority to the main line is concerned, the seventeenth section is unconstitutional.

The necessary power to the main line, if it exists, must be sought for in its own charter.

The Camden & Atlantic Road had authority under its charter to build the branch road from Mays Landing to Egg Harbor City, but as before stated did not exercise that right, the branch having been constructed under a charter subsequently granted in 1871.

In *Branch v. Jesup*, 106 U. S. 468 [Bk. 27, L. ed. 279], *Mr. Justice Bradley* held that the power granted to a railroad company to construct a particular line of railroad carried with it by implication the right to purchase such line of railroad subsequently built by another corporation.

The doctrine I think is sound, and the right

to lease for 999 years would coexist with the right to purchase.

This would establish the power of the main line to enter into the lease, if the right to construct the branch had survived until the lease was executed.

But by reference to the seventeenth section of the charter of the main line (Laws 1852, p. 271) it will be observed that its power in this respect expired by limitation on the first day of August, 1862.

The section reads as follows: "That if the said railroad shall not be completed and in use at the expiration of ten years from the first day of August next ensuing, then and in that case this Act shall be void."

Under the rules which apply to the construction of legislative grants of power, the only interpretation which this language will reasonably bear is that the authority derived through the charter must be exercised within ten years from August 1, 1852, and that such portion of the road as should not then be constructed could not thereafter be built under the granted authority.

In *Morris & Essex R. R. Co. v. Central R. R. Co.* 2 Vroom, 205, it was expressly adjudged that the power of a corporation to take the land of an individual is determined by the expiration of the term limited for its exercise, after which the right of eminent domain derived from its charter no longer exists in the company.

The branch road was not constructed until the year 1871, nine years after the expiration of the time limited to the main line for the enjoyment and exercise of its granted powers.

At that time the main line, having no longer the right of eminent domain, was without the power to build the branch road, and consequently in the loss of that authority is involved the deprivation of all power which would flow from it.

It must therefore be conceded that the execution of the lease on the part of the Camden & Atlantic Road was *ultra vires*.

The rule is well settled both in England and in this country that an executory contract, *ultra vires*, cannot be validated by the acquiescence of every stockholder of the company. It is also generally conceded that an *ultra vires* contract fully executed cannot be receded from. Field, Corp. §§ 263, 264; Green's Brice, *Ultra Vires*, 371-373; 1 Wood, Railways, § 171-173; *Thomas v. R. R.* 101 U. S. 71 [Bk. 25, L. ed. 950].

The courts have differed upon the question whether the plea of *ultra vires* is available by a corporation in an action brought against it for not performing its side of the contract, where the transaction is complete, and nothing remains to be done by the party seeking relief.

Ashbury R. etc. Co. v. Riche, L. R. 7 H. L. Eng. & Irish App. 658, is the leading English case. The company by its directors entered into an agreement with Riche to give him the construction of a railway from Antwerp to Tournay. After Riche had entered upon the work and executed it in part, the company repudiated the contract as one *ultra vires*.

Riche then brought an action to recover damages for breach of contract. The case was referred to a barrister to state a special case, and the question of *ultra vires* was that on which the decision was to depend.

The court was to be at liberty to draw inferences of fact. In the Court of Exchequer two of the three judges were of opinion that the plaintiff should have judgment, and when the case came before the Exchequer Chamber, it was heard before six judges, who being equally divided in opinion, the judgment was affirmed. On appeal to the House of Lords the judgment was reversed, pronouncing the contract *ultra vires*, and declaring that it was without the power to validate it by their acquiescence.

Mr. Justice Folger, in 78 N. Y. 187, distinguishes the English case, on the ground that the contract with Riche was prohibited by the Act of Parliament. Although the court did not rest its decision on that ground, Lord Chelmsford adverted to that fact to distinguish the cases of *Spackman v. Evans* [L. R. 3 H. L. Eng. & Ir. App. 171], and *Evans v. Smallcomb* [Id. 249], where the act of the directors was not prohibited by statute, but was merely not warranted by the deed of settlement of the company.

In affirming the judgment now under review it is not necessary to dissent from the conclusion reached in this case. The agreement with Riche was not fully executed on either side; and it was one in which payment to him of the money he had expended in behalf of the company, under the agreement, would have done complete justice. The suit, being for damages for breach of the contract, would have embraced profits which might have resulted from its execution. If the suit had been maintained it would have given the plaintiff a measure of relief greater than was necessary to restore him to the status he occupied before the contract was made.

In *Parish v. Wheeler*, 22 N. Y. 494, Chief Justice Comstock in delivering the opinion of the court said that a corporation cannot defend itself against a claim for money paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*, although the plaintiff, when he paid the money knew all the facts. He declared that corporations, like individuals, in dealing with other parties, must live up to the rules of common honesty.

In the previous case of *Bissell v. Michigan Southern, etc., R. R. Co.* 22 N. Y. 258, the same learned judge expressed the view that where a corporation has received the consideration of its unauthorized contract and restitution will not do complete justice, the other party may sue directly on the contract.

He said that the plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not make the unauthorized contract, but that it ought not to have been made. Such a defense therefore rests upon the violation of trust or duty towards the shareholders, and is not entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea.

This case was decided without an expression of opinion of a majority of the court on this point, but in the later case of *Kent v. Quicksilver Mining Co.* 78 N. Y. 159, Judge Folger delivered the opinion in which the entire court concurred, giving the fullest approval to the

views of *Chief Justice* Comstock in the cases cited. The case was one in which the directors had done an act which the company had no power to do, and in which there was not full execution on both sides. It was not of that class of cases, where an authorized act was executed in an unauthorized manner. The transaction was clearly *ultra vires*, and in that aspect it was dealt with by the court. The English and American cases were cited and the cause was ably and elaborately argued.

The propositions mentioned by the court were: that acts of a corporation which are not *per se* illegal, or *malum prohibitum*, or contrary to public policy, but which are *ultra vires*, affecting only the interests of stockholders, may be made good by the assent of shareholders, so that strangers to them dealing in good faith with the corporation will be protected in reliance on those acts.

That it needed not that there be an express assent upon the part of shareholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act and to seek judicial relief after knowledge of it, their acquiescence will be presumed.

That where the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent of the stockholders to the use of unauthorized power will be of no avail.

In *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, the Court of Appeals of New York enforced the *ultra vires* contract against the other party where it had been performed on the part of the corporation. In addition to the estoppel, which in that case applied to the person dealing with the company, it is true that none of his rights were infringed by the fact that the transaction was *ultra vires* the company, and he could not for that reason also interpose that defense. But where shareholders are chargeable with consenting to an understanding, which they have permitted to be executed, they waive their pre-existing rights, which would be affected by the unauthorized act, and become equally subject to the estoppel.

Chief Justice Ruger in *Woodruff v. Erie R. Co.* 98 N. Y. 609, in an opinion from which there was no dissent, gave his full approval to the previous cases, and held that under an *ultra vires* lease, the lessee is estopped from questioning its validity in an action to recover the stipulated rent.

In *Bradley v. Ballard*, 55 Ill. 418, *Chief Justice* Lawrence said that where the contract is executed, the doctrine of estoppel is applied for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished. The case was one in which money was borrowed and notes given by a corporation to enable it to prosecute a business which the lender knew it had no right to undertake.

In *Terry v. Eagle Lock Co.* 47 Conn. 141, the Eagle Lock Company entered into an unauthorized agreement with another company to purchase its stock, and run it as a separate company.

The Connecticut Court held that after the
N. J.

contract had been executed and the defendant company had been permitted for five years to transact business under the arrangement, it would not be interfered with.

In *Steamboat Co. v. McOutcheon*, 18 Pa. 18, a foreign corporation had taken a lease of real estate without authority in its charter, and in an action for the rent the court enforced the contract.

In *Dorst v. Gale*, 88 Ill. 187, the Peoria Marine & Insurance Company executed a deed of trust to secure payment of certain bonds upon which the company had received the money. The bill was filed to enjoin the trustee from selling the premises and to declare the deed of trust void. The court refused to allow the plea of *ultra vires* to prevail, on the ground that a private corporation cannot be heard in such a defense, where the contract has been performed by the other party, and the corporation has had the benefit of the contract and the performance. The language of *Chief Justice* Lawrence in *Bradley v. Ballard*, was cited with approbation.

"That it would be pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender knew that the corporation was transacting a business beyond its corporate powers, provided the business itself was free from any intrinsic immorality or illegality."

These views were reaffirmed in *Ward v. Johnson*, 95 Ill. 215, and in *Peoria, etc. R. R. Co. v. Thompson*, 108 Ill. 187.

In *Amerman v. Wiles*, 9 C. E. Green, 18, the chancellor refused to entertain the defense of *ultra vires* to a mortgage executed by a corporation to secure a debt to the defendants.

Thomas v. R. R. Co. 101 U. S. 71 [Bk. 25, L. ed. 950], is relied upon by the plaintiff in error. In that case the lease was held to be *ultra vires* and therefore void.

Mr. Justice Miller for the court referred to the English cases, and said that although the American cases were conflicting, the preponderance of authority was that an *extra vires* contract, but partly executed, could not be enforced.

He however held the lease there to be contrary to public policy, for the reason that the lessor company had no power to make the lease, and that thereby it disabled itself to perform the duties which it had undertaken, in accepting its charter from the State, and he therefore treated the contract as one forbidden by the law. He did not question that the lessee would be liable for the rental, for the period during which it had enjoyed the term.

It is to be observed in this case that by the surrender of the lease the lessor was left in his former position, and the rental being paid, no apparent injustice was done.

In the case of *Trenton Mutual Life & Fire Ins. Co. v. McKelway*, 1 Beas. 133, the defendant was successful in his attempt to recede from his contract, but it was not a suit by one of the parties to the unauthorized contract to enforce it against the other. The proceeding was instituted in behalf of corporators, as to whom the learned jurist who decided the case was careful to observe that it did not appear that they insured upon the faith of the *ultra vires* contract, or that they became corporators after the contract was entered into or in consequence of it.

In the conflict of judicial decision on this subject, this court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is that when the transaction is complete, and the party seeking relief has performed on his part the plea of *ultra vires* by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot upon rescission be restored to his former status.

In the cases maintaining the contrary doctrine the reasoning of the courts has been: 1. That corporators might, by ratifying corporate acts by their acquiescence, indefinitely extend and amplify their granted powers. 2. That consent on the part of those who do an act which they have no power to do cannot make it legal. 3. That to hold that an act performed in executing a void contract makes all its parts valid is to say that the more that is done under an unauthorized contract, the stronger is the claim to its enforcement by the courts.

To the first objection a sufficient answer is that the State may interpose its authority at any time, and compel an abandonment of the act in excess of power, and if need be revoke the charter of the company for its usurpation.

When the State challenges the legality of the transaction, the paramount and only question is whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed. It will be admitted that where there is an absence of authority on the part of a corporation to do an act, the requisite power cannot be imported into the transaction, either by the consent of stockholders or by the execution of the contract by the other party to the agreement. The contract must necessarily continue to be *ultra vires*.

No such effect has been attributed in any of the cases to acquiescence or unilateral performance. The basis upon which the enforcement of the contract in such cases rests is that the company is estopped from setting up its own unauthorized act, and its own incapacity to evade performance on its part, after receiving the fruits of the bargain. The power of the company is not amplified, the agreement is none the more legal, in the sense that there was authority to execute it; the court simply refuses to entertain the defense which common honesty forbids the company to make. A man may become bound by the act of an unauthorized agent, and be held liable to the contract made for him, not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority.

No reason is perceived why the rules of fair dealing which are so rigorously applied to natural persons shall not pertain as strictly to private corporations. No instance is known where a natural person can set up, in his own behalf and for his own advantage, his want of authority to do an act for which he has received the consideration from the other party. Transac-

tions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion; they cannot furnish a basis for a legal cause of action.

Why is it that *extra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been executed on both sides? Such execution imparts no additional power to the corporate body. It does not transmute the negative into the positive.

The absence of power is as apparent after as before performance. Why is it that corporations are compelled to pay money borrowed in excess of authority, and to pay the stipulated rent for premises unlawfully leased, for the period of occupation?

The law does not imply a contract to pay the bondholders the money thus received. It is illogical to say that the law will imply a contract by the company which it has no power to make for itself. A contract cannot be implied where an express contract cannot be made. The law recognizes the obligation; it precludes or estops the attempt to evade it. Apply to it what legal phrase you may, the underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defense on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained.

To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority but because good conscience requires it.

How, then, can recognition of the estoppel be denied, where the contract has been executed on the one side, and the party performing cannot upon rescission be restored to his former status? Why should the corporate body be permitted to plead its own wrongful act, and set up its own infirmity as a bar to the recovery by the other party of what it should in right and justice be accorded?

It is true that a person cannot by his own act acquire a right against another; the other must in some way bind himself. The acquiescence in the contract in virtue of which the other party performs, and the acceptance of its benefits, constitute the binding acts and raise the estoppel. I am unable to see how, upon a just conception of the legal principles involved, a different rule can be applied where the corporation has acquiesced in the contract, and the other party by performance on his part has been led into a position from which he cannot be extricated.

Misconception arises from failing to distinguish between those rights which parties acquire as between themselves, and the rule by which corporate authority must be measured and limited, when the State interposes to assert its prerogative. Nor does the liability of the company rest upon the doctrine of ratification. In its ordinary legal acceptance, ratification applies to such contracts as a party has authority to make. Repeated affirmations of a contract, by one who has no authority to enter into it, cannot supply the requisite authority.

But acquiescence in it upon which the other party acts may and does upon settled legal principles preclude the parties from starting the

question of power as between themselves. There is in fact a subsisting contract actually executed in due and legal form, which under the rule stated is unimpeachable, except at the instance of the State. It is thus, in legal contemplation, impressed with the vigor and incidents of a valid contract as between the parties, and there is no difficulty in enforcing it in a suit at law.

It is like the case of one who makes in legal form a conveyance of real estate which he has no power to convey, and not like the case where the true owner fails to do some act which may operate as an equitable estoppel to his setting up his title against the person who has been misled by his conduct. In the former case the grantee could maintain an action at law against the grantor, to recover possession of the premises granted. In the latter case the relief must be sought in a court of equity.

But whether the rule which I have formulated shall be applied in this case or not, the judgment below should in my opinion be affirmed, upon the ground that the lease in this case must be regarded as substantially a contract as fully executed on both sides as those unauthorized contracts in which money has been loaned to or work done for a corporation, for which it has issued its bond to the creditor.

The agreement was entered into November 8, 1871, between the Camden & Atlantic Railroad Company and the Mays Landing & Egg Harbor City Railroad Company, in and by which it was agreed that if the latter Company would construct the branch road in a specified manner, on or before the first day of July, 1872, the former Company would guaranty the bonds of the latter Company to the amount of \$87,500, to be used in the construction of the said road, and take a lease for the same when completed, for 999 years at a specified rental.

In pursuance of this agreement the bonds were issued by the branch road, and guarantied by the main line. The road was built under the direction of the main line and the lease executed.

Every term of this agreement on both sides has been fulfilled, and the agreement in all respects substantially executed.

The annual report of the directors for the year ending December 31, 1871, recited the terms of this agreement in detail.

Annually thereafter, until 1879, the existence of the lease and the income and disbursements incident to the operation of the branch were duly reported to the stockholders of the main line, during all which time no attempt was made to avoid the lease.

We must impute to the stockholders of the main line utter neglect of their affairs, if we say that they did not have notice of the agreement to build the branch road and of the lease executed in pursuance thereof. The only reasonable inference from the circumstances proven is that they had knowledge of the transaction, and that it was engaged in and consummated with their approval and acquiescence.

This case presents all the features which have led the judicial mind in the cases cited to establish the distinction between executory and executed contracts, in which respect it essentially differs from the case in 101 U. S. This was not
N. J.

as in the case in the federal court, the mere leasing of a road owned by the lessor, where the repudiation of its terms would restore both parties to their former status. Here the lessor built the road, not for itself but at the instance of and for the lessee, with the proceeds of bonds guarantied by the lessee to promote and effect the scheme. The branch road was a mere instrument in the hands of the main line to consummate the undertaking.

By the clearly expressed contract of the parties, the road was to be the road of the lessee, the lessor to have only the fixed rentals.

The lessor has fulfilled every term of its agreement, and put the lessee in possession of all that it stipulated for. Nothing remains on the part of the lessor to be done. We must look at the substance of things in applying legal principles. The lease for 999 years is practically an absolute transfer of the road to the lessee, and the rental a mere mode of paying the lessor for the work done and money expended in constructing the road for the lessee, instead of paying a fixed principal sum. The case does not in effect and substance differ from what it would have been if the main line had employed the branch road to construct the branch at a stipulated price, and had issued its bonds in payment after completion and acceptance of the work.

All the cases concede that under such circumstances the contract must be treated as executed.

If the contract had been to compensate the branch road for the work by the bonds of the main line, securing the payment of an annuity for 999 years, and those bonds had been delivered, would it be asserted that it was in substance the less an executed agreement? It is the merest verbiage and form whether it is termed a lease securing a rental for 999 years, or a bond securing an annuity for a like term.

The injustice and inadmissibility of permitting the main line to repudiate its bonds after it has been in occupancy of the road for more than seven years, because the road proved to be unprofitable, would not be more glaring than the inequity of the defense interposed here to the payment of the rental.

The work undertaken to be done was fully executed by the branch road, and the manner in which it is to be paid for is immaterial, so far as the principle involved is concerned. There is no consideration of justice and fair dealing which in the cases referred to led to the rejection of the offer by the corporations, to set up their own incapacity in avoidance of their just obligations, which is not forcibly presented by this case. It cannot in the application of legal principles be dissociated from executed contracts, without disregarding the reasons which lie at the foundation of the rule. If the lease is subject to the defense of *ultra vires*, the guaranty of the bonds is also incapable of enforcement, and thus loss will likewise fall upon those who advanced money upon the faith of the guaranty to be used under the direction of the lessee and for its purposes.

If such a doctrine is established, who can answer for the solvency of our insurance companies, savings banks, and moneyed institutions? It is a matter of common knowledge that corporate bodies in many instances,

through misconception of their powers or otherwise, have exceeded the legal limits of their authority.

An action to enforce against the main line its guaranty of these bonds could not be classed with those cases in which companies have been required to return the money they had received on *ultra vires* contracts, or to pay rentals for the period of occupancy.

If the invalidity of the contract and the right to repudiate it be conceded, the law cannot raise an implied obligation on the ruins of the contract upon which to found a recovery. The liability of the defendant upon the bonds must rest, if it exists at all, upon the contract of the guaranty. The money was not paid to the main line, but to the obligor of the bonds; and no obligation can be implied on the part of the defendant to repay it. The validity of the guaranty contract must be affirmed, or no action can lie against the defendant.

In the destruction of the contract there must be an entire absence of legal liability.

The legal doctrine which must be invoked to maintain an action by the bondholders on the guaranty will support the judgment in this case.

The doctrine of estoppel by acquiescence, in cases which present the characteristics which appear here, can work no inequity, for it may safely be presumed that the parties to be affected by an engagement are competent to determine what will best promote their own interest, and for any error in judgment they and not others should suffer.

The contrary doctrine, affording so easy an escape from the consequences of their own acts, invites them to overstep the boundaries of their authority.

There can be no dissent from the assertion that good faith and honest dealing unite in forbidding that the defense here set up shall be successfully interposed. In my opinion the law is against it, and the judgment below should be affirmed.

Solomon CLARK, *Piff. in Err.*,

v.

STATE of New Jersey.

1. On the trial of an indictment for selling lottery policies, the first count of which charged a sale to A, and the second count charged a sale to a person to the grand inquest unknown, the State may ask of A, when on the witness stand, whether she had seen other persons than herself buy of the defendant, and the names of those persons.
2. The State, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other crimes, although of a like nature.
3. Counsel cannot take the chance of testimony making in his favor and, if it happens to be adverse, then interpose an objection to it.
4. Because a witness has spoken of one transaction, the State is not precluded from proving, by the same or other wit-

nesses, that the offense charged was a different transaction.

5. Where the defendant requested the court to compel the prosecution to elect which of several transactions he would rely upon for a conviction under a count of an indictment, and there was an acquittal under that count, there was no error prejudicial to defendant in the refusal of the court to compel an election.
6. Upon the trial of such indictment, a book called a dream book found upon the premises of defendant, which was used to get numbers out of, and a checkered paper with numbers upon the squares, both of which belonged to the policy business, are admissible in evidence.
7. It was not error to refuse to charge the jury that in order to convict they must find that defendant expressly promised to pay or insure to the purchaser some money or thing in the event of the number being successful. Such promise might be inferred from the general character of the business and the well known course of dealing.

(Decided ——— — 1886.)

ERROR to the Supreme Court, to review a conviction for selling lottery policies. *Affirmed.*

The facts are stated in the opinion.

Mr. J. J. Crandall, for plaintiff in error.

Mr. R. S. Jenkins, for defendant in error.

Reed, J., delivered the opinion of the court:

The plaintiff in error was indicted for selling lottery policies. The first count in the indictment charged that the said Clark did receive from one Fannie Jordan certain money, in consideration of which he unlawfully promised and agreed to pay her a certain sum of money upon the event of her drawing certain numbers in a certain lottery, then set up and opened in certain state lotteries and thereafter drawn in the State.

The second count charges that he received money from a certain person, to the grand inquest unknown, upon a similar understanding.

There was a conviction upon the first count.

The first and second assignments of error are grounded upon the permission granted to the counsel for the State, in the face of an exception, to ask Fannie Jordan, a witness for the State, whether she had seen other persons than herself buy of the defendant; and second, to ask the names of those persons.

The first count, as already stated, charged a sale to Fannie Jordan. She had, when placed upon the witness stand, mentioned the fact of a sale to herself. The State was privileged, under the second count, to also prove a sale to someone other than the witness. For the purpose of showing that there were sales to persons other than her, the first question was relevant; and for the purpose of fixing the identity of the particular person with whom, in respect to such sale, the State wished to fix the defendant under the second count, the second question was equally relevant.

Thus far there was no error.

After the witness had, in answer to the second question, given the name of a Mr. Matthews as one of such purchasers, the State desisted, so far as appears by the record before us, from pursuing the matter of the sale to Matthews. The State then called two other witnesses, Carter and Rice, each of whom swore to a sale to himself. The counsel for the defendant moved to strike out the testimony of Carter, on the ground that it related to a distinct offense from that sworn to by Fannie Jordan.

The testimony of George Rice, so far as it related to the fact of the sale to himself, was not objected to, and the legality of its admission is not before us for review. The error alleged to arise by the admission of the evidence of Carter is that after the State had proven one sale under the second count to one Matthews, it was permitted to prove a second distinct sale to Carter.

The rule of evidence upon which this assignment is founded is entirely settled. As a general rule the State, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other crimes, although of a like nature. But, recognizing the force of this rule, I yet think that the defendant has not shown error in the record before us.

In the first place, the testimony of Carter, so far as the record informs us, was all in before the objection to it was taken. It does not appear that there was not an opportunity afforded to the counsel for the defendant to have made his objection earlier. The rule is established that counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection. There is nothing to show that the defense here was not apprised of the point upon which the witness was about to speak, before his testimony relative to the sale to himself was delivered. The testimony being so in without objection, it cannot be said that the court erred in not striking it out.

In the second place, it cannot be claimed that because a witness has spoken of one transaction, the State is precluded from proving by the same or other witnesses that the offense charged was a different transaction.

It is not unusual in the progress of a trial for a witness to commence to detail the circumstances of a transaction and it turns out to be a different assault or larceny from that charged.

The State has the privilege, as soon as the distinctness of the matter in the mind of the witness from the matter in the indictment is apparent, to abandon the former and proceed to prove the latter. This applies to all cases where the State has unintentionally been placed in this posture. Where it is obvious that the above course of procedure is for the purpose of prejudicing the interests of the defendant, by showing his tendency to commit crime, the court should hold the State to the first offense which it attempts to prove. Upon error, I think this effort upon the part of the State should be apparent, and that it was erroneously countenanced by the trial court, before a reversal can be claimed. There was in the conduct of this trial, undoubtedly, something to

show that this erroneous view was adopted by the court, for upon the State resting its case, the counsel for the defendant requested the court to compel the prosecution to elect which of these several transactions he would rely upon for a conviction. The court refused this request. To this refusal an exception was sealed. But it appears that there was no conviction upon the second count, and it was only upon this count that an election as requested was material.

Only one of the transactions, namely: the sale to Fannie Jordan, could refer to the offense charged in the first count, upon which there was a conviction. The others were all referable to the second count, charging the sale to a person unknown, upon which count there was an acquittal. The failure to elect could only have prejudiced the defendant's defense to the latter count, and the jury found that none of the sales except the one to Fannie Jordan were proven, and that was the single transaction sworn to under the first count. There was no error by which the defendant was injured in the refusal to compel an election.

It is also assigned for error that the court, under an exception, admitted in evidence a book proven to have been found upon the premises of the defendant, called a dream book, and also a checkered paper with numbers upon the squares. It was testified that the dream book was used to get numbers out of, and that both it and the checkered paper belonged to the policy business.

I think that this evidence was admissible, in support of the testimony of the witnesses who swore that they purchased numbers, as tending to show the character of the business carried on in the place where the numbers were purchased, and in which business the numbers were used, and so tending to give significance to the act of purchasing the numbers.

It is lastly urged that the refusal to charge that the jury must find that the numbers were understood by the parties to be connected with some scheme of chance, and that defendant expressly promised to pay or insure to the purchaser some money or thing, in the event of the numbers aforesaid being successful in some way in such scheme of chance, was error.

The request to charge that there must have been an express promise to pay upon a chance event was too broad. The jury had the right to infer the promise, if the general character of the business in which the numbers were bought was shown to be such as to support the inference. The purport of the transaction could be as clearly evidenced by a uniform and well known course of dealing between the vendor and the purchasers of numbers as if there was an express stipulation connected with each sale. If by such course of dealing with his patrons the defendant held out to the purchaser of numbers the hope of gaining something upon the occurrence of a chance event, the transaction is within the statute. This disposes of all the assignments of error.

The judgment of the Supreme Court is affirmed.

For affirmance—The Chancellor, Dixon, Knapp, Magle, Reed, Brown, Clement, Cole—7.

For reversal—Paterson—1.

George G. LENNIG, *Appt.*,

v.

OCEAN CITY ASSOCIATION, *Respt.*

1. Whenever the owner of a tract of land lays it out into blocks and lots upon a map, and designates on the map certain portions of the land to be used as streets, parks, squares, or in other modes of a general nature calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated.
2. Distinct and independent private rights of such character, in other lands of the grantor than those granted, may be acquired by implied covenant as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication.
3. Where a portion of land has been thus laid down on a map for a camp ground, and lots sold by reference to such map, the use of such camp ground for another purpose, as, for the erection of cottages, may be enjoined at the suit of the purchaser who has bought some of the lots.

(Decided ——— 1886.)

APPEAL from a decree of the Chancellor, dissolving a preliminary injunction and dismissing a bill in equity to restrain defendant from leasing certain lands or exclusively appropriating the same. *Reversed.*

The Chancellor's opinion is reported in 8 Cent. Rep. 68.

The facts are fully stated in the opinion of the court.

Mr. J. C. Leaming, for appellant.

Mr. D. J. Pancoast, for respondent.

Dixon, J., delivered the opinion of the court:

The defendant is a corporation organized under the laws of this State for the avowed object of "establishing a summer seaside resort, founded on Christian principles, and affording religious privileges as well as healthful recreation."

For this purpose it acquired a tract of land upon the Atlantic coast, consisting of three sections, distinguished by the letters A, B and C. It caused section A to be plotted upon a map or plan into rectangular blocks divided by Atlantic, Ocean, Wesley, Central, Asbury and West Avenues, running nearly parallel with the shore, and by streets numbered from first to ninth, inclusive, running at right angles with the avenues.

These blocks, except the five which lie between Fifth and Sixth Streets, were divided into lots numbered on the plan consecutively from 1 to 995. Of the five excepted blocks the two nearest the ocean and the one furthest from it appear on the map as blank rectangles, the other two form a square bounded by Fifth and

Sixth Streets and Wesley and Asbury Avenues, and intersected by what seem to be footways leading to an inner space marked "auditorium."

On May 26, 1880, the defendant held a public sale of lots laid down on this map, before and at which were distributed similar maps, on which, however, the lots were not numbered but only outlined, and the blocks between Fifth and Sixth Streets appeared to be occupied by trees, the square before mentioned being designated "camp ground." At this sale the complainant bought a lot on the southeasterly corner of Sixth Street and Wesley Avenue, which was conveyed to him as lot No. 696 on the map first mentioned.

Subsequently, in July, 1880, and May, 1881, he purchased from the Association lots Nos. 700 and 702 on the same plan, thus securing a plot having 105 feet on Sixth Street and 150 feet on Wesley Avenue; and shortly afterwards he erected thereon a summer dwelling.

Early in 1881 the Association published its first annual report, in which is stated:

"The space allotted to the encampment is 500 feet wide, from the thoroughfare to the ocean, with plenty of tenting ground."

This description applies to the entire space between Fifth and Sixth Streets.

In its second annual report, published in 1882, one page contains a diagram showing the square above referred to substantially as in the original map, and also the adjacent portions of the blocks upon the east and west of that square, the west block being marked "grove" and the east "park."

In the fall of 1882 the defendant publicly announced:

"After an experiment of two summers with canvas tents, the Association has taken a new departure. The two squares of ground lying between Wesley Avenue and the beach and between Fifth and Sixth Streets, reserved for tenting purposes, will be laid off in lots suitable for the erection of small, neat cottages, similar to those in use at Pitman Grove and elsewhere. The Association does not propose at present to erect the cottages, but simply to lease the lots for small rent yearly, with privilege of ten years."

The complainant insists that the execution of this scheme will be in derogation of his property rights, and will materially interfere with the enjoyment of his dwelling, and he prays that it may be prevented by injunction. On final hearing the injunction, which the chancellor had at first granted, was dissolved, and the bill dismissed. Hence this appeal.

Whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, parks, squares, or in other modes of a general nature calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated. This principle has been asserted most frequently for the purpose of supporting dedications to uses strictly public; but it is by no means necessary that such a use should be created.

As was said by this court in *Booram v. North*

Hudson Co. R. R. Co. 18 Stew. 557, with regard to the dedication of a highway by means of conveyances to private persons which referred to a proposed street over other lands of the grantor: "The private rights of the grantees precede the public right, and are the source from which the public right springs. By such conveyances the grantees are regarded as purchasers, by implied covenant, of the right to the use of the street as a means of passage to and from their premises, as appurtenant to the premises granted; and this private right of way in the grantees is wholly distinct from, and independent of the right of passage to be acquired by the public."

From this doctrine, it of course follows that such distinct and independent private rights, in other lands of the grantor than those granted, may be acquired by implied covenant as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication. The object of the principle is, not to create public rights but to secure to persons purchasing lots under such circumstances those benefits, the promise of which it is reasonable to infer has induced them to buy portions of a tract laid out on the plan indicated. *Clark v. Elizabeth*, 8 Vroom, 120; 11 Vroom, 173; *Bayonne v. Ford*, 14 Vroom, 292.

The inquiry now presented therefore must be, not whether the Association has dedicated the blocks between Fifth and Sixth Streets to public use, but whether it has entered into an implied covenant with the complainant not to use those blocks in the mode now proposed, and has granted to him, as appurtenant to his lots, the benefits to be derived from such restriction.

The circumstances lead us to answer this inquiry in the affirmative.

The map or plan according to which the complainant's deeds were made, interpreted in the light of the object of the Association as avowed in its articles of incorporation, indicates that the blocks between Fifth and Sixth Streets were not to be divided into lots; that the square between Wesley and Asbury Avenues was to be used for the auditorium; and that the blocks between Wesley Avenue and the sea were to be kept open. Taking into view also the plan circulated at the sale, in May, 1880, and the published reports of the Association, it further appears that these blocks and squares were to form the camp ground, reserved for religious services and tenting purposes.

The testimony shows that at the time the complainant bought his lots it was the usage among associations similar to the defendant to reserve, around their buildings erected for worship, an open space whereon those assembled for the campmeeting dwelt in tents during its continuance. These tents were, as the term imports, of canvas, sometimes with a wooden kitchen attached; but the erections were all of a temporary nature and were removed as soon as the meeting ended. This no doubt was the character of the use to which the defendant devoted the ground now in controversy; it was to be a camp for the purposes of a religious campmeeting, where the sojourners would remain a short time under the shelter of tents or other such temporary structures.

N. J.

It is obvious that the use now contemplated is a very different one, and very differently affecting the complainant's property. Instead of a camp, occupied for a few weeks only by tents which will scarcely at all interfere with the prospect or the breeze over an open space 600 feet wide extending to the ocean, the ground is to be divided into small lots, on which permanent buildings are to be constructed, of such height and dimensions as may suit the taste of the occupant, and shutting in the complainant's dwelling to an outlook over a fifty foot street. The contrast between the two situations covers much of the attractiveness of a seaside resort.

If the present scheme of the defendant be carried out, it is certain that the complainant will lose a great portion of those advantages which the Association impliedly promised him as inducements to the purchase of its lots. Of this he has a right to complain, and it is no answer to say that the use of tents at these campmeetings is now generally abandoned; that frequenters demand the accommodations of more durable places of abode, and the Association must meet this demand or suspend its operations. Such considerations do not impair the binding force of bargains.

In our judgment, the injunction prayed for should be granted, and to this end the decree below should be reversed.

Decree unanimously reversed.

Catharine CADMUS *et al.*, Exrs., *Plffs. in Err.*,

v.

Patrick FAGAN.

1. Where a city charter, after prescribing the mode in which commissioners of assessment shall make up and present to the board of councilmen an assessment for a local improvement, declares that "if said board of councilmen shall, by resolution, confirm said assessment, it shall constitute a lien,"—the lien of the assessment attaches at the date of its confirmation.
2. If after an assessment has become a lien it is replaced by a new assessment, without disturbing the improvement, the new assessment relates back to the original one and becomes a lien as of the date of the original assessment.
3. Where the original assessment was in existence at the time of the execution of a deed containing a covenant against incumbrances, such covenant was broken as soon as made, and the grantee is entitled to actual damages, measured by the amount paid by him on the new assessment.

(Decided — — 1886.)

ERROR to the Supreme Court, to review a judgment in favor of the plaintiff in an action in covenant. *Affirmed.*

Reported below, 17 Vroom, 441.

The action was brought to recover damages for breach of covenant contained in a deed to

certain premises at Bayonne, Hudson County, made September 26, 1872, by Richard Cadmus, deceased, represented by the plaintiffs in error, to the defendant in error, who is the grantee.

The covenant on which a breach is alleged is the usual one contained in warranty deeds, showing the property to be free and clear of all taxes, assessments and other incumbrances.

The municipal authorities of Bayonne, on February 24, 1871, directed by ordinance the opening of Avenue C, from North Avenue to Morris Canal. The final assessment map and the report of the commissioners were approved and confirmed by the city council, September 28, 1871.

By order of the supreme court, November 12, 1877, the assessment was set aside as to some of the property owners along the line of the improvement; and by a subsequent order, June 14, 1878, made in the same proceedings and on motion of the defendant, the city, it was set aside as to all persons affected thereby, and commissioners were appointed by the court to make a reassessment of the cost of the improvement.

Mr. Peter Bently, for plaintiffs in error.

Messrs. Parmlly, Olendorf & Fisk, for defendant in error:

The action of the municipal authorities on September 28, 1871, made the assessment a lien upon the premises of the plaintiff from that date.

Act to Incorporate the City of Bayonne, § 58, P. L. 1869, p. 371.

This assessment was a lien on the premises at the time of the execution of the deed by Richard Cadmus to the plaintiff; and therefore the covenant as to incumbrances was broken as soon as made.

Garrison v. Sandford, 7 Halst. 261; *Stewart v. Drake*, 4 Halst. 189; *Blackie v. Hudson*, 117 Mass. 181; *White v. Stretch*, 7 C. E. Green, 76; *Cross v. Hayes*, 16 Vroom, 12.

Magie, J., delivered the opinion of the court:

The conclusions reached by the supreme court in its advisory opinion were: 1, that the covenant on which the action was brought was broken when made, by the existence of the original assessment unpaid; and 2, that the plaintiff below (the defendant in error) was entitled to recover not merely nominal but actual damages, measured by the amount agreed to have been paid on the assessment imposed after the vacation of the original assessment.

The correctness of the first conclusion has not been and cannot be disputed.

The second conclusion is the point of contest and error complained of in this case.

In that respect the result reached so accords with my view of the case that I should be content to vote to affirm this judgment without comment, but for the fact that it appears to have been grounded on reasons with which I find myself unable to agree.

The question presented for solution related to the status of an assessment imposed after the vacation of a former assessment. If the reimposed assessment became an incumbrance only from its determination or confirmation, then only nominal damages were recoverable, for the incumbrance which caused the breach had

been wholly vacated. But if the reimposed assessment related back as an incumbrance to a time prior to the covenant, then its payment was the payment of an incumbrance covered by the covenant, and the amount paid would measure the damages to be recovered.

The supreme court adopted the last mentioned proposition; but in the opinion it was declared that the reimposed assessment related back as an incumbrance, not to the date of the first assessment but to the time when the work for which the assessments were made was completed. Cases from the courts of Massachusetts were cited and relied on as sustaining that doctrine, and it was on this ground that it was adjudged that the payment of the last assessment was the payment of an incumbrance existing at the date of the covenant.

It is from this portion of the opinion that I feel constrained to dissent. To adopt the doctrine there enunciated, as establishing the correct rule for determining the time when the lien of such assessments attaches to land, under the provisions of such charters as that of the City of Bayonne, would in my judgment be opposed to a proper construction of those provisions.

It is completely settled that taxes, whether general or specially imposed by reason of peculiar benefits conferred by a public improvement, become liens on land only by virtue of express legislation. The power to impose the lien necessarily includes the power to limit its extent and duration. *Cooley, Tax*, 305; *Heine v. Levee Comrs.* 19 Wall. 655 [86 U. S. bk. 22, L. ed. 225]; *State, Society, v. Paterson*, 18 Vroom, 615; *Johnson v. Van Horn*, 16 Vroom, 136.

The first question, therefore, must be: What has the Legislature prescribed? The legislative intent to impose the tax as a lien must appear; the extent and duration thereof may be expressly declared, or, in the absence of express declaration, inferred from the language of the Acts or their general scope.

The charter of Bayonne, after prescribing the mode in which the commissioners of assessment should make up and present to the board of councilmen an assessment of this sort, declares that "If said board of councilmen shall, by resolution, confirm said assessment, it shall constitute a lien on the property assessed for the amount of such assessment." Laws of 1869, p. 371, § 58.

In this respect, the provisions of this charter are similar to those of other municipalities, and identical with many.

Applying to such clauses the ordinary rules of construction, I think we are driven to the conclusion that the legislative intent is thereby, either expressly or by a persuasive and necessary implication, shown to be that the lien of the assessment should attach at the date of its confirmation. In the face of this expression, I conceive it to be impossible to hold that the time when the lien should attach was left to an implication to be deduced from the general scope of the legislation. If left to such a deduction, it seems to me we should be forced to hold that the lien attached when the work was ordered to be done, rather than when it was completed. But as the declaration of the charter is that when an assessment shall be confirmed it shall constitute a lien, in my opinion

we are not left to inferences from the general scope of the Act; but the enactment itself fixes the date at which the lien is to attach as that of the original confirmation of the assessment.

This construction, it is not amiss to note, establishes a convenient rule capable of practical application. The date when the lien attaches is, under this rule, discoverable by record evidence. Under the rule stated by the supreme court it could only be fixed by parol evidence, which, in respect to the completion of the work, might be uncertain or even variant.

Besides, the construction I put on these provisions has I think been generally adopted in practice by a consensus of the profession. To overthrow it would in my judgment be disastrous. It would operate to unsettle titles, and would vastly increase litigation on covenants of this sort, if the time at which these liens attach themselves to lands is open to the uncertainty of parol testimony.

My conclusion is that the lien of the original assessment in this case attached to the land, not when the work was completed but when the assessment was confirmed.

Upon this view, the conclusion of the supreme court may be supported in accord with principles already established.

Assessments of this sort have been treated as adjudications having the force of judgments, so long as unmodified and unvacated, in respect to moneys paid thereon. *Davenport v. City of Elizabeth*, 12 Vroom, 362; *Campion v. City of Elizabeth*, 12 Vroom, 355; *Jersey City v. Green*, 18 Vroom, 627.

In *Campion v. Elizabeth*, *supra*, the action was to recover money paid on an assessment which had been afterwards vacated. But it appeared that after the vacation, a new assessment had been imposed to as great an amount. The circuit court had denied the right of recovery, holding that the proceedings to assess and reassess were a unit, resulting in the substitution of the new assessment for the former one. The case was affirmed in this court, upon grounds which indicated, although they did not require, a concurrence with the view expressed in the circuit.

In *Cross v. Hayes*, 16 Vroom, 12, the supreme court held that an assessment of this sort was a mere determination of the amount which, on the basis of benefits conferred, should be returned to the public, and that an unsuccessful effort to levy this form of tax might be followed by a successful one, truly measuring the burden which the land should bear and which should take the place of the former one. This case was affirmed in this court, upon the opinion read in the supreme court. *Cross v. Hayes*, 16 Vroom, 565.

So it has been held that in making a reassessment the assessing officers should determine the liability as of the date of the first assessment. *Johnston v. Trenton*, 14 Vroom, 166.

In this court, in a suit to recover the excess of a payment made on an assessment afterwards vacated, over the amount of a reassessment, it was held that the amount of the reassessment was to be charged against the payment as of the date of the first assessment, and interest could be recovered only on the balance. *Jersey City v. O'Callaghan*, 12 Vroom, 849.

From these cases it appears that proceedings

of this kind have a sort of unity. When an assessment is made, it becomes a lien, if the statute so directs, at a time fixed by the confirmation or other similar act. If thereafter proceedings are taken resulting in affirming, or, at least, in not disturbing the foundation of the assessment, viz.: the making of the improvement, but disaffirm and annul the adjudication fixing the amount to be imposed, then if a reassessment is provided for, the latter (although separated from the first assessment in point of time) is, in intentment of the law, a single procedure with the former, and a mere revision of the adjudication. It relates back to the original assessment and takes practical effect, as to liability, as to drawing interest, and in my judgment as to becoming a lien, as of the date of the original assessment.

So in the case before us, the original assessment adjudged that the expenses of the improvements were to be paid in respect to specified property in specified amounts, which, on its confirmation, became liens. When this adjudication was vacated the property was not exonerated from a liability, but remained liable to the true amount and proportion of the expenses when imposed in the legal continuance of the proceeding. When the true amount was determined it became a charge as of the date of the original assessment.

The case of *White v. Stretch*, 7 C. E. Green, 76, presented the same question now before us. The conclusion reached by *Chancellor Zabriskie* accords with the views here expressed. He says:

"But the assessment was merely the mode of ascertaining the share of the cost of the sewer to be paid by these lots; they were liable to pay for the cost of the sewer from the time the proceedings were completed by the confirmation of the first assessment. That liability was the real incumbrance. It existed at the date of the deed, and it was never for a moment removed; the same judgment which set aside the assessment, affirmed the proceedings which created the incumbrance, and affirmed the continuance of that incumbrance by appointing commissioners to ascertain the proportion which each lot should pay. If, then, the cost of this sewer was an incumbrance on these lots at the date of the deed, and that incumbrance has never been removed, but the only change has been that the assessment of the amount which is the share of these lots has been changed, the conclusion is inevitable that White is liable to relieve the premises from it."

The present chancellor has presented a similar view of the subject. *Commissioners v. Linden*, 18 Stew. 27.

It is on the grounds above stated that I approve the result arrived at in the supreme court, and shall vote to affirm the judgment before us on this writ of error.

For affirmance—The Chancellor, Dixon, Magie, Van Syckel, Brown, Clement, Cole, McGregor, Paterson—9.

For reversal—None.

Lehman MOORE, *Appt.*,

v.

Robert B. S. DIAMENT *et al.*, *Repts.*

Where a bill is filed to restrain the sale, under execution, of personal prop-

erty, and upon the application of the complainant the property is delivered to him by order of the court, with leave to use it, on his giving bond to return it when ordered by the court, the court has the power, on dismissing the bill, to order that the complainant return the property or account for the value of it, less loss, if any, by unavoidable accident.

(Decided ——— — 1886.)

APPEAL by complainant from a decree of the Court of Chancery, in favor of defendants in a suit to settle the rights of creditors of Horace Hammell and to enjoin a sale. *Reversed.*

The decree appealed from was advised by *Vice Chancellor Bird*, who filed the following conclusions, wherein the facts appear:

This suit is instituted to settle the rights of certain creditors of Hammell to the goods and chattels named in the bill. The complainant claims them under a bill of sale, and the defendants, Diamant, the First National Bank of Camden and Benner, claim them under levies upon executions issued upon confessed judgments. The dealings between the complainant and Hammell, which ripened into the bill of sale, will appear in the recitals hereafter. It will be quite difficult to so formulate a statement as to fully express all that may be justly implied from the transactions between these parties, Moore & Hammell.

The defendant Hammell was a drayman, owning fourteen drays, and generally twenty-four to twenty-six horses and harness, and other things necessary to carry on such business.

Moore went into Hammell's employ in the year 1871. He then had, or he claims he had, \$500. This he placed in the hands of his brother, but when he cannot tell. Hammell paid Moore \$15 a week for his services from 1871 to the year 1879. During this interval Moore claims that he made \$2,400 by investments in Pennsylvania railroad securities, and \$800 out of some oil stock.

During all the period from 1871 to January 1, 1879, Moore made out bills for Hammell, and after the second year, in addition, would take orders to the foreman and occasionally collect a bill. That is all he did. After January 1, 1879, he says:

"I did the same, but worked harder, because I felt that I had more responsibility, and that I was doing that for myself, and not Mr. Hammell only."

Moore says that on January 1, 1879, he and Hammell entered into a copartnership in this dray business. He says that he proposed the partnership to Hammell, and asked him if it would be agreeable, and that Hammell replied:

"That it would be agreeable, and that he would be very glad to, as he had other business to attend to; that he and Mr. Brown expected, if they could get a suitable place, to go into the wholesale grocery business, and his time would be so taken up that it would be necessary for someone equally interested to look after the business; so, under the former arrangement, I agreed to go in with him; I was to pay him \$5,000 for the one half interest in

the business; I paid him \$3,000 in cash, and the balance out of the profits of the business."

There was no estimate made of the value of the horses, mules and wagons. Moore says that Hammell said that they might not be worth that much money, but "he considered the business worth some good will, not stating any amount." He produced a receipt signed by Hammell, dated January 10, 1879, for \$500, "on account of half interest in teams and business, consisting of twenty-four horses, fourteen wagons and all double heavy harness." He says he paid \$1,500 on the 13th of the same month, and \$1,000 on the 18th. For the last two payments he took no receipts. He says that a little over \$1,800 was paid out of the profits of the business for the first year, ending December 31, 1879. The balance, about \$186, was paid out of the profits of the business the following year, leaving a balance due him of over \$2,000.

It appears that Moore had the whole \$2,000, which comprised the first two payments by him, at the time when he made the first payment of \$500; he had it in his house and had had it there four or five years; and I infer he also had by him \$300 additional, for he says this, too, he had had by him three or four years, and had kept it in the cellar. According to his statement, then, he really had in his own possession and unemployed about \$2,300 at the time he made the first payment of \$500, yet he only paid the \$500. Then in a few days he paid \$1,500 more and takes no receipt, still retaining \$300 of his funds unemployed, and afterwards adds that sum to \$700 which he says he borrowed and paid to Hammell without taking any receipt.

This is the substance of the statement made by the complainant, showing how the copartnership was formed and how he paid the alleged consideration.

According to his statement he continued to do about the same work after the formation of the copartnership that he did before, when he only received for the like services \$15 per week.

It is important to observe that there was nothing said or done to indicate to the public that the complainant had any interest in the business. The business had been carried on for years in the name of Hammell, and Moore says the agreement was that it should still be carried on in his name. And it was so carried on in every transaction except in five or six cases; and in those, from all that I can gather, the transactions were exclusively with Hammell himself, so that the public was not informed of the act done. These were dealings between Hammell on the one hand and a firm of which Hammell was a member, by the name of Hammell & Mellor. This firm sold to Hammell certain goods, and the bills were receipted by Hammell in the name of Hammell & Moore. These receipts were given towards the close of the copartnership and after the formation thereof about two years.

Moore says that it was agreed that the business should be carried on in the name of Hammell, because Hammell did not want a neighbor by the name of Marshall to know that he had taken a partner, since Marshall himself had been anxious to be a partner with Hammell; and yet Moore leaves the impression that Ham-

mell told Marshall of the partnership in a few days.

I cannot but conclude if a partnership was formed, or if Moore had any interest whatever in the goods and the business, that it was the intention of the parties to keep the partnership, or such other interest as may have been created, a secret.

Besides the above fact that the parties had an understanding that it should not be published, it is very suggestive that they kept no books of account. We have here two men doing business as partners, the profits of which are several thousand dollars a year, carrying it on in the name of one, without the slightest evidence to show Moore's interest in those profits in case of his death, and without the slightest evidence to show his interest in goods and chattels except the receipt for \$500. And in case of Hammell's death Moore had nothing by which he could establish any payment of interest beyond the \$500.

I say there were no books of account; but it is said as between themselves they have the equivalent of books in the numerous slips of paper produced. Moore says that Hammell kept all the transactions of the concern on slips of paper, by which a settlement was made, and the balance due to the one or the other ascertained and exhibited on the paper. He produces a large number of such slips or bits of paper, some of them being note paper of the ordinary size, while some of them are pieces of blank leaves of day books or ledgers, two or three or four inches in width, while some others are plain bits about three or four inches square. In some instances the whole week's work is presented on a single piece and in many on two or more. It is due to complainant that one or two of these be given. • I will copy exhibit No. 8, which was offered to show the transactions for the week ending February 14, 1880. On one side of a half sheet of note is:

"February 14th, 1880.

Theodore.....	\$ 7 00
Andrew.....	6 00
Shaffer.....	3 25
Blange.....	8 00
Dwaul.....	9 00
Johnson.....	9 50
Brown.....	8 00
Jackson.....	12 00
Gale.....	10 00
Chick.....	10 00
Wolfe.....	10 00
Stanton.....	15 00
Harris.....	15 00
Martin.....	10 00
J. Wood.....	8 00
	3 00
A. Jenkins.....	10 00

\$158 75

February 14th."

On the other side is:

Wages.....	\$158 75
B. & P.....	92 14
Camden.....	98 25
Carson.....	46 94
H. H.....	15 00
Atlantic.....	18 00

L. Moore.....	\$ 5 00
L. Moore.....	112 60
Sailor.....	90 58
Moore.....	15 96
Moore.....	25 88
Moore.....	1 50

\$251 47

Stanton.....	\$186 18
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\$ 40 69

226 82

H. H.....	\$5 50
-----------	--------

\$488 79

419 08

Drew.....	\$64 71
-----------	---------

24 71

H. H.....	40 00
-----------	-------

John.....	6 00
-----------	------

Due from H. H.....	\$46 00
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February 14th."

The statement for the next week, being exhibit No. 9, is on two slips or bits of paper. The general characteristics are like those given above. In the list of items like the one given above, commencing with "wages," is the additional item "hay, \$5.04," and "discount, 60," and "Seifert, \$15." The totals are thus used producing such balance as appears:

Moore.....	\$267 75
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Stanton.....	69 60
--------------	-------

\$437 85

P. D. H.....	3 11
--------------	------

\$440 46

458 11

Due H. H.....	\$20 76
---------------	---------

8 11

\$17 65

3 71

\$18 94

February 21st.

Exhibit No. 10 is quite similar. Under the list beginning with "wages" there is an item of "discount, \$1.65." The totals are thus used:

\$598 18

528 80

\$73 38

Tickets.....	12 50
--------------	-------

\$60 88

Cash.....	30 00
-----------	-------

Due from H. H.....	\$80 00
--------------------	---------

Less.....	5 00
-----------	------

\$25 00

Less tickets.....	25 00
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February 28th.

Exhibit No. 12 closes thus:

	\$585 46
	508 82
Cash	\$26 64
without more, not saying to whom the balance is due, or from whom.	
On exhibit No. 13, under the list commencing with "wages" as above, is this item, "cash, \$25.25;" additional. The balance due on this paper is expressed thus:	
Due H. H.	\$88 87
March 22d, ticket	12 50
	\$96 87
Less Benner's check	84 60
	\$61 77

Exhibit No. 14 has some characteristics of its own. In the list beginning with "wages" is "discount, \$1.37," and "cash, \$28." Then the balance is attained by these figures:

	\$827 24
	490 48
	\$336 76
Seifert	100 00
	\$236 76
Bills	71 24
	\$165 52
October 2d	61 71
	\$108 75
October 6th	91 75
	\$195 50
Due from H. H.	6 98
Ridgeway	
	\$202 48
Due from H. H.	15 00
Less cash	
	\$187 48

After the first few exhibits, the letter "C," appears in the list, with the item "wages," with small items, as "15.48," opposite, and also the word "drawer" in with other items of a few dollars (less than \$15) up to \$30, \$40, and still higher.

I have presented these statements and results of statements for the purpose of showing why I have said that it seemed to be the desire to keep the relations of these parties a secret, in case there really was any other relation between them than master and servant or employer and employed. I can discover nothing on any of these papers (except the five or six above referred to), that in the least distinguishes the complainant from any other man named on them.

All inferences and deductions which are sought to be made in favor of Moore can as surely and as strongly be made in favor of Sailor, or Stanton, or Wood, or Martin, or Wolfe, or any other man who is named. The fact that in the footings and balances it is said "due from H. H." or "due to H. H." raises no presumption whatever that the balance was due to Moore or from Moore rather than to or from some one else. Indeed, the account being with Moore, as he claims, and he being present, as he swears, I think, if there can be a pre-

sumption of any kind from the papers themselves, such presumption inevitably is against the complainant.

Moore swears he became a partner in the business, and yet to all the world, as I read the exhibits, amounting to nearly one hundred, he acted simply as an agent or employee, as did Sailor, Stanton, Williams, Coffin and all the rest. He seems to have been on precisely the same level with them. There is nothing to show that he exercised any other rights or authority than they did. His name always appears on these papers in the same category with theirs, and I think in no instance otherwise. Take, for example, exhibit No. 24, and we have these words and figures:

Moore	\$567 97
Sailor	288 73
John	710 82
	\$1,561 51
	1,527 66

Due from H. H. \$39 85

Due from H. H., May 29th \$1,097 96

Due from H. H., May 29th \$1,137 81
Less for tickets

14th and 17th, H. \$1,112 81
June 5th, 1880, June 12th, due
H. H. 188 71

Due from H. H. \$924 10

What is there in this to show to whom these sums or any of them were due? Moore was by and often must have seen Hammell write "due H. H.," or "due from H. H.," but he never had him write "due to L. Moore," although his name appeared, as given above, on every paper as an agent or employee collecting large sums of money every week and paying them over, without protest, to Hammell. If Moore was a partner or had any other interest in the business such as the above named receipt would imply, there is no reconciling his conduct, except upon the theory that the parties were careful to conceal the fact from public view, for some unlawful purpose.

Again, and on the same point, Moore says that it was part of the agreement that each should have \$15 per week for his services. He says that he got his \$15 out of the money which Hammell placed in the drawer. Hammell, however, charged the business with his own \$15 per week in a distinct manner, as appears on the papers, while it nowhere appears that Moore was paid one cent. In many instances it appears that different sums, from less than \$15 to much above, went into the drawer; while in many others it does not appear that any at all did.

All this, perhaps, does not prove that there was no partnership or other relation between Moore and Hammell, beyond master and servant, but it does convince me that there was a studied effort on the part of Hammell to conceal that relation, and that Moore most fully assented thereto. There must have been some design in all this, hostile to creditors and obnoxious to good morals.

Who can believe that Moore would have

allowed Hammell to retain the title to at least \$5,000 of property in his own individual name and to deal with it as his own, and also to retain for so long a period of time the entire profits of the business in his own hands, without the slightest acknowledgment that would avail him in law or equity, unless there was a motive underlying all, that would not bear the light? It seems to me that every disinterested mind must incline to the conviction that Hammell designed mischief and that Moore was in collusion with him.

Look, again, at one of the five or six bills of goods above alluded to, and I think the conviction of illegal designs will be strengthened. It is true the complainant points to them as full proof of the partnership. I point to them for a different purpose, to show the collusion, to show that Moore knew of the concealment and must have known it was for some unworthy purpose. This bill, exhibit No. 79, is dated June 30, 1881, and reads:

"Messrs. Hammell & Moore, Bought of Hammell & Mellor."

Then follows a bill of meal and bran amounting to \$114.95, and the words "Rec'd payment, Hammell & Mellor."

The names "Hammell & Moore" and "Hammell & Mellor" are in Hammell's handwriting. The financial crisis in Hammell's affairs was approaching. He wanted a partnership, it may be, but for a purpose. He did not want it known. Hence "Hammell & Moore" deal with "Hammell & Mellor" by the hand of Hammell alone; but with all the rest of the world Hammell deals, not as Hammell & Moore, but as Hammell alone.

As to the same bills made out by Hammell to "Hammell & Moore" and receipted by him in the name of "Hammell & Mellor," it is quite worthy of attention that they are inconsistent with the fact in this: that Moore swears the business was to be carried on in the name of "Hammell," and not "Hammell & Moore." According to Moore's statement it was expressly agreed that his name should not appear.

It will be seen that I have not sought to determine whether or not a partnership was formed between Hammell & Moore, but rather to determine the effect of their relations to each other upon the rights of creditors. I am considering the rights of the respective creditors of Hammell, including Moore as a creditor. And in this case I think it matters not whether Moore be considered a creditor of Hammell as an individual or of Hammell as the representative of Hammell & Moore.

Thus matters stood until the year 1881 was well advanced. Hammell was, to all outward appearances, dealing with the world as he had been for very many years previously. So far as the world knew of Moore, he was the servant of Hammell, as he had been for seven years anterior to the year 1879.

On November 12, 1881, Moore says he and Hammell had a final settlement, and that his half of the profits was \$3,310.59, which was reduced, by the discovery of an error, to \$2,958.47. This included all the business for the year 1880 to November 12, 1881. Moore had received nothing but his \$15 per week. Moore says:

"I then told him if he would buy me out I

would sell out to him, clear and clean, for just what money I had in the concern, and would run the business on a salary that might be agreed on between him and me until such time as he was able to take charge of the business himself; if he wanted me no longer, I would step out without hard feelings towards him; he said no, he would prefer to have things continue as they were, and have Mr. Taylor draw up the proper papers of settlement; he did not seem to want to do that; I then wanted him to consent to give me a first class mortgage for all money that was due me, in the place of the bill of sale spoken of; he did not seem to want to do that; I then proposed for him to give me a judgment bond, and that I would not push him if he should get in a tight place, as long as no one else did; if no one else ever pushed him, I never would; he didn't seem to be willing to do that; so he agreed to give me the bill of sale as before stated."

He cannot give the date of this conversation, except that it was the latter part of November. He says:

"I was anxious to have this settlement made because Mr. Hammell's health was bad, and I thought he was liable to die at most any time."

He also says that he saw Hammell about November 21, and adds:

"It had been intimated to me, just the week previous, that he had some financial difficulty of some kind; I asked if it was so, and he said it was not; that he had no trouble of any kind, either financially or otherwise; that he didn't know of anything to give him any trouble in that direction."

However, Moore went to Hammell's physician, and inquired about his health, and learned that:

"Hammell appeared to be a man with a terrible weight on his mind of some kind, and asked me (Moore) if I knew of anything that would probably worry Hammell relative to his business, between him and me, or anything else; I told him I knew of nothing that would be likely to cause him trouble."

On the 23d of November he went to Hammell's house with Mr. Taylor, and "Mr. Taylor was instructed to draw up an article of partnership and a bill of sale." The parties met again, November 28, Mr. Taylor and George W. Moore, the brother of the complainant, also being present. He says that on this day papers were signed and afterwards destroyed. He says Hammell claims to have discovered a mistake. Moore says:

"He told my brother that he and I had been in business all this time and he had been receiving all the money; he was sorry it had run so long unsettled, and was willing and anxious now to have it settled up at once, and was willing to do anything that was right to make me safe."

He wanted Hammell to give him a bond and warrant of attorney, but Hammell refused. He also proposed that Hammell should give him a bond and mortgage.

George W. Moore was sworn. He was present at the interview last referred to. He says he conversed with Mr. Hammell, Mr. Taylor and Moore upon the best plan of making his brother secure. He says:

"My brother told him that if he could pay

him the balance due to him that would be satisfactory, and I think named the amount; Mr. Hammell said that he was not prepared to do that at that time; my brother then proposed a judgment note, and Mr. Taylor a chattel mortgage; Mr. Hammell refused to give the judgment note, and I said I didn't think a chattel mortgage was good in Pennsylvania."

I have given these interviews in detail because Moore says he did not know that Hammell was embarrassed; whereas, I conclude, from what appears above, that he did know, or had abundant reason for his anxiety. He had trusted Hammell for two years without even the slightest promise in writing, but at this juncture he insists on a bond and warrant of attorney, or a bond and mortgage, or a chattel mortgage, and accepts a bill of sale of all the goods and chattels used in the business, and would not be content until he was thus secured.

I think that the correctness of this conclusion will be impressed upon everyone who considers the foregoing statements in connection with the fact that at this time Hammell's liabilities to others besides Moore exceeded \$25,000.

But, following Moore and Hammell further, it appears that on December 2, 1881, Hammell executed a bill of sale to Moore for his undivided one half interest in the horses, wagons, etc. This, it was conceived, did not sufficiently secure Moore, and the papers were destroyed, and a new bill of sale executed, conveying the entire property in the horses and wagons to Moore, with a guaranty that the title thereto was in Hammell, and that he had the right to sell. At the same time articles of copartnership were entered into. In these articles is a clause which I cannot understand, except upon the theory that these parties were then and had been willing to lend themselves, each to the other, for illegal and fraudulent purposes. I refer to the clause in these words, viz:

"3d. That said partnership shall continue under the name of Horace Hammell, as heretofore."

Why not let the public know the whole truth, the exact condition of things? Why continue the deception? It seems to me that this is one of those false badges or tokens which the law condemns. Look at it from what standpoint I may, the whole scene is disclosed by the constant effort at concealment. Creditors are to be blinded, and put off their guard.

The said business is not only to be carried "on under the name of Horace Hammell as" heretofore, but it was expressly stipulated,

"4th. That said Lehman Moore shall suffer and permit the said partnership to use all of said personal property in the business of said partnership, but that the same not in any wise be considered partnership property, nor taken into account as the assets of the firm."

The proofs assure me that Moore knew that Hammell was in great distress, and could not stand the storm, and yet he solemnly aids him in hoisting a false signal. I cannot find and do not believe there is a case that gives countenance to such agreements, when creditors have been before the court, and especially when the fraud doer is complainant, and invoking the arm of the court to his protection. I speak with reference to all the circumstances of this

case. From the beginning, if the complainant is believed, Hammell presented to the world a false front, and the complainant for years encouraged the delusion.

But the complainant says no creditors were deceived, because none of them traded or dealt with Hammell on account of the partnership. That may be very true, most likely is; for I am not satisfied that any of them knew of the partnership, except Marshall, and to say that he did until after the 6th of December, 1881, is quite inconsistent with Hammell's desire for secrecy.

But the real question is not whether the creditors of Hammell dealt with him on account of this partnership business, so called, but whether that part of his business was so conducted as to obtain for him a false credit generally. This business, including good will and goods and chattels, was valued at \$10,000. There can be no doubt but that that went largely to make Hammell's credit good in every one of his transactions with bankers, merchants, and all others.

It seems to me that if the courts were to sustain this transaction, every man would be justified in doing business in his own name, while the absolute title to all his stock in trade could be secured clandestinely in another. As I have said, I do not think any of the cases since *Twynn's Case* go so far as to tolerate the actions of Moore and Hammell. I do not think these transactions were *bona fide*. For proof of this, consider Hammell's entire control of Moore and the business, from the commencement to the conclusion.

Moore seemed at no time to have any voice in the concern. If he was a partner at all, he was not only a secret but a silent partner. When the crisis came and Hammell consented to make a settlement, it appears that he dictated the terms, certainly the amount to be allowed Moore. And so potent was his dictation that after one result had been arrived at and the papers executed and delivered, as Moore says, Hammell, as I understand, demanded further reduction and obtained satisfaction. Then it was that Moore obtained a letter from Hammell to Mr. Taylor, directing the delivery of the bill of sale and articles of copartnership. For fifteen days Moore wanted possession of the papers (the bill of sale and articles of copartnership), but Hammell prevented it. Not once can I find that Moore asserted his pretended rights.

I conclude, therefore, that there was not that *bona fides* on the part of Moore which is called for by the authorities; *Sayre v. Fredericks*, 1 C. E. Green, 205; *Merchants Bank v. Northrup*, 7 C. E. Green, 58; 8 C. E. Green, 582; and consequently that the judgment creditors are entitled to the benefit of their levy on the goods in question. This is my view of the case, even though there was a delivery of the bill of sale at the time of its execution.

Hence it is quite useless for me to determine whether there was a delivery, in fact, of the alleged bill of sale, or not.

I will advise a decree in accordance with these views, sustaining the claims of the judgment creditors by virtue of their executions and levies as against the complainant's claim.

Mr. H. A. Drake, for appellant,
Mr. P. V. Voorhees, for respondents.

Reed, J., delivered the opinion of the court: Horace Hammell confessed judgments severally to the respondents, the defendants below. Upon these judgments executions were issued, and a lot of property used in the business of draying was levied upon as the property of Hammell. Moore then filed his bill in this case against the said judgment creditors to restrain the sale under said executions. Moore claimed by his bill that he and not Hammell was the owner of said goods. He sets up that Horace Hammell was engaged in the business of drayman in Philadelphia, with his principal stables in Camden, where he had a large number of mules, horses, wagons, etc.

He says that about June 1, 1879, he, Moore, having been employed as the clerk and book-keeper of said Hammell, purchased a one half interest in the business for the sum of \$5,000, \$3,000 of which he paid in cash, and the balance was to be paid out of the profits of the business.

He further says that he permitted his share of the profits to remain in the business until June 1, 1880, when it amounted to over \$3,000, and on June 1, 1881, it amounted (after deducting \$15 a week for living expenses) to \$4,500; that on the 6th of December, 1881, Hammell sold him the stock used in said partnership business for the sum of \$2,958.47, the amount then due after payment of the \$2,000 yet due for his interest in the partnership.

By virtue of this agreement for the sale of the said stock, Moore claims title thereto against the judgment creditors of Hammell, and asks the restraining order of the court of chancery to protect his property against a sale under their executions.

The vice chancellor refused this relief. In a very full and exhaustive review of the facts surrounding the transactions between Moore and Hammell, he found that the alleged partnership and sale was a fraudulent contrivance to defeat the creditors of Hammell. In this conclusion I concur.

There was no written evidence of the existence of the partnership until December 6, 1881, at the date of the alleged sale. Hammell was then hopelessly insolvent, and soon after gave the bonds with warrants to confess judgments, upon which judgments were entered. The existence of any partnership was not revealed by any change in the business, in any sign, or any important revelation, by Moore or by Hammell.

The evidence of the payment of \$3,000 in cash by Moore to Hammell is not credible, under the circumstances. He has a receipt from Hammell for \$500. The balance he says was paid within a few days thereafter. He had previously been working for Hammell for \$15 a week, and supporting himself and wife. He says that he had made some money in speculations in oil and railroad stock and in commissions on the sale of one or two houses. But Ridgeway, through whom the speculative enterprises were conducted, is not called. There is no testimony to corroborate his story as to the source of this large sum, and I am constrained to regard it as incredible. In this most important point of the complainant's case, such corroborative evidence as could, if the story was true, have been produced, or its absence accounted for, is entirely neglected. I conclude

that the arrangement of December 6, 1881, was fraudulent, and that the appellant was not entitled to relief.

The counsel of the appellant complains, however, that the decree, instead of merely dismissing the bill and dissolving the preliminary injunction, proceeded to grant affirmative relief to the respondents. A glance at the proceedings taken during the progress of the cause will disclose facts which gave the court of chancery the right to deal with the subject matter of the litigation. The bill prays that a receiver may be appointed to receive the moneys arising from the sale of the chattels, in lieu of an injunction of the sale, if the chancellor should deem such course equitable. Theodore B. Gibbs, the sheriff of Camden County, was appointed receiver.

On the 10th of January, 1882, on application of the counsel of the complainant, it was ordered that the complainant should have leave to use the chattels, etc., in the possession of the receiver, upon terms that he give bond, with security, for the return of them, when ordered by this court, in as good condition and repair as the same now are, loss by unavoidable accident alone excepted, and that said Moore should be at the expense of keeping, caring for and keeping in repair all of the said goods and chattels during all the time of his using the same. Under this order, made at the instance of the appellant, the property was delivered to him, to be used until the further order of the court. By this conduct on the part of the appellant, he submitted himself to the control of the court, in respect to the use and return of the goods. The court could not do otherwise than to make such an order as would place the judgment creditors in the position they would have occupied had the chattels not been delivered to the appellant. The terms upon which they were handed over to Moore were designed to effectuate that object.

The court of chancery had the right to make such order as would place the parties *in statu quo*. The decree, as made, however, after reciting that one or more of the horses had been sold or disposed of, ordered that appellant pay to the receiver the sum of \$4,683.50, the value of said chattels, as appraised by the appraisers, duly appointed by Gibbs, with interest from the time the goods were delivered to said appellant. Since then it has also been ordered that the said Moore, within three days after the service of a copy of the said order, return to the receiver all the chattels received by him under the original order, and the receiver and sheriff are by said order directed to appraise and sell the same.

I am constrained to adopt the conclusion that the order that Moore should pay the appraised value of the chattels with interest, during the term he was using them, is too stringent.

The obvious reason why they were handed over to Moore was to preserve the chattels, and to avoid the expense of their keeping. The degree of his responsibility was fixed by the terms of the order by which he got the possession.

He was to feed the animals, and care for the other chattels, and was to be allowed no reduction for the usual wear, but was to be allowed

a deduction for any loss resulting from unavoidable accident. He is to account to the receiver for the value of the goods at the time they came into his possession, less loss of any by unavoidable accident. The appraisal made by the sheriff's appraisers is not evidence of this value. If the property has been sold, then the difference between the proceeds of such sale and such value of the property as ascertained is the standard of Moore's liability.

I think the decree should, in this feature, be modified, and the cause be remitted to the court of chancery for an ascertainment of the value of the goods as above indicated.

Decree unanimously reversed.

Inhabitants of Township of NORTH PLAINFIELD, *Appts.*,

v.

Isaac S. COLTHAR, *Respt.*

Where complainant gave to a township his **bond and mortgage** for a sum certain, to indemnify it to the extent of a specified sum per week against the **support of his wife** while she should be chargeable to the township, and the township received moneys on the bond and mortgage and he has demanded an account thereof, he is **entitled to file his bill** against the township for an account of the moneys so received by it, and for the payment of whatever may be due him.

(Decided ———, 1886.)

A PPEAL from a decree of the Chancellor, overruling demurrer to a bill in equity for relief. *Affirmed.*

The nature of the case and the facts and questions raised are set forth in the following opinion of the CHANCELLOR:

The bill states that the complainant gave to the defendants, the Inhabitants of the Township of North Plainfield, in the County of Somerset, in 1875, his bond in the penal sum of \$1,000, with condition that he should pay to the Township, or to the overseer of the poor thereof for the time being, the sum of \$3.50 a week every week thereafter, during and for so long a time as his wife, who was then chargeable to the Township, should be chargeable to it; that to secure the payment of the money according to the condition of the bond, he gave to the defendants a mortgage upon land of his in Somerset County; that that land was afterwards sold under an execution against him on a judgment recovered in 1876, and a deed given by the sheriff therefor in November, 1878; that after that time, but at what particular time the complainant cannot state, the defendants, as the complainant is informed and believes, received from somebody unknown to him \$750 or more upon the mortgage; that after the complainant gave the bond and mortgage, the overseer of the poor of the township went to his house and carried away all his household goods (of the value of about \$300) under pretense of applying them to the support of the complainant's wife; that the mortgage was canceled of

record April 11, 1879; that the bond is still in the hands of the officers of the Township, who refuse to deliver it up to him, although he has requested them to do so; that he has been informed that the money received for or upon the mortgage was deposited with the treasurer of the Township on the 18th of April, 1879; that at the time of giving the bond and mortgage the complainant gave the overseer of the poor of the Township notice that he would make an arrangement for the support of his wife and provide a place of residence for her; that shortly after that time he gave notice to the overseer of the poor and to the township committee and to his wife that he was ready and willing to support her; that he had provided a place for her in a family in Plainfield, but his wife refused to go there and remained of choice at the almshouse of the defendants; that he gave the township committee and the overseer of the poor notice not to pay any money to her; that shortly after the giving of the bond and mortgage he requested his wife to live with him, but she refused, and he gave notice to the township committee and overseer of the poor of such refusal; that after the giving of the bond and mortgage his wife went out of the Township of North Plainfield into the County of Essex and resided there for a long time, and that in December, 1881, he filed a bill in this court for a divorce from her on the ground of desertion, and obtained a decree of divorce in the suit July 31, 1883.

The bill also states that he has applied to the officers of the Township for an account of the money received by them from the mortgage, but they have refused to give it. The bill prays an account of the moneys received upon the bond and mortgage and of the value of the household furniture, and for a decree for the payment thereof to the complainant.

The defendants demur on the ground of vagueness in the charges of the bill, want of particularity as to time, etc., and on the ground that the complainant has a remedy at law.

The substance of the bill is that the complainant gave the Township his bond for \$1,000, conditioned to indemnify it to the extent of \$3.50 a week against the support of his wife while she should remain chargeable to the Township. The Township received \$750 or more from the mortgage given to secure the payment of the bond. He insists that his wife was not chargeable after the giving of the bond and mortgage, and that she ceased to be his wife in July, 1883. He claims that he is entitled to the money received from the mortgage, or at least to an account of it, and files his bill to obtain the account and payment of whatever may be due him.

The statements on which he seeks to charge the Township are definite enough. He says that it received the money after November, 1878; that the mortgage was canceled of record April 11, 1879, and that the money was deposited in the treasury of the Township April 18, 1879. The relief sought cannot be obtained at law. The complainant is entitled to the delivery of his bond to him if the defendants have no lawful claim upon him thereunder. They have received money of his on account of it, but how much he cannot say; and he seeks a discovery. He could not compel them to de-

liver up the bond to him, in a suit brought against them at law to recover the money which he claims to be due to him from them.

The demurrer will be overruled, with costs.

Mr. J. H. Jackson, for appellants:

The bill resolves itself into: 1, a bill for account; or 2, a bill for discovery. It cannot be maintained as either.

Nesbit v. St. Patrick's Church, 1 Stock. 76; *Jewett v. Bowman*, 2 Stew. 174; *R. R. Co. v. Hopcock*, 1 Stew. 281; *Seymour v. Long Dock Co.* 5 C. E. Green, 396; *Little v. Cooper*, 2 Stock. 276; *Brown v. Edsall*, 1 Stock. 256.

The bill must show clearly the grounds of equity. They must not be left to inference.

Willard, Eq. 92.

Messrs. Wilson & Suydam, for respondent.

Per Curiam:

This decree unanimously affirmed, for the reasons given by the Chancellor.

Joseph J. READ, *Plff. in Err.*,
v.

Mary A. RIDDLE.

Where one entered into a contract for the purchase of lands, through the agent of the vendor, and thereupon made a payment to such agent on such lands upon his promise to return the money paid in case it should turn out that his principal's title was not good, and the sale fell through because the vendor had not a good title, such agent is liable to the purchaser for the return of the money.

(Decided ———, 1886.)

ERROR to the Circuit Court of Atlantic County, to review a judgment in favor of plaintiff in an action to recover back part of the consideration paid on a contract to convey land. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Garrison & French, for plaintiff in error:

A fatal bar to recovery by plaintiff against Read is that there is an entire lack of privity between them.

Colvin v. Holbrook, 2 N. Y. 126; *Stephens v. Babcock*, 3 Barn. & Ad. 854; *Baron v. Husband*, 4 Barn. & Ad. 611; *Bamford v. Shuttleworth*, 11 Adol. & El. 926; *Elliott v. Snartwout*, 10 Pet. 187 (35 U. S. bk. 9, L. ed. 873); *Stephens v. Bacon*, 2 Halst. Law, 1; Whart. Agency, § 517.

No subsequent change of agents could alter the status of money already received by an agent; nor could it defeat his right to payment for services rendered, or his lien on the funds in his hands for such services.

Shepherd ads. Hedden, 5 Dutch. 384; *Vreeland v. Vetterlein*, 4 Vroom, 247; *Derrickson v. Quimby*, 14 Vroom, 878; *Cooley v. Barcroft*, 14 Vroom, 863.

An agent having received \$500 for vendor, part payment on a written contract signed by his principal, is liable to be sued for it by his

N. J.

principal. In such a suit, it would be no answer that one Mary A. Riddle had recovered a judgment against him for that same amount.

Broom, Legal Max. "res inter, etc." cases cited.

Stephens v. Bacon, 2 Halst. 1; Whart. Agency, § 517.

"Whenever an agent is estopped from disputing the principal's title to the fund, then the agent cannot be compelled to pay it back to the third party."

Whart. Agency, § 517.

To give plaintiff's case the most favorable aspect it only amounts to this: that as Read did not represent all the vendors, the \$500 paid to him was payment on account to those whom he did represent. If this be true, then it was certainly error for plaintiff to pay over this sum a second time in settling with those whose agent she had once acknowledged him to be. Read as agent has a lien on this fund, and no one can sue him for the fund excepting the person or persons for whom he received it, and against whom he has an offset. This lien is irrespective of whether the contract was completed through Read's instrumentality or otherwise.

Chitty, Cont. 547; *Wilkinson v. Martin*, 8 Car. & P. 1; *Murray v. Currie*, 7 Car. & P. 584; *Shepherd ads. Hedden*, 5 Dutch. 384; *Vreeland v. Vetterlein*, 4 Vroom, 247; *Derrickson v. Quimby*, 14 Vroom, 878; *Cooley v. Barcroft*, 14 Vroom, 863.

Messrs. Thompson & Endicott, for defendant in error.

Runyon, Chancellor, delivered the opinion of the court:

Mrs. Maison, through Read as her agent, sold to Mrs. Riddle a tract of land in Atlantic City, for \$25,000. There was a written agreement between the parties, dated March 30, 1883. The deed was to be delivered on or before April 27, in that year. On making the agreement, Mrs. Riddle paid to Read \$500 on account of the price. The sale fell through because Mrs. Maison had no title in fee to the property. She had only her dower therein as widow of Peter B. Maison, who died intestate, seised of the land. He left several children. Mrs. Riddle afterwards got title to the premises by deed from Mrs. Maison and the children, but such conveyance was not under or in pursuance of the agreement between her and Mrs. Maison, but in execution of another subsequent one between her and the heirs. When Mrs. Riddle paid the \$500 to Read, he promised to return it to her in case it should turn out that Mrs. Maison had not a good title.

This suit was brought by Mrs. Riddle against him to recover the \$500. When the action was begun he had not paid the money over to Mrs. Maison. At the trial his counsel asked the court to charge that the action could not be maintained because Read received the money merely as the agent of Mrs. Maison, and the payment to him was in fact payment to her. The judge refused to so charge and, on the contrary, charged that under the evidence the action could be maintained. The charge was correct.

Under the circumstances, Read was liable to Mrs. Riddle for the return of the money. Where an agent, being a stakeholder, receives a deposit,

which he pays over before the conditions upon which it is to be paid are fulfilled, he is liable for the deposit. *Ewell's Evans, Agency, 818; Story, Agency, § 206.*

In *Burrough v. Skinner*, 5 Burr. 2639, it was held that an auctioneer was liable to an action by a bidder, to recover the deposit, where the latter had sufficient reason not to proceed to complete the sale, and the money had not been paid over to the principal.

To the same effect are the cases of *Edwards v. Hodding*, 5 Taunt. 815, and *Gray v. Gutteridge*, 3 Car. & P. 40.

Where payment of money, through a mistake of fact, is made to an agent, he is liable to the payer, unless, without notice, he has paid it over to his principal or has given him credit for it. Add. Cont. §87.

And it is held that if he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is precluded from insisting upon the defense that he has paid it over. *Edwards v. Hodding, supra.*

In the case in hand, Read expressly promised Mrs. Riddle that he would return the money to her in case it should turn out that his principal's title was not good. There is no error in the judgment.

It should be affirmed.

For affirmation—The Chancellor, Chief Justice, Depue, Dixon, Magie, Parker, Van Syckel, Brown, Cole, McGregor, Paterson—11.

For reversal—None.

Alice BUCKINGHAM, *Appt.*,

v.

James LUDLUM, *Respnt.*

Case affirmed on opinion reported in 2 Cent. Rep. 197.

(Decided ———, 1886.)

APPEAL from a decree advised by *Vice Chancellor Van Fleet*, sustaining a demurrer and dismissing a bill to set aside a deed made by complainant to the defendant. *Affirmed.*

The facts and questions raised are fully set out in the opinion of the Vice Chancellor, reported in 2 Cent. Rep. 197.

Messrs. Coult & Howell and **William Jay**, for appellant.

Messrs. McCarter, Williamson & McCarter, for respondent.

Mr. F. W. Stevens, for Andrew Kirkpatrick, receiver, etc.

Per Curiam:

This decree unanimously affirmed, for the reasons given by the Vice Chancellor.

RIEGLSVILLE DELAWARE BRIDGE CO., *Ptf. in Err.*,

v.

John D. BLOOM *et al.*

Plaintiff claimed title to land under a deed from S. which had been lost. The

evidence of title under the lost deed consisted of a statement in a subsequent deed for other land from S. to a third person, that one of the lines of the land thereby conveyed ran "thence by lands of" plaintiff. Held, that that statement was, standing alone, too indefinite to control the title to the land in dispute; that it by no means indicates that the whole of the line was along those lands.

(Decided ———, 1886.)

ERROR to the Circuit Court of Warren County, to review a judgment for defendants in an action of trespass *quare clausum fregit*. *Affirmed.*

The facts and questions presented are stated in the opinion.

Mr. J. G. Shipman, for plaintiff in error.

Mr. W. H. Morrow, for defendants in error.

Runyon, Chancellor, delivered the opinion of the court:

This is an action of trespass *quare clausum fregit*. The defendants pleaded freehold title in John M. Smith, and entry, etc., by them as his servants and by his command. The plaintiff claimed that it had had a deed for the land in question from Smith, but had lost it, and it claimed also that it had had twenty years' adverse possession.

The evidence of title under the lost deed consisted of the statement, made in a subsequent deed for other land from Smith to Benjamin Rieggle, that one of the lines of the land thereby conveyed ran along land of the plaintiff, and testimony that a verbal allegation was made by Jesse Rieggle, a former president of the Company, but now deceased, to and in conversation with Smith, as to the dimensions of the tract conveyed by the lost deed, that they were "eighty feet from the abutment of the bridge, and forty feet each way." If those were the dimensions, they would embrace the land in question. And if the land conveyed to Benjamin Rieggle by the deed from Smith was, in the description thereof in that deed, bounded along the whole of its north side by the land of the Company, it would be an indication that the land in dispute was conveyed by the lost deed.

The defendants, however, insisted that that boundary was only partially along the land conveyed by the lost deed, and that it was intended merely as descriptive of the direction of the northerly line of the land conveyed to Benjamin Rieggle. The court charged that that statement in the Benjamin Rieggle deed was, standing alone, too indefinite to control the title to the land in dispute. That view was manifestly correct. The expression in the deed is "thence by lands" of the Company. This description of the line by no means indicates that the whole of the line was along those lands. If it ran partially so only, the line would answer the description.

The evidence on the part of the plaintiff does not show what answer Smith made to the allegation made by Jesse Rieggle to him, as to the dimensions of the land conveyed by the lost deed, nor that he made any. On the other

hand, Smith denies that the allegation was made.

There was no error in the charge or refusal to charge upon the subject of title by adverse possession. The possession under which the claim was made was possession by Wolfinger, the plaintiff's tollgate keeper. But he obtained and held possession by and under express permission of Smith. It was not adverse.

The judgment of the Circuit Court should be affirmed.

For affirmance—The Chancellor, Depue, Dixon, Magie, Parker, Reed, Van Syckel, Brown, Clement, Cole, McGregor, Paterson.—12.

For reversal—None.

Amos CHAMBERLAIN, *Appt.*,

v.

Richard H. MANNING *et al.*, *Respts.*

Where complainant purchased by verbal contract, of an agent who had merely authority to solicit purchasers (the principal retaining the right to reject any sale by him), a piece of land, and paid the agent \$10, and by the agent's authority entered upon the land and dug a trench and deposited some timber for a building, the principal subsequently rejecting the contract on tender of performance, specific performance will not be decreed.

(Decided ———, 1886.)

APPEAL from a decree advised by Vice Chancellor Bird, dismissing a bill in equity to enforce an alleged contract for the sale of lands. *Affirmed.*

The facts and questions raised are set forth in the following opinion by the VICE CHANCELLOR:

This bill is filed to enforce an alleged contract for the sale of lands. The defendant Manning had authorized one Tintle to solicit purchasers for lots of land in a tract of 100 acres or more. Tintle had procured persons to purchase. His authority was by parol. He never signed for Manning. He accepted offers and promised conveyances; but in all cases the negotiations rested until Manning made, executed and delivered a deed. It seems that a few sales of lots were effected in this manner. I mention the fact because the complainant pressed it on my attention. But I cannot see that it aids him in the least, for it does not appear that Manning was bound in any case, or could have been in the law, until the delivery of the deed. The complainant says:

"I contracted with James Tintle, on the 28th of February, 1878, for a lot of land."

He also says he made a bargain on the 4th of March. He says:

"I went down on the 5th, the next day; he showed me where he had run off the land, showed me the corner, exactly where I stuck my cane in; the contract was on the 28th of February; he showed me where he had run it out; I said to him: 'It is just where we bargained for it;' he said: 'Yes;' I said: 'All right,

N. J.

I find no fault; now I am ready to pay for it at any time; I want to go right to work at it;' 'Well,' he said, 'here is your corner, borders and lines; I now deliver it over to you and give you possession; go on as soon as you have a mind; we will make you a deed in a few days or a few weeks.'" He says: "I pointed out to him where I wanted the lands to be, asked him his price, and he told me, and I said I would give it; his price was \$150; Tintle said he would get Roome to run the lines." He says: "Tintle showed me the lines which he had run, gave me the lines and borders where they struck."

He says that he took possession of the lot on that day, March 5, 1878, and went to work on it. He says Tintle gave him possession. The complainant says that after this, March 25, he saw Manning in New York, and that he told Manning that he had purchased the lot, and that Manning said it was all right, and that he told Manning he was about to build on it. The complainant says he again saw Manning, in the latter part of May, and said to him:

"I had bought that property, and I began to feel as if I wanted a deed for it now; and he said: 'All right;' he said he expected to be up a few days before, and didn't come; he said the reason why he didn't come was he was about negotiating with another party, he didn't tell me who the other was, for the sale of the rest of the land; I said: 'Has that got anything to do with me?' he said: 'No, what is done already is all right;' he said it had nothing to do with me.

Q. How far had you progressed with your building at that time?

A. I forget just whether I had it raised then or not; I had the timber all got out ready; I don't know whether I had it raised or not; I can't recollect exactly, but I had been working at it and getting out all the time."

He saw Manning again the latter part of July; then Manning told him that he had sold the land to Howell & Noble, the other two defendants; he says Manning told him that Howell & Noble would make a deed to him; he paid \$10 to Tintle on account, May 10, 1878; he spoke of the deed, and said to Tintle: "You are so slow about the deed;" "No question about it whatever—oh, no, not the slightest," he said; then I said: "I will make you a payment."

This was before he had seen Manning and had been told by him that he was about to sell to others. As to improving the lot at this time in May, he says:

"I built a foundation and got timber out for all the building.

Q. Where was the timber?

A. It was got out principally at Newfoundland, and carried down there; the foundation was laid, the stone was brought up there and the foundation was laid; the ditch was dug; there was no cellar under it; the ditch, where we laid the wall, was dug.

Q. Where was the timber at that time?

A. It was some on the ground, and some between there and Newfoundland; carted at my convenience, whenever I could.

Q. Have you erected a building upon the lands?

A. Yes, sir; it is forty feet one way, and sixteen feet the other way; there are eight rooms, counting the hall room below.

Q. How near was the building completed on the 12th of June of that year?

A. I can't just recollect; I had all the timber; I don't recollect exactly the time; I got it out at that time; I must have had it raised, and partly enclosed; I know I had a spree there, 4th of July."

The complainant then tendered the money to Manning in June, 1879, and demanded a deed; Manning refused to accept the money and to make a deed; Howell & Noble had purchased the entire tract of the defendant Manning; the complainant then made a tender to them and demanded the deed; they also refused.

If the complainant's statement is considered, it will be seen that he undertook to purchase of an agent who had no authority to execute any writing; it will also be seen that no writing was executed; it will likewise be seen that this agent delivered possession of some part of the larger tract to complainant, and that the complainant, at some time thereafter and before the sale to Howell & Noble, made some excavations for a structure of some kind on the premises; he is only certain in his own mind that the ditch was dug; it is not certain that the timber was on the ground.

This is the complainant's best showing. I think it does not make a complete case. He has no standing except on the doctrine of part performance. He claims that he entered into possession under the contract. I do not understand that simply going upon a vacant parcel of ground is enough to satisfy the demands of the adjudged cases which prevail against the statute to prevent fraud.

But the complainant insists that he made valuable improvements in good faith, relying upon his contract, supposing the agent had power to deliver possession. I cannot conclude that the alleged improvements were made before the sale to Howell & Noble, nor before Chamberlain had notice of such sale. As intimated above, I cannot determine that he had made any substantial improvements. Judging from his own statements, there was only a trench dug and some timbers on the ground and some at Newfoundland.

But still, from the complainant's side, the material inquiry is: Was the building erected at the time of the sale to Howell & Noble? Notwithstanding what I have said above, respecting the complainant's own statement, yet both he and his witnesses assert that the building was up and partially inclosed. This is emphatically denied by the defendants and their witnesses. The contradiction is full and complete. I have given great consideration to the numerous conflicting statements, in the hope of some reasonable reconciliation, but in vain. In such case it is not enough to say that the complainant's witnesses affirm positively that there was a house, while the defendants' witnesses only speak negatively. I can see no more reason for the latter to be mistaken than the former; they had equal opportunities for seeing. To insist that a negation cannot be established as against an affirmation in many like cases, is a mere mockery of our most common experience.

But let us look at this claim of possession further. Was it under the contract? How did he obtain it? Chamberlain says that Tintle told him to take possession; and Tintle says he au-

thorized Chamberlain to enter. Tintle being a mere agent to solicit purchasers, with no authority to execute a writing or to make a conveyance, was the possession here claimed such as can be pleaded in bar of the Act? As intimated, I can find no satisfactory evidence which authorized Tintle to bind Manning. It seems quite plain that Manning always had the right of rejection, and especially in cases where he had not previously fixed the price. Manning says so, and there is no evidence sufficiently explicit to the contrary. Hence, I am bound to say that Chamberlain was not in possession under any contract. His possession was that of a stranger, and consequently unlawful. Such a possession never ought to be tolerated to bar a solemn Act of legislation, which legislation was enacted to prevent the mischiefs which seem to throng this case from its commencement to its conclusion. In all the exemplifications of the wisdom of this celebrated Act, I think no more conspicuous illustration can be found than the one before me.

I have looked at this case from another standpoint. Suppose the relation of the parties reversed, the defendant Manning being complainant; could he, at any time prior to his sale to Howell & Noble, have prevailed in a suit for specific performance? I think not. Chamberlain was not bound. He paid \$10 to Tintle, but that did not bind him; all the cases so adjudge. He had taken possession of the naked soil, under the agent, and perhaps dug a trench.

I cannot believe that any considerate judge would regard that a valuable substantial improvement which so changed the nature of things as to bind Chamberlain to a specific performance. If it be said that the person who makes the improvements is the only one who can claim the benefit of them, then I say as to this case there is want of mutuality, without which the law abhors specific performance.

I conclude that there was no contract within the statute, and also that there was no such part performance by the delivery of possession and making valuable improvements as would enable the defendants to avail themselves of their own wrong, unless the court should interpose.

I will advise a decree dismissing the complainant's bill, with costs.

Mr. Z. M. Ward, for appellant.

Mr. H. C. Pitney, for respondents.

Per Curiam:

This decree affirmed, for the reasons given by the Vice Chancellor.

For affirmance—The Chief Justice, De-pue, Knapp, Reed, Van Syckel, Cole, McGregor, Paterson—8.

For reversal—Dixon, Brown, Clement, Whitaker—4.

James A. HAND, *Appt.*,

c.

The Mayor and Common Council of JERSEY CITY, *Respts.*

The lien of an assessment made under the charter of Jersey City, for a street improvement, upon mortgaged premises, is paramount to that of the mortgage.

(Decided ———, 1886.)

APPEAL from a decree of the Chancellor in favor of defendant in a suit to foreclose a mortgage. *Affirmed.*

The case was heard by the Chancellor on the pleadings and agreed facts. His opinion is as follows:

On August 17, 1871, an assessment of \$259.42, made under the charter of Jersey City for a municipal improvement, a street improvement, upon the mortgaged premises, which are within the bounds of that City, was confirmed; and on the 12th of July, 1872, another of \$2,031.89, made upon them, under the like authority, for another improvement, a sewer, was confirmed. Those improvements were duly brought before the board of commissioners appointed under the Act, "to adjust unpaid assessments in Jersey City;" P. L. 1873, p. 442; and new assessments were made instead thereof.

The assessment on account of the street improvement was reduced to \$238.88, and the other to \$720.98. The assessments appear to have been confirmed except as to the amounts. The confirmation in the case of the first mentioned improvement took place in May, 1874, and that of the other in February, 1874.

The Act provides that the proceedings of the board shall be filed and recorded in the office of the clerk of the city, and that when so filed, the assessments made by the board, or a majority thereof, shall be a lien upon the property on which they are laid, and shall be collected in the same manner provided for the collection of assessments in the charter of the city.

The Act also declares that, when an assessment has been adjusted or confirmed by the board, it shall be a new assessment.

The complainant's mortgage was given and recorded in 1873, after the assessments, as originally made, were confirmed. The complainant insists that, inasmuch as the Act just referred to declares that the assessment by the board shall be a new assessment, and that such new assessment shall be a lien when filed in the city clerk's office, the lien of the assessment, as originally made, was lost, and that of the new one did not attach until 1874, and therefore is subsequent and subject to the lien of the mortgage. The lien of the assessments has priority over that of the mortgage, by force of the provision of the charter for collecting the assessments.

Under the construction which has been put upon like provisions in municipal charters, the assessments are a lien, paramount to any mortgage or other incumbrance. The charter declares (P. L. of 1871, p. 1155, § 151) that assessments shall be a lien from the time of confirmation until paid, notwithstanding any devise, descent, alienation, mortgage or other incumbrance thereof; and there is a provision for the sale of the property for a term of years to pay them, and that the purchaser at the sale shall hold the property against the owner or owners, and all persons claiming under him or them. There is also a provision for redemption by mortgagees or other incumbrancers, and for a record of the sales. Under these provisions, the lien of the assessment is paramount

to that of the mortgage. *O'Neill v. Dringer*, 4 Stew. 507; *Howell v. Essex Co. Road Board*, 5 Stew. 672.

There will be a decree accordingly.

Mr. James B. Vredenburg, for appellant.

Mr. Allan L. McDermott, for respondents.

Per Curiam:

This decree unanimously affirmed, for the reasons given by the Chancellor.

Benjamin A. VAIL, Receiver of the Woodbridge Clay Mining & Refining Co., *Appl.*,

James JAMESON, *Respt.*

1. A transfer or mortgage of the property of an incorporated company, although made when the company was insolvent and to prefer creditors, is not prohibited by statute, nor objectionable in itself.

(Decided ———, 1886.)

APPEAL from an order advised by Vice Chancellor Van Fleet, in favor of petitioner in a petition for an order to compel the receiver to pay over the proceeds of the sale of goods and chattels mortgaged to petitioner. *Affirmed.*

The facts appear in the opinion.

Mr. Ephraim Cutter, for appellant:

Claimed, 1. That under the provisions of sections 72 and 77 of the "Act concerning corporations" (Rev. p. 175) any mortgage or conveyance of the property of a corporation, after it becomes insolvent, is null and void as to creditors. Previous to the Revision of 1874, such had been the law.

Holcomb v. New Hope Bridge Co. 1 Stock. 457; *Suydam v. Bank of New Brunswick*, 2 Green, Ch. 114; *State Bank v. Bank of New Brunswick*, 2 Green, Ch. 266; *Stratton v. Allen*, 1 C. E. Green, 229; *Wells v. Railway Rubber Co.* 4 C. E. Green, 402; *American Co. v. Paterson Co.* 7 C. E. Green, 72.

2. That although the second section of the "Act to prevent frauds by incorporated companies" (Nixon's Digest, p. 406) was not included in the Revision, yet the remaining portions of the Act, including section 15 (section 80 of revised Act), are unchanged; and their language is such as to require the same construction of the Act as had previously been given to it.

3. That the Receiver clearly had a right to recover back the sum of \$107.80, paid to Jameson, after the making of the restraining order, and if so, was entitled to have it offset against the claim of Jameson.

Rev. p. 191, § 77.

4. That it was competent, on the hearing of the rule to show cause, to show that the said company was insolvent when the mortgage was given.

Wells v. Railway Rubber Co. 4 C. E. Green, 402, and cases above cited.

Mr. C. C. Hommann, for respondent:

I. There was no error in the decision of the

vice chancellor in making the order appealed from. The Revision of 1877, p. 191, § 80, gives the order in which the funds in the hands of the receiver are to be distributed; and the order appealed from is in conformity with the section cited.

II. The company was not insolvent within the meaning of the statute on September 27, 1884.

"The Act respecting insolvent corporations, under which the proceedings were instituted, looks to the suspension of the ordinary business of the company, or some overt act by which its insolvency may be ascertained and declared. The court cannot, upon an inquiry of this nature, undertake to investigate the financial ability of the corporation at previous periods, founded upon nonfailure to meet its engagements, or upon the actual state of its finances after its business has been suspended."

Bedford v. Newark Machine Co. 1 C. E. Green, 120; *R. R. Co. v. Oxford Iron Co.* 6 Stew. 192.

III. The mortgage in this case was not a preference but a security. "A mortgage made in good faith to continue business is valid, though a part of the consideration is a present debt."

Blumenthal Bank. p. 232; *Ex parte Ames*, 7 Bank. Reg. 223; *Perrin v. Hance*, 13 Bank. Reg. 77; *Ex parte Winder*, *Re Winstanley*, L. R. 1 Ch. Div. 290.

IV. Even if the corporation was insolvent and the mortgage a preference, under the present statute it would still be a valid and subsisting lien; for at common law an insolvent corporation, as well as an insolvent individual, may prefer one creditor to another; and that part of the Statute of 1846 which forbade such preference by a corporation was repealed by the Revision of 1877.

The Act forbidding sales, transfers and assignments of the estate, effects, etc., etc., by the directors or managers of insolvent corporations, or sales, transfers, etc., in contemplation of insolvency, was the second section of the Act of 1846.

Rev. 1846, p. 129.

In the Act concerning corporations, Rev. 1877, sections 69-82 embrace sections of the Act of 1846; but the second section was omitted and the whole Act of 1846 repealed.

Rev. 1877, pp. 1395-1411, and p. 1122, § 16.

All the decisions based upon that statute or the second section thereof are, therefore, inapplicable.

This left the power of a corporation to prefer its creditors as at common law, and the rule at common law favored that right.

Morawetz, Corp. § 582; *Catlin v. Eagle Bank*, 6 Conn. 233; *Bump*, *Fraud. Conv.* p. 388.

See also *Sargent v. Webster*, 13 Met. 497.

Magie, J., delivered the opinion of the court:

The question presented by this appeal relates to the proceeds of a sale of property of an incorporated company, made by a Receiver appointed under the Act concerning corporations, with the concurrence of a creditor of the company holding a chattel mortgage thereon. The latter claims the proceeds of the sale by virtue of his mortgage; the Receiver contends that he

should be permitted to distribute the proceeds among the general creditors.

The Receiver was appointed February 19, 1885, on a bill filed by a creditor and stockholder February 17, 1885.

The mortgage was made by the company to respondent, Jameson, September 27, 1884, and was therein declared to be intended to secure the payment of such notes (not exceeding \$6,000) as had then been or might thereafter be made by the company, and indorsed by Jameson for the accommodation of the company.

The case shows that when the mortgage was made, Jameson was an accommodation indorser on a note of the company for \$3,000, which was afterward renewed and was outstanding when the bill was filed; and that on September 20, 1884, he indorsed a note for \$2,000, for the accommodation of the company, which was also renewed and outstanding when the bill was filed. Jameson paid both the outstanding notes, and a large sum is due to him.

The Receiver's contention is that Jameson's chattel mortgage was a transfer of the company's property to him after insolvency, and as a preference over other creditors; and that it is thereby rendered null and void as against creditors.

But the evidence has not satisfactorily made out that the company was insolvent when the mortgage was made, or that it was made as a preference.

The decree made in the proceedings fixed the insolvency of the company as having occurred on December 10, 1884. The mortgagee's petition was filed in that cause. If the decree does not conclude the Receiver in this proceeding, the evidence that he has produced is not sufficient to establish the fact of insolvency at a time prior to the date of the mortgage.

The only facts tending to show the intent with which the mortgage was made seem to indicate that it was designed rather as security for the loan of Jameson's credit to the company than as a preference over other creditors.

But if the facts were conclusively proved, the conclusion insisted on would not follow. It has been decided at this term that a sale or transfer of the property of an incorporated company, although made when the company was insolvent, and to prefer creditors, is not now prohibited by statute or objectionable in itself. *Wilkinson v. Bauerle*, 14 Stew. 625 [5 Cent. Rep.].

This result was reached from a consideration of the effect of the repeal of the second section of the "Act to prevent frauds by incorporated companies," approved April 15, 1846. R. S. p. 129.

Nor can there be found in the remaining sections of that Act which have been included in the "Act concerning corporations," or in other existing legislation, any prohibition against a preference of corporate creditors by way of a mortgage of corporate property.

The eightieth section of the last mentioned Act requires creditors to be paid in the distribution of an insolvent company's assets, proportionately to their debts, "excepting mortgage and judgment creditors, when the judgment has not been confessed for the purpose of preferring creditors." This evidently prohibits

any preference in distribution under the proceedings prescribed, to a judgment confessed for the purpose of preferring creditors. It may be that it constitutes an implied prohibition against any such preference. But the expression of a prohibition of preferences by way of a confessed judgment plainly excludes any intent to prohibit preferences by way of mortgage.

For these reasons the respondent Jameson is entitled to the proceeds of the property covered by his mortgage.

The receiver further contends that Jameson should be charged with \$107.80, alleged to have been paid him by the company on the day the bill for a receiver was filed.

This contention cannot prevail.

If there is sufficient proof that such a payment was made, it was not in violation of the restraining order, for that was not served on the company's officers until the next day.

The only objection to this payment to be considered is that it was a transfer of the company's property, to prefer Jameson as a creditor after the company's insolvency. But, as we have seen, such a transfer is neither prohibited nor objectionable in itself.

The order made below, giving the whole proceeds to Jameson, should be affirmed.

Order unanimously affirmed.

ORANGE & NEWARK HORSE R. R. CO.,
Plff. in Err.,
v.

James WARD.

1. If it appear by plaintiff's evidence that his own negligence caused the injury of which he complains, or contributed to it in such way that but for it he would not have received harm from defendant's negligence, the court should nonsuit, and error may be assigned upon its refusal.
2. Held, in an action for an injury caused by the collision of a street car with plaintiff's vehicle, that whether, under the facts, the safer and more prudent course for plaintiff to pursue to avoid collision was to attempt to get off the track, or to quicken his speed and pass before a car coming on to the same track from a spur reached him, were questions for the jury.
3. The driver of a vehicle rightfully using a street railroad track as a part of a public street is entitled to notice that the company requires the track for its car, before he is obliged to leave the track.
4. Whether the verdict was against the charge and against the weight of evidence are matters for the trial court, and can not be considered on review.

(Decided —, 1886.)

ERROR to the Supreme Court, to review a judgment in favor of the plaintiff in an action on the case for damages occasioned by a collision between the plaintiff's wagon and the defendant's horse car. *Affirmed.*

N. J.

The facts appear in the opinion.

Mr. Edward Q. Keasbey, of A. Q. Keasbey & Son, for plaintiff in error:

If the injury was occasioned in any degree by the plaintiff's own negligence, he is without redress, unless the act of the defendant amounted to a willful trespass or an intentional wrong.

N. J. Exp. Co. v. Nichols, 4 Vroom, 434; *Drake v. Mount*, 4 Vroom, 441; *Moore v. R. R. Co.* 4 Zab. 268, 824; *Runyon v. R. R. Co.* 1 Dutch. 556.

If the plaintiff's negligence was the immediate cause of the accident, he cannot recover even though the defendant was also negligent. If both parties are to blame, neither one can hold the other responsible; and if the plaintiff alone was to blame, a judgment against defendant is plainly against the law.

If it appears by the plaintiff's evidence that his own negligence contributed to the injury, it is the duty of the court to nonsuit; and a writ of error will lie for the refusal to grant a nonsuit in such a case.

N. J. Exp. Co. v. Nichols, 4 Vroom, 434-8.

Mr. Charles Borchertling, for defendant in error:

The court properly refused the motion for nonsuit.

Plotts v. Rosebury, 4 Dutch. 146; *Durant v. Palmer*, 5 Dutch. 544; *R. R. Co. v. Moore*, 4 Zab. 824; *R. R. & Trans. Co. ads. West*, 8 Vroom, 95; *R. R. Co. v. Matthews*, 7 Vroom, 582; *Bonnel v. R. R. Co.* 10 Vroom, 189; *Klein v. Jewett*, 11 C. E. Green, 474.

The court will consider the instructions of the judge who tried the cause, with reference to the evidence before the jury; and if the instruction can be sustained so far as there was evidence to which it was applicable, will not reverse, although it might be erroneous if taken literally.

Million v. Riley, 1 Dana, 359.

When the charge of the court is erroneous in some particular, but the result of the charge is correct, such error furnishes no ground for a new trial.

Gibson v. Stevens, 7 N. H. 852; *Camden, etc., Trans. Co. v. Belknap*, 21 Wend. 354; *Freeman v. Rankins*, 21 Maine, 446; *Holbrook v. Hyde*, 1 Vt. 331; *Walcott v. Keith*, 2 Foster, 196.

Knapp, J., delivered the opinion of the court:

This suit was brought by the defendant in error to recover compensation from the plaintiff in error, a Horse Railroad Company, for injuries which the defendant in error received in a collision with a car of the Company, which injury was charged to the culpable negligence of the plaintiff in error's servants in managing the car.

On the trial, at the close of the case on the part of the plaintiff below, the defendant below asked that plaintiff be nonsuited, on the ground that the testimony disclosed contributory negligence on the part of the plaintiff in the management of the vehicle which he was driving. The court denied the motion, and upon the refusal to nonsuit, error is assigned. It is also alleged for error that there was misdirection in the judge's charge.

The second ground was not relied upon in

the argument, and it is sufficient to say as to that, that the law was correctly stated to the jury by the judge.

The only question then for our consideration is whether the judge, on the evidence as it stood when the plaintiff rested his case, should have granted the nonsuit for contributory negligence of the plaintiff, established by his own proofs.

It is unquestionably the law that if it appear by plaintiff's evidence that his own negligence caused the injury of which he complains, or contributed to it in such a way that but for it the plaintiff would not have received harm from the defendant's negligence, the court should nonsuit, and error may be assigned upon its refusal. *N. J. Exp. Co. v. Nichols*, 4 Vroom, 434; *R. R. Co. v. Moore*, 4 Zab. 824; *Telfer v. R. R. Co.* 1 Vroom, 188; *Drake v. Mount*, 4 Vroom, 441; *R. R. Co. v. VanHorn*, 9 Vroom, 188.

When the evidence leaves that fact in uncertainty, it is the duty of the judge to submit the evidence, under proper instructions, to the jury for their decision.

I think the case of the plaintiff, on the point of contribution, presented such a state of uncertainty as rendered it necessary for the judge to submit the question as one of fact to be determined by the jury. This he did, with clear and precise instructions on the law.

The plaintiff gave evidence to prove that at the time when he received the injury he was driving in his wagon along one of the streets of Newark and was, just before and at the time of the collision, using one of the tracks of the Company's horse railroad. He was traveling at an ordinary gait. No car was in front of him on the track along which he was passing, but as he neared a spur of this road, leading to one of the car stations of the Company, a car which had been standing there came out suddenly from the station on the main track and faced him.

The point was whether in this situation the best mode of avoiding collision was to attempt to turn off the track or to urge his horse on and thereby pass the car before it barred his way. Both vehicles were in motion towards each other when the plaintiff saw the car. The plaintiff decided to urge on his horse, as the safer means of escape, and failed; a foot more gained in distance would have saved him.

The contributory negligence charged is that he drove on instead of turning from the track.

Now, whether the safer and more prudent course for the plaintiff to pursue to avoid collision was to attempt getting off the track, or to quicken his speed and pass before the car reached him, were questions of fact to be settled upon the evidence and by the jury. I think it quite obvious that the judge could not have determined, legally, that one course or the other was demanded of the plaintiff in the exercise of proper care; or that driving on under existing exigencies was legal negligence.

The plaintiff was rightfully upon the track using it in the manner that he did, as a part of the public street. *Coach Company v. R. R. Co.* 6 Stew. 267.

Before he was obliged to leave it, in submission to the superior right of use vested in the Company, he was entitled to some notice or timely signal that the Company then required

the track, for passing its car. The notification came in the presence of the car itself coming suddenly upon him from a side track, the view of which was somewhat obstructed at the time. That notice coming so late put him in a dangerous and perplexing position. Whether, then, he acted with reasonable judgment or negligently was properly and necessarily submitted to the jury.

It is alleged for error that the verdict was against the charge of the court, and against the weight of evidence. These matters belong to the trial court, and cannot be considered here in a review of this record.

There is no error in the judgment, and it should be affirmed.

Paterson, J., dissenting:

I cannot agree with the conclusions reached in this case. My reason is that the facts and circumstances appear to disclose such fault on the part of the defendant in error as preclude his recovering damages for the injury sustained. He should show a clean record, and this, in my opinion, he has failed to do, and that most decidedly. He was an expert driver on the street and among horse cars, by his own showing, and familiar with the location of the tracks and siding where the accident occurred. He was going on a downward grade, and saw the car start. This was full notice to him, as much as the record of a deed is of the existence of that instrument. Other special notice was not required.

The car came out on an upward grade, and over or round a curve—elements of retarded motion; the wagon was on a downward grade and on a straight track—elements of speed. It is idle to attempt to show that the car was going as fast or faster than the wagon. To make out a case, this had to be shown. It was necessary, also, to change the place where Ward first said he was when he saw the car. Just here was the turning point. If Ward had been where he located the spot originally, a nonsuit must have followed. If his wagon was where the witness Billings placed it, then that light vehicle traveled on a downward grade and a straight, smooth, iron track, with the rate of speed accelerated by the momentum carried from Lawrence Street, more slowly than a heavy, lumbering car, proceeding on an upward grade, around a curved track, with a momentum to acquire, and under increased friction.

This is against all ordinary probability. It is simply impossible that the car could have started from the usual place on the side track and acquired as much velocity as the light wagon running down hill at the rate of five or six miles an hour. Ward knew that the car was entitled to the right of way, and his familiarity and experience in driving among cars and on their tracks required him to be on his guard. An expert cannot plead the ignorance that would excuse a novice in the art.

I am satisfied that neglect and want of proper care on the part of the defendant in error were the main causes of the accident, and for that reason shall vote to reverse.

For affirmance—Dixon, Knapp, Magie, Reed, Van Syckel, Brown, Clement, Cole, McGregor—9.

For reversal—Paterson—1.

Abigail R. DOUGHTEN *et al.*, *Appts.*,
v.

CAMDEN BUILDING AND LOAN ASSOCIATION, *Respt.*

John C. DOUGHTEN *et al.*, *Appts.*,
v.

SAME, *Respt.*

One party to a contract **cannot rescind** it by his own will, and at the same time **keep possession of the consideration**, in whole or in part, which he has received under it. He must, so far as practicable put the other party *in statu quo* before he can exercise his right of rescission.

(Decided — —, 1886.)

APPEALS by defendants from decrees advised by *Vice Chancellor Bird*, in favor of complainant. *Reversed.*

Two cases were argued together. Separate bills were filed to foreclose two mortgages, one for \$3,000, the other for \$1,800, on distinct lots of land in the City of Camden.

William S. Doughten was a shareholder in the Association, having fifteen shares on which the loan of \$3,000 was made, and nine shares on which the other loan had been made to one Elisha Shaw for \$1,800. He owned both lots of land covered by the separate mortgages. The shares, when fully paid up, were valued at \$200 each, and would satisfy the mortgages. On January 4, 1881, the following entry appears in the minutes of the Association:

"Mr. William S. Doughten made a proposition through the secretary, stating that he wished to straighten up his accounts with the Association by making a new transaction and canceling the old mortgages on the properties Seventh and Mount Vernon and 528 Liberty Street.

"The matter was considered by the board and the transaction accepted; loan on thirteen shares of the fourteenth series to be considered as bought at 8 per cent premium, both properties to be included in one mortgage. (For description of property see minutes of February 8, 1880.)

"Mr. Doughten's proposition was accepted. An order for \$2,392 was directed to be drawn in favor of William S. Doughten upon the delivery of the required papers."

The required papers were a bond and mortgage for \$2,600, covering both lots. These were duly executed February 10, 1881. They were drawn and the mortgage recorded by George W. Gilbert, the solicitor of the Association and, as he testifies, "in the regular course of business, and as it is my custom to do in all cases," searches were ordered by him up to the date of record.

Another requirement was that the fifteen and nine shares of stock, in all twenty-four shares, covering the two loans, should be assigned. These were transferred in writing, for William S. Doughten, by J. C. Doughten and Isaac Doughten, his attorneys in fact, to one William B. Mulford, by deed of assignment dated February 1, 1881, according to the direction of the Association.

Henry F. Geiter, secretary of the Association. J.

tion, testified that "the old roll-book No. 2 shows that Doughten had thirteen loans bought out and several monthly payments made thereon." These were in the fourteenth series, which commenced to run in July, 1880.

The searches disclosed that the \$2,600 mortgage would be the first mortgage after the two former mortgages were removed, but that there were unpaid taxes and assessments against the property due to the City of Camden. These taxes and assessments Mr. Doughten, or his sons acting for him, promised to settle. The solicitor testifies that everything they were to do was arranged except the taxes and the expenses of the papers and searches.

On May 26, 1881, a statement of account was made by the secretary, at the request of J. C. Doughten, acting for his father's estate, in which appears a debit for the thirteen shares of new stock and dues for the same, January, 1881, \$26, and for May, \$26 less a credit of \$9.25, the balance of the general credit, which includes the twenty-four shares of stock to be delivered and surrendered, and the thirteen loans at 8 per cent premium on the thirteen shares, the final balance due at June meeting, 1881, being \$48.59. For this balance (\$48.59) a check was given by J. C. Doughten, agent, June 27, 1881, which was paid at the First National Bank of Camden to the credit of F. P. Mulford, treasurer of the Camden Building & Loan Association.

From this statement of balance and check therefor it appears that all was settled up to June, 1881, except the taxes and assessments against the property mortgaged.

The \$2,600 mortgage settled the two former mortgages, leaving an excess of \$9.25, which was credited in the final statement. Doughten paid, in February, 1881, \$26, the regular dues on these shares, the same in March, also in April, missed the month of May, and in June paid the balance due for May and June of \$48.59, above stated. All were credited, at the time they were paid, to the fourteenth series of the new loan. Afterwards he attended two meetings, tendered payment, and the Association refused to accept it on the new transaction on which he offered it. The Association offered to take it on the old transaction, but he would not consent. With the expectation that the whole thing would go through, the stock was transferred, as collateral, to the Association when the last papers were made.

After June, 1881, the Association transferred the whole amount of money paid on the thirteen shares to the nine shares of the seventh series, a part of the stock of the old loan. It was done by the directors without consulting Mr. Doughten, he wishing to keep the new loan alive by offering to pay the dues as he had been doing.

J. C. Doughten testifies that at the time the last loan was made nothing was said about paying the municipal taxes, nor the expense of drawing the papers, searches, etc.; that when his attention was called to the taxes by the solicitor, he told him that he expected to pay them. Doughten was notified that they would not accept the mortgage until he paid the municipal claims, and if he did not pay them before the end of the fiscal year, on the fourth Monday in June, the transaction would fall. These taxes were paid July 30, 1881.

The bills to foreclose the two mortgages for \$3,000 and \$1,800, respectively, were filed August 10, 1881. William S. Doughten died before the bills were filed.

Vice Chancellor BIRD, on advising a decree for complainant in the first entitled suit, filed the following conclusions:

"The complainant held two mortgages on two lots of the defendant.

She allowed the accruing payments to fall in arrears. She also allowed the taxes and assessments to remain unpaid. The payments which she had made on the loans reduced the amount due from her to about \$2,600. At this juncture she offered to assign and transfer so much of the stock as represented the payments which she had made to the Corporation, and give a new mortgage for all the balance due on both properties. The Company agreed to accept this offer, provided the defendant would discharge all the taxes and other assessments. The Company passed a resolution to this effect.

A settlement was had between the parties determining the amount of the balance actually due from the mortgagor. The defendant, the mortgagor, assigned the stock accordingly. It ought to be remarked that all the stock was of a certain value. The solicitor of the Corporation was directed to draw a mortgage in compliance with the terms of the agreement. He did so, and it was executed by the defendant and recorded. All this was done, but the defendant did not discharge the liens by way of taxes and other assessments. These not being discharged, the Company rescinded the resolution and directed a foreclosure of the two original mortgages. After this had been done, and before the bill was filed, the defendant paid the taxes and other liens.

The defendant now insists that this bill should be dismissed; that the court should compel the complainant to regard the agreement and settlement; and that she has a just defense to this bill under said agreement.

In the first place, I am not at all clear that there is any consideration shown for the alleged agreement. The defendant paid nothing but what was her duty to pay; she owed every dollar of it. It is true she did not owe it all at that particular time, but the then value of the stock was ascertained and that value was applied to the payment of the principal of the mortgages and all the dues that remained unpaid.

This does not, in my judgment, present a consideration. The Company got what was due to it at that time; that is, what was actually due, and what was due by anticipation, determined by the then value of the stock.

In the next place, the defendant did not comply with the agreement on her part until after the Association had withdrawn therefrom. The Association had a perfect right to rescind the contract, the defendant herself being at fault. The complainant reaps no advantages from the rescission, nor does the defendant suffer. She is placed just where she stood at the time negotiations began. The Association then had the right to foreclose, and in so doing would have been obliged to apply the stock at its value to the payment of the amount. This will still be done.

The amount due upon the mortgages on February 10, 1881, was \$2,600. The complainant

is entitled to interest and dues, according to the rules and by-laws of the Association, from that time.

I will advise a decree in accordance with these views."

Messrs. Bergen & Bergen, for appellants:

A party seeking to rescind a contract, even for fraud, must put opposite party *in statu quo* so far as able. So long as he retains anything received under the contract, there can be no rescission. The rescission must be before suit brought and on notice. The Association has never given us notice nor returned us our mortgage or our money paid.

Byard v. Holmes, 4 Vroom, 119; *Smalley v. Hendrickson*, 5 Dutch. 371; *Roberts, Fr. p. 130*; 3 Pars. Cont. p. 65; Rev. p. 445, § 6.

Mr. P. L. Voorhees, for respondent.

Scudder, J., after stating the facts, delivered the opinion of the court:

It is claimed that under these facts the Association was authorized to rescind the resolution to substitute the bond and mortgage of \$2,600 for the two prior mortgages, and the stock and loan on thirteen shares for the previous loan on twenty-five shares. But, granting that the complainant had the right to rescind on the nonperformance of the full terms of the contract by the defendants, it failed to legally exercise that right before there was a substantial compliance on the part of the defendants by payment of the municipal taxes; and the bills to foreclose were not filed until after these taxes had been paid. The consideration was good, and completed before the agreement was annulled.

One party to a contract which imposes reciprocal obligations upon both parties may have a right to rescind it, by reason of the failure of performance of conditions by the other party; but he must, if he wish to rescind for such cause, return to the other party what he has received, so as to put him in the same position he was before.

It is a well settled principle of law and equity that a party cannot rescind a contract by his own will, and at the same time keep possession of the consideration, in whole or in part, which he has received under it. So far as it is practicable, he must put the other party *in statu quo* before he can exercise his right of rescission. The rule is that there shall be prompt repudiation and restoration so far as possible. *Byard v. Holmes*, 4 Vroom, 119; *Gay v. Alter*, 102 U. S. 79 [Bk. 26, L. ed. 48]; *Hunt v. Silk*, 5 East, 449; *Clough v. London, etc. R. Co.* L. R. 7, Exch. 26, 37; *Rulch-y-Phom Lead Mining Co. v. Baynes*, L. R. 2 Exch. 324; *Pollock Pr. of Cont.* 509; 2 Pars. Cont. *679.

In this case the twenty-five shares of the prior loans were transferred to the Association in part performance of the agreement; the mortgage for \$2,600 was executed and recorded. The assignment of shares was delivered to the treasurer of the Association, and the bond and mortgage were left in the possession of their solicitor.

It is no answer to say that there was not a formal acceptance of them by the Association. It is enough that the defendant, William S. Doughten, or his representatives, by legal transfers, put them in the possession and control of the Company's agents in part perform-

ance of the contract, and in such form that he could not be restored to his former position without the action of the Association.

He could not cancel the mortgage for \$2,600, and satisfy the record; nor could he reassign the twenty-five shares to himself. It might in equity be allowed that the complainant should, on failure to conclude the arrangement by the delay and neglect of the defendants, transfer the credits of the payments on account of the thirteen shares in the last loan series to the former loans, on which there were large arrearages, and the defendants could have no just cause of complaint; but it is not necessary to decide this, for the complainant has done nothing to restore the defendants to their former position, but has shown a purpose to manage the matter for its own advantage, and to regard the transaction as altogether void.

It has taken the shares of the old loans, and credited them to the defendants at their withdrawal value, not at their actual value, which is a well known difference in the business of all loan associations; it has changed the special appropriations of payments or the thirteen shares of the last series to the ducs and the indebtedness on the old loans; it has left the assignments of those shares in the hands of its treasurer; and the bond and mortgage for \$2,600, to it duly executed, and recorded by the act of its solicitor for its greater security, is in his hands; and it has left the defendants to get these papers and right themselves as they may be able. This is not rescission, with proper regard to the equitable rights of the defendants, but a repudiation of the partly executed contract without any attempt at restoration. This it cannot do, and the decrees should be reversed, and the bills dismissed with costs.

Decree unanimously reversed.

ESSEX PUBLIC ROAD BOARD, *Plff. in Err.*,

STATE, James A. SPEER *et al.*, Prosecutors.

1. The legislative grant in section 16 of the supplement of 1870 to the Road Board Act (P. L. p. 181) of the right to assess damages upon lands benefited, for the transfer of the franchise of a turnpike company to the Essex Public Road Board, is an authority to lay a burden where no possible benefit can accrue, and is **unconstitutional and void**. It sanctions the taking of private property for public use without compensation.
2. Therefore, the prescribed limitation of the time within which a writ of *certiorari* must be sued out, to review an assessment under said section, for benefits alleged to accrue by reason of the transfer of a turnpike franchise to the Road Board, is **inoperative**.

(Decided ———, 1886.)

ERROR to the Supreme Court, to review a judgment of *certiorari*, setting aside a report of appraisers of damages for Bloomfield Avenue. *Affirmed*.

N. J.

The case was argued in the supreme court at the November Term, 1884, before Van Syckel and Knapp, *JJ.* The opinion of the court, delivered by VAN SYCKEL, *J.*, is as follows:

The writ in this case brings up the report of appraisers of damages for Bloomfield Avenue, awarding \$22,000 to the Newark & Pompton Turnpike Company, as compensation for the franchise of its turnpike from the Newark City line to Morris County line, and apportioning \$7,515.64 as the share to be paid by Caldwell Township.

It also certifies for review the revised assessment of February 6, 1872, against the relators, for the special benefits alleged to accrue to them by reason of the transfer of the said franchise to the Essex Public Road Board.

The Act of 1874 (P. L. p. 389), as amended by the Act of 1875 (P. L. p. 421), provides that writs of *certiorari* shall be brought within two months after ratification of the assessors' report.

The writ in this case was not prosecuted until August, 1884; and therefore the plaintiff, by his laches, has lost his remedy, unless the assessment is wholly without authority and void.

If any benefit could have been conferred upon the relators, by the transfer of the turnpike franchise from the turnpike company to the Road Board, the judgment of the assessors cannot be disturbed.

Section 16 of the supplement of 1870 to the Road Board Act (P. L. p. 181), empowers the said Board to purchase or take (compensation being first made) any turnpike road in said county, or such part thereof as may be necessary; and the damages sustained by the taking shall be ascertained as is directed in case of taking lands; and the compensation paid the turnpike company shall be assessed upon lands peculiarly benefited.

Under this provision the franchise of the turnpike company was condemned by the Essex Public Road Board, and the turnpike company awarded \$22,000 therefor.

This case turns upon the question whether there can be, in legal contemplation, any special benefit conferred upon the adjacent land owners by such transfer of the turnpike franchise. If not, the legislative Act, in the respect that it authorizes an assessment against the relators for supposed benefits, is unconstitutional and void.

In *Wright v. Carter*, 3 Dutch. 76, which was an action of ejectment, Chief Justice Green held that the land was subject to the same easement after the turnpike company took it as before, it having been a laid out road; that, therefore, the land owner suffered no damage, so far as the change in the title to the franchise of the road was concerned. Nothing was taken from him that he had before the transfer.

In the court of errors the view of the court below was concurred in, although the judgment was reversed on another point. See *State v. Lacerack*, 5 Vroom, 207.

In delivering the opinion of the supreme court, Chief Justice Green said: "The title of the soil is not changed; it remains as it was before, in the owner of the adjoining soil. He has precisely the same right to and control over the soil that he had before the passage of the Act. The land was subject to the easement or right of way before the passage of

the Act, and continues subject to the same burden still. It cannot, therefore, be said that the property of the plaintiff was, by virtue of the Act, taken for public use without just compensation. Nothing was, in fact, taken from the plaintiff. As before the passage of the Act, so after, the title to the soil remained in the plaintiff, the right of way in the public. All that the Legislature granted to the turnpike company was the easement of the use of the ancient highway for the purposes of their road."

So in this case; the easement, after its acquisition by the Essex Public Road Board, did not lose its identity, or in anywise change its character. It was neither diminished nor enlarged in its extent, and it constituted no additional burden or servitude. If, therefore, the easement remains the same in the ownership of the Road Board, and no damage by such change falls upon the land owner, how can any benefit accrue to the land owner by the transfer? If some benefit could accrue by reason of abolishing tolls in this case, then in *Wright v. Carter*, some damage might have ensued to the land owner by the conversion of the public way from a free to a toll road.

If the extinguishment of the right to toll is a benefit to be assessed, then the grant of a right to take toll must be a damage for which the land owner is entitled to compensation. Such right in the land owner was expressly denied in *Wright v. Carter*.

The condemnation of the franchise by the Road Board is not an improvement of the highway. Until work or reparation is done upon it, it in no respect undergoes improvement. It simply vests the franchise in a new owner, so that improvements may be projected and carried out, if desired.

The Legislature may authorize an assessment against land owners for benefits conferred by taking land not before constituting a road bed, because by such taking the advantage of a highway not before *in esse* is acquired. But here the easement was enjoyed as fully before the condemnation as afterwards.

The right to assess for the mere transfer of the franchise is one thing; the right to assess for improving it is another and very different thing. The latter right is not controverted.

If there is any possible benefit to the relators in this case, there must have been a possible damage in *Wright v. Carter*, in which event it must have been submitted to a jury. But the court in that case held, as matter of law, that there could be no resulting damage to the land owner.

If the right to take toll has been extinguished by the transfer of the franchise to the Road Board, the cost of repairing must be provided by tax, to which the relators must contribute. The tax will stand in the place of the toll; and the change from one burden to the other will constitute no basis for an imposition upon the relators, according to the views expressed in the case cited.

The legislative grant in section 16, of the right to assess damages for the mere transfer of the franchise, is an authority to lay a burden where no possible benefit can accrue, and is to this extent unconstitutional and void. It sanctions the taking of private property for public use without compensation. In such case the pre-

scribed limitation of the time within which a writ of *certiorari* must be sued out is inoperative. *Traphagen v. West Hoboken*, 10 Vroom, 232; *State v. Elizabeth*, 12 Vroom, 152; *Kirkpatrick v. Commissioners*, 13 Vroom, 510; *Culver v. Jersey City*, 16 Vroom, 256.

The assessments for benefits, based upon the mere transfer of the turnpike franchise to the Road Board, should be set aside.

Mr. John W. Taylor, for plaintiff in error.

Messrs. Stevens & Ward, for defendants in error.

Runyon, Chancellor, delivered the opinion of the court:

The judgment of the Supreme Court should be affirmed, for the reasons given by that court in its opinion.

For affirmance—**The Chancellor, Chief Justice, Magie, Parker, Scudder, Brown, Clement, Cole, Whitaker**—9.

For reversal—**Dixon, Reed, McGregor, Paterson**—4.

STATE, William A. ALDRIDGE *et al.*,
Prosecutors, *Pliffs. in Err.*,
v.

ESSEX PUBLIC ROAD BOARD.

STATE, Lydia ANDREWS *et al.*, *Prosc-*
utors, Pliffs. in Err.,
v.

SAME.

1. The change of a turnpike to a common, free, public road confers no special benefit upon the land owner.
2. The statutory provision authorizing the assessment of the price of the turnpike upon land owners benefited is unconstitutional and void.

(Decided —, 1886.)

ERROR to the Supreme Court, to review a judgment affirming an assessment for damages for Bloomfield Avenue. *Reversed*.

The facts are stated in the opinion. The opinion of the supreme court is reported in 17 Vroom, 126.

Mr. John L. Blake, for plaintiffs in error.

Mr. John W. Taylor, for defendant in error.

Runyon, Chancellor, delivered the opinion of the court:

The writs of error in these cases bring up for review assessments made by the Essex Public Road Board upon the lands of the prosecutors in the Townships of Bloomfield and Montclair, in the County of Essex, for benefits conferred by the laying out and widening of Bloomfield Avenue, in that county.

Among the objections to the proceedings it is assigned for error that a proportion of the price at which the Board purchased, from the Newark and Pompton Turnpike Company, its turnpike, which is part of the avenue, was assessed upon the prosecutors' lands. By a supplement, passed in 1870, to the Road Board Act, the board was authorized to buy the turnpike and to assess the price upon the lands peculiarly benefited.

The objection above stated is well founded. It was held by the supreme court in *Wright v. Carter*, 3 Dutch. 76, that no damage is done to the owners of the soil of a public highway by changing such highway from a common, free, public road to a turnpike; or in other words, by transferring the easement from the public to a private corporation, which by law is authorized to require of the public payment of tolls for traveling upon the road.

The court of errors took the same view of the matter, as appears from the opinion of Chief Justice Beasley in *State v. Laverack*, 5 Vroom, 201. Upon the same grounds upon which the decision in that case rests, it must be held that the converse: that the change of a turnpike to a common, free, public road confers no special benefit upon the land owner, is true also. It was so held by this court at this term in *Essex Public Road Board v. Speer* [ante, 829].

It follows that the statutory provision authorizing the assessment of the price of the turnpike upon the land owners is unconstitutional and void. This conclusion renders it unnecessary to consider the other objections to the proceedings.

The judgment of the Supreme Court will be reversed.

For affirmance—None.

For reversal—The Chancellor, Chief Justice, Dixon, Knapp, Magie, Scudder, Clement, Cole, McGregor, Paterson, Whitaker—11.

George B. BEATTY *et al.*, Executors of David Cory, Deceased, *Appts.*,

v.

Trustees of CORY UNIVERSALIST SOCIETY at Sparta *et al.*, *Respts.*

1. An account rendered by executors within thirteen months after the probate of the will and before the estate was in condition for final settlement, which nowhere on its face states that it was either final or joint, and which was neither signed nor sworn to by any executor, where only two of the four executors were present at or cognizant of the making of the account, and they swore that they understood that the account was not final, and that each was accounting for his own transactions only, is not binding upon the executors as a joint and final account.
2. Where a will directs that certain legacies shall be paid to the legatees "in notes or bonds and mortgages, transferred to them with the respective value at the time by the executors," such securities are to be taken by the legatees at their fair intrinsic value, and not at the amount due on them.

(Decided ———, 1886.)

APPEAL from a decree of the Chancellor. *Reversed.*

The facts and questions raised are stated in the opinion of the court. The chancellor's opinion is reported in 12 Stew. 452.

Mr. Thomas Kays, for appellants.

N. J.

Mr. Edward Q. Keasbey, with whom was Mr. A. Q. Keasbey, for respondents:

The executors cannot have relief in equity from a decree of the orphans' court, except on the ground of fraud or palpable mistake appearing on the face of the account. If there had been a mistake, they should have appealed or applied to the orphans' court for a resettlement of the account; and even the orphans' court cannot open a final account, except to correct the particular item which is wrong. The account cannot be restated and made over again on new evidence.

Stevenson v. Phillips, 2 McCart. 236; *Hyer v. Moorehouse*, Spencer, 125; *Voorhees v. Voorhees*, *Exr.* 3 C. E. Green, 223-228; *Black v. Whitall*, 1 Stock, 572-576; *Frey v. Demarest*, 1 C. E. Green, 236; *Conover v. Conover*, *Saxt.* 403; *Story*, *Eq. Jur.* § 142, *et seq.*

Even if the executors did not intend to make a joint account, they cannot now be relieved of the consequences of filing an account which purported to be joint. They became jointly liable for the balance stated; and the legatees had a right to rely on that liability and were not driven to a discovery in whose hands the funds are.

Laroe v. Douglass, 2 Beas. 308; *Wilson v. Fisher*, 1 Halst. Ch. 439.

The executors were bound to take measures promptly to turn all the securities in their hands into money and, if they did not pay the legacy, to invest the money in state or United States bonds, or bonds and mortgages, according to the rule imposed upon all executors and trustees.

Tucker v. Tucker, 6 Stew. 235; 7 Stew. 292; *Gray v. Fox*, *Saxt.* 259; *Lathrop v. Smalley*, 8 C. E. Green, 192; *Halsted v. Meeker*, 3 C. E. Green, 186; *Vreeland v. Vreeland*, 1 C. E. Green, 512.

For instances of the rule as to the personal liability of an executor for a loss resulting from delay or negligence in collecting or investing funds, see:

Wms. Exrs. 1284, 1285, 1287, 1290; *Hayward v. Kinsey*, 12 Mod. 573; *Lowson v. Copeland*, 2 Bro. Ch. Cas. 156; *Powell v. Evans*, 5 Ves. 839; *Mucklow v. Fuller*, Jacob, 198; *Massey v. Banner*, 1 Jac. & Walk. 248; *Moyle v. Moyle*, 2 Russ. & Myl. 710; *Buxton v. Buxton*, 1 Mylne & C. 80; *Brazier v. Clark*, 5 Pick. 96; *Cooley v. Van Syckle*, 1 McCart. 496; *Holcomb v. Holcomb*, 3 Stock. 282, 300, 476; *Vreeland v. Vreeland*, 1 C. E. Green, 512-530; *Stark v. Hunton*, 2 Green, Ch. 800.

The intention of the testator must be very clear before the court will hold a legacy to be specific.

See *Norris v. Thomson*, 1 C. E. Green, 218; 2 McCart. 498; *Perrine v. Perrine*, 1 Halst. 133, 140; *Wheeler v. Hartshorn*, 40 Wis. 83; *Metcalf v. Framingham Parish*, 128 Mass. 870.

Messrs. Roe & Shepherd, also for respondents.

Dixon, J., delivered the opinion of the court:

The object of the present bill, filed by the executors of David Cory, deceased, is that the court of chancery should take exclusive jurisdiction and control of the final settlement and distribution of the estate of the decedent; and to this end the executors ask to be relieved from the force of an alleged joint and final account,

presented to and confirmed by the Orphans' Court of Sussex County, at the December Term 1871. On this prayer, the chancellor has decreed that the account must stand and be accepted as a joint and final account of all the executors, except as to a few designated items. From this feature of the decree, the complainants appeal.

In our judgment the decree is erroneous.

There are four executors, and they all swear that only two of them, Beatty and Easton, were present at or cognizant of the making of this account; and these two also swear that they understood that the account was not final, and that each was accounting for his own transactions only.

The account was rendered within thirteen months after the probate of the will, and before the estate was in condition for final settlement. It nowhere on its face states that it was either final or joint, and it was neither signed nor sworn to by any executor. The testimony to the contrary is that of the surrogate alone, by whom the account was stated. It is not likely that his memory of a transaction occurring so long ago, and resembling no doubt many others in which he was engaged, without more than an official interest, should be so distinct as that of the executors, to whom the matter was comparatively novel and specially important. The general veracity of none of the witnesses is impugned. We therefore think that the decided preponderance of proof is with the complainants, and that this portion of the decree should be reversed, and the executors be permitted to render their accounts in the pending suit.

Consequent upon the chancellor's view of the conclusiveness of this account are other portions of the decree, to the effect "that the cost of endeavors to collect claims (except as to the Alfred Roof mortgage), after the account in the orphans' court, are not to be allowed; that the complainants, as such executors, are chargeable with all the unpaid legacies in full, with interest thereon; and that the complainants pay the costs of this suit." These directions must also be reversed, and the points involved will remain to be disposed of, upon other considerations, at the final accounting.

The bill also prays for the construction of various clauses of the will, and the appellants complain of the interpretation put by the chancellor on some of its provisions. In one respect only do we think he has erred.

The will directs that certain legacies are to be paid by the executors to the legatees "in notes, or bonds and mortgages, transferred to them with the respective value at the time by the executors."

The chancellor regards this as directing that the value at which these securities shall be taken by the legatees shall be the amount due upon them at the time of the transfer. The appellants insist, and we agree with them, that the intention was that they should be taken at their fair intrinsic value; otherwise some of the bequests might be rendered abortive by the perverse or mistaken conduct of the executors in assigning worthless paper to the legatees. Such a result we think would defeat the purpose of the testator. On this point also the decree should be reversed.

Let the record be remitted, that the cause may be proceeded in according to equity.

For affirmance—McGregor—1.

For reversal—The Chief Justice, Depue, Dixon, Knapp, Parker, Reed, Scudder, Van Syckel, Brown, Clement, Pater-son—11.

Trustees of the CORY UNIVERSALIST SOCIETY at Sparta, *Receipts*, v.

George B. BEATTY *et al.*, Executors of David Cory, Deceased, *Appts.*

Per Curiam :

This cause was heard before the chancellor in conjunction with and upon the same evidence as was offered in the case of *Beatty, etc. v. Trustees of Cory Universalist Society* [preceding case]; and upon the opinion in that cause delivered (to the effect that the account presented to the Orphans' Court of Sussex County at December Term 1871 was binding upon the executors of David Cory, as a joint and final account), the chancellor adjudged that the executors were jointly chargeable with assets sufficient to pay to these complainants the legacy bequeathed to them by the will of David Cory, deceased, and decreed that the said executors pay the same, \$12,000 with interest thereon, from the end of one year after the probate of the will, less \$3,000 thereof previously paid.

The executors appealed from that decree, and their appeal was heard with their appeal in the said cause wherein they were complainants.

For the reasons stated in the opinion delivered in the appeal last mentioned, the decree below should be reversed, and the determination of the amount for which the executors are chargeable toward the payment of said legacy should await the settlement of the executors' accounts upon the bill which they have filed for that purpose.

For affirmance—McGregor—1.

For reversal—The Chief Justice, Depue, Dixon, Knapp, Parker, Reed, Scudder, Van Syckel, Brown, Clement, Pater-son—11.

PREROGATIVE COURT.

Joseph R. BRUERE, Trustee, etc., *Appt.*,
v.

Almira R. GULICK *et al.*, Admsrs., *Receipts*.

Where, by the provisions of a will, a trust therein established, is to be executed by the executor in that capacity, and the trust is inseparable from the executorship, the executor is not entitled to double commissions, first as executor and then as trustee.

(Decided ———, 1886.)

APPEAL from a decree of the Orphans' Court of Mercer County, upon an accounting in the settlement of a decedent's estate. *Reversed.*

Mr. A. G. Richey, for appellant.

Mr. G. O. Vanderbilt, for respondents.

Runyon, Ordinary, delivered the following opinion:

By the third section of the will of William Gulick, deceased (the instrument is dated July 30, 1855), he devised to his executors and to the survivor of them certain lands, in trust to receive the rents, issues and profits thereof, and pay them to his son, William A. Gulick, and his son's then wife, Sarah, each and every year during their lives, and after their death the property was to go to their children.

By the residuary clause, he gave one fifth of the residue of his estate to William. By the codicil, dated February 14, 1863, he revoked that gift, and gave the fifth to his executors, thereafter named, and the survivor of them, in trust for the use and benefit of William's before mentioned wife for life; and after her death it was to go to their children.

By the codicil, he directed the executors to retain William's indebtedness to his estate out of the share, and if there should be any residue thereof after payment of that indebtedness, they were to invest it and pay the interest to William's before mentioned wife for life, and the principal after her death was to go to the children. He revoked the appointment of executors made by the will, and appointed his son Alexander and Job S. Olden, and the survivor of them, executors. The inventory amounted to \$151,398.08.

By the first account, which was filed by Alexander Gulick alone, and ran from July 31, 1865, to January 10, 1867, the accountant charged himself with \$164,092.21, and was allowed \$3,461.64 as commissions upon that sum. He was charged, on that account, with a balance of \$86,013.48. The next account was that of both executors. They charged themselves with that balance, and \$31,808.94 of additional receipts. They were allowed commissions to the amount of \$806.17 upon the \$31,808.94. This account was sworn to, and allowed in February, 1870. The third account was passed in May, 1876, and was of the sum of \$4,000, retained, under the provisions of the will, for the support of Rachel, a slave, and interest thereon. It was filed by Alexander Gulick alone. Job S. Olden, the other executor, was then dead. It charged the accountant with the \$4,000 and \$1,680 of interest, and he was allowed commissions upon the latter sum alone.

Alexander Gulick subsequently died, and his administrators, in 1885, filed his account of his dealing with the trust under the will in favor of William A. Gulick and his wife and children. It runs from January 1, 1870, to January 15, 1881. It charges the amount received from settlement of the estate of William Gulick, deceased, \$6,518.91, and interest received thereon, \$6,241.80, and "cash from trust fund invested, under the will of William Gulick, for Rachel, \$824.17," and interest received thereon, \$422.88; also, rents received from farm (land devised by the third section of the will for the benefit of William A. Gulick and his wife and their children), \$8,400. The commissions of the executor upon the interest and rents were paid thereout.

The administrators claim commissions upon the principal of the two funds; that is, upon the \$6,518.91, and the \$824.17. The claim is resisted on the part of Mrs. Gulick. The orphans' court allowed it.

By the will the share in question was given to the executors, and the survivor of them, in trust, and they were (as executors) to collect the indebtedness due the estate from William A. Gulick, by retaining the amount of it from the share (and to that end the power to convert the share into cash if they should deem it necessary or advisable was conferred upon them); and they were, as executors, to hold the balance in trust, to pay the interest to William A. Gulick's wife for life, and at her death the principal was to go to the children.

The provision for the slave was that she should be free, and if she should become unable to support herself, the executors should support her out of the estate. These trusts devolved upon the executors as executors. In the case of the fund for the support of the slave, the principal constituted part of the residue, and it could not be distributed until she ceased to need support out of the estate, and then it would be the duty of the executors to distribute it.

There is no evidence in the provisions of the will that the testator intended that the executors should hold the balance, not as executors but in a different capacity, as trustees. He clearly intended that the trust should be executed by the executors in that capacity. Where, as in this case, the trust is inseparable from the executorship, the executor is not entitled to double commissions, first as executor and then as trustee. *Everson v. Pitney*, 18 Stew. 539, and cases there cited.

The supplement of 1882 to the Orphans' Court Act (P. L. 1882, p. 280) supports this view of the subject. It provides that whenever, upon the settlement of the accounts of executors or trustees under a will, or of commissioners in partition, the usual commissions shall have been allowed them, according to law and in pursuance of the provisions of the will or of the directions of the court, any money shall remain in the hands of or to be intrusted to any such person or persons for investment, the interest of which is required to be paid to any legatee or other person that may be entitled thereto, it shall and may be lawful, upon any subsequent accounting, for the court before which said account shall be presented for settlement and allowance to consider the actual pains, trouble and risk of such accountant, and to allow such commissions upon the interest or income received as to [by] the said court shall be deemed fair and just; provided, that said allowance shall not exceed the sum of 5 per centum on such interest or income.

It will be seen that that Act embraces such cases as this, and it is quoted to show that the Legislature, when its attention was drawn to the subject, provided, not that there shall be double commissions on the principal, but that the accountant, where he shall once have had the usual commissions, shall receive his compensation for his further pains, trouble and risk, in commissions to be allowed him upon the interest and income only, and that then it

shall not exceed 5 per centum of such interest or income.

It is admitted, and it so appears from the accounts also, that the executors received commissions according to law upon the principal of the fund in their accounts as executors. The accountants in this case are not entitled to commissions upon the *corpus* of the trust fund. It may be remarked that it seems that in the first account Alexander Gulick received commissions upon the whole amount of the inventory, though he asked and obtained allowance for \$33,425.63 of it as unsettled and subject to a claim of set-off, and in the second account the executors received commissions again upon \$24,610.05 for the same demand which had then been settled and that sum collected upon it.

The decree of the orphans' court, which merely adjudges that the exceptions to the allowance of commissions on the principal of the trust fund be overruled, and that the accountants be allowed a commission at the usual rate upon such principal, *will be reversed. No costs, either above or below, will be awarded to either side.*

Ann J. HICKS, *Appt.*,
v.

Sarah C. WILLIS, *Exrx.*, *Respt.*

An **executor's sale** of real estate to pay debts, ordered by the orphans' court and duly advertised, **may be adjourned** by the executor through his **attorney or agent**; and it is not essential that the executor be present in person at the announcement of adjournment.

(Decided — — 1886.)

A PPEAL from the Orphans' Court of Union County, to review an order confirming an executor's sale of lands to pay debts. *Affirmed.*

The facts are stated in the opinion.

Mr. E. F. Morrow, for appellant.

Mr. Charles F. Hill, for respondent:

The executor may sell lands to pay debts.

See Orphans' Court Act, §§ 70, 71, 76; and Sale of Land Act, §§ 1, 3, 6, 37, 40.

If the court has jurisdiction, a mere irregularity in selling or in the method of conducting the same, will not avoid the sale.

Boylan v. Kelly, 9 Stew. 331, 332; *Runyon v. Newark India Rubber Co.* 4 Zab. 467; *Youngs' Admr. v. Rathbone*, 1 C. E. Green, 224; *Bray v. Neill's Exrx.* 6 C. E. Green, 343.

It is not necessary that a notice of sale be signed by the sheriff or master or executor, with his own hand.

Coze v. Halsted, 1 Green, Ch. 311.

There is no rule of court regulating adjournments, and the statute governing is the Sale of Land Act, §§ 3, 4, 6, 37, 40.

Unless fraud, mistake or accident be shown, by which the rights of others have been injuriously affected, the sale will not be interfered with by this court.

Seaman v. Riggins, 1 Green, Ch. 214, 217; *Campbell v. Gardner*, 3 Stock. 423.

A purchaser is not to be deprived of his rights by reason of mere irregularities in the proceedings, of which he was ignorant.

Conover v. Walling, 2 McCart. 178.

Where a party is present and makes no ob-

jection to an adjournment, he cannot afterwards be heard to except to it because irregular.

Zingsem v. Kidd, 2 Stew. 516.

A public proclamation of an adjournment is all that the law requires.

Allen v. Cole, 1 Stock. 286; *Coze v. Halsted*, 1 Green, Ch. 311.

The adjournment of a sale of lands is purely a ministerial act and may be done by attorney.

See *Losey v. Simpson*, 3 Stock. 246; *Hayes v. Stiger*, 2 Stew. 196; *McDowell v. Perrine*, 9 Stew. 632; *Butler v. Kitchen*, 12 Vroom, 229; *De Louis v. Meek*, 2 G. Greene (Iowa), 55; *Weeks, Attys.* § 216; *Freem. Void Judg. Sales*, 43, 44; *Boylan v. Kelly*, 9 Stew. 331; *Skillman v. Holcomb*, 1 Beas. 131; *Hewitt v. R. Co.* 10 C. E. Green, 392.

The purchaser is not to lose his purchase because of erroneous advice regarding matters of law given to the appellant by her counsel.

Dillett v. Kemble, 10 C. E. Green, 66; *Hayes v. Stiger*, 2 Stew. 196; *Skillman v. Holcomb*, 1 Beas. 131; *Mott v. Shreeve*, 10 C. E. Green, 438.

Offers to pay more for the property than it brought at public sale, are not in themselves ground for setting aside the sale.

Cline v. Prall, 12 C. E. Green, 415; *Hewitt v. R. Co.* 10 C. E. Green, 392.

A sale for less than value, if fair, is no cause for setting aside the sale.

White v. Zust, 1 Stew. 107; *Flommerfelt v. Zellers*, 2 Halst. Law, 153; *Smith v. Young*, 1 Halst. Law, 300.

Public proclamation of an adjournment of a sale is all the notice of such adjournment that is required.

Wade, Notice § 1086; *Coze v. Halsted*, 1 Green, Ch. 311; *Allen v. Cole*, 1 Stock. 286.

This proclamation may be made by the executor in person or by representative.

R. S. Sale of Land Act, § 3; *Freem. Void Judg. Sales*, 43; *White v. Zust*, 1 Stew. 107; *Tousslip of Morris v. Carey*, 3 Dutch. 377; *Abbott*, Law Dic. 109.

The title of a purchaser, not himself in fault, cannot be impaired by any mere error or irregularity in the proceedings.

Freem. Void Judg. Sales, 43, 44; *Skillman v. Holcomb*, 1 Beas. 131; *Hewitt v. R. Co.* 10 C. E. Green, 392; *Boylan v. Kelly*, 9 Stew. 331.

Runyon, Ordinary, delivered the following opinion:

The appeal in this case is from an order of the orphans' court, confirming a sale of land made, under its order, by the respondent, as executrix of Thomas E. Hicks, deceased, to raise money to pay his debts. The appellant is the widow of Mr. Hicks. The only grounds of objection presented on the argument were that the sale was not duly advertised, and that if it was so, the adjournments were not made by the executrix in person or in her presence. The objection to the advertisement was not discussed and there does not appear to be any ground for it.

The executrix was not present at any of the adjournments. Some of them were made for her by her attorney, and the others by the deputy surrogate of the county (the sale was advertised to take place at the court house), upon the written request of the attorney. In each case a written notice of the adjournment, signed by

the attorney as attorney for the executrix, was posted under the notice of sale at the court house. It was to the effect that the sale was adjourned by order of the executrix, to take place at the court house at a specified day and hour, the same stated in the verbal announcement of the adjournment.

The executrix, in her report of the sale to the court, stated that the adjournments were made by her, and that the last one (which, like the others, was for one week only) was advertised in two newspapers and by notices set up in four public places in the City of Elizabeth, and in five public places in the Township of Springfield, the township in which the land lay. And she reported that in pursuance of such last adjournment, at the time and place fixed therein, she attended and then and there sold the property at public vendue to George Schmitt, the highest bidder, for \$1,400.

It appears, by the stipulation of counsel, that the property is worth \$2,000 "to any person who wants it;" but it also appears thereby that the property was sold by the executrix twice before the sale under consideration, under the order of sale, and brought the same price, \$1,400, at each of those sales. No person was present at any of the adjournments to bid upon the property. The appellant or her attorney was present at each of the adjournments, and had full notice thereof.

There is no good reason for holding that the announcement of an adjournment of a sale by an executor or administrator, under the order of a court, must be made either by or in the presence of the executor or administrator. On the other hand, every consideration of convenience is against it.

It is urged that an argument in favor of the proposition is to be drawn from the supplement of April 13, 1876, to the Act "relative to sales of lands under a public statute or by virtue of any judicial proceedings" (Rev. p. 1051, § 37), by which it is provided that any master in chancery may continue any sale to be made by him under execution or order of sale, by public adjournment made by a master in chancery, or the sheriff of the county in which the lands lie, provided such master or sheriff be authorized by him in writing under his hand, to make such adjournment. But it by no means follows from that legislation that an executor or administrator cannot lawfully adjourn a sale to be made by him under order of the orphans' court, unless he either make the announcement himself or be present in person at the making thereof; nor is any such inference to be drawn therefrom.

The case of *Meyer v. Patterson*, 1 Stew. 239, cited by the appellant's counsel, is not in point. That case holds that a sheriff cannot appoint a special deputy *pro hac vice* by parol, and that if a sale under an execution in a foreclosure suit in chancery be made by a bailiff thus informally appointed, it will be set aside on a direct application to the chancellor in the course of the proceeding. It is no authority for the proposition for which the appellant's counsel contends. Nor has the maxim "*Delegatus non potest delegare*" any application; for there is no delegation of trust or confidence in the committing to an attorney or agent the performance of the merely

ministerial act of announcing an adjournment of a sale for and in the stead of the trustee.

Trustees may act through agents and attorneys to a certain extent in matters confided to their discretion. If a trustee gives instructions to his attorneys and agents how to act, it cannot be said to be a delegation of his trust. *Perry, Trusts* § 409; *Sugd. Pow.* 222.

It is very clear that an executor or administrator, ordered by a court to make sale of land, may lawfully adjourn the sale through the instrumentality of an attorney or agent. It may be added that in this case the first adjournment at least, and perhaps all of them, was made at the suggestion of the ordinary, in open court, upon an application for an order for such adjournment in behalf of George Schmitt, who was the purchaser at the second sale. He was also the purchaser at the first sale, but the orphans' court refused to confirm that sale on account of a defect in the advertisement. After the second sale he refused to complete his purchase, because he was advised by his counsel that the orphans' court could not lawfully sell the property free from the widow's dower. He made an unsuccessful application to that court to set aside the sale upon that ground. From the order denying the application he appealed to this court. The executrix, upon his refusal to complete his purchase, readvertised the property. In order to save himself from the consequences of a resale at a lower price than that which he had bid, he applied to this court to prevent the executrix from reselling the property until his appeal should have been decided. In consequence of and upon that application, as before stated, the first adjournment was made, and perhaps the others also. So that some of the adjournments at least (how many does not appear), and perhaps all of them, were made, not at the discretion of the executrix, but in consequence of judicial direction.

The order appealed from will be affirmed, with costs.

James A. ALEXANDER, *Exr., Appt.*,

v.

John V. BACOT, *Admr. Recept.*

1. A **bond and mortgage**, executed by an **executor and a devisee**, to **secure a debt against the estate** of the testator, on part of the lands of the estate, intended to secure payment of the debt by the executor, do not operate to discharge the liability of the estate for the debt.
2. The **orphans' court** has **power to determine** whether one who files exceptions to the account of an executor or administrator is a **creditor** of the estate.

(Decided — — 1886.)

APPPEAL from an order of the Orphans' Court of Hudson County. *Affirmed.*
The nature of the case and the facts are stated in the opinion.

Mr. P. Bentley, for appellant.

Mr. Clarence Linn, for respondent.

Runyon, Ordinary, delivered the following opinion

The administrator of the estate of Mrs. Helen C. McClelland, deceased, filed exceptions to the account of James A. Alexander, executor, etc., of Dr. John M. Cornelison, deceased, in the Orphans' Court of Hudson County; and the court, by its order, set the exceptions down for hearing upon a day fixed, and directed that the executor appear on that day, and present himself and his vouchers for examination. From that order the executor appealed. The ground of appeal is that the administrator has no right to except to the executor's account, because the administrator has no claim against the estate.

Dr. Cornelison, at his death, was indebted to Mrs. Maria M. Meade in the sum of \$13,000 or thereabouts. By his will he gave to Mr. Alexander one-half of all his real estate except a certain farm (which he gave to his son in fee) for the benefit of his, the testator's, son for life, with remainder to the son's children or their issue, and in default of children or issue thereof, the remainder to go as the son might by his will direct. He gave to his daughter, the wife of Mr. Alexander, the other half of his real estate, excepting the farm; and he gave all his personal estate, except household goods and furniture and farming utensils, to Mr. Alexander, for the purpose of discharging incumbrances upon his, the testator's, property, and the testator's debts, and gave all his household goods and farming utensils and his horses, carriages, harness and cattle to his son and daughter, in equal shares.

After the testator's death, Mr. Alexander as trustee under the will, and Mrs. Alexander as devisee under the will, in order to secure the payment of the debt to Mrs. Meade, gave her their bond in the penalty of \$28,000, conditioned for the payment, by Mr. Alexander as trustee, and Mrs. Alexander and Mr. Alexander personally, of \$1,291 a year to Mrs. Meade for life, and of the sum of \$11,300 to her legal representatives at her death.

To secure the payment of the bond, a mortgage of real estate, part of the Cornelison property, was given. Mrs. Meade died, and by her will gave \$5,000 to Mrs. McClelland. The \$11,300 due from Dr. Cornelison's estate to Mrs. Meade was unpaid, and for \$5,000 of it Mr. Alexander, as trustee under the will of Dr. Cornelison, and Mrs. Alexander, gave to Mrs. McClelland their bond in the penalty of \$10,000, dated November 1, 1879, conditioned for the payment, by Mr. and Mrs. Alexander, of \$5,000 in three years, with interest.

Under the bond was written an agreement, under seal, signed by Mr. Alexander as executor, by which he, as executor of the will of Dr. Cornelison, agreed with Mrs. McClelland to pay her \$500, on account of the principal of the bond, each year, until the bond should be paid off. To secure the payment of that bond, a mortgage of part of the real estate mortgaged to Mrs. Meade was given. Upon the delivery of the latter bond and mortgage, the bond and mortgage to Mrs. Meade were canceled. Mr. Alexander has paid \$750 on account of the principal of the McClelland bond, and the interest up to 1884, inclusive. He testifies that he has always considered the debt due to Mrs. McClelland a debt of the estate of Dr. Cornelison.

If the liability of the estate of Dr. Cornelison to pay the debt due to Mrs. Meade was dis-

charged by the giving of the bond and mortgage to her, the administrator of Mrs. McClelland has no right to except to the account of the executor. But the giving of the bond and mortgage was not payment of the debt. It was intended to secure thereby payment of the debt by the executor. The bond was made by Mr. Alexander in his trust capacity under the will. He styles himself trustee.

The intention was to bind the estate, part of which was devised to him in trust for the testator's son, and another part to Mrs. Alexander, for the payment of the debt by the executor. The bond to Mrs. McClelland was given in like manner and with like design, and Mr. Alexander, as executor, agreed to pay the money therein mentioned in certain specified installments. The debt due from Dr. Cornelison's estate was not discharged by the giving of the bond and mortgage to Mrs. Meade, nor were \$5,000 of it discharged by the bond and mortgage to Mrs. McClelland. Such appears to have been the understanding of the parties. In his letters to Mrs. McClelland and her administrator, Mr. Alexander speaks of the \$5,000 bond and mortgage as having been given by him as executor, and of the money due thereon as being due from Dr. Cornelison's estate, and in his account he claims credit for the payments of principal and interest made by him on the bond. There is no evidence that the bonds and mortgages were accepted in discharge of the liability of the estate, but the evidence is to the contrary.

The administrator of Mrs. McClelland, upon the application to have the exceptions set down for hearing, made oath that the estate of Dr. Cornelison was indebted to the estate of Mrs. McClelland in the sum of \$4,000 and upwards. The executor cannot, under the circumstances, deny the title of Mrs. McClelland's administrator to part of the Meade debt.

The orphans' court decided that the administrator was a creditor of the estate, and therefore entitled to except to the account. It had power to make such adjudication. *Poulson v. Nat. Bank of Frenchtown*, 6 Stew. 250, 618.

It may be remarked that in the report of the opinion of this court in that case, upon the subject of the power of the orphans' court to determine whether one who files exceptions to the account of an executor or administrator is a creditor of the estate, the word "without" (p. 253) is a misprint of the word "within."

The order appealed from will be affirmed, with costs.

Elwood KING, *Appt.*,

v.

Elwood ROCKHILL, *Respt.*

An order of the orphans' court revoking an order theretofore made by it extending the time for filing exceptions to claims against an insolvent estate, on the ground that such order was improvidently granted, being discretionary, is not appealable.

(Decided — — 1886.)

A PPEAL from an order of the Orphans' Court of Burlington County, revoking an

order extending the time for filing exceptions to claims against an estate. *Dismissed.*

The facts are stated in the opinion.

Mr. J. H. Gaskill, for appellant.

Mr. Mark R. Sooy, for respondent:

Contended—1. That the orphans' court had no power to grant further time to creditors to file exceptions to the administrators' accounts, the application not being within the time fixed for presenting the report of claims.

Rev. p. 771, § 83.

2. That if the court had such power, its exercise was entirely discretionary, and that it was equally within the discretion of the court to vacate an order improvidently made.

3. That no appeal will lie from an order that was discretionary.

Moore v. Ruggi, 5 Stew. 273.

4. That if an appeal would lie, there is nothing on the record to show that the discretion was improperly exercised.

Ruayon, *Ordinary*, delivered the following opinion:

In this case the administrators, upon obtaining the letters of administration, May 9, 1883, took an order limiting creditors. It required them to present their claims within nine months. The limited period expired in February, 1884. In April following, the orphans' court, on application of the administrators, fixed the 16th of July then next as the time for making the report of claims, etc.; and the administrators duly gave notice that the report of claims would be made on that day, and that they would then apply to have the estate declared insolvent.

In May, 1884, the court made an order barring creditors who had not come in under the before mentioned order of limitation. On June 6, 1884, the report of assets and claims was filed, from which it appeared that there were assets to the amount of \$15,009.25; preferred claims to the amount of \$13,528.81, and unpreferred claims to the amount of \$3,666.69. On the 25th of August following, the administrators filed their final account, which was duly passed at December Term, 1884. It showed a balance in favor of the administrators of \$274.20.

On May 5, 1885, the court ordered the account to be restated, which was done, and the account as restated showed a balance of \$1,259.98 against the administrators. On July 1, 1885, the court, on application of a creditor, and without notice, made an order giving twenty days further time in which to file exceptions to the claims presented to the administrators. On July 19, 1885, exceptions were filed to twelve of the claims, amounting together to \$3,096.58. On the 18th of August following, the court, upon due notice, on the application of one of the creditors, to whose claim exception had been filed, set aside the order giving further time to accept, on the ground that it was improvidently made, and at the same time dismissed all the exceptions without hearing them. From the order setting aside the order giving further time, the exceptant appealed to this court.

The Orphans' Court Act provides that any person interested may file exceptions to the claim or demand, or any part thereof, of any creditor against an insolvent estate, but such exceptions must be filed on or before the day

specified for presenting the report of claims to the court, or within such time as the court may on application allow. Rev. p. 771, § 86.

The time specified in this case was July 16, 1884. No exceptions were filed at that time, nor was any extension of time for filing exceptions asked for at or before that time. When, subsequently, the final account of the administrators was passed, it appeared that there was nothing to distribute. On the restatement thereof a balance for distribution was shown. The court then, upon application, gave further time within which to except, and exceptions were filed within such period. The ground on which the court vacated the order for further time was that it had been improvidently granted. The time for filing exceptions expired on the 16th of July, 1884. No application for further time was made until nearly a year afterwards, when an application was made without notice.

It is urged, on behalf of the appellant, that the creditors did not know until after the restatement of the final account in May, 1885, that there would be any sum to distribute among them; for, at the settlement of that account in December Term, 1884, there appeared to be a balance in favor of the administrators. But as before stated they filed no exceptions within the time fixed by law, and asked no further time to do so for almost a year.

The respondent's counsel insists that the court had no power to grant further time to except, unless the application were made at or before the expiration of the time fixed for presenting the report.

Without regard to the questions thus raised, it is enough to say that it was entirely discretionary with the court whether it would grant the appellant further time to except or not, and it was equally within its discretion to vacate an order improvidently made. The appeal is from the vacating order. No appeal will lie from that order, because it was discretionary; and if an appeal would lie, there is nothing before me from which I could say whether the discretion was properly exercised or not.

The appeal will be dismissed, with costs

Re WILL OF James M. DIETZ, Deceased.

1. The reasons which induce a testator to change his testamentary disposition of his property, or to make a disposition of his estate which appears to be unequal or even absolutely unjust, need not be mentioned by him. The will cannot be rejected because the court can see no good reason for the change.
2. The orphans' court, having appointed an administrator *pendente lite*, may order parties before it to pay and deliver over moneys and property of the estate, received by them since the death of the testator, to such administrator.

(Decided — — 1886.)

APPEAL from a decree of the Orphans' Court of Essex County, admitting a previ-

ous will to probate and rejecting a subsequent one. *Reversed.*

APPPEAL from an order of the Orphans' Court of Essex County, directing appellants to pay and deliver over to the administrator with the will annexed, or *pendente lite*, moneys and property belonging to an estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Linn. Parmly, Olendorf & Fisk, E. T. Bartlett, of New York, and B. Williamson, for appellants.

Mr. C. Parker, for respondent.

Runyon, Ordinary, delivered the following opinion:

James M. Dietz, late of East Orange, in the County of Essex, died at that place on the 31st day of March, 1884. Two instruments of writing, purporting to be wills of his, one dated January 6, 1870, and the other June 18, 1880, were propounded for probate before the Orphans' Court of Essex County. His widow (he had no children) and his brother, Samuel Dietz, each filed a *caveat* against admitting to probate any paper purporting to be his last will and testament, until after examination and decree thereon by the orphans' court.

After a long and severe contest, the will of 1870 was, by the decree of the orphans' court, admitted to probate, and the will of 1880 rejected. From that decree, appeals were taken. The appellants are Samuel Dietz and William Cheney, executors of the will of 1880, Samuel Dietz, the American Baptist Home Mission Society, the American Baptist Missionary Union and the American Female Guardian Society, otherwise known as the Home for the Friendless, legatees under that will.

The will of 1870 was executed in the City of New York, while the testator resided there. It was drawn by Mr. Fransioli, a lawyer of that city, and witnessed by him and Joseph F. Mosher, who at that time was a clerk in his office. By it, the testator gave to his wife his household goods, furniture and paintings, and the income of his estate, for life; and he gave, upon her death, \$3,000 to his adopted daughter, Maggie Dietz, and the interest of \$15,000 to his sister, Sophia, for life, the principal, at her death, to go to Christopher Wolston, then of the City of New York, to whom he also gave the residue of his estate. He appointed John L. Campbell, physician, of Brooklyn, and William Cheney, then the testator's bookkeeper, executors.

The will of 1880 is a holograph. By it, the testator gave to his wife all his household furniture, cooking utensils, beds and bedding, books and pictures, his horse and buggy and carriage, and all the articles appertaining thereto. All the rest of his estate he gave to his executors, in trust, first, to pay his brother, Samuel Dietz, \$1,000 a year for life; second, to apply the balance of the interest, income, rents, issues and profits to the use of his wife, annually, for life; third, to pay to his aunt, Mary E. Dietz, if living, \$500; fourth, to pay to the American Baptist Home Missionary Society, \$10,000; fifth, to pay to the American Baptist Missionary Union, \$5,000; and sixth, to pay over, deliver and convey all the residue of his estate to the Home of the Friendless, in East

Twenty-Ninth Street, in the City of New York. He then added:

"In case I have not precisely and correctly described the proper, corporate, or associated names and titles of the American Baptist Home Mission Society, the American Baptist Missionary Union, and the Home of the Friendless, in East Twenty-Ninth Street, yet my executors will not doubt what institutions, associations or establishments are intended by me in using those designations; and if, by reason of any misdescription herein of them or of either of them, or if, by reason of their, or either of their, not being incorporated, they would not respectively take the gifts and devises hereinbefore given and declared in respect to them or either of them, then and in such case as to them respectively, I give to my said executors the power of appointment of the portions of my estate so by me declared to be given and devised respectively to said American Baptist Home Mission Society, the American Baptist Missionary Union, and the Home of the Friendless in East Twenty-Ninth Street, City of New York, so that my said executors shall apply and appropriate the same to the use of the said associations that I have so described as the American Baptist Home Mission Society, the American Baptist Missionary Union, and the Home of the Friendless in East Twenty-Ninth Street, in such manner as to my said executors may seem best and most likely to effect my wishes as above expressed in the premises."

He then appointed his brother, Samuel Dietz, of Grove Street, East Orange, in this State, and William Cheney, of Brooklyn, Long Island, executors, and declared that all the powers, authority and discretion therein given to them, were given to them and the survivor of them, and to whichever of them, if but one, should take upon himself the execution of the will, without bonds; and he empowered his executors to sell his real estate and invest the proceeds thereof, and his personal estate, in such securities, real and personal, public or private, as they should from time to time see fit.

The will is, as before stated, dated June 18, 1880. It was drawn by the testator, in his office in the City of New York, on that day, in the presence of Frederick B. Smith and Gustave Horst, the two members of the firm of F. B. Smith & Horst, die sinkers and engravers, who also carried on their business there.

Mr. Smith testifies, and he is corroborated by his partner, that the testator came into the office in the forenoon and got some paper and wrote; that the witness did not know what it was that he was writing until the testator told them what he had written; that the testator was engaged in writing about an hour and a half or two hours; that when he had written the will, the testator called on the witness and Mr. Horst to come and witness his last will and testament; that he called them "Smith" and "Gus" (meaning Horst, whose Christian name is Gustave), and said to them that it was his last will and testament, and that he wished them to witness his signature; that the testator signed his name to the will, and then read the attestation certificate, and then the witness said to the testator: "You acknowledge this to be

your last will and testament, in regard to your personal effects and all your property," or something to that effect, or, as the witness afterwards says: "You acknowledge that to be your last will and testament, and acknowledge that to be your signature;" that the testator said he did, and that the witness then said: "Does this contain the disposition you wish to have made of your property, real and personal?" and the testator replied that it did. He further says that after the testator had signed his name and read the attestation certificate the witnesses signed their names. After the will had been signed, the testator folded it up, and went out of the room into the next room, taking the paper with him.

Mr. Smith had been acquainted with the testator for over thirty years, and had witnessed a will for him about twenty years previously. He says the testator was as sound in mind as he had ever known him in thirty-two years; that he was perfectly sound. Mr. Horst had known him for about six years. He says he was of sound mind. There is no evidence entitled to any weight that at that time the testator was not possessed of full testamentary capacity.

Dr. A. L. Fowler Ormsbee, a doctress, of Orange, testifies that she attended him in an illness of a severe character, which, she says, confined him to his bed during the whole of the month of June, 1880. She says that she thinks he was in an unsettled state of mind; that his "physical condition was very exaggerated, and that he was suffering a great deal," and that she should suppose a man in his physical condition would not be in a very good mental condition. She says, also, that his intellect was very much impaired by his previous life (referring to habits of intemperance), and that his mind was more or less distorted; but she says, also, that he understood what she said to him, and as a rule gave rational answers. He subsequently (July 31, 1880) paid her \$194 for medical services. In settling the bill he objected, she says, to one of her charges. He gave her his check for \$194, payable to her order, and she indorsed it, and obtained the money for it. An examination of the checks which he gave about the time in question, and of the memoranda in his check book, and the other evidence of his business transactions, renders it entirely clear that on the 18th of June, 1880, he was possessed not only of testamentary capacity, but of excellent business ability.

Mrs. Dietz, the widow, when asked, in her direct examination, what was the condition of his mind with respect to testamentary capacity, from the beginning of 1880, answered that for the last three years of his life (he died in March, 1884) she "should not think" that he was competent to make a will. On her cross examination she says that he was incompetent, because he "indulged so strongly in liquor that he was scarcely ever himself." She says he conducted his own business altogether in 1880, and he appears to have attended to his business down to December 12, 1883, a few months before he died. Mrs. Dietz, when asked when it was that Samuel Dietz acted for her husband, answered that she never knew that he acted for him.

The will in question is itself evidence of the complete possession by the testator of testamentary capacity. He wrote it himself. Including the attestation certificate, it covers five pages of legal cap paper, and it is written in a current hand, without a single erasure. The words "without bonds" are written in a larger hand than the rest of the instrument, and they are emphasized by underscoring.

It is urged that the instrument contains internal evidence that it was drawn by a lawyer. There is no evidence on that head, except such as the will itself affords. There is no evidence that he copied the will from any other paper, or that he had any other paper at the time he wrote it; nor is there any evidence to the contrary. But if he did copy it, that would be evidence of competency, rather than incapacity. It would be evidence of care and painstaking in the preparation of the will, in order that his wishes in the disposition of his property thereby might not be defeated if he could prevent it. That he knew what he was about in making the will is beyond all question, if the testimony of Smith and Horst is to be believed, and no attempt was made to impeach their character for veracity.

Experts were called, in opposition to the will, to speak as to the handwriting. It is quite unnecessary to consider their testimony. It is not of such a character as to demand attention. The proof, from comparison, is so clearly in favor of the genuineness of the instrument, and shows so conclusively that it was written and signed by the testator, that it would be waste of time to dwell upon that subject.

And here the fact that the testator, in the last clause of the will, misspelled the words "eighteenth" and "eighteen," spelling the one "eitheenth," and the other "eithreen," may be adverted to. The orphans' court regarded these errors as evidence that the testator did not write the will. But it will be found, on examining the letters of the testator that have been put in evidence, that he frequently misspelled words, sometimes omitting a letter. And again it will be seen that, in the date of the will in which the words "eighteenth" and "eighteen" are misspelled, he spells the word "eighty" correctly.

What has been said in reference to the testimony of the experts produced by the caveators, on the subject of the will and the signature of the testator, is equally applicable to their testimony as to the signatures of Smith and Horst upon the will. Smith and Horst signed twice; once under the *in testimonium* clause, and again under the attestation certificate. The signatures were written on the same occasion. It seems, from the testimony, that when the testator signed the will the witnesses signed under the *in testimonium* clause as witnesses to that fact, and signed the attestation certificate after he had read it to them. There is no reason to doubt the genuineness of their signatures, nor that they were all written at the time of the execution of the will.

But an effort was made (and it was successful in the orphans' court) to discredit Smith and Horst, by evidence that at the date of the will the testator was sick abed at home, in Orange, and was not in the City of New York on that day. Indeed, the testimony goes fur

ther and, if entitled to confidence, would establish the fact that the testator was not only unable to rise from his bed on that day, but had been in the same condition for the whole of the preceding part of the month, and remained so (or, at least, was unable to leave his house) up to the first of July.

The principal testimony on this point is that of Dr. Ormsbee. She says that on the first of June they sent for her in the night, and she was there all night; that the testator had cystic hemorrhage, and it reduced him very much; that previously to this he had inflammation of the lungs, or pneumonia, which had reduced him very much; that her visits to him were constant, with the exception of three days, the 8th, 9th and 12th in the month; that he was affected with muscular rheumatism, which rendered him helpless; that he was obliged to remain on the bed, except when persons moved him—except when he was helped by some one else; that he was lifted from the bed to the lounge by persons who had the strength to do it, and that he was not able to get off the bed himself.

To the question whether he was able to write, she answers that she cannot say whether he was or not; that she knows that he should not have written; that he was not able to write, and he could not have written any more than his name; that the rheumatism confined him entirely to the bed; that he was so that he could not have been, on the 18th, in New York; that she visited him on that day, and that it would have been impossible for him to go to New York, unless by some miraculous transfer. She adds that he was not in New York on any day in June. The witness speaks from recollection and from her account book in which she made her charges for visits to her patients.

There are other witnesses who testify that the testator was sick abed on the 18th of June. They are the widow, and Elizabeth Somerville and Joseph A. Marsh. The widow testifies that the testator remained ill and in bed five or six weeks, and that it was four or five weeks after the 18th of June that he became convalescent. Elizabeth Somerville says she went to the testator's house on the 16th, which she thinks was Tuesday, and she stayed there until Friday of the next week. She says he was confined to his bed all the time she was there, and that he got up only on one day, Thursday, of the week in which she left, and then he walked across the room only until they got the bed changed. She says, also, that before that he had not been up and had not been able to be up at all.

Joseph A. Marsh testifies that he was employed by the testator to attend to his horse, etc., and do work generally around the premises; that in June, 1880, the testator was "sick and complaining; mostly confined to his room," and that he was in bed most of that time; that the witness assisted him in getting up from the bed during his sickness; that he is positive the testator did not go to New York for two weeks at least before the 24th of June, at which time the witness left his employ, but returned to it again about three weeks afterwards, and stayed about two months or two months and a half longer.

According to the testimony of this witness (and he is corroborated by other witnesses), on 598

the 24th of June the testator was not only not confined to his bed, but was about the house, and was so violent toward his wife that she sent the witness to appeal to a neighbor for her protection. The witness did the errand, and when he returned the testator threatened to kill him with a carving knife, which he had in his hand, for going, and it was with some difficulty that he was restrained from doing the witness bodily injury with the knife, until the witness escaped from the house.

It is very evident, from this transaction, that the testator was not confined to his bed during the whole of the month of June, and that on the 24th he was capable of very considerable bodily exertion. But there is proof that on the 16th day of June, two days before the will was drawn, he was in his office in New York, and there drew a check for \$61.48 to the order of Charles Doughty, a real estate or insurance agent at East New York, for payment of a bill due from the testator for some expenses for repairs, etc., upon a small house he owned at Belle Plain, in the Town of New Lots, and gave it to Mr. Smith, requesting him to deliver it to Doughty, which Smith undertook to do. Smith went with it to Doughty's office, but did not find him in, and therefore brought the check back with him, the next day. When at Doughty's office he wrote a note to Doughty informing him of his visit and errand, and requesting him to inform him by postal card how he could safely get the check sent to him. He says in the letter that the testator had been sick and could not attend to the matter personally, but that he was then better, and that the testator might not be in New York until Friday of that week.

The note is produced. It is dated June 16, 1880. The postal card written by Doughty in reply is also produced. It is dated June 17, 1880. Mr. Smith says that when the testator gave him the check on the 16th, he told the witness that he would not be in the office the next day, the 17th, as he expected Mr. Fransioli's son to come out to his place for some cherries, and he was going to give him a drive, but he would be in his office again on Friday. As already stated, he swears that the testator came in on Friday, and drew and executed the will. Mr. Fransioli's wife and the son referred to testify that the latter came out on the 17th of June and made the visit and got the cherries, and the son says that he took the drive with the testator. Doughty's bill for the \$61.48 is also produced, receipted, and it is indorsed by the testator, "Charles Doughty, \$61.48, paid June 18, 1880."

The testator appears to have drawn his check on the 19th for \$50, and got the money for it himself, in New York, from one J. Trigan, who kept the restaurant to which he was in the habit of going for his meals. On the 28th he drew two checks—one for \$38.37, to the order of Edwin W. Hine, to whom it was delivered, and who indorsed it and got the money for it, and the other for \$50, to his own order. He appears to have indorsed the latter check to Thomas F. Brosnan, who indorsed it and got the money for it. He drew a check on the first of June, 1880, for \$50, to his own order, and indorsed it to Purss & Young, who indorsed it and obtained the money for it. Between the

first and the 16th he drew no checks. Bills rendered to him are in evidence, which are indorsed by him as having been paid: one on the 10th of June, one on the 16th, two on the 17th, one besides that of Doughty on the 18th, and two on the 28th. It seems quite probable that the testator was sick for a few days in the early part of June.

Mr. Fransioli, it should be observed, swears that he saw the testator in New York and did business with him there on the 12th and 14th of June. The testator was in New York on the 16th, and drew the check for Doughty. He kept his check book in the office there. The stub of the check in the book contains the following entry in the testator's handwriting:

"June 16th.

"To pay for repairs of house at Bellplain, Long Island, to the order of Charles Doughty, \$61.48."

The will is evidence that on the 18th he was in New York. It is dated on that day. Not only so, but, in addition to its date, the date is twice stated in the attestation certificate. Smith and Horst are wholly disinterested witnesses, and they swear he was there on that day, and they are not in any way impeached. There is a fact sworn to by Mr. Fransioli of some importance in corroborating them. He says that in the spring of 1880 the testator said to him that he wanted him to draw another will for him; that he, Fransioli, replied that the testator could come to his office at any time he desired, and he would be glad to attend to him. He says the testator did not come, and that afterwards they met and he said to the testator that he, the testator, had not come, and the testator said: "Well, I have attended to that business myself without any lawyer; I have cheated the lawyers."

The will was found in a safe in which the testator kept his valuable papers, where he himself had put it, in a sealed envelope indorsed by him, addressed originally "William Cheney, Bank of America" (where Cheney was employed), to which he appears to have added, after Mr. Cheney's name, "or my bro. Samuel." Mrs. Dietz testifies that the testator told her that she would find all the papers "in the safe in Mr. Smith's office." Mr. Cheney, who is wholly disinterested, swears that the will and signature are in the handwriting of the testator. He was his bookkeeper from March, 1869, to March, 1872, three years, and is well acquainted with his handwriting. Mr. Fransioli and Samuel Dietz, and the expert, Mr. Carvalho, all testify to the same thing. And here it may be remarked that the witnesses who swear that the testator was not in New York on the 18th of June swear from memory as to what his physical condition was, and as to what he was or was not able to do on a particular day four years before they gave their testimony.

It is urged that the will is the result of undue influence on the part of Samuel Dietz, who, it is alleged, was actuated by desire of gain and by dislike of the testator's wife. But there is no proof of such influence, nor is there any of such dislike at the time when the will was made. Mrs. Dietz testified that there was no unfriendliness on his part towards her until the last year of the testator's life. She says that he had always come over every Saturday to sit at the

table and have dinner with them, and was pleasant and polite to her until the last year of the testator's life; and the other evidence shows that whatever discord there was between them occurred within the period she mentions.

Samuel Dietz swears that he had no part or instrumentality in preparing the will or in having it prepared; that he did not know his brother had written it; that the testator never consulted him in regard to preparing a will for him, and that he never spoke nor made a suggestion to the testator about writing his will. He says that in November, 1883, the testator said to him that in case anything should happen to him, the testator, he, Samuel, would find the document or documents which he would need under Samuel's private checks, in the right hand corner of the safe; and he swears that that was all the knowledge he had of the paper.

The will, so far as the widow is concerned, differs from the will of 1870 only in that it gives to Samuel \$1,000 of the income and the rest of it to her, while, by the will of 1870, the whole of the income was given to her. There is a similarity between the two wills in this: that in both the testator preserves the *corpus* of the estate intact until his wife's death. By the first, he gave, after her death, \$3,000 to his adopted daughter, and the interest of \$15,000 to his sister Sophia, and then gave the residue, including the \$15,000 after Sophia's death, to Christopher Wolston, a friend of his.

It appears, by the testimony of the adopted daughter, that she married (it would seem without his consent), and left the family in 1875. The testator's sister Sophia is dead. She died in 1877. Maria E. Dietz, the testator's aunt, to whom \$500 are given by the will of 1880, was an indigent invalid. She became dependent upon charity for support after the will of 1870 was made. What the testator's reasons were for the change of testamentary disposition, so far as his wife was concerned, do not appear. Nor does it appear that she, in fact, will get less by the will of 1880 than she would have got under that of 1870 had he died then, for it does not appear that his estate was not much larger in 1880 than it was ten years before. The estate appears to be worth \$60,000.

It was alleged on the hearing (but I find no proof of it) that the Orange property, which was bought after the making of the will of 1870, was given by the testator to his wife. It appears that he gave to her, after the making of the will of 1870, real estate in New York which she sold about 1880 for \$11,500. But it by no means follows that if the court cannot find a reason satisfactory to its own mind for a change of testamentary disposition, the last will must therefore be rejected. *Stat pro ratione voluntas*.

I will not discuss at length the matters which are presented on behalf of the widow as evidence of fraud on the part of Samuel Dietz and Mr. Fransioli. I find nothing in them to lead to any conclusion adverse to the genuineness of the will under consideration, nor to induce the conviction that the instrument was the result of any imposition or fraud.

It is urged on the part of the widow that what was said in *Delafield v. Parish*, 25 N. Y. 9, 35, is apposite to this case, viz.: "That it is not the duty of the court to strain after probate,

nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing, and that when it is sought to establish a posterior will to overthrow a prior one, made by the testator in health and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made when the testator was in enfeebled health, and in hostility to the provisions of the first one, the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. Also, that the prior will is to prevail unless the subsequent one is so proven to speak the testator's intentions as to leave no doubt that it does so speak them."

In adjudicating upon the admission of wills to probate, it is the manifest duty of the court to uphold the right of free testamentary disposition of property, and not to attempt to annul or control it by considerations wholly at variance with that right. It is its duty to sustain the instrument, and admit it to probate if it finds that it is the duly executed last will and testament of the testator. If he is proved to have been possessed of testamentary capacity at the time of making the will, and the will does not appear to have been the result of any fraud, and it is proved to have been duly executed, the court has no right to reject it. If probate courts are to determine, from any other considerations whether a will ought or ought not to stand, then there will be an end of that right of free testamentary disposition of property which it has been and is the policy of our law to favor and guaranty. In the case in hand I am satisfied that the testator executed the will in the City of New York, on the day of its date, with all the legal formalities required by the law of this State; that at the time he was possessed of full testamentary capacity, and there is no proof that the will was the result of any manner of fraud.

It is urged that the fact that the testator has given considerable legacies to two religious societies and has given the residue of his property to an eleemosynary society is a suspicious circumstance. But the first two are societies of a religious denomination with which he was long connected, and the other is a most worthy public charity.

The fact that he has made those societies his legatees is surely not more remarkable than the provision which, by the will of 1870, he made for Mr. Wolston, who was not a relative of his, but only a friend. He had a right to give the property to the societies or to his friend, just as he saw fit. The reasons which induce a testator to change his testamentary disposition of his property, or to make a disposition of his estate which appears to be unequal or even absolutely unjust, may be very good ones, and yet they may be wholly confined to his own breast. He is not bound to mention them in his will, under penalty of having it rejected by the probate court if he fails to do so.

The decree of the orphans' court admitted to probate the will of 1870 and rejected that of 1880. It directed that Samuel Dietz pay the costs of the caveatrix and \$2,000 counsel fee to her counsel. It also directed that letters of administration with the will annexed be issued to

George H. Hartford, the executors named in the will of 1870 having made no application for probate thereof, although notified and requested to do so.

The decree will be reversed, and there will be a decree refusing to admit the will of 1870 to probate, and admitting the will of 1880. The costs of both sides in the matter of probate, both in this court and in the court below, will be allowed out of the estate, with a counsel fee of \$1,500 for each side in both courts.

The orphans' court appointed an administrator *pendente lite* in the cause, and on the day on which the decree above mentioned was made; and after the making thereof, it made an order by which, after reciting that it had appeared to the court, by the examination of Samuel Dietz and Augustus G. Fransioli, that they had severally received, since the death of the testator, moneys belonging to his estate, or due to him, it was ordered that they forthwith pay to the administrator with the will annexed, or to the administrator *pendente lite*, in case of appeal from the before mentioned decree of the court, denying probate to the will of 1880 and admitting the will of 1870 to probate, all moneys by them, or either of them, received since the death of the testator, due to the testator or coming to his estate, with interest thereon from the time of such receipt, and also deliver to such administrator all books, papers, securities, certificates of stock, bonds, mortgages, or other choses in action belonging to the testator which, at the time of making the order, were in the possession of either of them, and that Samuel Dietz give to the administrator, on demand, access to the safe of the testator proved in the cause to have been and to be in the office of Samuel Dietz, in the City of New York, to the end that any papers and securities of the testator there being might be found and taken into the administrator's possession.

From that order Samuel Dietz and Mr. Fransioli appealed. It is argued that the court had no jurisdiction to make the order. It had jurisdiction of the subject matter and of the parties. Speaking generally, the order was a direction (it was an authorization also) to pay and deliver over property of the estate to the person entitled by law to the custody of it. There was no conflict of jurisdictions. The order directed the parties to do nothing which it was not their plain duty to do without it. It does not appear that they were in any way prejudiced or aggrieved by it.

It will be affirmed, with costs.

James P. SULLIVAN, Appt.,
v.

Richard W. HORNER, Admr., etc., Respnt.

1. Reasonable funeral expenses, and the physician's bill for the last sickness, of a deceased debtor, are preferred in payment to all other claims or debts.
2. Reasonable funeral expenses of the wife and child of a decedent, who were deprived of life by the same accident, and buried at the same time, with him, are also preferred in payment, over all other claims or debts against his estate.

3. Expenses of bringing home the body of one who dies away from home, and of a person to accompany the body, are proper funeral expenses.

(Decided — — 1886.)

APPEAL by a judgment creditor from a decree of the Orphans' Court of Monmouth County, preferring a claim against decedent's estate for funeral expenses. *Affirmed.*

The facts are stated in the opinion.

Mr. G. T. Werts, for appellant.

Mr. E. W. Arrowsmith, for respondent:

Where any person interested sees to it that the funeral rites of the decedent are decently performed, and incurs and pays the expenses thereof, the assets in the hands of the personal representative are liable for the expenses thus incurred.

8 Redf. Wills, pp. 245, 247; 3 Wms. Exrs. ed. 1877, p. 1886; *Hagood v. Houghton*, 10 Pick. 154; *Re Miller*, 4 Redf. 302; *Patterson v. Patterson*, 59 N. Y. 582; *Happleyea v. Russell*, 1 Daly, 214; *McCue v. Garvey*, 14 Hun, 568.

This principle is clearly established in this State in the case of *Campfield v. Ely*, 1 J. S. Green, 150.

"Under the advanced civilization and christianizing influences of the present age, the extreme rigor of the common law has greatly relaxed, so that it now has become the rule that a suitable tombstone or monument is properly chargeable as a part of the funeral expenses, even where the estate is insolvent, and is almost invariably allowed, because it is one of the demands of public opinion and is in accord with public sentiment."

3 Redf. Wills, p. 246.

In *Jennison v. Hagood*, 10 Pick. 77, the expenses of a journey (made by the wife and other relatives) to the testator, who was sick at a distance from home, were allowed, although they did not arrive until after his death.

The expenses of a wake have been allowed; *McCue v. Garvey*, *supra*; the cost of ordinary mourning apparel for the family of the deceased; *Campfield v. Ely*, *supra*; and the bills incurred by erecting suitable gravestones at the grave of the deceased.

2 Wms. Exrs. ed. 1877, p. 1035, note; and note to *Wilson v. Staats*, 6 Stew. 524.

Where the intestate committed suicide at a hotel in New York City, it was held that the expense of sending a special messenger to the relatives of the deceased at Philadelphia should be allowed, and that the charge for accompanying the body to that place should fairly be considered as a funeral charge.

Husler v. Hasler, 1 Bradf. 248.

In *Stag v. Punter*, 3 Atk. 119, decided nearly 150 years ago, the case of an insolvent estate, Lord Hardwicke was "of opinion that sixty pounds is not too much for the funeral expenses, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death."

In the case of *Haines v. Price*, Spencer, 480, the court on page 483 says: "The priorities or order of preference at common law may be shortly stated as follows: 1. Funeral charges and the expenses of administration. 2. Debts of record."

N. J.

Toller, Exrs. 2d ed. 245; Dayton, Surr. 2d ed. p. 813.

Funeral expenses were to be preferred, even to a debt due to the Crown.

2 Wms. Exrs. top p. 1055.

Apd to debts of the United States Government.

U. S. v. Eggleston, 4 Sawy. 199.

Judge Folger decided in *Patterson v. Patterson*, above cited: "Though our statute of payments of debts and legacies (2 N. Y. R. S. 87, § 27), gives the order in which the executor shall make payment of debts against the estate, and though there is no provision there for a priority of payment of funeral expenses, it is not to be held therefrom that the common-law rule is abrogated. Those expenses are not to be treated as a debt against the estate, but as a charge upon the estate, the same as the necessary expenses of administration."

It can hardly be seriously contended that this is such an officious intermeddling with the estate of the decedent as to make him an executor *de son tort*; the contrary has been the law for a century.

Toller, Exrs. 2d ed. pp. 40, 245. See note to *Rogers v. Price*, 3 Younge & J. 28, 38.

But even an executor *de son tort* should be allowed for proper and reasonable funeral expenses conditioned to the circumstances of the case.

Yardley v. Arnold, 1 Crompt. & Mees. 484.

Runyon, Ordinary, delivered the following opinion:

The subject presented for adjudication is a claim of James S. Coleman against the estate, for the funeral expenses of the intestate, Moses W. Stoll, and his wife and child. Stoll died on the 7th of February, 1882, at Waco, in Texas, whither he had gone from Matawan, in this State, to engage in the construction of a railroad there. His residence was in Matawan. His stay in Texas was to be merely temporary. He intended to return to Matawan. He and his wife and child were all killed at the same time, in a collision on a railroad.

Coleman ordered and paid for the funeral. The bodies were brought from Texas to this State for burial in the same month of February, and were buried in Stoll's burial plot, in a cemetery at or near Matawan. The cost of the funeral, including the amount (\$10) of a surgeon's bill for services at Waco to render the head of the child presentable to view, and the cost (\$235.25) of sodding and curbing the lot in the cemetery, and of a monument over the graves, was \$1,767.95. In this amount were included the expenses (\$100) of a person who came from Texas to this State with the bodies, to superintend the transportation thereof. The expense of the funeral was increased by the amount of about \$500 by the bursting of the caskets in which the bodies were placed in Texas, which rendered it necessary to buy new ones on the arrival of the bodies here, and to transfer the bodies thereto.

The agent of Mr. Coleman (it was Mr. Horner, who afterwards became administrator of Stoll) endeavored to keep down the expenses of the funeral as much as possible, and the funeral was in accordance with the station in life of the decedent. The estate is insolvent.

The appellant, a judgment creditor of Stoll, excepted to the claim of Coleman, which, with interest to June 24, 1884, amounted to \$1,980. At the time of the funeral, Coleman did not know of the existence of the judgment. The orphans' court allowed the claim to the amount of \$760, which they adjudged to be a reasonable sum for the funeral expenses of the intestate.

The appellant insists that the expenditures of Coleman were entirely voluntary, and that he cannot recover against the estate therefor, nor for any part thereof; that if he can recover, his claim is not to be preferred to that of the judgment creditor; that if it is to be so preferred, it can only be preferred for what would be the reasonable cost of the funeral of the intestate alone, in Texas, where he died. An executor is bound to provide for his testator decent and appropriate Christian burial. Not only do the usages and necessities of society require this at his hands, but it is a requirement of the law also. *Went. Exrs.* 17, § 1; *Ram, Assets*, 331.

Decent Christian burial is part of the individual rights of everyone. The estate in the hands of the executor or administrator is bound by law for the payment of the expenses of the decent interment of the decedent; and the executor or administrator, if he have sufficient assets, is liable upon an implied promise to another person who, as an act of duty or necessity, has provided for the interment, if the funeral was conducted in a manner suitable to the rank in life of the decedent, and the charge is fair and reasonable. *Tugwell v. Heyman*, 3 Campb. 298; *Rogers v. Price*, 3 Younge & J. 28; *Rapley v. Russell*, 1 Daly, 217.

Funeral expenses are, by the common law, to be first paid out of the assets. 11 Vin. Abr. 432.

And they are by law, in England, preferred in payment to a debt due the Crown. 2 Wms. Exrs. 938.

And in this country, to a debt due to the United States Government. *U. S. v. Eggleston*, 4 Sawy. 199.

By our statute they are among the preferred claims. Though grouped in the statute with other claims also preferred, they are entitled to preference over those claims, as they are at the common law. The statute does not take away the absolute preference which the common law accorded. The reason for such absolute preference still exists in full force. Our statute as to preferred claims is as follows: judgments entered of record against the decedent in his lifetime, funeral charges and expenses, and the physician's bill during the last sickness, shall have preference, and be first paid out of the personal and real estate of the testator or intestate. Rev. p. 764, § 58.

In the statute, as it stood before revision, they were mentioned in inverse order. R. S. p. 846, § 2.

It is argued that the preferred claims, under the present statute, are entitled to priority in the order in which they are mentioned. This construction would give to judgments of record against the decedent in his lifetime preference over his funeral expenses and the physician's bill for services during the last sickness. It is entirely obvious that such a construction is not allowable. It might give to the judgment creditor of an insolvent decedent the entire

property of the debtor, and leave his body to be buried at public expense, and his physician's bill for services in his last illness unpaid. It would subordinate the demands of society, i. e. the very important matters of medical aid in sickness and decent burial after death, to the claim of a creditor; and thus the insolvent might be compelled to depend upon charity for medical aid in his last illness, and his body, at his death, go to a pauper's grave, furnished at the public expense.

The condition of a man's estate is, in the great majority of cases, unknown to the community until after his death. It follows that if the construction contended for were adopted, the physician and the undertaker would, in very many cases, decline to render their services on the credit of the estate. The law is not so careful of the interests of judgment creditors of insolvent debtors as to prefer their demands to the claims of humanity and the proprieties and necessities of society, but, on the contrary, for manifest reasons, subordinate the former to the latter. It has been held that the claim for funeral expenses is not to be regarded as a debt at all, but as a charge upon the estate. *Patterson v. Patterson*, 59 N. Y. 574; *Schouler, Exrs.* § 421.

From an early day it has been held that a stranger who furnished a funeral for a decedent does not thereby make himself executor *de facto*. The dictates of humanity, no less than the decencies of enlightened society, demand that the reasonable funeral expenses, and the physician's bill for the last sickness of a deceased debtor, be preferred in payment to all other claims or debts. The same considerations apply in this case to the reasonable funeral expenses of the wife and child of the decedent. He and they were deprived of life by the same fatal stroke, and were buried with one and the same funeral. Had he survived them, it would have been his duty to bury his wife and child, and the law would have required it at his hands. This duty, which he was thus unable to discharge, the law, under the circumstances, charges upon his estate. Otherwise, the law, while it secures to the deceased insolvent debtor decent burial out of his estate, would deny it to his wife or child dying at the same time, and would, merely out of consideration for his creditors, leave their bodies to be buried by the hand of charity, and perhaps at the public expense. That would be discreditable to the law.

In such a case it should be held that, in the interest of society, out of a proper regard to its proprieties and decencies, and to protect the public against the expense, and put it where it of right should fall, the reasonable expense of the funeral of the wife or child may be included in that of the husband or father. Nor would it be too great a strain upon the words of the statute, but it would be a reasonable construction, to hold that, under such circumstances, it embraces such expense. It is true the statute, in the provision for the payment of funeral expenses, contemplates the expenses of the funeral of the decedent debtor; but an enlightened construction would hold that the provision is broad enough to embrace, in an exceptional case, such as this, the reasonable funeral expenses of the wife and child in that of the husband and father.

The case under adjudication differs essentially from that in which a husband or father furnishes the funeral, and dies without paying for it. In the latter case, the unpaid claim for funeral expenses would not be a charge upon his estate, but merely an unpreferred debt. The charge of funeral expenses of the wife or child upon the husband's or father's estate, when he dies insolvent before he can discharge his duty of burying his dead, rests upon the ground of necessity and public decency. The expense of the funeral must, in such case, not only be reasonable, but should be only such as is necessary for a funeral conducted in a plain manner, and without the superfluous accessories which would be allowable in case the estate were solvent. The rule, as against a creditor, is that no more shall be allowed for a funeral than is necessary, and, in considering what is necessary, regard must be had to the degree and condition in life of the decedent. *Hancock v. Podmore*, 1 B. & Ad. 260; *Edwards v. Edwards*, 2 Crompt. & M. 612.

When the decedent dies away from home, it is reasonable that his body should be brought home for interment. And to the expense of such transportation may reasonably be added that of a person to accompany the body for the purpose of superintending such transportation. *Hastler v. Husler*, 1 Bradf. 248; *Schouler*, Exrs. § 421.

In this case the expenditure for the funerals, not including \$253.35 expended for a monument and work upon the burial plot, was \$1,514.70. The court allowed only \$760, including interest, *i. e.*, \$650 for the expenditures. That is about \$216 for each person. The rule on the subject of allowances for funeral expenses, already stated, is that they must be reasonable under all the circumstances. The amount allowed by the orphans' court is reasonable under the circumstances of this case. It is true that in the decree the orphans' court states that the \$760 were allowed as a reasonable sum for the expenses of the funeral of the intestate. The court probably regarded the funeral as the funeral of the intestate, in which his wife and child were buried with him.

The decree should be affirmed, but without costs.

Jacob N. HILL, *Appt.*,

v.

John D. BLOOM, *Exr.*, *Respnt.*

1. A will contained the following: "I do further order that if, at the time of the distribution of said estate or any part thereof, there shall be due to my estate, from any of the said legatees, obligations of any kind or evidences of debt of any kind, then such obligation shall be first deducted from his or her share of said estate before payment shall be made of such share or legacy." Held, (a) That term "obligations" was intended to include notes and all instruments by which the maker thereof binds himself to pay money; (b) That the term "evidences of debt" was intended to embrace instruments

not obligations or promises to pay, and which might not be even acknowledgments of indebtedness; *e. g.*, receipts for advances of money; (c) That by the use of the word "obligation" in the second clause of the sentence, testator intended to embrace everything mentioned in the first clause, namely: obligations of any kind and evidences of debt of any kind.

2. The orphans' court has power to construe a will so far as necessary to determine to whom distribution or payment of the amount shown by an account filed by an executor or administrator *cum testamento annexo* shall be made.

(Decided — — 1886.)

APPEAL from a decree of the Orphans' Court of Sussex County. *Affirmed.*

The facts and questions presented are stated in the opinion.

Messrs. Roe & Shepherd, for appellant.
Mr. C. D. Thompson, for respondent.

Runyon, Ordinary, delivered the following opinion:

This is an appeal from an order of distribution made by the Sussex Orphans' Court, October 21, 1884, under the will of Nehemiah Hill, deceased. By the seventh section of the will, the testator ordered that if, at the time of the distribution of his estate or any part thereof, there should be due to his estate, from any of his legatees, "obligations of any kind or evidences of debt of any kind," then "such obligation" should be first deducted from his or her share of the estate, before payment of such share or legacy.

He gave a share of his estate to his daughter, Mary Ann Newbaker; another to the heirs of his daughter, Magdalena Emmans; another to his son, Jacob N. Hill, the appellant; another to his daughter, Sarah Jane Bowers; and another to his daughter, Susan Ellen Bloom.

At the time of his death, he held two promissory notes and four receipts given to him by the appellant for money advanced by him to the latter. They amounted, with interest, to \$3,206.12.

The executors filed two accounts. The first was passed August 8, 1882. The balance thereon to be distributed was \$3,692.60. That balance was distributed by an order made August 22, 1882, which adjudged that Sarah Jane Bowers owed the estate, at the date of the order, \$3,746.60 on notes and obligations given by her to the testator in his lifetime, and that there was due to the estate from the appellant, at that date, \$3,431.98 on notes and obligations given by him to the testator in his lifetime, and that there was nothing due the estate from any of the others to whom shares were given. The order distributed the balance among those other persons.

The final account was passed July 22, 1884. The balance thereon for distribution was \$8,093.90, including the balance of the former account. The order of distribution upon the settlement of the final account was made Oc-

tober 21, 1884. It recited that there was at that date due to the estate from Sarah Jane Bowers, \$4,013.91 (\$2,061.72 of principal and \$1,952.19 of interest), and from the appellant, \$3,658.77 (\$1,695 of principal and \$1,963.77 of interest), and ordered and adjudged that those sums respectively be deducted from their respective shares. Also, that there was no proof that there existed any indebtedness of any kind to the estate from the other persons entitled to shares, and that it appeared that the balance upon the account of August, 1882, had been distributed according to the provisions and directions of the will, so that there remained in the hands of the executor, to be distributed, the sum of \$4,401.30. It thereupon ordered that the costs of the order and a counsel fee be paid out of that residue, and that the remainder, \$4,348.86, be distributed and paid by the executor as follows: \$1,449.45 to Mary Ann Newbaker, the like sum to Susan E. Bloom, and the like sum to Joseph R. Emmans, Nehemiah H. Emmans and Uriah Emmans, children of Magdalena Emmans, deceased, in equal shares. From this latter order the appeal was taken.

The appellant insists that the court erred in charging against him the amount of the notes and receipts given by him to the testator in his lifetime. According to the evidence, he has admitted that he received from his father the money mentioned in those instruments, and that the money was advanced to him by his father. It appears that it was advanced to him on account of his share of his father's estate.

John R. Reamer testifies that after the testator's death, the appellant said to him that "he had had his share of his father's estate and a little bit more, but, if there was anything more to get, he was going to have some more." The appellant's counsel argues that by the terms of the seventh section of the will, only obligations according to the technical signification of the term are to be deducted from the shares. The language of the section is:

"I do further order that if, at the time of the distribution of said estate or any part thereof, there shall be due to my estate, from any of the said legatees, obligations of any kind or evidences of debt of any kind, then such obligation shall be first deducted from his or her share of said estate before payment shall be made of such share or legacy."

Obviously, that construction would be too narrow. It evidently would not be in accordance with the intention of the testator. By the term "obligations" he meant to include notes and all instruments by which the maker thereof binds himself to pay money. And by the term "evidences of debt" he meant to embrace instruments not obligations or promises to pay, and which might not be even acknowledgments of indebtedness, such, for example, as receipts for advances of money. And when in the second clause of the sentence he used the word "obligation," he intended to embrace therein all those things mentioned in the first clause, namely: obligations of any kind and evidences of debt of any kind. He meant, by means of this provision, to secure to his children an equal division of his estate, taking into account and charging against them any advances which he might have made to them, for which he held their obligations or written promises to

pay, or of which he held other written evidence.

As before stated, he held, at the time of his death, two promissory notes given to him by the appellant for advances made by him to the latter, and four other instruments of writing, signed and given to him by the appellant, acknowledging the receipt by the latter from him of different sums of money. Those sums were also advances made by the testator to the appellant, and those receipts were given, taken and held as evidence of those advances. The testator always spoke of them as "Jacob's notes." They all merely acknowledged the receipt from the testator of the money mentioned therein, without stating on what account or for what the money was paid or received. One of them (for \$500) contains a statement of the mode in which the money mentioned therein was transmitted, in the words "what I sent to you by a check." That receipt is in the handwriting of the testator and signed by the appellant.

The words above quoted were written by the testator, and by them he intended to identify that particular advance. The testator never owed the appellant any money. The former lived in this State, and the latter lived in Michigan during all the time in which the advances were made. When, since the testator's death, the appellant was asked why he did not send notes to his father, instead of receipts, he replied that that was his business. He also said that the notes and receipts (he had then examined them) were all right; that he had received every cent of the money for those papers, and that his father was very kind, and always sent him money when he wanted it.

In *Harens v. Thompson*, 11 C. E. Green, 383, a receipt given by a son to his father for a sum of money "in full, in lieu of dowry," was held, under the evidence, to be an agreement by which the son, in consideration of the money so paid to him by his father, agreed with the latter that he would make no claim to a share of his father's estate, should the latter die intestate, but would be debarred therefrom by that instrument made upon what was a satisfactory compensating consideration.

There is no error in the adjudication complained of in this case.

The appellant's counsel insists that the orphans' court had no jurisdiction to make the decree of distribution, because, in order to do so, it was necessary for it to construe the will, and he insists that that court had no authority to construe the instrument. The objection is not well founded. The one hundred and fifty-first section of the Orphans' Court Act (Rev. p. 785) provides that when an account shall have been filed by an executor or an administrator *cum testamento annexo*, exhibiting a balance in hand, it shall be lawful for the court, upon the application of any party in interest, to adjust, order and make just distribution, in accordance with the directions and provisions of the last will and testament in each case, of what shall remain after all debts and expenses shall have been allowed and deducted. The power to construe the will, so far as necessary to determine to whom the distribution or payment is to be made, is obviously a necessary incident to the power given by that section.

It is also urged, on behalf of the appellant, that if the orphans' court had authority to make the deduction, and it was right that the deduction should be made, the court ought to have treated the money due to the estate from Sarah Jane Bowers and the appellant respectively as part of the assets of the estate, for the purpose of ascertaining the shares.

It appears, by the account of 1882, that those debts were included in the inventory, and that allowance therefor was obtained in that account, on the ground that they had not been collected and were, in fact, uncollectible.

The decree appealed from will be affirmed, with costs.

Caroline BROKAW *et al.*, Exrs., Appts.,
v.

Edward V. BROKAW, Resp.*

A testator gave all his personal property to his wife, and directed his executors to sell all his real estate and divide the proceeds into two equal parts, one of which he gave to his wife and the other to his executors in trust, to invest it and pay to his father, from time to time, so much of the principal and interest as he might require for his support as long as he should live; and he gave so much of this fund as should remain after his father's decease, to his, testator's, brothers' children. The wife and father of testator survived him and occupied his house and land until the father's death, when it was sold; and to the account of the disposition of the proceeds filed by the executors, a son of a brother of testator excepted. Held:

(a) That the **testamentary provision for the wife was inconsistent with her dower**, and having accepted it, she was **not entitled to occupy the mansion house of her deceased husband rent free**, on the ground that dower had not been assigned;

(b) That the **heirs at law of the testator had no claim, as such, to the rents and profits of the land, but were entitled to an account for half the value of the use and occupation, and to have it applied to the cost of the support of testator's father;**

(c) That **the executors were chargeable with one half the value of the use and occupations of the land, and were to be credited with one half the taxes and insurance;**

(d) That a part of the exceptions to their account having been sustained, it was not error to decree that the **executors should pay costs and counsel fees out of their own funds.**

(Decided — 1886.)

ON appeal from the Orphans' Court of Middlesex County, to review a decree on exceptions to an executors' account. *Modified.*

The facts are stated in the opinion.

Mr. Jacob Weart, for appellants:

The widow was entitled to dower in the real estate; she was entitled to quarantine until the dower was assigned, and the dower never was assigned.

Van Arsdale v. Van Arsdale, 2 Dutch. 404; *Colgate's Exr. v. Colgate*, 8 C. E. Green, 372; *Den v. Creveling*, 1 Dutch. 449; *Stark v. Hutton*, Saxt. 216.

The executors having treated the fund as at interest from the day of the death of their testator, and this charge having been excepted to, this court can now deal with the question, and do in the matter what, according to law and justice, ought to be done.

Cook's Exrs. v. Cook's Admr. 5 C. E. Green, 377; *Fluke v. Exrs. of Fluke*, 1 C. E. Green, 478; *Craig v. Leslie*, 3 Wheat. 563 (16 U. S. bk. 4, L. ed. 480); *Fletcher v. Ashburner*, 1 Bro. Ch. 497; *Pratt v. Douglas*, 11 Stew. 539; *Macknet v. Macknet*, 2 Stew. 54; 1 Wms. Exrs. 551.

An election made in ignorance, or under a mistake of the real nature and extent of the parties' own rights, is not binding, and may be revoked, unless the rights of third persons have intervened which would be interfered with by such revocation.

Pratt v. Douglas, 11 Stew. 539; *Macknet v. Macknet*, 2 Stew. 54; *Stewart v. Stewart*, 4 Stew. 398.

The devise to exceptants being in money, and not in land, they had no right to the rent of the farm until it was sold.

Moores v. Moores, 12 Vroom, 440; *Romaine v. Hendrickson's Exrs.* 9 C. E. Green, 231.

Mr J. J. Bergen, for respondent.

Runyon, Ordinary, delivered the following opinion:

Garret G. Brokaw, late of Middlesex County, at the time of his death was the owner of a farm of 105 acres, and another tract of about 51 acres. He died February 24, 1877. By his will he gave all his personal property, after payment of his debts and funeral expenses and costs of settling his estate, to his wife. He then directed his executors (his wife and Archibald C. Wallison) to sell and convey all of his real estate, as soon as convenient after his decease, but at such time as would be for the best interest of his estate, and divide the proceeds into two equal parts; and he gave one of those parts to his wife, and the other to his executors, in trust, to safely invest it and pay to his father (Samuel S. Brokaw), from time to time, whenever he should desire it, and ask for it, so much of the interest, and also so much of the principal as his father, in his own uncontrolled judgment, should require for his own comfortable support and maintenance so long as his father should live.

And the testator directed that in case his father's mental faculties should become impaired so that he should become unable to appropriate and use the money, the executors should use and expend for him so much of the principal and interest as should be needful and proper for his support, so long as he should live; and he bequeathed whatever, if anything, of the fund so created and set apart for his father, should remain after his father's death,

*See *Brokaw v. Brokaw's Exrs.* 3 Cent. Rep. 365.

to the children of his (the testator's) deceased brothers who should be living at the time of his father's death, in equal shares, to be divided *per capita*; and if only one should survive, then the whole was to go to that one.

The farm of 105 acres was conveyed to the testator January 6, 1865, by his father, upon condition that he, the testator, should suffer and permit his father to have a home and maintenance upon the premises, in the testator's family, so long as his father should live; and the testator thereby agreed, in consideration of the conveyance, to furnish and provide for his father good, sufficient, appropriate, fit, proper, comfortable, convenient and suitable food, lodging, raiment, nursing, care, medical attendance and medicines during his sickness, and all necessary care and attention during sickness and health, to make him comfortable; and that he would furnish and provide for him, at his death, proper burial, and provide a suitable tombstone for his grave.

At the death of the testator his father was in the eighty-second year of his age; and when he died (which was six years and nine months after that time), he was in his eighty-eighth. For the greater part of the period between the testator's death and his own he was an invalid and confined to his room, and part of the time he was confined to his bed.

The executors, in execution of the power of sale conferred upon them by the will, sold part of the tract of about fifty-one acres, before the death of Samuel S. Brokaw, for \$1,150, and paid one half of the proceeds to the widow, and applied the rest, except \$1, to his support. Because of the condition upon which the testator held the farm, they could not sell that property to advantage before the death of Samuel S. Brokaw, who refused to release.

The widow, from the death of the testator to the death of Samuel S. Brokaw, continued to occupy the farm, and kept and cared for him there. After his death, the executors sold the farm and the residue of the fifty-one acre tract for \$7,112. Of this money they paid over one half to the widow, and accounted in the Orphans' Court of Middlesex for the rest. In the account they charged themselves with the half of the \$7,112, and interest at 6 per cent per annum upon the amount of that half from the death of the testator. They claimed credit for half of the taxes and insurance upon the property for the same time and for the support of the testator's father, money paid him, etc., etc.

Exceptions were filed by Edward V. Brokaw, a son of the testator's deceased brother John. Some of them were allowed, and the accountants were accordingly charged with the rental value of the farm from the death of the testator until the death of his father, instead of the interest on one half of the purchase money of the property, and were credited with all of the taxes and insurance for that period, instead of only half thereof. The charge for board, etc., of the testator's father was reduced, and certain items were struck out because the same money had been previously charged in the account. The court decreed that the accountants pay out of their own funds the costs of both sides on the exceptions, and a counsel fee of \$75 to each side. From part of that decree the executors appealed to this court.

The respondent insists that, inasmuch as the title to the farm was, from the death of the testator to the death of the testator's father, in the heirs at law of the former, the rents, issues and profits of the property for that period should go to them; or, if not, should be applied to the satisfaction of the claim for the support, etc., of the testator's father. The property was not rented during that time, but, as before stated, was occupied by the widow, who lived upon it; and the testator's father lived with her there and was supported by her.

The executors, on the other hand, claim that the widow was entitled to dower in the property, and that, her dower not having been assigned, she was entitled to remain on the farm rent free under the statute, which provides that a widow may, until her dower is assigned to her, remain in, hold and enjoy the mansion house of her husband, and the messuage and plantation thereto belonging, without being liable to pay any rent therefor. Rev. p. 320, § 2.

They also claim that if she was not thus entitled to the use of the property, she was, under the will, entitled to one-half of the rents, issues and profits.

She was not entitled to occupy the property rent free as a dowress. She accepted the provision made for her by the will, and that provision was inconsistent with her dower. The will gives her all the personal estate after payment of debts and funeral and testamentary expenses, and then directs that the executors sell, as soon as conveniently may be after the testator's death, at their discretion as to the time of sale, all his real estate, and divide the proceeds into two equal shares, of which the will gives her one and devotes the other to the support of the testator's father, etc. The testator certainly did not intend that she should have her dower in his land in addition to the provision made in the will for her.

Where the provisions of the will manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower, it is sufficient, without express words, to put her to her election between the provision made for her in the will and that made for her by law. *Stark v. Hunton*, Saxt. 216; *Colgate's Est. v. Colgate*, 8 C. E. Green, 372; *Stewart v. Stewart*, 4 Stew. 398.

The heirs at law of the testator have no claim, as such, to the rents and profits of the farm. Their claim to the property is under the will. The testator, manifestly, did not intend that they should have the rents and profits. He directed that the property be sold as soon after his death as might be convenient, and, but for his father's refusal to release his claim under the condition, it would have been sold accordingly. The heirs at law are entitled to an account for the half of the value of the use and occupation, and to have it applied to the cost of the support, etc. of the testator's father.

Where a testator directs his executor to sell lands for a particular purpose, until such disposition is made of them, the heir is entitled to the rents and profits unless the testator has, by express terms or by implication, otherwise disposed of them; but whoever is entitled to the beneficial interest of the land from the death of the testator until it is sold, is entitled to the

rents and profits. *Current v. Current*, 8 Stock. 186.

In that case the testator directed his executor to sell at public auction or otherwise, as to him should seem best, and for such prices as he should deem expedient, all the rest and residue of his land and real estate and personal property, and the money arising from such sale, with certain other moneys, to divide among eight of the testator's children not before provided for in the will. He died in 1849, and the executor sold in 1852. It was held that those eight children were entitled to the rents and profits for the intermediate time.

As before stated, this property was not rented, but the widow occupied it. The executors are chargeable with a proper sum for the use and occupation. The counsel of the parties agreed that the value of the use and occupation for the whole time was \$3,346.10. The executors are chargeable with one half of this sum, or \$1,673.05, which is the amount with which they charged themselves as interest; and they are to be credited in this account with one half only of the taxes and insurance. The amount on which commissions are to be allowed will, of course, be reduced in accordance with this decision.

The appellants insist that the award by the decree, that the costs and counsel fees upon the exceptions be paid by them out of their own funds, is erroneous. But of the exceptions, two—one as to a duplicate charge of a large amount of money, and the other as to the amount to be allowed for board, etc., of the testator's father—were sustained. It would not be proper, under the circumstances, to put the cost of the litigation upon the trust fund. There is no error in that part of the decree. The costs of the appeal, and a counsel fee of \$50 to each side, will be paid out of the fund.

COURT OF CHANCERY.

John HOGAN

v.

Edwin A. GASKILL *et al.*

1. A provision, in a lease of shore front with right to build a pier thereon, that the lease shall cease and determine "in case of the destruction of said pier, or failure in operation, or the abandoning of it," will not entitle the lessee to surrender the pier to the lessor so as to cut off a mechanics' lien upon the pier built by the lessee.
2. The filing of a mechanics' lien secures to the lien claimant the rights of the owner of the property existing at the time of filing, and the owner cannot abridge or abandon such rights to the injury of the lien claimant.

(Filed November 15, 1886.)

BILL to quiet title and for an injunction. On order to show cause why injunction should not issue. *Denial of injunction advised.*

The facts are stated in the opinion.

N. J. C. R., V. IV.

Mr. J. J. Crandall, for complainant.

Mr. George T. Ingham, for defendants.

Bird, V. C., delivered the following opinion:

Hogan was the owner of a shore front, a portion of which he leased to Howard with the right to build a pier thereon extending into the Atlantic Ocean. The term was for ten years, at the rental value of \$50 a year. The conclusion of the instrument was in these words:

"In case of the destruction of said pier, or failure on the part of the said George W. Howard to keep the said pier in operation, or the abandoning of it, then this lease shall become null and void, cease and determine; otherwise to remain in full force to the end of said term."

On the 7th day of September, 1886, the said Howard executed a paper writing in which, after reciting the agreement or lease by which he held the land whereon said pier stood, used these words:

"Know, all men, by these presents, that I, George W. Howard, the above named lessee, do hereby abandon and yield up the above described pier to the said John Hogan and his heirs."

Prior to the execution of the last named instrument, Hogan recovered a large judgment against Howard, and so also did Gaskill, the defendant. Hogan's judgment was a general judgment; but Gaskill's was special by virtue of the statute respecting mechanic's liens. Gaskill advertised the pier for sale, by virtue of his special judgment. The bill was filed to restrain such sale. The bill sets forth many alleged irregularities in the proceedings at law in recovering the judgment upon the lien claim, and also sets forth the abandonment of the pier by Howard as is expressed in the above quotation. An order to show cause why an injunction should not issue was allowed. Counsel have been fully heard.

There never was any doubt in the mind of the court as to its duty to refrain absolutely from interfering with the common law proceedings, so far as any question could possibly arise as to methods or practice, whether regular or irregular, in the prosecution of the suit.

The only question worthy of consideration was whether Howard, under the circumstances, could abandon his right to the pier under his lease, so as to effectually defeat the lien of the judgment creditor. It is admitted that if such abandonment were effectual it could be pleaded at law; but it is insisted that if that be so, Hogan should be protected in this court and his property be preserved from the cloud which will be cast upon it by a sale.

It may be, considering that the bill was filed to quiet title, that it was properly filed. I am not sure that the cases, in New Jersey, have gone quite so far, yet perhaps they have. Than about this, I concern myself more about the effect of the alleged abandonment. This is not easy of solution.

The real question is, Could Howard, under the circumstances, abandon a valuable legal right, simply for the purpose of defeating his creditors? I think it will be conceded on every hand that he could not, if the agreement by which he held and enjoyed the right did not contain the clause "or the abandoning of it." Does this qualification change the legal rights

of the parties? I think not. I think there is a great difference between abandon and surrender; between abandoning a right or thing, and the surrender of such right or thing to another; between giving it up because it is regarded as utterly useless or valueless, and surrendering, assigning or transferring it to another as a valuable right or thing. When one surrenders a right or thing to another by solemn agreement in writing he certainly does not abandon it, in the sense in which all understand the word "abandon."

But it is claimed that this contract between Hogan and Howard was purely a personal affair, and that Hogan had a right to abandon the pier at any time, and that upon such abandonment the lease or agreement was terminated, and Hogan as effectually entitled to the absolute and unqualified possession as though the whole term of ten years had expired.

This is too broad a view, and I think must be qualified by the observations already made. It seems to me if valuable legal rights can thus be abandoned, it would be a hopeless task for creditors to attempt to enforce their just claims; for if I am right in the foregoing remarks, the act of Howard amounts to nothing more than a voluntary conveyance of this property to Hogan. It was done evidently without consideration and most plainly to prevent Gaskill from enforcing his lien.

But there is another consideration which it is impossible to overcome; that is, the effectual security of the lien itself, from the time of filing, by virtue of the statute. This lien was filed long before the alleged abandonment. The rights thereby secured to the lien claimant were the rights of the owner; no more, no less. The owner could in nowise abridge or abandon them to the injury of the lien claimant. If all others should fail, this view must prevail.

It seems to be my duty to advise an order denying the injunction and dismissing the order to show cause, with costs.

RODDY *et al.*, Trustees,

v.

BRICK *et al.*

1. An instrument, purporting to be a bill of sale, construed by the intention of the parties as shown by the facts and held to be a chattel mortgage.
2. The following principles applied in determining whether certain machines and machinery in a foundry building were, as between mortgagor and mortgagee of the realty, fixtures or chattels, namely: when a building is erected for a particular purpose and machinery is placed therein to effectuate that purpose and is reasonably necessary therefor and is, in some substantial manner, attached to the land or the building and, consequently, to the freehold, so as to give the idea of permanency and to evince an intention of making a fixture of it, the courts incline to regard such machinery as a part of the realty, irrespective of weight or size, unless the size be such that the machine

cannot be removed without removing or damaging the building; but the fact that machines in a building are essential to the successful conduct of the business carried on therein, and the intention of the owner of the concern in the construction of the building and in placing machinery therein are not conclusive that such machines are fixtures; and the fact that a machine may be removed without injury to itself or to the building does not determine it to be a chattel.

(Filed November 22, 1896.)

BILL to foreclose a mortgage. *Decree of sale advised.*

The facts are stated in the opinion.

Mr. A. V. Schenck, for complainants.

Mr. J. D. Bedle, for defendant Campbell.

Mr. W. P. Wilson, for defendant.

Bird, V. C., delivered the following opinion:

This bill is filed to foreclose a mortgage bearing date the 17th day of May, 1890, and recorded on the 17th day of June in the same year, in the county wherein the mortgaged premises are situated. This mortgage was given by Riley A. Brick and wife to the complainants, as trustees, to secure the payment of one hundred bonds, given by the said Brick payable in five years, with interest semi-annually on the first days of January and July, on condition that if default be made in the payment of any interest or any part thereof, on the day when the same was payable, and should remain unpaid for the space of thirty days, then the principal of said bonds should become due.

The property covered by the mortgage is first described as follows: "All that certain lot or parcel of ground, with the buildings and improvements thereon erected, situate," etc., with a more particular description by courses and distances, containing 4½ acres. It makes no mention of the property which is in dispute, which the complainants claim is part of the real estate, as being fixtures, and which the defendant Campbell claims is personal property.

The bill alleges that at the time of the execution and delivery of the said mortgage, the said premises were designed for and used as an iron foundry for the casting and making of water pipe and gas pipe, and that there was, at that time, machinery and fixtures of a permanent nature used in the said business and attached to the realty and intended to be, and actually were included in the said mortgage, and as such did pass as a part of the real estate to the complainants.

The articles claimed by the complainants are: "One large steam crane, one jack, one steam engine and boiler, one large lathe, one small lathe, one planer, one drill press, one drill upright, one Mackenzie blower, two small pumps in machine shop, shafting, belting, etc., one large truck scale (for weighing cars and contents), one wire rope and drum, one jig saw and stand in blacksmith shop, one pair of bellows, two anvils, one large anvil, railroad track and smith at foundry in machine shop, one iron hoisting block and chain, one wood hoisting block and rope, one wood hoisting block and small."

The bill states that the whole number of bonds (that is, 100) was issued, and that many of them are held entirely by persons unknown, and that no interest has been paid since January 1, 1884, and that therefore the whole amount of principal and interest has become due.

The bill also shows that on the 29th day of May, 1880, the said Brick and wife made and delivered to the defendant Campbell a mortgage upon the same premises to secure the sum of \$10,000.

The bill also shows that on the 24th day of June, 1882, the said Brick conveyed all the said mortgaged premises to the said Campbell; and also that on the 29th day of May, 1880, the said Campbell executed a bill of sale, to the said Brick, for said articles and many others, which was filed in the clerk's office on the 16th of August, 1880, and also a certain other bill of sale dated January 5, 1882, which was recorded January 6, 1882, and also recorded December 22, 1882, and the 18th of December, 1883, which were given to the said Brick, by the said Campbell, to complete the sale and transfer of the chattels therein mentioned by said Campbell to said Brick, each one containing a distinct proviso that in case default be made by said Brick in the payment of four several notes, given in consideration of said sale or any part thereof; then said sale should be void and the said chattels should revert to Campbell and it should be lawful for him to take possession of them.

As intimated, the articles above enumerated are all named in this bill of sale. Campbell claims two cranes (one steam and one jack), one engine and boiler and one blower, by virtue of the proviso in said bill of sale; insisting that the title did not pass thereby, and could not, in law, until all the consideration money was paid; whereas, the complainants claim that they have all been attached to the realty and are fixtures, and that the taking of a chattel mortgage or treating the bill of sale as a chattel mortgage estops Campbell from claiming under bill of sale.

First. Did the title pass, and was the instrument called a bill of sale intended to be used as a mortgage to secure the payment of the purchase money only? I think it was intended to be used as a mortgage only. It is true, the language used, which is: "In case of default, this conveyance to be void and of no effect, and the possession of the goods herein described shall revert to the said party of the first part," is very clear and emphatic; yet a copy of this bill of sale Campbell had recorded in 1882, after having it acknowledged, both by himself and Brick, and after making thereon an affidavit by himself, in which he declares himself to be "the mortgagee in the within described chattel mortgage."

This must be taken to show what the parties intended. Campbell called it a mortgage, when giving it character under oath. I cannot see how the court can now give the instrument any other name. And if there be any doubt, the law prefers treating such instruments as securities.

Mr. Justice Story in Flagg v. Mann, 2 Sum. 480-533, so declares. I quote: "It has been said that the true test whether the conveyance in this case was a mortgage or not is to ascertain whether it was a security for the payment of any money or not * * * whether the convey-

ance is a security for the performance or non-performance of any act or thing. If the transaction resolves itself into a security, whatever may be its form it is in equity a mortgage. If it be not a security, then it may be an absolute sale or a conditional purchase." Again; "It is well known that courts of equity lean against construing contracts to be conditional sales; and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage. So *Lord Hardwicke* laid down the doctrine (*Longuet v. Seaven*, 1 Ves. 406), and it has never been departed from. The *onus probandi* then is on the defendants to establish it to be a conditional sale. If it be doubtful, then it must be construed to be a mortgage." *Id.* 535.

And this view of the law is not at all in conflict with the case of *Cole v. Berry*, 13 Vroom, 308, where the rights of the vendor, when it is intended that possession shall pass to the vendee, but not the title to the thing agreed to be sold, is most clearly defined.

The doctrine which is involved in the present case is discussed in *Jones on Chattel Mortgages*, §§ 26-32. In section 30 he declares the law to be the same as laid down by *Mr. Justice Story* in *Flagg v. Mann et al.*, *supra*; but I believe he does not notice this case in his treatise.

If the parties had stood by the original bill of sale, with the distinct agreement that the title should not pass until all the consideration money was paid, no question could fairly have been raised as to the articles included therein and now in this foundry whether, independently of this question, they be considered fixtures or not. Attaching them to the freehold, however securely, would not deprive the true owner of them. See *Ewell, Fixtures*, 54.

But having come to the conclusion that the parties intended to treat this property as a security for debt and that Campbell is to be regarded as a mortgagee, I must inquire, second, whether the articles above named or any of them are fixtures or not. In view of the apparent uncertainty of the law on the subject, the question before me is quite embarrassing. However, let me take the facts and apply the law as I understand it.

Brick was desirous of establishing the foundry business to make water and gas pipe. For this purpose, he bought the land covered by the mortgage, and to carry it on issued the bonds secured thereby, and from time to time raised money on them. Campbell was the owner of a large stock of machinery valued at \$30,000, which he sold to Brick for that sum. This is the same machinery named in the bill of sale. At the time of the sale it was all located in Campbell's shop at Bricksbury in a distant county. Several of the articles named in the bill of sale (including two cranes, one engine and boiler and one blower) were transferred to the foundry built by Brick. The evidence leaves no doubt that they were purchased for that purpose, and that Campbell so understood it.

I think the case shows that Campbell also knew what Brick intended to manufacture and what use he intended to make of the machinery which he had bought. The building erected for the reception of the machinery was a mere shell, consisting of posts, joists, rafters, roof-

ing and clapboards. The land on which it stands is said to be of no value for any other purpose. At the time of the execution of the mortgage, the building was not complete nor was any of the machinery on the premises until about one month after it was completed. What Brick has done with all the other articles included in the bill of sale does not distinctly appear. It does not appear whether Campbell can realize his claim from them or not.

The different articles are connected with the building as now shown. The cranes have in each end a three inch iron pin. This pin rests in a socket in a large iron plate, both below and above. The plate below rests on brick work let into the ground and is made secure by iron bolts, running up through the brick work and plate, and by screws. The plate above is fastened to the joists or girders of the building by bolts and nuts. In this position the cranes are used in manufacturing and moving the pipe. It seems that they or similar ones are absolutely necessary in conducting the business. The steam engine rests upon a brick foundation let into the ground, about two feet in width by twelve in length and carried above the ground three feet. It is held in its position by bolts running through the brick work and the bed plate of the engine, and nuts screwed on top. This engine supplies steam to two boilers, and the power by which the entire business is carried on. The power is applied by means of shafting and belting. The shafting is all connected with the building by means of hangers, in the manner everywhere seen, I think. The steam boilers are secured in the same manner that the engine is, but they are more securely bricked in.

The McKenzie blower, a large iron box with a fan in it, to create a blast to melt the iron, is fastened to timbers imbedded in the ground by bolts and is connected with the shafting by belting, and so put in motion. The large planer sits on timbers and is kept in position by its own weight. The hoisting block and chain, used for raising material to a given height, and weighing about a ton and a half, is placed in position for use, by means of a large hook and eye, the eye being fastened into the building above. The hook can be readily lifted from the eye.

The turning lathes are set on timbers and are not otherwise fastened to the building; one of them is about fourteen feet long, and both are operated by belting and shafting. Their own weight keeps them in position. The drill press is supported in place by its own weight and is operated as are the lathes. The rope machines are quite certainly connected with the building. The railroad track and switch are iron rails and bars fastened to cross-ties, which are imbedded in the ground. The weighing scales are set on a foundation built in the ground and are fastened to the foundation by bolts. The bellows are used with the forge and the forge is of brick and mortar carried above the ground about eighteen inches. The pump is fastened to a bed plate of wood, as a witness says, "in a hole in the ground covered with boards, and there is a bed plate at the bottom and the pump is made fast to it." The anvils are fastened by spikes to large blocks of wood which are let into the ground.

It is urged that each of the machines named is essential to the successful management of the concern. This I concur in. But that alone does not settle the question between mortgagor and mortgagee, nor between the mortgagee and judgment creditors, nor between the mortgagee and the assignee of the mortgagor. If Campbell cannot hold any of these articles, should they be held not to be fixtures, because his alleged chattel mortgage is not a lawful lien, he may still claim them as such assignee.

Again; it is said that the intention of the party in the construction of a building and in placing machinery therein is a safe criterion. This principle is often invoked but it is not always controlling. There is no doubt that Brick purchased every machine and placed them in his foundry with the view of using them there, just as he did the building itself for the land, in the manufacture of pipe. But the cases all show that notwithstanding this, many machines large and small, heavy as well as light, placed in buildings erected expressly for them or similar ones, cannot be held by the mortgagee. It is only necessary to refer to the case of *Penn Mut. Life Ins. Co. v. Semple*, 11 Stew. Eq. 575, decided by the court of errors, and the cases referred to in the opinion of Justice Knapp.

Nor does the fact that a machine may be removed without injury to itself or the building, determine its character to be a chattel or not a fixture. For illustration take the engine used in this foundry: I suppose it can be taken from its foundation, by unscrewing the nuts, and carried away without doing any special damage to the freehold; yet it has been the judgment of all courts that when engines and boilers are annexed to the freehold as these are, by bolts and screws imbedded in masonry, they are to be considered fixtures. This principle applies with equal certainty and force to the cranes in dispute in the case before me.

I am impressed with another fact in connection with the cranes; that is, that as to the large ones, at least, the building must have been constructed with reference to them; for they reach from the ground floor or mason work on which they rest to the joists or girders which support the roof, about forty feet above and which one witness says were so placed and arranged as to receive and hold the cranes.

My conclusion is that the articles named are fixtures, excepting the planer, the hoisting block and chain, the lathes and the drill press. Counsel for complainants regarded these four chattels as fixtures, and relied upon *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459, 482 [78 U. S. bk. 20, L. ed. 199, 206], but quite clearly there is no strong analogy here. It seems to me that I cannot aim at anything like harmony or consistency in the law on this perplexing subject, without placing the four articles last named in the list of chattels rather than fixtures.

Nor is the view above expressed as to the articles regarded as fixtures at all in conflict with *Early v. Burtis*, 13 Stew. 501. In that case the facts were that the steam boiler was taken out of the building for repair, and was moved from place to place in the building, and rested on a brick foundation without bolts or any other attachment to the soil.

It would seem that when a building is erected for a particular purpose and machinery is

placed therein to effectuate that purpose, and is reasonably necessary therefor, and is in some substantial manner attached to the land or the building and consequently to the freehold, so as to give one the idea of permanency and to evince an intention of making a fixture of it, the courts incline to regard such machinery as part of the realty, irrespective of weight or size, unless the size be such that the machine cannot be removed without removing or damaging the building.

I will advise accordingly.

The decree will direct a sale, and if money enough is raised to discharge all of the bonds and complainants' costs, then all the outstanding bonds and such costs will be paid, except the twenty-three which are claimed by Mrs. Brick, and the amount due or claimed to be on those will be paid into court to await the further order of the court. If money enough to pay all be not raised by a sale, then an equal proportion will be paid on the former and the balance paid into court, there to remain until such further order.

James C. LORD'S EXRS. *et al.*,

v.

CARBON IRON MANUFACTURING CO.

- *1. For a **simple trespass**, which is complete when the force by which it is committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his **damages once for all**.
2. The **jurisdiction of courts of equity** in cases of trespass is **purely preventive**; they may restrain a threatened trespass, if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass; but **for a completed trespass**, which as a legal wrong is complete when protection is sought, they **can give no redress whatever**.
3. A court of equity cannot award **pecuniary damages** in redress of a trespass.
4. A court of equity has **no authority to impose an easement** on the land of a trespasser, in redress of the wrong done by the trespass.
5. As a **general rule**, the only **legal duty** which a **trespasser** incurs by his wrongful act, where his trespass is complete when judicial aid is invoked, is a liability to reimburse the person injured, in money, for the loss which his trespass has caused.
6. If an **upper mine owner breaks through a barrier** which was left by the lower mine owner for the purpose of **protecting his mine against the water** which otherwise would flow from the upper into the lower mine, the trespasser is answerable for the damages, including the cost of restoring the barrier; but the trespass in such case im-

*Head notes by VAN FLEET, V. C.

poses no legal duty upon the trespasser to either close the opening, or to prevent the water in his mine from flowing through the opening into the lower mine.

7. The **flowage of water** from the upper mine into the lower, through an opening thus made, is neither the continuance of a trespass nor of a nuisance, and gives **no distinct ground of action**.
8. If the **damages** resulting from a trespass are aggravated or **increased** by the folly, willful obstinacy, or gross carelessness of the **injured person**, such part of his loss as is directly attributable to his own fault cannot be recovered.
9. Where one person makes a **grant of land** to another, **reserving the minerals** in the land, a **covenant** will be implied, in the absence of all words to that effect and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, shall **leave or provide sufficient support for the surface** to prevent its subsidence.
10. **Land on a lower level** is under a natural servitude to that located above it, to receive the **water flowing** down to it naturally.
11. For **damages resulting from natural causes**, or from lawful acts done in a proper manner, the law gives **no redress**, such losses being regarded as *damnum absque injuria*; but where one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in greater quantities than it would go there naturally, he commits a legal wrong.
12. The owner of mineral land has a **right to take away** the whole of the **minerals** in his land, for such is the natural course of user of such land; and if in the course of such **user water** accumulates on his land, either on the surface or underground, and then **passes off** by the operation of the laws of **nature** into the land of his neighbor, his neighbor has no legal cause of complaint.

(Filed November 30, 1886.)

ON final hearing on bill and answer and proofs taken in open court. *Bill dismissed.*

The facts are set forth in the opinion of the Vice Chancellor.

Messrs. S. H. Little and Theodore Little, for complainants:

Cited Thomas Iron Co. v. Allentown Mining Co. 1 Stew. Eq. 77.

Mr. Henry C. Pitney, for defendant.

Van Fleet, V. C., delivered the following opinion:

The questions in dispute in this case relate to the rights and duties of persons owning adjoining mines. The litigants own adjacent iron mines in the County of Morris. They have both worked the same vein of ore, but at different levels and at different times, the de-

fendant's mine being above that of the complainants, and having been first worked in order of time. The main purpose of the complainants' suit is to procure a decree which will protect them against injuries, which they allege they now suffer, from the flowing of water from the defendant's mine into theirs, and which will also give them protection against injuries which they say they will inevitably sustain in the future, if the defendant is allowed to do what it threatens, namely: reduce the pillars and walls of its mine and let its surface subside. The complainants ask protection, it will be observed, against both present and prospective injury.

The facts on which the complainants rest their right to be relieved against present injury may be summarized as follows: the Carbon Iron Company was the predecessor in title of the defendant; it owned the mine now owned by the defendant up to June, 1878, when, under a decree of this court, directing the sale of certain mortgaged premises, this mine, with other lands, was conveyed to the defendant.

The Carbon Iron Company while it owned the defendant's mine, worked over the boundary line and took ore from the complainants' land. The time when this trespass was committed is not fixed with entire certainty. The bill does not allege when it was committed; it simply says that the Carbon Iron Company, while in possession, committed a trespass by working over the line. The answer, however, says that it was committed somewhere about the year 1872, and the proofs render it tolerably clear that it was committed near that time, certainly prior to 1875. The point where it was committed is about 100 feet, measured vertically, below the surface.

There is a dispute between the parties as to the true location of the division line, and a large amount of evidence was submitted by each in support of their respective claims; but, without expressing an opinion as to which claim is vindicated by the evidence, I shall, for the purposes of this discussion, treat the line claimed by the complainants as the true one. Adopting their line as the true one, the wrongful act of the Carbon Iron Company, which the complainants seek to make in part the basis of the relief they ask against the defendant, consisted in making an excavation or hole in the complainants' land 100 feet below the surface, for a distance of about 47 feet beyond the property line. A second trespass was committed in 1881. The defendant's lessees were the wrong doers in this instance. This trespass was committed at a point about 200 feet, vertical measurement, below the surface, and consisted in making an excavation beyond the division line for a distance of about 30 feet.

The two wrongful acts just described form the sole foundation of the complainants' right to relief against present injury. Neither the defendant, nor those who preceded it in title, nor those who have succeeded to any of its rights, have, by the exercise of force or violence, committed any other wrong against the complainants. It is not claimed that these trespasses, at the time they were committed, did the complainants any immediate irreparable injury, or even serious harm, but it is consequences which have since flowed from them,

consequences produced by the complainants' own subsequent acts, which have inflicted the injuries against which they ask protection.

The complainants did not begin to open their mine until the fall of 1880. They then sunk a shaft at a point where they knew it must, if carried down on the vein, strike the excavation which the Carbon Iron Company had previously made in its land, and that an opening between the two mines would thus be made, and that when it was made the inevitable result would be, if no barrier was erected to bay back the water rising in the defendant's mine, that the water would flow down into their mine.

The location of their shaft was judiciously selected. It was placed where it could be constructed with the least expense and be used to the greatest advantage. Their superintendent, however, says, and he is the person who selected the site for the shaft, that he expected, when he located the shaft, that in sinking it he would break into the excavation made by the Carbon Iron Company; and that he knew if he did, an opportunity would be afforded to the complainants to turn the water rising in their mine, above that point, into the defendant's mine; and he also says that he thought, if at any subsequent time it should become necessary to protect the complainants' mine against the water rising in the defendant's mine, that he could do it by building a dam across the opening.

The first opening between the two mines was made in sinking the shaft, in the manner in which the complainants' superintendent expected it would be made. And the second was made by the complainants' miners in blasting. A hole was drilled immediately above where the second excavation, across the line, had been made and was then charged with powder and fired. The blast was not successful. Two of the complainants' miners say that they supposed the reason why it was not successful was that the bottom of the drill hole happened to be near a crevice or fissure in the rock, and that when the powder exploded, the force produced spent itself in this opening.

A new bottom was then made for the hole and it was again charged with powder, and when this second charge exploded, a hole as large as a man's head was made between the two mines. This hole was afterwards enlarged by the use of picks, so that an ordinary person could pass through it from one mine to the other. At the time this last opening was made the complainants' mine had no means of ventilation except through its shaft and the upper opening made into the defendant's mine. One of the miners who assisted in making the second opening says that the complainants' mine needed ventilation, and that after the second opening was made its ventilation was much better than it was before.

The surface above the mines is low and wet, and they both, consequently, carry a large quantity of water. They are both wet mines. Through the two openings, made in the manner just described, all the water rising in the defendant's mine above the openings is given a free passage into the complainants' mine, and it is against the injury inflicted by this flowage that the complainants ask protection. They insist that upon the facts above stated they are

entitled to an injunction restraining the defendant from permitting the water rising in the defendant's mine from flowing through these openings into theirs. The complainants' right to the relief they ask, it will be perceived, stands distinctly and exclusively on two simple trespasses, neither of which was committed by the defendant.

The material question then would seem to be, Has this court any power, for injuries like those from which the complainants are now suffering, and which proceed from causes like those which produce the complainants' injuries, to give redress by the exercise of its prohibitory power? For a simple trespass, which as a legal wrong is complete when the force by which it is committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass in which the person injured must recover his damages once for all. The damages recovered in a suit founded on such a cause of action, extinguish the cause of action; and the sum recovered must, therefore, necessarily embrace compensation for all the injury, whether it be past, present or future, certain or contingent, known or unknown.

Courts of equity, in cases of trespass, exercise a limited and not a general jurisdiction. They may prevent or stop a trespass, but they cannot otherwise redress a wrong of that kind. They may restrain a threatened trespass, if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass; but for a completed trespass, which is finished and ended when protection is sought, they can give no redress whatever. And the reason is manifest; their injunction being purely preventive, if the wrong is already done when their power is invoked, they cannot prevent the wrong. The doing of that which is already done cannot be prevented. For a past trespass, which as a legal wrong is complete when redress is sought, no redress can be given except compensation in money, by way of damages, and redress in that form cannot be administered by a court of equity. In cases where the damages are not susceptible of exact estimation, and where no standard of measurement exists, except such as an experienced judgment will approve, it has been declared by the highest court of this State that this court cannot admeasure them, but their admeasurement, in all such cases, belongs exclusively to the common-law courts. *Palys v. Jewett*, 5 Stew. 312.

Therefore, if the wrong which forms the ground of this action had been committed on the surface, and had consisted of an excavation made in the complainants' land, and also of the removal of a solid stone wall, erected by the complainants on their own land to prevent the water of a pond standing on the defendant's land from overflowing theirs, and the effect of the defendant's wrongful acts in making the excavation and removing the wall, had been to produce a continuous discharge of the water of the pond over the complainants' land, which would continue, constantly inflicting additional injury, so long as the wall was not restored, and the complainants had failed to apply

for protection while the wrong was in progress, but came seeking it after all force and violence had ceased, and after the defendant's trespass, as a legal wrong, was fully completed, though its injurious consequences were still in progress, I consider it entirely clear on principle that, under such a condition of facts, this court would be powerless to give the complainants any relief whatever. It is certain that the trespass could not be restrained, for, as already remarked, it is impossible to restrain or prevent the doing of that which has already been done. It is equally certain that this court has no power to decree the payment of pecuniary damages in satisfaction of such a wrong.

And I know of no power in this court, or in any other, which gives it authority, when one person has made an excavation in the land of another, to command the aggressor to go back and fill up the excavation and restore the land to its original condition. Such a decree, would, I think, be entirely anomalous, having the support of neither precedent nor principle. And it would produce this incongruous state of affairs: to redress the first trespass, the court would command the aggressor to commit a second.

Nor do I think that this court has power, in such a case, to compel the wrong doer to erect a wall on his own land to protect the injured party against the consequences of his wrongful act. The practical effect of such an exercise of power, it will be observed, would be to fasten a perpetual easement on the lands of the aggressor, as a remedy for a trespass committed by him on the land of his neighbor. I have never understood that it was possible for any such consequence to flow from a trespass nor that it was possible for an easement to have its origin in such a source. Acts which are wrongful in their origin may be repeated so frequently and so long as to raise the presumption of a grant, and thus to transform what was originally wrongful into a right; but I know of no act which a wrong doer may do on the land of another which will give the person injured a right of any kind in the land of the wrong doer.

It would seem, therefore, to be entirely clear that if the trespasses on which the complainants ground their right to relief had been committed on the surface, this court would have been without the slightest pretense of jurisdiction over the case, and that the only remedy to which the complainants could, in that case, have had recourse would have been an action at law. But the complainants say that their right in this respect is changed by the place where the trespasses were committed and by the character and consequences of the trespasses. The proposition on which they rest their right to a remedy in equity is this: that the defendant by its trespasses having placed the two mines in such position or relation to each other that water rising in the defendant's mine must necessarily, by force of the law of gravitation, flow into that of the complainants, it thereby imposed upon itself, as a consequence of its wrong, a legal duty to prevent the water accumulating in its mine from flowing into the complainants' mine; and that, inas-

adequate protection against the injuries which will arise from the violation of this duty, by an injunction commanding the defendant to prevent the water in its mine from flowing into the complainants' mine, their right to relief in equity is clear, for the reason that a court of equity is the only tribunal which can effectually and adequately redress their wrong.

This proposition, it will be observed, goes to the length of declaring that it is a settled rule of law that a trespass which is complete in everything except its damnifying consequences, when suit is brought, will, in a case like the present, raise a duty against the person committing it to do something more, in making redress for it, than to pay pecuniary damages. No such duty, it is clear, exists by force of any general principle; and if it exists at all, it must be as an exception to some general rule. According to the rule which prevails generally if not universally, in such cases, the only legal duty which a trespasser incurs by his wrongful act, where his act as a legal wrong is complete when judicial aid is invoked, is a liability to reimburse the injured person, in money, for all loss, both direct and consequential, which his trespass has caused.

If A breaks the windows of B's house, and a rain storm should afterwards occur before B could, by the exercise of reasonable diligence, have the windows repaired, and his house should in consequence be seriously injured by the rain, B, in a suit against A, would be entitled to recover all the damages which his house had sustained, as well those resulting from the destruction of the windows as those subsequently caused by the rain. But B could not leave his windows in the insecure condition in which A's wrongful act put them, and then maintain an action against A for not repairing them. To allow B to maintain an action against A for not repairing the windows would involve this absurdity: A would have no right to enter B's close to repair the windows—if he went there, even for that purpose, he would commit a further trespass—and so if B should be allowed to maintain an action against A for not repairing the windows, his action would rest on A's not doing that which he had no right to do.

The only judicial hint ever given, so far as I am aware, that it was possible for a duty, like that which the complainants charge against the defendant, to spring from a trespass, was thrown out by Chief Baron Pollock, in disposing of a demurrer to a declaration, in *Firmstone v. Wheeley*, 2 Dowl. & Lownd. 208.

The declaration alleged that the defendant had committed a trespass on the plaintiff's land, by removing a barrier which the plaintiff had left there to protect his mine against water accumulating in the defendant's mine, and that in consequence of the defendant's trespass, the water in his mine, which the barrier would have held back if it had been left undisturbed, now flowed into the plaintiff's mine. The declaration then charged that it became the defendant's duty, in consequence of his having unlawfully removed the only barrier between the two mines, to so deal with the water accumulating in his mine as to prevent it from flowing into the mine of the plaintiff. The

Chief Baron, in deciding the question raised by the demurrer said:

"There may, perhaps, be a difference as regards the law between the barrier of a mine and a fence above ground. If a wall is knocked down, the owner may maintain an action of trespass, but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damages. But here, the plaintiff says that the removal of the barrier is irreparable, and, therefore, the duty alleged in this declaration may well arise."

This, it will be seen, is at most a mere intimation that such may be the law. The case does not decide that a trespass will create any such duty, and it has never been so understood. Lord Denman, in speaking of it in *Clegg v. Dearden*, 12 Ad. & El. N. S. 601, said that it had not been determined in that case that any such duty or obligation would flow from a trespass; and in *Smith v. Kenrick*, 7 Man. G. & S. 564, the court, in reviewing the last remark attributed to the Chief Baron, said that the case could hardly be treated as a decision.

If these criticisms of *Firmstone v. Wheeley* do not show that no such duty exists, they are certainly sufficient to raise serious doubts respecting its existence. Whether it exists or not is a disputed question of law; and while that remains the case no injunction or other equitable relief can be granted. So long as the defendant's duty is in doubt there must also be doubt respecting the complainants' legal right; for if the defendant is not subject to the duty claimed, the complainants are without legal right; and, where, as in this case, a complainant asks protection against injury arising from the violation of a legal right, he is not entitled to what he asks, unless he can show that the right on which his title to relief rests is settled as a matter of law.

There is, however, authority declaring directly that no such duty exists. To this extent I think the law pertinent to this branch of the case must be considered settled; that for wrongs like those of which the complainants complain, there is but a single remedy and that is an action of trespass; and that the only duty which a wrong doer incurs by the commission of such wrongs is a liability to answer in damages for the loss his wrongs have caused.

These are the doctrines established by *Clegg v. Dearden*, *supra*. The plaintiff's right of action in that case rested on the same duty which the complainants here seek to fasten upon the defendant. The defendant had broken down a barrier which the plaintiff had left on his land to protect his mine against water rising in the defendant's mine. The parties owned adjoining mines, the plaintiff's being the lower of the two. The plaintiff brought an action of trespass against the defendant, had a recovery and his damages were subsequently paid. The plaintiff afterwards suffered further damages, damages which were not covered by the previous recovery; and to recover such subsequent damages he brought an action on the case against the defendant for wrongfully keeping open and continuing the aperture between the two mines which he had made in breaking down the plaintiff's barrier. The case was submitted, on a special verdict, to the court of

Queen's Bench for judgment, whether, on the facts above stated, the plaintiff could recover. The court held that he could not. It was said, leaving the aperture open, in consequence of which the water continued to flow from the defendant's mine into the plaintiff's, afforded no distinct ground of action, as for the continuance of a trespass or of a nuisance; the flowing of the water, and the damage thereby caused to the plaintiff was merely consequential to the making of the aperture, and for that the plaintiff had already received compensation. The pith of Lord Denman's argument against the plaintiff's right to recover was expressed as follows:

"There is a legal obligation to discontinue a trespass or remove a nuisance; but there is no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiff's land was liable to an action of trespass, but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor of a nuisance, nor is it a breach of any legal duty."

Substantially the same views were expressed by the court in *Smith v. Kenrick*, *supra*.

The law as established by *Clegg v. Dearden* was adopted and enforced in *Williams v. Pomeroy Coal Co.* 37 Ohio St. 588. The defendants in that case, while working out the coal in their land, broke over the line and took coal belonging to the adjacent owner for a distance of from thirty-six to thirty-nine feet. This trespass was committed in 1861 and the defendants abandoned their mine in 1862. In 1864 the plaintiff acquired title to the land upon which the defendants' trespass had been committed. In 1868 the plaintiff's workmen, while taking out his coal, broke into the excavation made by the defendants, and through the opening thus made, the water which had collected in the defendants' mine was let into the plaintiff's mine and flooded it. The plaintiff subsequently, and after the right of action for the trespass committed in 1864 had become barred by statute, brought an action to recover the damages which he had sustained by the flooding of his mine. He insisted that the defendants' wrong was, in legal substance, a continuing nuisance; that while it was true their wrong had its origin in the trespass committed in 1861, yet its injurious consequences did not cease with the trespass, but were continuous, those most remote causing the utter ruin of his mine, and the damnifying consequences of the wrong should, therefore, be treated like the injuries inflicted by other continuing nuisances, and be adjudged to be the proper basis of successive actions. The court refused to adopt this view; but on the contrary held that the case was one of simple trespass and not of nuisance, and that any bar or extinguishment of the right of action for the trespass, whether it arose from lapse of time or a prior recovery, absolved the defendants from all liability for the trespass or any of its consequences.

A recent decision of the Supreme Court of Michigan adopts the doctrine laid down in

these two cases in all its length and breadth. The case referred to is the *National Copper Company v. Minnesota Mining Company*, 56 Mich. —. The plaintiff and defendant owned adjoining copper mines, each holding their land in fee. The plaintiff, in working out its ore, left a wall of rock, from fifteen to eighteen feet thick, next to the defendant's mine. The defendant left no barrier, but in taking out its ore worked not only up to the boundary line but over it, breaking into the plaintiff's mine at two different points, at one of which its trespass extended over on the plaintiff's land about twenty feet. The plaintiff subsequently in making blasts in its mine, broke into the excavations, and openings were thus made between the two mines, by which the water in the defendant's mine was let into that of the plaintiff. The defendant afterwards abandoned its mine, first robbing it, by taking out all the ore which had been left for supports. In consequence of the removal of the supports, the surface of the defendant's mine caved in, and depressions were thus made, into which the water produced by rains and melting snow collected, and then sank into the defendant's mine, and from there flowed through these openings, into the plaintiff's mine. The plaintiff, after its right of action for the original trespass was barred by statute, brought an action against the defendant. It put its right to maintain its action on two grounds: first, that the defendant's trespass was a continuing wrong; and second, that the defendant having wrongfully removed the barrier which the plaintiff had left for the protection of its mine, and thereby caused the water in the defendant's mine, which the barrier would, if it had been left undisturbed, have kept there, to flow into the plaintiff's mine, thereby, as a legal consequence of its wrong, imposed upon itself an obligation either to close the openings, or to prevent the water in its mine from flowing through them into the plaintiff's mine. The plaintiff recovered a judgment for a large sum in the court of original jurisdiction. The case was then removed to the supreme court, and there both grounds taken by the plaintiff were declared fallacious. Chief Justice Cooley, who pronounced the opinion of the court, said, in discussing the plaintiff's first ground:

"The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises, and leaving houses or other obstructions there to incumber or hinder his occupation. Physical hindrances are a continuance of the original wrongful force; but the hole is only the consequence of a wrongful force, which ceased to operate the moment the hole was made."

The Chief Justice then discusses the second

ground taken by the plaintiff, with more elaboration and a greater wealth of illustration than is used in either *Clegg v. Dearden*, or *Williams v. Pomeroy Coal Company*, but he rests his repudiation of it at last upon the principle established by those cases.

On the important question whether the remedy given by the common law, in cases of this kind, where the damages flowing from a trespass contemporaneous with its commission, or shortly afterwards, may be very insignificant in comparison with those which may result from it, at a date long subsequent to its commission, is adequate to enable a court of law to do full and complete justice to the person aggrieved, the Chief Justice speaks as follows:

"The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the costs of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit then brought, and that being the case, the plaintiff is not entitled to recover now for an injury for which an award of the means of prevention was within the right of action which was suffered to become barred! The right which then existed, being a right to recover for all the injury that had been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a nonsuit. The wrong which had then been committed was indivisible, and the bar of the statute must be as broad as the remedy was which it extinguishes."

These adjudications make it entirely clear that the wrongful acts imputed to the defendant imposed no such duty upon it as that which the complainants seek to fasten upon it; and they also demonstrate that the only remedy to which the complainants could ever have had recourse, for the redress of the wrongs of which they complain, was an action of trespass.

So far the case has been considered as though the defendant had itself committed the trespasses of which complaint is made, and also as though the damages, against which protection is sought, were all caused by the unlawful acts of the defendant, and were, therefore, legally chargeable against it. This, however, is not the fact.

The defendant committed neither trespass; nor is it true that all the damages the complainants have since sustained resulted from the trespasses. They were to a large extent self-inflicted. As already remarked, the proofs show that the complainants' shaft was judiciously located, and also that in carrying their shaft down it was impossible to avoid breaking into the upper excavation. But so long as their mine did not extend below the first excavation, an opening between the two mines, at this point,

could do the complainants no harm, but, on the contrary, would be advantageous. It would provide them with a way by which their mine could be relieved of all the water accumulating in it, above this point, without pumping it to the surface. Their superintendent says that this was one of the advantages which he had in view in selecting the site for the shaft. The injury which the complainants' mine now suffers from this opening is inflicted at a point far below the opening, and is caused by the flowage of water, rising in the defendant's mine, through the opening, into the complainants' mine.

The complainants carried their mine on down below the opening, not only with full knowledge that the opening was there, but also knowing what would be the inevitable effect upon their mine, if they sunk it below the opening, without first erecting a barrier across the opening. The erection of a barrier at this point was one of the things which the complainants' superintendent had in contemplation when he selected the site for the shaft. He says that he intended, if it became necessary for the protection of the complainants' mine after an opening had been made, to build a barrier across the opening, and that he thought that this course would be less expensive than to sink the shaft at any other point, or to so alter the course of the shaft as to avoid breaking into the excavation.

In view of these facts, there can be no dispute that the injuries against which the complainants seek protection are largely, if not entirely, due to causes which the complainants have themselves created. It is certain that if they had not sunk their mine below the opening, or if, before carrying it below that point, they had erected a sufficient barrier across the opening, none of the injuries of which they now complain could have happened. Their injuries have been caused by what they did and what they omitted to do. And this is true of both sources of injury, of both the upper and lower opening. The complainants had an unquestionable right to sink their mine below the opening; but the fact that they knew that the opening was there, and that if they left the opening in just the condition they found it, they would expose their mine to constant and serious danger, made it their duty to do what they could to protect their mine against injury from this source. A wrong doer is not liable for such damage as the injured person may easily avoid by his own act. The rule is settled that if the damages resulting from a trespass are aggravated or increased by the folly, willful obstinacy or gross carelessness of the person injured, such part of his loss as is directly attributable to his own fault cannot be recovered. 1 Suth. Dam. 148; Field, Dam. § 126; *Loker v. Damon*, 17 Pick. 284.

For these reasons I am of opinion that the first measure of relief asked by the complainants must be denied.

The threatened or prospective injury against which the complainants ask protection is that which they fear their mine will sustain in case the surface of the defendant's mine subsides. The complainants allege that the defendant intends to reduce the pillars which were left in its mine, while it was working it, for the

support of the stratum immediately above them, and that it also intends to take the ore from the walls of its mine; that the pillars and walls are now too weak to furnish sufficient support for the stratum above them, and that if their strength is further impaired by the removal of additional ore, the inevitable effect will be the caving in of the surface of the defendant's mine, and that the cavity thus made will serve as a conduit to pass into the complainants' mine a large quantity of surface water, which, if the surface is left in its natural condition, will flow off over the surface and never reach the complainants' mine.

The complainants also allege that as the Rockaway River flows near the workings of the defendant's mine there will be great danger, in case a subsidence occurs, that the water of the river will be precipitated into the cavity made by the subsidence and from there into the defendant's mine, and thence through the two openings into the complainants' mine.

The defendant does not deny that it intended to remove, according to the customary methods, all the ore which remains in its mine, and which can be removed with profit; nor does it deny that the removal of the ore may cause the surface of the mine to subside, nor that in case a subsidence takes place, some damage may not be done to the complainants' mine; but it insists that if any damage should result to the complainants' mine, from that cause, it cannot be held answerable for it, either here or elsewhere.

The defendant does, however, deny that, in case the surface of its mine should subside, the slightest damage will thereby be created, or that the water of the Rockaway River may be thrown into the complainants' mine; and the proofs in support of its averment in that regard seem to render it perfectly clear that there is not, at present, the least reason to fear that the complainants will ever suffer any injury from that cause.

The first question then, which this branch of the case would seem to present, is this: Has the defendant a right by law to remove all the ore from its mine, regardless of the effect which the removal may have on the mine of the complainants? It is to be assumed, of course, that the work necessary to be done in the removal of the ore is to be done in a skillful and proper manner. The parties to this litigation stand free from all covenant obligations to each other. They each own their land in fee and have all the property rights in it which an absolute and independent title can give.

There can be no doubt that the rule is settled that where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect and solely from the nature of the transaction, that the grantor in removing the minerals reserved shall leave or provide sufficient support for the surface to prevent its subsidence. And the same implication will arise where grants are made of different strata, one above the other, to different persons. This rule is founded on the familiar maxim that whoever grants a thing, shall be understood to grant also whatever is indispensable to the full beneficial enjoyment of the thing granted. *Harris v. Ryding*, 5 Mees. & Wels. 60; *Hilton*

v. Lord Granville, 5 Ad. & El. N. S. 701; *Mundy v. Duke of Rutland*, L. R. 28 Ch. Div. 81. But it is manifest that this rule has no application to this case.

The two general rules which must control the decision of this branch of the case may be stated as follows: first, land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally; and second, for damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*; but where one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in larger quantities than it would go there naturally, he commits a wrong which the law will redress. The second of these rules states the principle to be deduced from two adjudications which have received the approval of the highest judicial tribunal of Great Britain. They are both cited in *Rylands v. Fletcher*, L. R. 3 H. L. 880, as correct expositions of the law.

The first declares that it is the natural right of each of the owners of two adjacent mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from negligent or malicious conduct. *Smith v. Kenrick*, 7 C. B. 515.

And the second says that the occupier of the higher mine has no right to be an active agent in sending water down into the lower mine. The lower mine is subject to no servitude of receiving water, conducted by men from the higher. Each mine owner has all rights of property in his mine and among them, the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine to bay back the water of his higher neighbor. The law imposing these regulations for the enjoyment of somewhat conflicting interests does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine, or advantageous to himself. *Baird v. Williamson*, 15 C. B. N. S. 876.

And here it may not be improper to say that the value of the minerals in the soil of Great Britain, and the importance of mining as one of the great industries of that country, as well as the frequency with which its courts have been called upon to decide controversies respecting the rights and duties of mine owners, render it quite certain that questions like the one under consideration have received the very best consideration which it was possible to give them, and the decisions of the courts of that country, on such questions, are therefore entitled to the very highest respect.

The application of the leading principle established by the two cases just cited to the case

in hand has been made easy and simple by a judgment pronounced by the House of Lords in 1876. That case and the one under consideration are identical in all their material parts, except in that case a subsidence had actually taken place, and some of the injury consequent to the subsidence had been actually sustained, while here damage is simply apprehended. The following are material facts of that case, as given in the opinion of Lord Blackburn, who pronounced the judgment of the House of Lords: the plaintiff and defendant were the lessees of the minerals under two adjacent parts of the same estate. The defendant's seam of coal cropped out at the surface and lay at a high inclination, dipping towards the seam in the plaintiff's holding, and entering the plaintiff's seam at a point many fathoms below the surface, so that any water which fell on or percolated into the defendant's holding would necessarily, by force of gravitation, descend to the plaintiff's holding, unless stopped by the minerals or soil from doing so. The soil above the coal was stiff and impervious to water, so that, while it remained undisturbed, the greater part of the rainfall flowed away over the surface, very little filtering down to the seam, which was in consequence a very dry seam; the impervious strata above, while it remained undisturbed, forming what might be called a roof, practically water tight, over the coal. The defendant altered this state of affairs. He worked out his coal, carrying away the whole of it, and as a necessary result the surface sank. At the upper part, where the seam cropped out to the surface, the subsidence was so great over about five acres, that the surface sank into pits and cracked into open fissures, through which the rain, which fell on those five acres, flowed down into the defendant's workings; and the coal in these workings having been removed, the water in the defendant's mine flowed down towards the plaintiff's holding, and in consequence a considerable quantity of water which, while the roof remained in its original state, a water tight roof, had flowed away over the surface, descended into the plaintiff's mine, and he was in consequence put to additional expense in freeing his mine from water. To recover compensation for the loss thus sustained, the plaintiff brought an action. He was defeated in the courts below and then carried his case to the House of Lords.

Lord Blackburn, in pronouncing judgment, stated that it seemed to him the question to be decided was whether the loss the plaintiff had sustained was not *damnum absque injuria* against which he was bound to protect himself in the best way he could, or whether the defendant, while working the upper mine was under any obligation to the plaintiff, to preserve or restore the impervious roof, which, while it existed, prevented the greater part of the rainfall from descending to the plaintiff's mine. He then said:

"The general rule of law is that the owner of one piece of land has a right to use it, in the natural course of user, unless in doing so he interferes with some right created either by law or contract; and as a branch of that law, the owner of mineral land has a right to take away the whole of the minerals in his land, for such

is the natural course of the user of mineral land; and a servitude to prevent such an user must be founded on something more than neighborhood."

Quoting then from Lord Cairns, in *Rylands v. Fletcher*, he said that the occupier of a close may use it for any purpose for which it may, in the ordinary course of the enjoyment of land, be used; and that if, in the course of such user, water accumulates on his land, either on the surface or underground, and then by the operation of the laws of nature passes off into the close of the plaintiff, the plaintiff has no legal cause of complaint. He also said:

"I may observe that I cannot see any principle on which an obligation to restore the surface to its natural state of water tightness, for the benefit of the owner of the coal on one dip, can be founded which would not equally give rise to an obligation to make the underground workings as water-tight as they were before the coal was removed." *Wilson v. Waddell*, L. R. 2 App. Cas. 95.

Subsequently the same tribunal declared, in *Fletcher v. Smith*, L. R. 2 App. Cas. 781, that after the decision in *Wilson v. Waddell*, the court could not be asked to hold that a defendant was liable, as for a wrongful act, for removing the coal from his land, and thereby opening the soil above his mine, so as to let through into the plaintiff's mine the rain water which might fall on the surface of the defendant's mine. And just in this connection I think it should be noticed that all the injuries which the complainants fear, but have not suffered, had actually been sustained by the plaintiffs in the *National Copper Company v. Minnesota Mining Company*, *supra*, and yet the court was compelled to declare in that case that, as the plaintiffs had lost their right of action for the trespass, they were remediless.

These adjudications are directly in point: they stand upon a principle universally recognized as just, namely: the right of every land owner to have the full, free and perfect enjoyment of his land, for all purposes for which land may rightfully be held and enjoyed; and they demonstrate, beyond all question, that if this right be accorded to the defendant in this case, the complainants are without the least title to any kind of equitable relief.

The question, whether if the defendant removes the ore remaining in its mine, and a subsidence shall in consequence take place, and the injuries, which the complainants now fear, shall actually happen, they may then have a right to maintain an action against the defendant, under the doctrine laid down in *Backhouse v. Bonomi*, 9 H. L. Cas. 508; and *Mitchell v. Darley Main Colliery Co.*, L. R. 14 Q. B. Div. 127 (and which doctrine is stated more clearly and forcibly by Chief Justice Cockburn in *Lamb v. Walker*, L. R. 8 Q. B. Div. 389, than it has ever been stated by any other judge), cannot be considered now, and probably may not be a proper subject for the consideration of this court until it has been considered and determined by the Supreme Court of this State.

My judgment on the whole case is that the complainants are not entitled to either measure of relief asked; and their bill must therefore be dismissed, with costs.

SERGEANT
v.
METTLER *et al.*

1. Although the court would not, in a suit to foreclose a junior mortgage, make a decree against the holder of an admittedly prior mortgage, still the holder of a lien subsequent to the junior mortgage has no standing to move to dismiss the bill because it seeks to have the junior mortgage given a preference in payment over the prior mortgage.
2. In such a suit the rights of all parties, so far as stated in the bill, can be protected under a prayer for general relief.

(Filed November 27, 1886.)

ON motion to dismiss bill. *Denied.*

The case is stated in the conclusions of the Vice Chancellor.

Messrs. Hazelhurst and Riehl, for the motion.

Mr. W. D. Holt, *contra*.

Bird, V. C., filed the following conclusions:

This bill is filed to foreclose a second mortgage. The first mortgagee is made a party and the priority of his mortgage is distinctly admitted. Arnet has a lien on the premises which the complainant alleges is subsequent to his mortgage. The complainant prays that the defendants may be decreed to pay the amount due to him, and in default thereof that they be foreclosed of the equity of redemption, and that the mortgaged premises be sold and he paid the amount due to him; together with the general prayer for further and other relief, etc.

The defendant Arnet now moves to dismiss the bill, because "There being a prior incumbrance upon the premises * * * the said complainant prays that the said premises be sold and he be paid the amount of his said mortgage with interest and costs; which said relief in the nature of the case and under the circumstances cannot be granted."

In other words, the complainant in this special prayer asks for that which the court will not grant. He asks that a prior mortgagee, whose mortgage he admits, may be decreed to pay his mortgage or be foreclosed.

The case of *Gihon v. Belleville White Lead Co.* 8 Halst. Ch. 581, is relied on in support of the motion. In that case the complainant, who held a subsequent lien, stated the existence of the prior mortgages, but did not admit such priority. I think this fact makes a material difference. I am quite certain that no court would make a decree against a party to a suit, whatever the prayer might be, if the complainant distinctly stated that such party had a just claim and that such claim was entitled to priority, as has been most clearly done in the case before me.

It is also to be noticed that in that case the holder of the prior mortgages came in and demurred, while in this case the holder of the lien which is alleged to be subsequent makes the motion, and in his argument claims the same benefit as though he were the first mortgagee.

N. J.

This I think he is not entitled to do. But as has been intimated there is the prayer for general relief, which in our practice is broad enough to protect or save the rights of all the parties so far as they are stated in the bill.

The motion must be denied, with costs.

Fannie C. FISHER

v.
James A. FISHER.

A will contained the following: "I give, devise and bequeath to my beloved wife all my estate, both real and personal, to her, her heirs and assigns, to have and to hold the same to her, her heirs and assigns forever; in trust, nevertheless, that she shall only have and hold the same for her benefit during her natural life as trustee, for my child or children; and, in case of her death, then all shall go to my child or children, to be divided between them, share and share alike; and this trust is to be continued, if necessary, to her executors or administrators." The testator left one child, a minor, and real estate. **Held:**
(a) That the devise to the widow was in fee, in trust for her own benefit for life, with remainder to the child;
(b) That whether she has power to sell the real estate or not depends upon the necessities of the trust and, were she to sell, the purchaser would take the property with notice of the trust.

(Decided ——— 1886.)

BILL for the construction of a will. On final hearing.

Mr. R. E. Chetwood, for complainant.

Runyon, Chancellor, delivered the following opinion:

The bill seeks construction of the will of James W. Fisher, deceased. After directing payment of his debts and funeral expenses, the testator provided as follows:

"I give, devise and bequeath to my beloved wife all my estate, both real and personal, to her, her heirs and assigns, to have and to hold the same to her, her heirs and assigns forever; in trust, nevertheless, that she shall only have and hold the same for her benefit during her natural life, as trustee for my child or children; and, in case of her death, then all shall go to my child or children, to be divided between them, share and share alike; and this trust is to be continued, if necessary, to her executors or administrators. This will is to devise all estate in possession, reversion or expectancy."

He then appointed his wife and his friend, Robert E. Chetwood, executors. The latter renounced; the former proved the will. The testator left but one child, the defendant, a minor under fourteen years of age. He left real estate; and the object of this suit is to get the decree of this court declaring what the estate of the widow is in the real estate under the gift to her in the section above quoted, and whether she has power to sell the real

estate. The devise is to her in fee, but in trust for her own benefit for life, with remainder to the child; that is, she has the legal estate in fee and an equitable estate for life only, and the child has an equitable remainder in fee.

Although the gift is by its terms "for her benefit during her natural life as trustee for," the testator's "child or children," it is obvious that the testator did not intend, by the words "as trustee for my child or children," to grant or restrict the beneficial use of the property to the children during the widow's lifetime; for that would not have been for her benefit, but for the benefit of the child or children. What he meant was that she was to have the beneficial use of the property for life only, at the same time holding the property in trust for his child or children, who were to be entitled to it at her death. By the words "in case of her death," he meant upon her decease. It is quite clear, on the authority of the adjudged cases also, that the beneficial interest of the widow, under the devise, is an estate for life. Theob. Wills. 200-203; *Wallace v. Dold*, 3 Leigh, 258.

The will vests in the widow the legal estate in fee, by technical words. But whether she has power to sell the real estate or not depends, notwithstanding that fact, upon the necessities of the trust. The testator does not appear to have contemplated a sale of the property, for he gives it to her in trust, to have and to hold it for her benefit during her natural life, as trustee for his child or children; and on her death it is to go to the child or children.

The general rule is that whether there are words of inheritance or not in the gift, the trustee will take an estate adequate to the execution of the trust, and no more nor less. Perry, Trusts, § 320.

Were the trustee to sell, the purchaser would take the property with notice of the trust. Her title being derived from the will, the purchaser would be chargeable with notice of the trust from that instrument.

Phoebe S. DROST

v.

Calvin CORLE, Exr.

Where a husband received money and a note belonging to his wife upon an express agreement between her and him that he would hold them in trust for her, but which upon his death went into his estate, the widow has no remedy at law against the estate of her late husband to recover them. She has a remedy in equity alone.

(Decided ——— 1888.)

ON demurrer to bill. *Overruled.*

The facts are stated in the opinion.

Mr. John Schomp, for demurrant.

Messrs. A. Dixon and J. L. Griggs, for complainant:

In a doubtful case the court will not decide the question raised by demurrer to the bill, but will overrule the demurrer.

Brown v. Edwards, 2 Ves. 243; *Mortimer v. Hartly*, 3 DeG. & Sm. 321; *Evans v. Evans*, 620

18 Jur. 666; *Dickinson*, Ch. Prec. 163, note 6.

Where a demurrer is frivolous or intended for delay it should be overruled.

Rev. title, *Chancery*, p. 108, § 26.

Where a demurrer is too extensive it should be overruled.

Lindeley v. Personette, 8 Stew. 355; *Vail v. Errs. v. Cent. R. R. of N. J.* 8 C. E. Green, 466.

At common law the chose in action of a married woman remained hers until reduced to possession by the husband. Reduction to possession is a matter of intention by the husband.

Stall v. Fulton, 1 Vroom, 430.

Courts of equity apply the Statute of Limitations by analogy.

Horner v. Webster, 4 Vroom, 387, 406.

An action cannot be maintained at law by the wife against her husband's representatives, for money received by him in his lifetime, as so much money had and received for her use. *Id.*; *Gould v. Gould*, 8 Stew. 37.

Her remedy is a bill in equity for an accounting.

Horner v. Webster, *supra*; *Black v. Black*, 3 Stew. 215, 226; *Vreeland v. Schoonmaker*, 1 C. E. Green, 512, 522; 2 Story, Eq. Jur. §§ 1372, 1373; 2 Kent. Com. 164.

When a husband receives money from his wife during coverture, with the understanding that he was to hold it for her, his estate must account in equity at the suit of the widow.

Gray v. Gray, 12 Stew. 511; *Treash v. Wirtz*, 7 Stew. 124; *Middaugh v. Trimmer*, 7 Stew. 82; *Vreeland v. Schoonmaker*, 1 C. E. Green, 512; *Clauson v. Riley*, 7 Stew. 348; *Greiner v. Greiner*, 8 Stew. 134, 140; *Personette v. Personette*, 8 Stew. 472.

Reduction to possession, with the wife's consent, for the purpose of reinvestment, does not vest title in husband.

Vreeland v. Schoonmaker, *supra*.

Where title by gift of wife is set up, the gift must be shown to have been free and voluntary.

Black v. Black, 3 Stew. 215, 219; *Clancy*, Mar. Wom. 347.

Runyon, Chancellor, delivered the opinion of the court:

This suit is brought by a widow against the estate of her late husband. The bill states that the marriage took place in 1864, and the husband died in 1885; that in 1864 the wife received from her brother, for an indebtedness from him to her, \$1,500, part of it (\$1,000) by the note of one Abraham C. Whitenack, to her brother's order and by him indorsed, and the balance (\$500) in cash; that the note was delivered and the money paid to her husband, who received them for her upon an express agreement between her and him that he would hold them in trust for her; that he subsequently exchanged the note for another one made by Whitenack for the same amount but payable to his (the husband's) order; that he invested the \$500, and received the interest on both sums, from the time he received the note and cash from her brother up to the time of his death, and invested it; and that the \$1,000 note given by Whitenack to him was, after his death, appraised as part of his estate, as were also the \$500.

The ground of demurrer is that the complainant has an adequate remedy at law. It is

very clear that she has no remedy at law, but has a remedy in this court alone. *Horner v. Webster*, 4 Vroom, 387; *Gray v. Gray*, 12 Stew. 511; *Tresch v. Wirtz*, 7 Stew. 124.

The demurrer will be overruled as frivolous.

Emma I. TOFFEY

v.

William ATCHESON.

*1. The first section of the **Statute of 1880**, P. L. p. 255, declaring that no **decree for deficiency** shall be made in a **foreclosure suit**, is valid.

2. Notwithstanding the **constitutional provision**, that the **Legislature** shall **not pass any law depriving a party of any remedy for enforcing a contract** which existed when the contract was made, it is competent for the Legislature to change the practice of the courts; and any legislation which merely affects the pursuit of remedies for enforcing contracts is not within the constitutional prohibition.

(Decided December 6, 1886.)

ON demurrer to bill in equity to foreclose a mortgage. *Sustained.*

The facts are stated in the opinion of the Vice Chancellor.

Mr. W. P. Douglass, for demurrant:

The first section of the Act of 1880, P. L. 1880, p. 255, provides that "In all proceedings to foreclose mortgages hereafter commenced, no decree shall be rendered therein for any balance of money which may be due complainant, over and above proceeds of the sale or sales of the mortgaged property; and no execution shall issue for the collection of such balance under such foreclosure proceedings."

This abolishes decrees for deficiency in foreclosure suits in this State.

Newark Sav. Inst. v. Forman, 6 Stew. 436.

But the complainant is not thereby deprived of any remedy which he might have had at the time of making the contract. He may proceed in equity by separate bill, if a deficiency is subsequently ascertained to exist.

Allen v. Allen, 7 Stew. 493.

The fact that the amended second and third sections of the Act of 1880 (amended by Act of 1881, p. 184) have been declared unconstitutional does not make the first section obnoxious to the same charge. It can stand alone, and as it stands merely regulates but does not destroy the remedy.

The court will give effect to that part of a statute which is not obnoxious to the Constitution.

The opinion of *Vice Chancellor Dodd* in *Allen v. Allen* was adopted by *Vice Chancellor Bird* in *Chancellor v. Naphagen*, affirmed by the Court of Errors and Appeal, in 14 Stew. 369, 2 Cent. Rep. 209.

Mr. M. T. Newbold, for complainant.

*Head notes by VAN FLEET, V. C.

Van Fleet, V. C., delivered the following opinion:

This is a foreclosure suit. The complainant, in addition to the ordinary decree condemning the mortgaged premises to sale, asks that a decree be made adjudging that the defendant is liable for any deficiency which may exist, in case the mortgaged premises shall be sold for a sum less than the amount due on her mortgage. Her mortgage was made in 1869.

During the same year the mortgagor sold the mortgaged premises to the defendant; and by the deed by which they were conveyed to him the defendant assumed the payment of the complainant's mortgage, and thereby, as between the mortgagor and himself, became the principal debtor, and as such stood bound to discharge the mortgage debt in exoneration of the mortgagor.

These facts, according to the former practice of the court, would unquestionably be sufficient to entitle the complainant to the decree she asks. *Klapworth v. Dressler*, 2 Beas. 32; *Crowell v. Currier*, 12 C. E. Green, 152; *S. C.* on appeal, *Id.* 650.

But a statute was passed in 1880 which declares that in all proceedings to foreclose mortgages, commenced after it takes effect, no decree for deficiency shall be made. P. L. p. 255.

If this statute is valid, it is clear that no such decree as the complainant asks can be made. The complainant, however, disputes the validity of this statute, her insistence being that it is void under that provision of our Constitution which declares that the Legislature shall not pass any law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made. Const. art. IV, § 7, p. 3.

This objection is not new. It has been made twice before. First in *Newark Savings Institution v. Forman*, 6 Stew. 436, where the chancellor held that, although the statute prohibits the entry of a decree for deficiency, in a suit to foreclose a mortgage, on a purely legal liability (as, for example, against the obligor making the bond accompanying the mortgage, or against a guarantor of the mortgage debt), and thus takes away the complainant's equitable remedy, it was nevertheless valid, for it does not deprive the complainant of his legal remedy. The statute leaves that in full vigor, and it was held to be a valid exercise of legislative power for the Legislature (where both a legal and equitable remedy exists for the same cause of action) to abolish the equitable remedy, provided the legal remedy is left in full force, and provided also that in taking the equitable remedy away, the suitor is deprived of no right of recourse, to either person or property, for the collection of his debt which his remedy in equity gives him and his remedy at law does not.

And next in *Allen v. Allen*, 7 Stew. 493, where, on a precisely similar state of facts with that existing in the case under consideration, *Vice Chancellor Dodd* held that the statute was valid. The ground on which he put his judgment was that the statute simply regulates the remedy but does not destroy it or take it away.

By the uniform course of decision of the question as to how far legislative power is restrained by this provision of the Constitution it has been held that it is entirely competent for the Legis-

lature to change the practice of the courts, and that any legislation which merely effects the pursuit of remedies for enforcing existing contracts is not within the prohibition of this provision. *Potts v. New Jersey Arms etc. Co.* 2 C. E. Green, 395; *Rader v. Road District*, 7 Vroom, 278; *Newark Savings Institution v. Forman*, *supra*.

All that this statute attempts to do is to prescribe a new rule of practice. By the practice inaugurated by the court in *Klapicorth v. Dressler*, *supra*, it was made competent for a complainant in a foreclosure suit (where the grantee of his mortgagor had bound himself to pay the mortgage debt, and thus made himself the principal in respect to such debt and so liable over to the mortgagor for deficiency, in case the mortgaged premises were not sold for a sum sufficient to discharge the mortgage debt) to have the question of such person's liability for deficiency decided in that suit, before it was known whether there would be a deficiency or not, and also before any right of action for deficiency had accrued.

This course of practice, while appearing somewhat incongruous, inasmuch as it put it in the power of a complainant to compel a defendant to litigate the question whether he was liable or not, before the fact on which his liability depended had occurred, was nevertheless highly advantageous to the defendant. It placed him in a position where he could know, before the sale of the mortgaged premises, just what his liability was; and he was thus afforded an opportunity, before the sale of the mortgaged premises, to adopt such measures as might be necessary for his protection. The statute changes this course of practice. It does not take away a mortgaged right to a decree for deficiency that remains in full force, but it does declare that hereafter he shall not have a right to a decree adjudging that a defendant is liable for deficiency until a deficiency actually exists; in other words, that he must wait for his remedy until he has suffered a wrong. The constitutionality of the statute is, in my judgment, free from the slightest doubt.

A further objection is made. The second and third sections of this statute, as amended by an Act passed in 1881, P. L. p. 184, have been declared unconstitutional. *Baldwin v. Flagg*, 14 Vroom, 495; *Coddington v. Exrs. of Bispham*, 9 Stew. 574; *Morris v. Carter*, 17 Vroom, 260.

The complainant insists that the sections which have been pronounced unconstitutional are so closely connected with the main object of the action under consideration and form so essential a part of the general legislative scheme that if a part of the statute falls, the whole must go down. There is nothing in this objection. The section under consideration stands wholly independent of the other two. The two parts of the statute deal with entirely different subject matters, and stand as distinct as they would if they had been the subject of separate statutes, passed at different times. The chancellor passed upon this objection in *Newark Savings Institution v. Forman*, *supra*, and held it to be groundless.

The statute upon which the demurrer in this case is founded having been held to be valid, the demurrer must be sustained, with costs.

CAROLINE MORGAN'S EXECUTOR

v.

JOHN MORGAN'S TRUSTEE.

1. A will contained the following: "Second, I, give, devise and bequeath unto my beloved wife, Caroline Morgan, all of my household goods and furniture, also one third of the income or interest of my estate during her widowhood, in lieu of dower." Held, that "also" was equivalent to "in like manner," and that therefore the gift of the household goods and furniture was during widowhood only.
2. The widow having died before the rents for the portion of the current year up to her death became due, and it appearing that the gift thereof was intended for support,—held, that the rents should be apportioned.

(Decided ——— 1886.)

SUIT for the construction of a will. Heard on bill and answer.

The facts are stated in the conclusions filed by the Vice Chancellor.

Mr. S. P. Jones, for complainant:

The question upon which the parties differ and which the court is asked to solve, is:

"What estate did Caroline Morgan take in the household goods and furniture under the second clause of her husband's will, according to the true intent and meaning of said clause?"

The complainant claims that the estate taken was an absolute one, and that the true construction of said second clause gives to it that effect, and no other.

The justice of this claim is based upon the following propositions:

1. That the said clause, when correctly read, according to the punctuation marks therein, and the rules of grammar, vests in the said Caroline Morgan, the absolute title to said household goods and furniture.

2. That the absence of the word "use" or other word or words of limitation in connection with the devise of said furniture, forbids the supposition of any purpose or wish in the mind of the testator to convey any other interest than absolute.

3. That no mention of said furniture is made in any subsequent part of the will, nor do the terms used in the residuary clause, taken either together or separately, suggest any contemplation in the mind of the testator of this furniture becoming at any time a part of his residuary estate.

4. That the application to the devise of the furniture, of a condition attached to and making part of another gift (entirely unconnected with said furniture, both in character and enjoyment) devised in the same clause, is unreasonable, inconsistent with the obvious intent of the testator, and unwarranted by the rules of construction.

5. That there is nothing within the whole will that destroys the presumption that the true intent of the testator in regard to said furniture was that expressed in the words used in

said devise according to their strict and primary acceptance; and that said words should be construed in their strict and primary sense.

We have no means of ascertaining the intention of the testator, as expressed in the second clause, except from the language of the will.

Punctuation may be regarded as a guide to the construction, when no other means of solving an ambiguity can be found.

Wigram, Wills, title, *Construction*, p. 29.

As to the intention as shown by said clause, when proper effect is given to the punctuation thereof, and its correct grammatical reading: the clause is composed of three separate sentences according to the punctuation: 1. "I, give, devise and bequeath unto my beloved wife Caroline Morgan all of my household goods and furniture." 2. "Also one third of all the income or interest of my estate during her widowhood." 3. "in lieu of dower."

There are two distinct gifts mentioned in the clause: one in the first sentence, and another in the second sentence.

The condition upon which the two gifts are to be taken is stated in the third sentence of said clause, viz.: "in lieu of dower."

Other than this general condition, the gift mentioned in the second sentence (or its enjoyment) is limited, viz.: "one third of the income or interest of my estate during her widowhood."

The gift mentioned in the first sentence (being of the furniture) is unrestricted, except by the general condition "in lieu of dower."

This is not a mere conjectural hypothesis of the testator's intention, but is the plain and obvious sense of the language of the clause.

"It is the duty of the court to construe the will in the light of the terms used—and give to them their legal and natural import," says the court of errors in *Graydon's Exrs. v. Graydon*, 10 C. E. Green, 561.

The language of the clause above quoted, is ample to vest the household goods and furniture absolutely in the widow.

In *Sherman v. Wooster*, 26 Iowa, 272, it was held by the court where the expression was "to my wife one half of my real estate, also all my personal property during her natural life," that the wife took one half of the real estate in fee, that the expression "during her natural life" was limited to the personality. In punctuation, etc., that case was less distinct and certain than this, although in the generality of expression exactly parallel.

See also *Van Houten v. Post*, 12 Stew. 51.

The presence of the word "use" or other word or words of limitation, in a devise or conveyance of a particular thing, is necessary to create a limited estate therein to restrict the title and enjoyment, or to make the estate in the same anything less than absolute and complete, unless that construction is overcome by a very clear intention to the contrary, removing all doubt derived from other parts of the instrument.

There is no gift over of said household goods and furniture, either in express words or by implication, no mention of the same being made in any subsequent part of the will. Nor do the terms used in the residuary clause, taken either

together or separately, suggest any contemplation in the mind of the testator—of this furniture becoming at any time a part of his residuary estate, or make disposition of same.

Even if it were a gift for life, without any limitation over, such a bequest would be absolute.

Smith's App. 23 Pa. 9; *Bromfield's Est.* 8 Watts, 465; *Diehl's App.* 36 Pa. 120; *Silk Knitters' App.* 45 Pa. 365; *Groves' Est.* 58 Pa. 429.

The application, to the devise of the furniture, of a condition attached to and making part of another gift (in the same clause) is inconsistent with the obvious intent of the testator, and unwarranted by the rules of construction.

One of the rules of construction laid down by Jarman is that several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other, unless a design to connect them be very plain and apparent.

3 Jarman, Wills, p. 708, 5th Am. ed. 1881; *Compton v. Compton*, 9 East, 267.

The principle certainly applies to this question. Here are two entirely distinct things devised in the same clause, upon a common condition, viz.: "in lieu of dower;" the two gifts are widely different and bear no relation whatever to each other; the enjoyment of one does not in any manner affect or conflict with the enjoyment of the other; they are far removed in their character. Why, therefore, should a certain express condition attached to one apply by implication to the other of said gifts, which, if taken absolutely, disappoints no part of the will? In the absence of express words to that effect why should this result be supposed to follow? With what show of reason can such a hypothesis be demonstrated? What warrant is there for holding, on the language used, that such was the testator's intention? We see none whatever.

A testator is presumed to have an additional purpose for each additional expression.

2 Jarman, Wills, 62.

"Though a will must be construed as an entirety, yet the legal construction of one section cannot be controlled by guesses as to the intent of the testator, arising from the disposition of his property in the remaining sections."

Gulick v. Gulick's Exrs. 12 C. E. Green, 498; 2 Roper, Legacies, p. 1462.

There is nothing within the whole will that overcomes the presumption that the true intent of the testator in regard to said furniture was that expressed in the words used in said devise, according to their strict and primary acceptance.

The words used in said clause should be construed in their strict and primary sense.

A will, statute or other document, is construed according to the primary sense of the words used, except where a rule of law, the context, external circumstances, or a rule of construction, is inconsistent with such interpretation.

Wigram, Wills, title, *Intention*, p. 28; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Grey v. Pearson*, 6 H. L. Cas. 61.

The words, in general, are to be taken in their ordinary and grammatical sense, unless a clear

intention to use them in another can be collected, and that other can be ascertained.

8 Jarm. Rules of Construction, p. 707.

To change the express and definite words of a bequest it must clearly appear that the testator did not intend what he said, and this by the provisions of the will.

Hayes' Exrs. v. Hayes, 6 C. E. Green, 267. See also *Hance v. West*, 3 Vroom, 233; *Casper v. Walker*, 6 Stew. 38.

All doubts must be resolved in favor of the testator's having said exactly what he meant, and plain, clear words, read in their ordinary sense, must always control in searching for the intention of a testator, unless repugnant to other words equally plain and clear in another part of the will.

Courter v. Stagg, 12 C. E. Green, 305; *Graydon's Exrs. v. Graydon*, 10 C. E. Green, 561; *Hand v. Marcy*, 1 Stew. 59; 1 Redf. Wills. 421, 635.

In the absence of something in the context, in the circumstances of the case, to exclude the natural import of the words of a will, the court is bound to give them effect according to their plain, grammatical sense.

Burnet v. Burnet, 3 Stew. 597.

The construction of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within "the four corners of the instrument." And the natural construction of the words will be adopted, unless there is such an impracticability of so construing them as to authorize their rejection; or such uncertainty that no effect can be given to them in that sense.

Mowatt v. Carow, 7 Paige, 828; *Chambers v. Bairdsford*, 18 Ves. 363, 374.

Under the intestate laws the widow would have been entitled to one third of the personal estate absolutely, and one third of the income from the real estate during her life time. In the absence of any expressed contrary intent, it must be assumed that the testator intended to give her a fair equivalent for this.

Merkel's App. 1 East. Rep. 638.

The personal estate of John Morgan is shown by the inventory to amount to \$4,475.56; one third of this amount equals \$1,491.85.

The value of the furniture in question, as shown by inventory and stated in defendant's answer, is \$1,110.25, which is less than one third of the value of the personal property of which testator died possessed.

In view of the language of said second clause of the said will of John Morgan, read according to the grammatical sense of the words used, and the punctuation of said clause, in the absence of anything in the context of the whole will to exclude the natural import of said words, or to establish the presumption of any intent of the testator contrary to that given by the sense of said words, and in the light of the various authorities quoted and cited, which sustain that construction, the complainant respectfully submits that it is obvious that the true intent of the testator with regard to his household goods and furniture was to give the same to his wife absolutely and without condition.

Mr. P. L. Voorhees, for defendant.

Bird, V. C., filed the following conclusions:

John Morgan made his last will, providing

for his funeral expenses and the payment of his debts. He then said:

"Second, I, give, devise and bequeath unto my beloved wife, Caroline Morgan, all of my household goods and furniture, also one third of the income or interest of my estate during her widowhood, in lieu of dower."

In a separate paragraph he gave the sum of \$100 to the Camden City Dispensary. In another paragraph he gave to Sarah Horner \$2.50 per week during her natural life, to be paid her in monthly portions. In another separate paragraph he gave all the residue and remainder of his estate, real and personal and mixed, whatsoever and wheresoever, to his trustee, among other things, to pay for the maintenance and education of his son until he arrived at the age of twenty-one years, when the balance remaining was to be paid to said son.

He appointed his wife guardian of his said son, Jonathan Burr, the defendant, trustee, and his said wife and said Burr executrix and executor of his will. The wife survived him, took possession of the household goods and furniture mentioned in the paragraph above quoted, and made her will, disposing of all her personal estate. The executor of her will claims the goods and furniture named in the paragraph above, and also the rents for that portion of the current year up to the time of her death, although not due until after her death, by the terms of the lease.

Is her executor entitled to such goods and furniture, and to such an apportionment of the rents? are the questions submitted. The complainant, who has the affirmative, relies chiefly upon the construction of the clause giving said goods and furniture. He insists that it cannot be read, with due regard to the punctuation, without concluding that the testator intended to make an absolute gift of the said goods and furniture; that it is plain, from this division of the paragraph, that the testator only intended the interest of his real estate to go to his wife during widowhood.

I am not much impressed in this case with this argument; for the use of the comma seems to have been without regard to any rule; for it will appear that he separates the "I," at the very beginning, from all the rest of the sentence, which use of the comma is similarly displayed throughout the whole instrument. I cannot understand how a principle can aid in the construction of a will when the testator wholly disregards that principle.

The testator says: "I, give, devise and bequeath my household goods and furniture, also one third of all the income to my wife during her widowhood, in lieu of dower." It seems to me that the entire gift was intended to be limited to the period of her widowhood. He gives the goods, and also the interest of his estate, and adds, "during her widowhood."

The word "also" signifies the same as "in like manner." And this view seems to be sustained by the authorities.

In 8 Vin. Abr. 214, Q. a. it is declared:

"If a man devise black acre to one in tail, and also white acre, the devisee shall have an estate tail in white acre also, for this is all one sentence, and so the words which make the limitation of the estate go to both."

In *Fenny v. Ehoestace*, 4 Maule & Sel. 58, it

appears the testator said: "I give unto my nephew, Collyer, all that my home and premises at Pittston, in the occupation of R. Reed; I also give unto my nephew, John Collyer, all that my land in the Parishes of Riddlestone and Aubury, in the occupation of J. Tomkins, to my said nephew, John Collyer, his heirs, assigns forever." The devisee took a fee in both. The words expressing a quantity of estate were reserved till the last. In that case the punctuation is much more servicable, the two members of the sentence making the devises being separated by a semicolon.

This view is sustained in the case of *Giles v. Melsom*, L. R. 6 H. L. 24. "The proviso being at the end of all the devises must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. See also 2 Jarm. Wills, 75; *Child v. Elsworth*, 2 DeG. M. & G. 679.

Richards v. Baker, 3 Atk. 321, fully sustains this view. *Leeke v. Bennet*, 1 Atk. 470.

Sherman v. Wooster, 26 Iowa, 272, is in conflict with the foregoing authorities. The testator said: "The residue of my estate, real and personal I give, bequeath and dispose of as follows, to wit: to my wife, one half of my real estate also all my personal property during her natural life, and, at her decease, to be equally divided between my two daughters; the one half of my real estate I bequeath to my two daughters and their heirs." It was held that the fee in the land passed by the devise, and that the words "during her natural life" were limited to the personal property. From this view *Dillon, Chief Justice*, dissented, and said that the wife took only a life estate in the land.

The complainant relies also upon *Van Houten v. Post*, 12 Stew. Eq. 51. I think nothing can be plainer or more satisfactory to the mind than the opinion of the chancellor in that case; but it does not seem to me to be in any sense like the one I am considering. In that case the testator gave nine acres of land, definitely locating it, and also personal property, "to be left to discharge my debts, and so much of the real property to discharge the remainder of my debts, if any wanting, and the remainder of my property, of what nature soever, during widowhood." It was held that the widow took the fee in the lot first named. This the testator must have intended, for he limits all the rest of the gift to the widow for life.

I conclude that the widow took only a life estate. I think the rent should be apportioned. At law this cannot be done; but it is most equitable that it should be, especially where it is plain that the gift is intended for support, although it may not so be expressed in words.

See *Re Lackwanna Iron & Coal Co's Case*, 10 Stew. Eq. 26; *Vernon v. Vernon*, 2 Bro. C. C. 659; *Paget v. Gee*, Amb. 198; *S. C.* 3 Swans. 694; *Monson v. Essex*, 8 L. J. Ch. 169.

I will advise a decree in accordance with these views.

Warren MARSH, Exr.,

v.

Andrew LOVE.

A testator directed his executors to convert real estate into money, "such sale
N. J.

or sales to be made in one year after my decease, and sooner if deemed desirable by them," and gave the proceeds—after paying legacies which were charged thereon and expenses, and after investing a specified sum to raise an income for his wife—to his sons in equal shares. **Held**, that the limitation of the sales to one year after the testator's death was **directory merely** and not of the essence of the power to sell, and, therefore, that the power could be exercised after the expiration of the limited period.

(Decided December 9, 1886.)

BILL for specific performance. On final hearing on bill and answer. *Decree for performance.*

The facts are stated in the opinion.

Mr. C. Marsh, for complainant.

Mr. W. L. Hetfield, for defendant.

Runyon, Chancellor, delivered the following opinion:

This is a suit for specific performance of a written contract of sale of land in Plainfield, made between the parties, by which the complainant, surviving executor of Frazee Marsh, deceased, agreed to sell to the defendant, and the latter agreed to purchase. The defendant refuses to comply with his agreement, upon the ground that the complainant cannot convey to him a good title for the property, because, although the will confers upon the executors power of sale, it limits its exercise, as he alleges, to the period of one year after the testator's death, which took place in 1874.

The sale was made in 1886. By the will, which is dated May 22, 1869, the testator directed that his debts and funeral expenses be paid, and he then proceeded as follows: "I hereby order and direct my executors, herein-after mentioned, to invest upon good security \$4,000 (\$2,000 of which being now invested in stock of the First National Bank, Plainfield, New Jersey, the balance to be made up from what money I may have on hand at my decease, or from the sale of my property), the interest and income therefrom to be paid to my wife, Mary C. Marsh, half yearly, so long as she shall remain my widow."

After giving specific legacies to his wife and making specific devises of real estate to two of his sons and giving pecuniary legacies to his other four sons, he proceeded as follows: "I hereby order and direct my executors, hereinafter named, and the survivor of them, to sell and dispose of all my real and personal estate, not hereinbefore disposed of, either at public auction or private contract, whichever may be thought by them most advantageous to the interest of my estate, and to make, execute and deliver good and sufficient deeds for said real estate to the purchaser or purchasers thereof; such sale or sales to be made in one year after my decease, and sooner if deemed desirable by them; and the net proceeds arising from such sale or sales, after paying the legacies above mentioned and all expenses of settling my estate and investing the said \$4,000 for the use of my said wife, as mentioned in article second, herein contained,

I give and bequeath to my six sons, Albert, Washington, Warren, Aaron, Alexander and Randolph, to be divided equally between them, share and share alike," etc. The real estate in question was not specifically devised.

When the will was made (in 1869) real estate in Plainfield was readily salable at high prices; but at the date of the testator's death (in 1874) it had greatly depreciated in salable value, and then and for several years thereafter, the executors found it impossible to make sale of the property in question, except at great sacrifice. Besides making continuous diligent effort to sell it at private sale for a fair price, they offered it for sale at public auction in 1880, and got but a single bid; and that was in their judgment far below the value of the property, and they therefore refused to sell it at that price. They and the survivor of them continued to endeavor to sell it at a fair price, but were unable to do so up to the time when the latter sold it (at public auction) to the defendant. The premises are the only remaining assets out of which to raise \$2,000 of the fund to be invested for the widow.

The testator directs his executors and the survivor of them to convert absolutely his real estate not specifically devised, and gives the proceeds, after paying thereout the legacies and all expenses of settling his estate and after investing the \$4,000, to his six sons in equal shares. After the death of his wife, he gives the \$4,000 to them in like manner. Two thousand of the \$4,000 must be raised out of the proceeds of the sale. The legacies are all charged upon the land. There is no evidence whatever of any intention to limit the exercise of the power of sale to the period of one year after the testator's decease.

The rule of construction of such powers is that the limitation is directory merely, unless it appears from the will that the testator intended that it should be of the essence of the power. Where it is merely directory the power may be exercised after the expiration of the limited period, but where the limitation is of the essence of the power, the power must be executed within the prescribed period. *Perry, Trusts*, § 771; *Pearce v. Gardner*, 10 Hare, 287; *Cuff v. Hall*, 1 Jur. N. S. 972; *Shalter's App.* 43 Pa. 83; *Chasmar v. Bucken*, 10 Stew. 415.

It is urged by the defendant's counsel that the language of the power in this case shows an intention to limit the exercise of it to the period of one year from the time of the testator's death. This construction is based upon the words "and sooner" in the clause of limitation. The whole clause is: "Such sale or sales to be made in one year after my decease, and sooner, if deemed desirable by them." But the words "and sooner," were evidently used to prevent the executors from construing the limitation of one year as it would have stood without those words, as postponing the sale for the year; or, in other words, as prohibiting them from selling at any time within the year.

The direction in *Pearce v. Gardner* was to sell with all convenient speed and within five years.

In *Cuff v. Hall* the trustees were authorized to postpone the sales, but not for a longer period than ten years.

In *Shalter's App.* the language was "so that it be done within one year after my decease." The use of the words "and sooner" does not warrant the construction for which the defendant's counsel contends.

But further; the power is coupled with a trust in which others besides the surviving executor, are interested; and, therefore, if he be derelict in the performance of his duty to sell, he may, in the interest of the other beneficiaries, be compelled by this court to sell.

There will be a decree for the specific performance by the defendant, of his contract.

IMPORTERS & TRADERS NATIONAL BANK of New York

v.

Isaac LITTELL and Wife *et al.*

1. In a creditor's bill the complainant is entitled to a **discovery** as to the consideration of a mortgage given by the debtor, and, where it is said to have been given to indemnify the sureties for him as guardian, to a discovery of the **extent of liability** of the sureties and of the estate held by him as guardian.
2. **Whether the debtor is able to pay** his debts or not is a pertinent inquiry in a creditors' bill.
3. Where the bill seeks to **set aside a deed** made by the debtor and his wife, for fraud, the **wife is a proper party** defendant.
4. A complainant in a creditor's bill may properly make **everyone a party who is a participator in the fraud** therein alleged. He has a right to do this for the purpose of discovery; and the defendants cannot object to the bill for **multifariousness**, so long as the matters contained in the bill are pertinent to the imputed fraud.

(Decided ——— — 1886.)

CREDITORS' bill. On special demurrers to bill. *Overruled.*

The facts and questions raised are stated in the opinion.

Mr. R. E. Chetwood, for demurrants.

Mr. W. T. Day, for complainant.

Runyon, Chancellor, delivered the following opinion:

The bill states that the defendant Isaac Littell was, on or before the first day of February, 1884, the owner in fee of seven different tracts of land described in the bill; that on or about the first day of March in that year, he was indebted to the complainant in the sum of \$13,500 and upwards, for the recovery of which it then began a suit against him in the supreme court of this State, and afterwards and on or about the 6th of June, 1885, recovered a judgment against him in that court, for \$14,687.85 damages and \$55.97 costs; that, the judgment remaining unpaid, it issued execution June 9, 1885, against his goods and lands, which was returned wholly unsatisfied; and on or about

the 17th of June, 1885, the complainant issued two other like writs, one an *alias* and the other a *testatum*, the former to the sheriff of Union, and the latter to the sheriff of Middlesex; that under the *alias* the sheriff of Union levied upon certain goods and chattels, but not enough to satisfy the execution; and being unable to find more, he then levied upon the first six of the tracts described in the bill; and that under the *testatum* the sheriff of Middlesex, being unable to find any goods to levy upon in his county, levied upon the seventh tract; that the first and second tracts described in the bill are worth about \$8,000, the third about \$5,000 (it is subject to a first mortgage held by Ebenezer Ludlow for \$2,900), the fourth about \$1,500 (it is incumbered by the taxes of ten years or more of the City of Rahway), the fifth and sixth, which are one property, about \$1,500, and the seventh about \$2,500 (it is subject to a first mortgage of \$1,000, held by Ebenezer Ludlow); and that on or about June 25, 1894, Littell mortgaged all of the tracts to Daniel S. Scudder and Ebenezer Ludlow for \$80,000, and the third, fourth and fifth tracts to Augusta Squire, trustee, for \$2,000, and the first and second tracts to Adelaide Littell, by two mortgages, one for \$1,675, and the other for \$1,800; and that she, on the 26th of June, 1884, assigned the mortgage of \$1,675 to Littell's wife, Phebe C. Littell.

The bill charges that all those mortgages were without consideration and fraudulent, and made for the purpose of hindering, delaying and defeating the complainant in the collection of its debt due from Littell. It also states that afterwards, by deed dated February 6, 1885, Littell and his wife conveyed the first and second tracts to Lewis P. Clark, for the consideration, as stated in the deed, of \$6,000; that Littell, by deed dated the 11th day of the same month, conveyed the fourth tract to William Ryno, for the consideration, as stated in the deed, of \$5,000; and, by deed dated the 10th of the same month, conveyed the fifth and sixth tracts to Ann E. Dunn, sister of his wife, for the consideration, according to the deed, of \$2,000.

The bill charges that those deeds to Clark, Ryno and Dunn were all without consideration and fraudulent, and made to hinder, delay and defeat the complainant in the collection of its debt from Littell, and that if any money passed between the parties, on the making of those conveyances, it was by way of advance and not payment of purchase money.

The bill further states that the complainant is informed that Scudder and Ludlow, to whom the mortgage for \$80,000 was given, are Littell's sureties in a guardian's bond given by him as guardian for several infant wards, and that it is pretended that that mortgage was given to secure them from loss by reason of such suretyship; and the bill prays that Littell may discover by whom and when he was appointed guardian; what are the ages and residences of the wards; what estate (showing in detail) he has in his hands as such guardian, and how it is held or invested, and in what manner and amounts it, or the income therefrom, is paid to or on account of the wards, and all other facts in reference to the management of the trust.

The bill, averring that Littell is insolvent and would not scruple, in order to defeat the

complainant in the collection of its debt, to convert to his own use a part of the estate, leaving his sureties to collect any money they might be required to pay, out of the mortgage, claims that the complainant is entitled to an injunction restraining Littell from wasting or appropriating to his own use any part of the estate of the wards, and to an account from time to time in this court as to how he is fulfilling his trust, in order that the complainant's security under its judgment may be protected.

It also states that the complainant has no certain knowledge or information as to the terms of the trust, if any, under which Augusta Squire holds the mortgage given to her as trustee, or who are the *cestuis que trust* thereunder; that the complainant has been informed that Augusta Squire, Abel V. Shotwell, Israel Vail, Harriet Vail and Sarah Marsh claim some interest under that mortgage, and it prays discovery on that head.

It further states that Littell had, on or about the 28th of June, 1884, certain goods, which he then mortgaged to George W. Force for \$1,200; and it charges that the mortgage was fraudulent, and that if not, then Force, who has suffered Littell to possess and consume part of the mortgaged property since the making of the mortgage, should be compelled to credit the value of that part upon his mortgage; and it prays a discovery on that subject.

It also states that under the *alias* execution the sheriff of Union levied upon the remaining goods.

The bill prays that the defendants may answer without oath, and especially that they may discover and set forth the real estate belonging to Littell. Also that Littell and his wife and Adelaide Littell, Scudder, Ludlow and Clark may make discovery as to the real estate conveyed to Clark; and that Littell, Scudder, Ludlow, Augusta Squire, Sarah Marsh, Abel V. Shotwell, Israel Vail, Harriet Vail, William Ryno and Ann E. Dunn may discover and set forth the real estate conveyed to Ryno and Dunn, as stated in the bill; what disposition has been made of it or what incumbrance put thereon; in whose possession it has been since March 1, 1884, and whether it is incumbered, and if so, how, in whose favor, by whom, and to what amount; also that they may discover whether the conveyances and mortgages mentioned in the bill were made of the real estate, and if so, for and upon what consideration, and to whom and when and by whom it was paid; and who has possessed and occupied the property and received the rents, issues and profits since such conveyances; and whether the defendants or some of them do not or did not, at some time heretofore, hold the property in trust for Littell or somebody else, and for whom; and if so, how the trusts were created or were manifested at the time of the filing of the bill, and when they were created or reduced to writing, if they have indeed been reduced to writing; and under what agreement, arrangement or understanding, express or implied, the conveyances of the lands and the mortgages were made or assigned to them, and with what intention; and what reason Littell gave to them for desiring them to take the conveyances and mortgages, and whether he is insolvent; and it prays that the defendants, or

some of them, may be decreed to pay the complainant's judgment, etc., etc.

Littell demurs specially to the bill, on the ground that the complainant is not entitled to a discovery as to the estate which he holds as guardian, nor to an injunction to restrain him from wasting or appropriating his wards' estate to his own use; nor to an accounting in regard to that estate from time to time; nor to a discovery as to whether he is insolvent, because, as he insists, the fact is immaterial.

It is clear that the complainant is entitled to a discovery as to the consideration of the \$80,000 mortgage given by Littell to Scudder and Ludlow. It is said to have been given merely to indemnify them as his sureties against liability for him in his performance of his duty as guardian. It is highly important to the complainant to know whether such liability, in fact, exists at all, and if so, what is the extent thereof; and to that end the discovery sought is eminently desirable and necessary.

The bill suggests that if it shall prove that the mortgagees are indeed Littell's sureties, and are secured by the mortgage against loss from his misconduct in regard to the estate of his wards, and he is insolvent, he may be induced to appropriate some part of the estate to his own use, and so, for his own advantage and to the prejudice of the complainant, throw a burden upon the mortgaged premises, which, as between it and him, they ought not to bear; and it insists that in case the validity of the mortgage shall be established, the complainant will be entitled to the protection of this court in the premises, and to an account, from time to time, of his dealings with and the condition of the trust estate or estates.

This claim of right to auxiliary equitable relief in a certain contingency, the establishment as valid of a mortgage attacked for fraud, whether such relief be by injunction or accounting, is not a ground of demurrer. The objection made to the call for an answer as to the insolvency of Littell is that the bill is based upon the assumption of his insolvency, and therefore the inquiry is irrelevant.

It may be very important for the complainant to establish the fact of Littell's insolvency at the time when he made the mortgages and conveyances which are attacked by the bill; and the complainant has a right to call for an answer upon that head in order that it may be spared the necessity of adducing proof. *Reed v. Cumberland Ins. Co.* 9 Stew. Eq. 393.

Whether the debtor is able to pay his debt or not is a pertinent inquiry in a creditor's bill.

Phebe C. Littell, Adelaide Littell, Daniel S. Scudder and Ebenezer Ludlow demur, upon the ground that the bill calls for an answer from them as to a transaction in which they are not shown to have taken any part or to be in any way interested, viz.: the conveyance by Littell and wife to Clark, and that it calls for an answer from them as to the real estate of Littell; also because it calls for answer from Scudder and Ludlow in reference to the real estate conveyed by Littell to Ryno and Dunn, and whether Littell is insolvent.

The ground of objection is that the matters as to which inquiry is so made are immaterial and irrelevant and are not and cannot be

within the knowledge of the demurrants. Phebe C. Littell, according to the bill, joined her husband in the deed to Clark. She is a proper defendant to a suit to set aside that deed for fraud. *Randolph v. Daly*, 1 C. E. Green, 313.

All the matters to which objection is made by her and her codemurrants are relevant; and it is enough to say that the demurrants are proper parties to the suit and cannot object to the bill upon the ground of multifariousness, so long as the matters contained in the bill are pertinent to the imputed fraud.

A complainant in a creditors' bill may properly make everyone a party who is a participant in the fraud. He has a right to do this for the purpose of discovery. *Robinson v. Davis*, 8 Stock. 302; *Randolph v. Daly*, *ubi supra*; *Miller v. Jamison*, 9 C. E. Green, 41; *Bermes v. Frick*, 11 Stew. Eq. 88.

Obviously, all the answer that can be required of a defendant, as to matters which are not within his knowledge, information, remembrance or belief, is an asseveration or averment that for that reason he cannot make discovery.

The demurrers will be overruled.

Jacob H. CHAMBERLAIN *et al.*, Complainants,
v.

ELIZABETHPORT STEAM CORDAGE CO. *et al.*

1. The imposition of the burden of a railroad operated by steam upon land in and constituting part of a street is a taking, for that purpose, of the property of the persons along the line of the street who own the land to its center, subject to the right of way of the public therein.
2. The land of the street cannot be lawfully taken for such use, if private, without the consent of such owners; nor can it be lawfully taken for such use, if public, without due compensation.
3. The charter of the City of Elizabeth giving power to the city council to grant the right to lay down railroad tracks in the streets, as it makes no provision for compensation to the owners of the land, does not give authority to the city to exercise the right of eminent domain.

(Decided — — 1886.)

BILL to restrain the laying of a steam railroad in a street, without the consent of or compensation to the adjoining land owners, who own to the center of the street. *Relief granted.*

The facts appear in the opinion.

Mr. R. V. Lindabury, for complainants.
Mr. J. Alward, for defendants.

Runyon, Chancellor, delivered the following opinion:

The bill states that the complainants are, and have been for at least three years past, the own-

ers in fee of a lot of land at the corner of Elizabeth Avenue and Butler Street in the City of Elizabeth, on which are two houses and a barn; that the defendants have begun to build in that city a railroad for cars to be drawn by steam locomotive engines, which is to run from the defendants' land near Smith Street (which is the next street parallel to Butler Street on the southeast) through and upon Smith Street to Elizabeth Avenue; thence along and upon the avenue to Butler Street, and in front of the complainants' land, to a point about 100 feet from the corner of that street and the avenue; and that the complainants' property has a frontage on Butler Street of about 135 feet, and on Elizabeth Avenue of about 76 feet. The defendants' property is on the opposite corner of the avenue and Butler Street.

The bill alleges that if the road be constructed as proposed, it will be laid upon the land of the complainants in front of their lot in and constituting part of the street, and will do great damage to the complainants' property. The defendants, by their answer, admit that they have begun to build the road as stated in the bill, and substantially admit also that they intend, if not prevented from doing so, to complete and operate the road; the cars upon which are to be drawn by steam locomotives. They deny that the road or the operation thereof as proposed will injure the complainants' property, and they claim that they have a lawful right to lay the track and operate the road, under authority given them to do so by ordinance of the City of Elizabeth.

The complainants' land is bounded in their deeds therefor on two sides by the side lines of Elizabeth Avenue and Butler Street, respectively. By legal presumption they own the land in front of their property to the middle of the street, subject to the right of way.

The imposition of the burden of a railroad operated by steam, upon the latter land (in and constituting part of the street) is a taking of their property for that purpose, and it cannot be lawfully taken for such use, if private, without their consent. Nor can it be lawfully taken for such use, if public, without due compensation. *Starr v. Camden & Atlantic R. R. Co.* 4 Zab. 592; *Hinchman v. Paterson Horse R. R. Co.* 2 C. E. Green, 75.

The defendant Company is not a railroad company, but is a manufacturing firm called the Elizabethport Cordage Company, and the other defendants are the individuals who compose that firm. They have no authority to lay and operate the road, except that given by the city ordinance before mentioned.

In *Montgomery v. Trenton*, 7 Vroom, 79, the City of Trenton had given permission by ordinance to certain persons to lay for their private use a railroad track at grade across a public street. It was held that the city had no authority, under the general power in its charter to regulate streets, to make the grant. But by the charter of the City of Elizabeth the city council has power, not only to pass ordinances to regulate the streets but also to grant to corporations or persons the right to lay down railroad tracks in the streets, highways and alleys, and to regulate the running of cars thereon, provided that no such right shall ever be given by the city council until a majority of the owners

of the lands in front of any such railroad, and along which the same may be intended to be run or be constructed, shall first consent, in writing, to the laying and constructing thereof, such consent to be filed in the clerk's office of the city before making the grant. P. L. of 1868 p. 119.

The defendants insist that, under that provision of the charter, the city has authority to grant the right to lay in the street the tracks of railroads to be operated by steam. But the charter makes no provision for compensation to the owners of the land upon which the railroads may be laid. Hence, it is to be presumed that the Legislature did not intend to give authority to the city to exercise the right of eminent domain. *Carson v. Coleman*, 3 Stock. 106; *Boston & Lowell R. R. Corp. v. Salem & Lowell R. R. Co.* 2 Gray, 1; *Mills, Em. Dom.* § 128.

The Legislature itself has no power to take private land for public use without providing for compensation. It is probable that the grant in the charter of the power to authorize the laying of railroads has reference to horse railroads merely. The complainants are entitled to the protection of this court against the unlawful taking of their property.

There will be a decree accordingly.

Charles G. ENDICOTT

v.

Mordecai T. ENDICOTT *et al.*

1. A will directed that testator's "entire estate be and remain the same as it now is, real, personal or mixed, including the furniture," etc., to be occupied by his wife during her life; and that at her decease the homestead, furniture, etc., should be used by testator's daughters, during life, or while unmarried. **Held**, that the words "**the homestead**" were manifestly omitted by mistake from the provision for the wife, and that it was the intention that the homestead should be occupied by her for life; that the term "**furniture**" embraces everything about the house that has been usually enjoyed therewith; that the provision for the wife was in lieu of dower and, accepting it, she was not entitled to the \$200 exemption; and that, as **life tenant**, she was bound to pay taxes and make repairs, but not to insure.
2. The will also provided that the executors should invest a specified sum and pay the interest annually to testator's daughters "**for their support and maintenance in keeping such home as aforesaid.**" **Held**, that it was testator's intention that this gift should take effect when the use of the homestead by the daughters should begin, and not at testator's death, and that it should cease when such use should cease; that it was a **special trust** and not an absolute gift, and that therefore the daughters were not entitled to the fund itself.
3. The will devised the homestead, when it should be no longer used by the

daughters, "to such child or children at that time living, and their heirs and assigns forever, and the representatives of any deceased child to have the share of his or her parent." Held, that the intent was to give the property to those of testator's children who should be alive at the termination of the use by the daughters, and the issue of those of his children who should then be dead, *per stirpes*; and that neither the gift to the daughters nor that in remainder was vested.

4. Held also, that the right of occupation given to the daughters was intended as a personal right, and that therefore they could not rent the premises; and that, while occupying them, they were liable to pay taxes, etc., as life tenants.

(Decided — — 1886.)

BILL for construction of will, etc. On final hearing on pleadings and stipulation of counsel.

Mr. F. McGee, for complainant.

Mr. P. L. Voorhees, for defendants.

Runyon, Chancellor, delivered the following opinion:

Thomas D. Endicott, late of May's Landing, in Atlantic County, died May 28, 1884. He left a widow and four sons and five daughters. His personal estate was appraised at \$31,926.29; and his real estate, including his homestead, valued at about \$2,000, was of the value of about \$6,000. The following are the parts of his will in respect to which a judicial construction and interpretation are sought:

"*Second.* It is my will, and I do order, that my entire estate be and remain the same as it now is, real, personal or mixed, including the furniture, etc., to be occupied by my beloved wife, Ann Endicott, for and during her natural life. And I further order my executors, hereinafter named, to pay over to my beloved wife, Ann Endicott, the sum of \$800 per year, for each and every year so long as she lives, out of the rents, interest, issues and profits thereof.

"*Third.* That at the decease of my beloved wife, Ann Endicott, the homestead whereon I now reside, including the furniture, etc., to become and be used by my beloved daughters, viz.: Catharine, Elizabeth and Hannah, as and for a home of and for all or either of them as may then be unmarried; or if either or any of them marry and become widowed whilst said homestead be used or occupied as aforesaid, then to be a home for either or any of them so bereft during such widowhood.

"*Fourth.* It is my will, and I do hereby order and direct my said executors, hereinafter named, to place the sum of \$5,000 at interest, on some good security, and to pay the interest annually over to my beloved daughters, viz.: Catharine, Elizabeth and Hannah, for their support and maintenance in keeping such home as aforesaid.

"*Fifth.* And when said homestead shall be no longer used or occupied as aforesaid by either or any of my beloved daughters above named, then I give and devise the same to such child or children at that time living and their heirs

and assigns forever, and the representatives of any deceased child to have the share of his or her parent.

"*Sixth.* And my will is that any balance that may remain of the general income, rents, interest, issues and profits of my estate, not herein disposed of, it is my will the same be placed at interest on good security, or otherwise invested by my executors, as may seem to them safe and more advantageous to the estate and increase of the same.

"*Seventh.* But should both of my executors, hereinafter named, be removed by death, then the administrator *cum testamento annexo* to place said balance at interest on real security, and in no other way whatsoever invest the same."

The scheme of this will is to keep all the estate, except the homestead and furniture, invested during the life of the widow, and to pay her \$800 a year for life, out of the rents, interest and income, she to have the right to occupy the homestead and use the furniture for life. At her death the homestead and furniture are to be used as a home by Catharine, Elizabeth and Hannah, if unmarried; and if any of them, having been married, shall become a widow during such occupation and use, such widow or widows is or are also to have the right to occupy the homestead and use the furniture with her or their sister or sisters. And in order to furnish the three daughters with the means of support there and keeping up the property and paying taxes upon it, \$5,000 are to be invested at the testator's widow's death, and the interest is to be paid to them annually. The rest of the estate is to be kept well invested by the executors until such right of occupation shall be at an end, and then the homestead is to be divided among all of the testator's children who shall be then living and the heirs of any deceased child or children, such heirs taking *per stirpes* the share of the parent or parents. The property, other than the homestead and furniture and the \$5,000, is to be divided among the testator's children at the death of the widow, and the \$5,000 when the daughters cease to occupy the homestead.

In the first sentence of the second section of the will the words "the homestead" have manifestly been omitted by mistake. The intention was, it is clear, to provide that the homestead, including the furniture, etc., should be occupied by the widow for life.

The term "furniture" embraces everything about the house that has been usually enjoyed therewith, including plate, linen, china and pictures. 2 Jarm. Wills, R. & T. ed. 352.

The gift, in the third section, of the use of the homestead and furniture is, as already indicated, for the purpose of providing a home for Catharine, Elizabeth and Hannah, if they should be unmarried at the widow's death, or for such of them as shall then be unmarried, and also for any or either of them who having married shall have become widowed, or shall, during such occupation by the other or others of the three daughters, become widowed.

The fourth section provides that the executors shall invest \$5,000 and pay the interest annually to Catharine, Elizabeth and Hannah, "for their support and maintenance in keeping such home as aforesaid." The expressed ob-

ject of this provision shows that it was the intention of the testator that the gift should take effect when the use and enjoyment of the homestead and furniture by Catharine, Elizabeth and Hannah, or such of them as should be entitled thereto under the third section, should begin, and not before that time, and that it should cease when that use and enjoyment came to an end. The gift is expressly for the purpose of supporting and maintaining them in keeping the homestead as a home.

It is insisted, on behalf of Catharine, Elizabeth and Hannah, that the gift is to take effect and the enjoyment to begin at the death of the testator, and that it is, in effect, an absolute gift of \$5,000 to them, and that they are entitled to it now. But the expression of the purpose and object for which the interest of the fund is given is fatal to all of those propositions. To enable Catharine, Elizabeth and Hannah, or such of them as should have the use and enjoyment of the homestead, to pay taxes, etc., during their occupation, after the death of the widow, and to assist them in supporting themselves in the homestead the testator creates and places in the hands of trustees a fund, of which the interest alone is to go to those daughters while living there. The trust is not a simple trust, where the trustee is a mere passive depositary, but it is a special one, one in which the machinery of a trustee is introduced for the execution of a purpose particularly pointed out, and the trustee is called upon to exert himself in the execution of the settlor's intention. Lewin, Trusts, 21; *Cooper v. Cooper*, 9 Stew. 121.

To hand over to the *cestuis que trust* in this case the \$5,000 would defeat the testator's purpose. To effectuate his intention the fund must be invested and the interest paid over annually.

Again; it is urged that the gift of the income of the fund is unlimited, and that therefore Catharine, Elizabeth and Hannah are entitled to the fund itself. But, as has already been said, the gift is not unlimited, but is to terminate with the use and enjoyment of the homestead by the beneficiaries.

By the fifth section of the will, it is provided as follows:

"And when said homestead shall be no longer used or occupied as aforesaid by either or any of my beloved daughters above named, then I give and devise the same to such child or children at that time living, and their heirs and assigns forever; and the representatives of any deceased child to have the share of his or her parent."

Catharine, Elizabeth and Hannah insist that the gift is to them, and that it is vested. The testator, by the expression "child or children," referred to all of his children, and the word "such" was not used in the sense of "said" or "before mentioned," but with reference to the subsequent qualification of survivorship. What he meant was to give the property to those of his children who should be alive at the termination of the use and enjoyment of the homestead by Catharine, Elizabeth and Hannah, and the issue of those of his children who should then be dead, such issue to take *per stirpes*. Had he intended to give the property to Catharine, Elizabeth and Hannah alone, he would most probably have done so by devising it to them

expressly, subject to their use and enjoyment of it as a home; and he would have said "to such of my said three daughters," etc., and not "to such child or children," etc.

It is also urged that the remainder is vested; that, although it would otherwise be held to be contingent, the presence of the word "assigns" makes it a vested remainder. The gift is to those of the children who shall be alive at the time when the use and enjoyment by Catharine, Elizabeth and Hannah shall cease, and to the issue of those who shall then have died. The words "and assigns" were used to indicate the absolute character of the estate, a fee, which the remaindermen are to take. They have no significance beyond that. Wms. Real Prop. 121; *Re Walton's Est.* 8 DeG. M. & G. 178. They were entirely unnecessary. The estate is a contingent estate.

By the sixth section the testator directs that any balance that may remain of the general income, rents, interest and profits of his estate, not previously disposed of in the will, be invested. The balance here mentioned is that which will remain after payment of the annuity of \$800 to the widow. At her death, that annuity ceases, and then the \$5,000 are to be invested; but all the rest of the estate except the homestead and furniture, will be at once distributable according to law.

Catharine, Elizabeth and Hannah insist that the gift of the use of the furniture to them is unlimited, and therefore absolute. The gift is not unlimited. The bequest of the use of the furniture is expressly to provide a home for them in the homestead. If, at the death of the widow they be all dead or all married, the provision will not take effect at all. Whenever their use of the homestead shall cease, their right to the furniture will be at an end. The homestead and the furniture are given together for the same purpose.

The question is submitted to the decision of the court, whether the widow is not entitled to dower and to the \$200 exemption. It is quite clear that both of those claims are inconsistent with the provisions of the will. The testator orders that all his property of every kind shall remain as it is; that his widow shall have the use of the homestead and furniture for life, and an annuity of \$800, also for life, out of the rents, interest, issues and profits of all the rest of his estate; and directs that the surplus of interest, etc., over her annuity, be invested for the benefit and increase of his estate. Besides the homestead, he owned real estate in Newton and real estate in Jersey City. The rents and profits of those properties are, by the will, with the rest of his estate except the homestead and furniture, charged with her annuity. She was put to her election between the provision made for her by the will and her dower. *Colgate's Est. v. Colgate*, 8 C. E. Green, 872.

The claim for the \$200 exemption is, as will have been seen, in conflict with the provisions of the will. It therefore cannot be allowed. Rev. 763 § 58.

The question whether the right of occupation given to Catharine, Elizabeth and Hannah is personal, or whether they may rent the property, is also presented for decision. Whether the donee of the use and occupancy of a house is confined to a personal use, so that he is de-

barred from letting the property during the continuance of his interest, is a question of intention. If it appears, from the terms of the gift or the context of the will, that a personal use only was intended, the enjoyment of the gift will be confined accordingly. *Ingersoll v. Ingersoll*, 9 Stew. 127; *Maclaren v. Stainton*, 4 Jur. N. S. 199; *Stone v. Parker*, 29 L. J. Ch. 874; *Kingman v. Kingman*, 121 Mass. 249; *Maack v. Nason*, 21 Vt. 115.

In *Ingersoll v. Ingersoll* the devise was of the privilege of occupying so much of the house in which the testator then lived as the donee might need during the time she should remain his widow. It was held that her use was to be personal. And it was so held in *Maack v. Nason*, where the testator gave his daughter the right to live and remain in his house so long as she should remain unmarried.

In the case under adjudication, the gift was expressly for a home for the donees. This implies a personal use. The three daughters, or such of them as shall use the homestead, will be liable to pay the taxes and to bear the other burdens which the law imposes upon life tenants of real property.

The widow, as life tenant of the homestead, is bound to pay taxes and to make repairs, but she is not bound to insure.

James P. WESTERVELT, *Complainant*,

Ida E. VOORHIS *et al.*

1. By the common law the **priority of liens**, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in order of time standing first in order of rank.
2. An **unregistered mortgage** executed by an ancestor, although **prior in date to a judgment** recovered against his heir in the ancestor's lifetime, does not on the **ancestor's death** become void under the twenty-second section of the statute concerning mortgages.
3. A mortgage and judgment, in order to stand in the **relation of being prior and subsequent** to each other, must embrace or cover the same land.

(Decided December 1, 1886.)

BILL to foreclose a mortgage. On final hearing on bill and answer and facts admitted. *Decree for complainant.*

The facts are stated in the opinion of the Vice Chancellor.

Mr. T. C. Simonton, Jr., for complainant:

Charles H. Voorhis inherited his interest of the mortgaged premises, subject to the lien of complainant's mortgage, although it was not recorded. For the statute (Rev. 706, § 22) provides that such mortgage, as between the parties and their heirs is valid and operative.

The defendant's judgment became a lien on the interest that descended to Charles H. Voorhis at his father's death, which interest was subject

to complainant's mortgage. The subsequent judgment creditor whose judgment becomes a prior lien, if the mortgage is not recorded before the entry of the judgment, is the judgment creditor of the mortgagor, not a subsequent judgment creditor of a person not then the owner of the mortgaged premises and who afterwards may become the owner as heir; for the statute prescribes that unless the mortgage is recorded or lodged for that purpose, at or before the time of the entry of the judgment, the mortgage will be void and of no effect unless such judgment creditor have notice of the mortgage. The notice must be notice at the time of the entry of the judgment.

Condit v. Wilson, 9 Stew. 370; *Sharp v. Shea*, 5 Stew. 65.

In this case Ida E. Voorhis, judgment creditor, could not have notice of the existence of the mortgage on land that at the time of the entry of her judgment did not belong to a judgment debtor.

The whole object of the Registration Act is to protect subsequent purchasers and incumbents against previous deeds and mortgages which are not recorded.

2 Washb. Real Prop. p. 140.

Mr. Charles H. Voorhis, for defendant, Ida E. Voorhis:

A judgment creditor need not part with anything. The phrase "for a valuable consideration" does not apply to a judgment creditor.

Condit v. Wilson, 9 Stew. 374.

That Ida E. did not become the creditor of Charles H. upon the faith or credit that he owned the lands in question can raise no equity against her.

Vreeland v. Clafin, 9 C. E. Green, 315.

"As to third persons acquiring subsequent liens on property; the record is their proper resort for information and they must be permitted to rely on it with confidence."

Halsted's Digest, 637; *Rutgers v. Kingland*, 3 Halst. Ch. 187; *S. C.* on app. *Id.* 658.

Ida E. is a *bona fide* purchaser without notice "for valuable consideration" from the apparent owner, by the record, free of the mortgage.

Rev. 1043 § 7; *Sharp v. Shea*, 5 Stew. 66.

"An unrecorded deed is not valid after the death of the grantor, as against one holding a recorded deed from the grantor's heir, without notice of the former deed."

Earle v. Fiske, 103 Mass. 492.

Van Fleet, V. C., delivered the following opinion;

The question to be decided in this case is whether the mortgage on which the complainant's action is founded is void or not, as against the defendant.

The complainant seeks to foreclose a mortgage made to him by Henry H. Voorhis on the third of June, 1883, to secure \$1,000. The mortgage was not recorded at the time of its execution, nor for more than two years afterwards. The mortgagor died intestate January 30, 1885. On his death, the mortgaged premises descended to his four children, of whom Charles H. Voorhis was one.

The defendant Ida E. Voorhis on the 28th of December, 1884, recovered a judgment against Charles H. Voorhis in the supreme court of this State for \$14,000; and his interest in the

mortgaged premises was subsequently, on the 4th of June, 1885, conveyed to her in execution of a sheriff's sale made under her judgment. The complainant's mortgage was not recorded until the 19th of February, 1885. The defense is that the complainant's mortgage is void as against the judgment under which the defendant claims title to one fourth of the mortgaged premises.

By the common law and in the absence of statutory regulation the priority of liens, whether by mortgage or judgment, is governed exclusively by the date of their acquisition, the first in order of time standing first in order of rank. Unless, therefore, the common-law rights of the parties to this suit have been changed by statute, there can be no doubt that the complainant's mortgage is both valid against and prior to the defendant's judgment.

The defendant, however, insists that the complainant's mortgage is rendered a nullity, as against her judgment, by the twenty-second section of the statute concerning mortgages. This section in substance declares that every mortgage of land shall be void and of no effect against a subsequent judgment creditor not having notice thereof, unless such mortgage be recorded or lodged for that purpose, at or before the time of entering such judgment; provided, nevertheless, that such mortgage, as between the parties and their heirs, shall be valid and operative. Rev. 706.

The mortgage in question is undoubtedly valid against Charles H. Voorhis, the judgment debtor; it is made so by the express words of the statute. As heir, he could take nothing from his ancestor, until his ancestor's debts were paid. So long as the title to lands descended remains in the heir, the debts of the ancestor constitute a lien thereon. Rev. 768, § 77, *Haston v. Castner*, 4 Stew. 697.

And as a general rule, a judgment creditor can take nothing for the satisfaction of his debt which his debtor cannot himself sell and make a good title to as against his creditors. Speaking generally, the limit of his right as a creditor is to sell by judicial process only such property for the satisfaction of his debt as his debtor could himself sell. It must be admitted, however, that this statute has changed this rule and has given a judgment creditor, in a certain contingency, a right to sell property for the satisfaction of his debt, which his debtor could not himself sell, and to sell the same free from the lien of a prior unregistered mortgage executed thereon by his debtor. But in order to possess this right he must be a judgment creditor of the person who executed the prior unregistered mortgage, and not a judgment creditor of some person who may at some future time after entry of his judgment become the owner; by descent of the mortgaged premises.

That this is the meaning of the statute seems to me too obvious for debate. There are some things so plain that any attempt by argument to make them more explicit serves rather to obscure than to elucidate. Prior to the enactment of this statute it was possible for a dishonest man, after having mortgaged his lands for all they were worth, to procure an additional loan upon them, by falsely representing that they were unincumbered, and thus defraud the last mortgagee. The evil which needed correc-

tion consisted in this: that all prior liens, although secret and unknown, were valid and entitled to be paid according to their priority. The remedy which the statute applies is to compel a mortgagee to give notoriety to the fact that he has a lien, by requiring him to record his mortgage, under the penalty of losing his priority as against subsequent lien holders, acquiring liens in ignorance of his.

The nullification is effected by the entry of the judgment. If the prior mortgage is not recorded or lodged for that purpose, at or before the time of entering the subsequent judgment the mortgage becomes void, at once, on the entry of the judgment. But if, when the judgment is entered, the mortgaged premises are owned by one person, and the judgment is entered against another and different person, so that the judgment is not a lien on the mortgaged premises, the mortgage and judgment do not stand in the relation of successive liens, so that one can be prior to the other.

The obvious design of the statute is to protect a subsequent incumbrancer against a prior unregistered incumbrance, where both incumbrancers have liens on the same lands; but where two persons have liens against different debtors, and embracing or affecting different tracts of land, their liens stand wholly independent of each other, and neither is prior or subsequent to the other. Legislation which in such case should declare either void against the other would be both useless and absurd.

The defense, it is obvious, comes within neither the words, the spirit nor the policy of the statute, and must therefore be pronounced groundless.

The complainant is entitled to a decree.

William G. NIXON, Complainant,
v.

Benjamin R. WALTER *et ux.*, *et al.*

1. A bill is **not maintainable** under the Act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same" (Rev. p. 1189), **unless complainant is in peaceable possession** of the land under a claim of ownership; but the proceeding may, if the facts warrant it, be supported as a suit *quia timet*, irrespective of the statute.
2. **Equity will set aside, as a cloud upon title, a deed** purporting to convey a part of complainant's land, being a strip of water front bounded by the high water line, where in fact the land intended to be conveyed was other and different land which, from the receding of the high water line through natural causes, has been **submerged** and has disappeared, and **extrinsic evidence is necessary** to show the fact.
3. The description in a deed "**high water line**" or its equivalent (here, "**the beach**"), is a fixed and permanent one, bounding the land conveyed by the high water line existing at the date of the deed; if the high water line subsequently

recedes by natural causes, the land submerged is lost to the grantee in the deed.

4. The removal, by defendant, of sand from the strip of land the title to which complainant desires to have cleared, and payment of taxes thereon, are not evidence of possession thereof by defendant.

(Decided ——— — 1886.)

BILL to quiet title. On final hearing on pleadings and proofs. *Relief granted.*
Mr. S. H. Grey, for complainant.
Mr. D. J. Pancoast, for answering defendant.

Runyon, *Chancellor*, delivered the following opinion:

This suit is brought under the Act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." Rev. p. 1189.

The bill alleges that the complainant, ever since the conveyance of the property in question to him, has been in peaceable possession thereof, claiming to own and owning the same in fee simple. One of the defendants has answered. She denies that the complainant is or ever has been in possession of the property, under or by virtue of his conveyance, or in any other way or manner; and she alleges that she and those under whom she claims title have had possession for over twenty years, and have been accustomed to use the property for the only purpose for which it has been or is valuable, viz.: digging and removing sand for molding and other purposes. There is no proof in the cause that the complainant is or ever has been in possession of the property.

In order to maintain a suit under the statute it is necessary that the complainant be in peaceable possession of the land under a claim of ownership. The statute was passed for the relief of a class of persons who, up to that time, had been without remedy; those who, being in peaceable possession of land of which they believed themselves to be the owners, were vexed and injured by claims of title to, or interest in or incumbrance upon it by others, or by denials of or imputations upon their title, and there was no suit pending to enforce or test the validity of such claim, or to silence such denial or clear up such doubts. Such persons had no means of removing the cloud, except under peculiar circumstances, and could not bring their title to a test.

The complainant, by the allegations of his bill, has brought himself within the provisions of the statute; but the jurisdictional averment of possession was liable to be controverted, and it was controverted and issue joined upon it. It was, thereupon, incumbent upon him to establish its truth. Not only has he not done so, but he has made no attempt whatever in that direction. His suit, therefore, cannot be maintained under the statute. But it can be supported as a suit *quia timet*, irrespective of the statute.

The complainant claims to be the owner of land bounded by the line of high water in Delaware Bay and Maurice River Cove. He states that the defendants claim to be the lawful owners of part thereof, viz.: a strip six rods wide, the whole length thereof, bounded on

high water mark. He insists that they have no title whatever to that strip, but that the strip which was conveyed by the deeds under which they claim title, and which was between his land and high water mark, as it stood when the title to the strip, as a separate tract, originated, has been submerged by the encroachment of the waters of the bay, which have covered it entirely.

A court of equity will set aside a deed as a cloud upon title where it is invalid, and extrinsic evidence is necessary to show its invalidity; especially if such evidence be oral testimony. Here are deeds which, upon their face, convey title to part of the complainant's land, while, if the complainant is right, they in fact convey and were intended to convey other and different land which, from natural causes, has disappeared, temporarily if not permanently; and it is necessary to produce extrinsic evidence by the testimony of witnesses testifying as to their personal knowledge of the locality, derived from long observation, to show the fact—to show where the line of high water is at this time, and that it has shifted inland more than six rods since the making of the original conveyances for the strip as a separate tract under which the answering defendant claims title. It is true that if the answering defendant is in possession, the complainant might bring an action of ejectment to try the title, and so bring her claim to a legal test.

The evidence on the subject of the possession is that the answering defendant or those under whom she claims have from time to time dug and removed sand for sale from the land in question (which is a mere uninclosed and unoccupied sand bank), and have paid taxes for the property, and that she and others claiming with her under the same claim of title brought suit against some other person or persons for trespass on the property, and recovered in the action.

The removal of sand was, if the complainant was the owner of the property, a trespass merely; and the payment of tax, either irrespective of or in connection with such removal, is not evidence of possession. Other persons who made no claim of title also have taken the sand from time to time without leave or license. The witness who testifies that the answering defendant and those who claim with her, under the same claim of title, took sand, says that a good many persons trespassed upon the property and took the sand without leave.

But in my view of the case the complainant's right to maintain this suit does not depend upon the decision of the question whether he could maintain an action at law to test the defendant's claim. He does not admit, but denies, that the defendants have ever had possession. If the land is his, and they have an apparent but unreal title to it, he is entitled to relief in this court. Under such circumstances, the relief which is appropriate is such as this court can best give. What is required to relieve the complainant is a decree that the answering defendant has no title under her deeds to the land described in his deeds, to declare and establish the rights of the parties with reference to the present situation.

There can be no doubt, and indeed the fact is not denied, that the six rod strip which was

the subject of the conveyance under which the answering defendant claims, has been, since the time when some of those conveyances were made, covered by the waters of the bay, by the encroachment thereof. The answering defendant claims that, notwithstanding that fact, she has title to a six rod strip answering the description, taking the present high water line as the boundary on the bay. That claim cannot be supported. The deeds under which she claims convey a strip of land by explicit boundaries, one of which was the high water line. By the term "beach," in the expression "back of the beach," was meant high water line. *Trustees of East Hampton v. Kirk*, 68 N. Y. 459.

Had there been accretions to the strip by imperceptible degrees, the owners of the property would have been entitled to them. On the other hand if, by encroachment of the waters of the bay, it has been and is submerged and lost, the loss fell, not on the adjoining owner, but on those who owned the land submerged.

It was held, in *Scrutton v. Brown*, 4 Barn. & Cress. 485, that the grantee of the shore of navigable waters does not take a fixed freehold, but one that shifts as the shore recedes or advances; but there the grant was of the shore, the land between high and low water marks; a shifting thing, not, as here, of a strip bounded by the shore.

In *Cook v. McClure*, 58 N. Y. 437, where a boundary line was "along the high water mark" of a pond, it was held that the line thus given was a fixed and permanent one, the line of high water at the date of the deed, and did not follow the changes of the high water mark of the pond.

In this case the six rod strip was, when it was first conveyed, a definite parcel of land. It has been covered by the waters of the bay, so that that which was the high water or beach line when the original conveyance for the strip as a separate tract under which the answering defendant derives her title was given, is now at least six rods below the present high water or beach line. Such being the fact, she has no title under her deed to any part of the land covered by the complainant's deeds.

The following is the history and derivation of the titles: April 18, 1735, Samuel Cotton located a tract of marsh by virtue of a deed of right. The tract was said to contain about 8,200 acres, and the strip was included in it. In 1764, the sheriff of Cumberland, under execution, sold and conveyed the tract to Robert Towers and John Towers. It appears that in 1768, they conveyed to Silas Parvin an undivided one third of the beach, which is in the deed described as follows: beginning at the mouth of a creek (said to be Broad Oyster Creek) next above False Egg Island Point; thence, to extend down the several courses of the bay to the mouth of Egg Island Thoroughfare; thence, along the same thoroughfare, to the mouth of a small creek or gut, nearly opposite the northeast part of Egg Island; thence up the creek or gut, ten rods from the bay; thence, to continue a course ten rods from the bay, from the side of the thoroughfare up to near the upper point of Egg Island Thoroughfare; thence, six rods wide, on the marsh on the back of the beach, and to continue the same breadth on the back of the beach, up the

bay, to the creek next False Island Point, and thence down the said creek to the place of beginning; containing two hundred acres, more or less.

In 1785, Clarence Parvin, the only child and heir of Silas Parvin, who had died intestate, conveyed that third of the beach to Robert Towers, Jr. In 1787, the sheriff of Cumberland sold and conveyed that third, under execution against Robert Towers, Jr., to Robert Towers, Sr. The latter was, before that time, owner of half of the marsh and one third of the beach. By this conveyance he became the owner of two thirds of the beach.

By his will, made in 1791, he gave all his lands to his three daughters, Margaret and Elizabeth Towers and Sarah Evans. Margaret died after his death, and her two sisters inherited her share. Elizabeth subsequently devised her interest to her surviving sister, Mrs. Evans. She died intestate, and her only son and heir, Robert T. Evans, inherited from her the half of the marsh and two thirds of the beach. By his deed, made in 1845, he conveyed those interests to James Dunlap. The beach is in that deed described as in the above mentioned deed from Clarence Parvin, and the marsh is described as follows: bounded on the easterly side by Dividing Creek; on the north-west by Broad Oyster Creek; on the south-easterly by the aforesaid tract of two hundred acres and Delaware Bay, and on the northerly side by ———; containing 3,000 acres, excepting five acres sold to the United States for a lighthouse.

John Towers, Sr., by his will, made in 1778, devised his interest in the marsh and beach to his son, John Towers, Jr., and he conveyed it, in 1810, to Philip Walter, four of whose "children, grandchildren and devisees," conveyed that property to the other, Peter B. Walter, in 1833, and he conveyed, in 1846, to George Sheppard, all his right and title to a tract of marsh "beginning at a post standing on the west side of Dividing Creek, by the mouth of a small creek, being the third creek from the mouth of said Dividing Creek on the west side thereof; from thence, north-westwardly, thirty-five degrees five chains, to a post for a corner; thence, west, northerly six degrees ninety-five chains, to a post standing by Ononocan Creek; thence, down the same creek, bounding thereon, to the mouth of the thoroughfare; thence, down along the same thoroughfare, bounding therewith, to the Broad Oyster Creek; thence, down the same creek, to the bay; thence, down the bay on the several courses and distances thereof, to the mouth of Dividing Creek aforesaid; thence, up the said Dividing Creek, bounding thereon, to the beginning; containing thirty-two hundred acres, more or less."

George Sheppard, in June, 1848, conveyed his interest (one undivided half) in the marsh to James Dunlap (who already owned the other undivided half), by deed which describes the marsh as being bounded on the southeast side by a tract of land containing two hundred acres, more or less, belonging to Arthur McCarney, and also by Delaware Bay. The tract of five acres sold to the United States Government for a lighthouse was excepted. Dunlap, in July, 1848, conveyed his undivided two thirds of the beach to Arthur McCarney, and George Shep-

pard, in December, 1848, conveyed his third of the beach to him, so that in 1848, McCaerney became the owner of the whole of the beach. The land so conveyed is, according to the description in those deeds to McCaerney, a strip of "sand beach" six rods wide "on the back of the beach." The description is as follows: "beginning at the mouth of the creek formerly called Broad Oyster Creek, and runs thence, down Delaware Bay the several courses and distances thereof, to Egg Island Point; thence, down the point to Maurice River Cove; thence, down the cove to Oronoken Creek; thence, up said creek, six rods on the back of the beach, to Egg Island Point, and to continue the same breadth, six rods, on the back of the beach, to Broad Oyster Creek; thence, down the same creek to the beginning; containing two hundred acres, more or less." McCaerney then, in 1848, owned the strip, and Dunlap owned the marsh.

In 1850 McCaerney conveyed the beach, or six rod strip, to Benjamin R. and Washington Walter. The property is described in that deed as a sand bank or tract of land situate, etc., and is conveyed by the same description last quoted.

Washington Walter died intestate and without issue, and his brother Benjamin inherited his interest. Benjamin died intestate. His heirs at law were Benjamin R. Walter, Jr., Caroline Voorhees, Rebecca Sheppard, Emma Neal, Mary Jane Leidy, Anna R. Berry, Albert W. Nichols, Emma Larkin, Mary Morgan, Sarah James and Mary Horn. In 1878, the United States Government took, by condemnation, the title of those heirs at law to a strip six rods wide, along the shore in front of the lighthouse property at Egg Island Point. In 1854, Dunlap, who owned all the marsh, conveyed an undivided half of it to Furman L. and Lewis Mulford. Part of the description in the deed is as follows: "thence, down said creek (Broad Oyster Creek), bounding thereon, to a stake standing six rods on the back of the beach; thence, down Delaware Bay the several courses and distances thereof, six rods back of the beach, to the mouth of Ockonock (Oronoken) Creek; thence, down on the said Ockonock Creek to Maurice River Cove; thence, down said cove to the mouth of Dividing Creek; thence, up said creek to the place of beginning."

The deed states that the property described is the same which was conveyed to Dunlap by Evans and Sheppard, as before mentioned. Dunlap evidently intended to convey to the Mulfords half of all he had. In May, 1866, Dunlap and the Mulfords conveyed one fourth of their interests in the marsh to Jacob Sutton; and in May, 1867, Dunlap conveyed his remaining interest to the Mulfords. The deed to them describes the marsh, in the general description, as being bounded on the southeast by Delaware Bay; but in the particular description the fourth course runs "along the thoroughfare to Broad Oyster Creek, and thence, down the creek, to a stake standing six rods inside the beach, as per survey made by Ephraim B. Lawrence in 1849, and thence, down the bay the several courses of said survey, to the mouth of Dividing Creek; thence, up said creek, to the place of beginning." By this deed the grantors evidently intended to

convey one fourth of all their interest in the whole of the marsh property.

Sutton, in 1870, conveyed his interest, the before mentioned one fourth of the marsh, to Thomas E. Fleetwood, who, in 1880, conveyed it (except about twenty acres, which he and the Mulfords had conveyed to the United States Government) to Lewis Mulford.

The Mulfords, in March, 1881, conveyed the marsh to the complainant by the same description as that contained in the deed from Dunlap to them. The deed excepts from the conveyance the land sold to the United States Government, the five acres and the twenty acres, also land conveyed to David Compton, and land conveyed to George Moore. Furman L. Mulford died March 23, 1881, the next day after the date of the before mentioned deed to the complainant. He left a will, made in 1878, by which he devised all his interest in the marsh to Lewis Mulford.

In March, 1883, Lewis Mulford, by a deed of confirmation, declaring that there was a mistake in the description of the deed from the Mulfords to the complainant, and that the grantors intended to convey all the marsh, down to high water mark in the bay, without excepting or recognizing the existence of any such beach as that described in the before mentioned deeds to McCaerney (which beach, it declared, had been washed away, and was covered by the waters of the bay), and that the mistake in bounding the marsh, in the deed of 1881, upon the strip, was caused by taking the description from a deed made when part of the strip still remained, confirmed the property to the complainant by a description bounding the land by high water mark on the bay and Maurice River Cove, from the mouth of Broad Oyster Creek to the mouth of Dividing Creek.

It will be seen that in 1768 Robert and John Towers and Silas Parvin owned the whole tract, including both marsh and beach. Each had an equal undivided third. In 1785, Clarence Parvin conveyed his interest in the strip of beach to Robert Towers, Jr., whose title thereto was conveyed, by sheriff's deed, in 1787, to Robert Towers, Sr., who was then, after the delivery of that deed to him, the owner of two thirds of the beach. He was also the owner of half the marsh. The rest of each was owned by John Towers. It was not until 1848 when Sheppard and Dunlap, respectively, conveyed to McCaerney their interests in the beach, that a conveyance of that land, or any interest therein, not accompanied by a conveyance of an interest in the marsh, was made to any one. But then, and subsequently, it was conveyed separately.

The proof is clear that the whole of the strip has been washed away and covered by the waters of the bay. There is no contrariety in the evidence. Daniel M. Loper testifies that, in his judgment, the encroachment along the beach, from Broad Oyster Creek to Oronoken Creek, within the last forty years, is three times as much as six rods. George Shropshire says that there have been more than six rods washed away around the marsh in the last twenty-five years. Thomas Hand says that from Broad Oyster Creek to Oronoken the beach has gone away more than one hundred yards. Thomas Garrison and James G. Gandy also testify to

the encroachment, and William B. Trenchard, a surveyor, testifies to it according to measurement and comparison with the maps. One of the maps was made by E. B. Lawrence, a surveyor, for Dunlap, in 1849, and the other is a reduced copy of it. Mr. Trenchard says that the greatest difference between high water at this time and high water in 1849, as shown on the original map, along the whole of the shore from Broad Oyster Creek to Oronoken Creek, is eleven chains, or forty-four rods, and the least, two chains, or eight rods.

It is urged that the recognitions of the existence of the strip, in the deeds to the Mulfords, estop the complainant, who holds under them, from denying it. But it is entirely clear that there is no ground whatever for this claim. The conveyances made by Dunlap to the Mulfords and Sutton were all made after he had conveyed away his interest in the strip. The question is not whether the strip was not, at some time, conveyed, nor as to its dimensions and location when it subsisted, but whether what was conveyed still subsists.

The claim of title by adverse possession set up in the answer has not been sustained. The evidence of possession before referred to is not sufficient to establish such title. *Cobb v. Davenport*, 8 Vroom, 369, 385; 8 Washb. Real Prop. 140; *Wheeler v. Spinola*, 54 N. Y. 377.

There will be a decree declaring that the deeds under which the answering defendant claims convey no title to the land conveyed by the deeds of the Mulfords to the complainant, or any part thereof.

The complainant is entitled to costs.

Lydia G. FROST *et al.*,

v.

James C. DENMAN *et al.*

An executor who has discharged his duty with fidelity and economy, and with advantage to the estate, should not be held to have forfeited his right to commissions, merely because he had retained in hand larger balances accrued from the estate than were required to meet expenses; and, it appearing that he had not used such balances for his own private purposes, he should be charged with simple interest only, thereon.

(Decided ——— 1886.)

BILL for accounting. On exceptions to master's report, by both sides. *Complainants' exceptions overruled; defendants' exceptions allowed.*

The facts are stated in the opinion.

Mr. Joseph Alward, for complainants.

Mr. P. H. Gilhooly, for defendants:

A direct and positive answer to a bill responsive to the charges must prevail, unless overcome by two witnesses, or one witness supported by circumstances equivalent to evidence.

Brown v. Bulkley, 1 McCart. 294; 2 Story, Eq. Jur. 1528.

The complainant calling upon the defendant to answer an allegation of fact admits the answer to be evidence of the fact.

N. J.

Brown v. Bulkley and 2 Story, *supra*; *Price v. Lytton*, 3 Russ. 206.

He thereby makes the defendant his own witness.

Wilson's Exrs. v. Cobb's Exrs. 1 Stew. 177, 180; *Bird v. Styles*, 3 C. E. Green, 297.

The uncorroborated testimony of the complainant is insufficient to overcome a responsive answer.

DeHart v. Baird, 4 C. E. Green, 423; *Calkins v. Landis*, 6 C. E. Green, 183; *Stearns v. Stearns*, 8 C. E. Green, 167; *Zane v. Cawley*, 6 C. E. Green, 180.

Commissions of administrator are allowed when earned.

Re Barclow, 2 Stew. 284; *Mathis v. Mathis*, 8 Harr. (N. J.) 59.

Where yearly accounts are required to be rendered, and interest charged on balance, full commissions should be allowed on each year's receipts and disbursements.

Hancox v. Meeker, 95 N. Y. 589; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Halsey v. Van Amringe*, 6 Paige, 17; *Re Atkinson*, Id. 216; *Re Kellogg*, 7 Paige, 266; *Wheelwright v. Wheelwright*, 2 Redf. 501; Redf. Surr. 704; Dayton, Surrogates, 535.

No interest will be charged where the administrator pays over the funds received within a reasonable time.

Lynn's App. 31 Pa. 44.

In taking an account the trust funds received during the year are unproductive, until the close of the year.

Pettus v. Clawson, 4 Rich. Eq. 92; *Clarkson v. De Peyster*, 2 Wend. 78; *Luken's App.* 47 Pa. 356; *Boynton v. Dyer*, 18 Pick. 1; 8 Wms. Exrs. *p. 1844, note a.

An administrator is to be charged with interest on the amount remaining after deducting commissions.

Callaghan v. Hall, 1 Serg. & R. 241; *Shepherd's Exr. v. Stark*, 3 Munt. (Va.) 41; *Burwell's Exrs. v. Anderson's Admrs.* 3 Leigh, 348.

Commissions to accountant are due at the time at which the services for which they are allowed are performed.

Parker's Est. 64 Pa. 307; *Davis' App.* 23 Pa. 206.

Respecting the allowance of commissions to executors and administrators, see *Pomeroy v. Mills*, 10 Stew. 578; *Aldridge v. McClelland*, 9 Stew. 288; *Reynolds v. Jackson*, 9 Stew. 515; *Re Wolfe*, 7 Stew. 223; Orphan's Court Act, § 113; *Tucker v. Tucker*, 6 Stew. 235; *Wilson v. Staats*, 6 Stew. 524; *Squier v. Squier*, 3 Stew. 627; *Re Barclow*, 2 Stew. 282; *S. C. 9 Stew. 611*; *McKnight's Exrs. v. Walsh*, 8 C. E. Green, 186; *S. C. 9 C. E. Green, 498*; *Re Marcy*, 9 C. E. Green, 451; *Lathrop v. Smalley's Exr.* 8 C. E. Green, 192; *Fowler v. Colt*, 7 C. E. Green, 44; *Frey v. Frey's Admr.* 2 C. E. Green, 71.

There is a right of appeal on questions of commission.

Anderson v. Berry, 2 McCart. 232.

The supreme court cannot alter commissions after final account has been passed.

Post v. Stevens, 2 Beas. 293.

No interest is to be allowed on balances during pendency of the account in the courts.

Hoopes v. Brinton, 8 Watts, 78; *Wendell v. French*, 19 N. H. 205; *Duncan v. Dent*, 5 Rich. Eq. 7.

Unless use is made of the money during the interval.

Stearns v. Brown, 1 Pick. 530.

Simple interest is allowed on balances.

Hill, Trusts, 548, note, see 874.

As to when interest will be allowed, see:

Mount v. Van Ness, 8 Stew. 118; *Re Doremus*, 6 Stew. 234; *Aldridge v. McClelland*, 9 Stew. 288; *Re Barcelow*, 9 Stew. 611; *Van Houten v. Post*, 5 Stew. 709; *Holcombe v. Holcombe*, 2 Beas. 413; *King v. Berry*, 2 Green, Ch. 261; Schouler, Exrs. § 538; *Id.* note 2; *Voorhees v. Stoothoff*, 6 Halst. 192; *Mathis v. Mathis*, 3 Harr. (N. J.) 61.

Compound interest allowed, when.

Perrine v. Petty, 7 Stew. 194; *Salisbury v. Colt*, 12 C. E. Green, 492, 495, affirming *Fowle v. Colt*, 10 C. E. Green, 202, and *Fowle v. Colt*, 7 C. E. Green, 44; *McKnight's Exrs. v. Walsh*, 9 C. E. Green, 498; *Barney v. Saunders*, 16 How. 542 (57 U. S. bk. 14, L. ed. 1051); *Lathrop v. Smalley's Exrs.* 8 C. E. Green, 192; *Frey v. Adms. of Frey*, 2 C. E. Green, 71; *Craig v. Manning*, 4 Halst. Ch. 813; *Coddington v. Stone*, 9 Stew. 362.

Pending an accounting simple interest only will be charged.

Van Houten v. Post, 5 Stew. 709; *Re Mott*, 11 C. E. Green, 509.

An executor is not charged with interest on a balance retained under a fair apprehension of his right to it.

8 Wms. Exrs. 1845; *Forward v. Forward*, 6 Allen, 494.

Executors may retain money to meet contingencies.

Lloyd's Estate, 82 Pa. 143; *Pace v. Burton*, 1 McCart. 247; *Sprail v. Cannon*, 2 Devereaux & B. (N. C.) 400; *Doster v. Arnold*, 60 Ga. 816.

Ranyon, Chancellor, delivered the following opinion:

The bill was filed against James C. Denman, surviving executor of Major Denman, deceased, for an account, etc. Mr. Denman answered; and upon bill and answer an order of reference to a master to take the account was entered. To the master's report both sides have excepted; the complainants, to the allowance of commissions to the executor, and the executor's representative (the executor died after the taking of the account had been begun), to the charge of compound interest made against the executor, on the balances in his hands, from 1870 to 1878. He claims also that if the account be taken with annual rests, the executor should be credited in each year with his commissions earned in the year.

The executor appears to have discharged his duty with fidelity and economy, and with much advantage to the estate. The master reports that the executor had the management and disposal of a large number of building lots; that he managed the estate with care and prudence, and negotiated advantageous sales; that there were over ninety sales and about fifty mortgages taken for purchase money; that there are no charges for commissions to agents for negotiating those sales, and that the executor collected rents and interest and paid taxes and assessments (the property was in the City of Elizabeth) and other bills, and made payments to the devisees from time to time; the whole

amount of payments and allowances being nearly \$74,000. The master thinks that the executor ought to have commissions.

The executor has had charge of the estate since 1854, when his coexecutor (who up to the time of his death had sole charge of it) died. Nor does the executor appear to have done anything in his administration to forfeit his right or claim to commissions. None of the charges made against him in the bill have been established. The complainants insist that he has not kept proper books of account. He has kept books of his transactions, which although kept in a simple way are intelligible and are sufficient to show his dealings, and he has made a full account. The balances, from 1870, were larger than he ought to have kept in hand. After retaining enough to meet the charges (taxes, assessments, etc.) against the property, he should either have distributed the rest among the devisees or should have invested it.

But there is no evidence that he used the money for his own private purposes. The bill charges that he has so used it, and it calls for an answer on oath. He has answered explicitly and positively that he has not done so. Not only is the answer not overcome by proof, but there is no evidence whatever to the contrary. The executor should, under the circumstances, pay simple interest only (*King v. Berry*, 2 Green, Ch. 261) on yearly balances after 1870, after deducting a proper sum (\$1,500 a year would be a reasonable amount) as a fund to meet expenses.

The exceptions of the complainants will be overruled, with costs, and those of the other side will be allowed, with costs.

SUPREME COURT.

George M. TROUTMAN, *Plff. in Err.*,
v.

STATE of New Jersey.

***The agent of the owner renting a house knowingly for the purpose of a brothel may be indicted as the keeper of such house.**

(Decided November 17, 1886.)

ERROR to the Monmouth Quarter Sessions, to review a conviction on an indictment for keeping a disorderly house. *Affirmed.*

The facts and questions presented are stated in the opinion.

Messrs. George C. Beekman and Henry G. Clayton, for plaintiff in error.

Messrs. Charles Haight, Prosecutor of Pleas, and John W. Swartz, for the State:

An agent letting a house to be kept as a bawdy house is, equally with the one who keeps it, liable to indictment.

State v. Williams, 1 Vroom, 105.

Letting a house to a woman of ill fame, knowing her to be such, is an indictable offense at common law.

See *Commonwealth v. Harrington*, 3 Pick. 26; *Brooks v. State*, 2 Yerg. 482.

*Head note by BEASLEY, Ch. J.

The procurer is guilty.

1 Bish. Crim. Law, § 886.

The prosecution may prove the reputation of the keeper of the house, and of the inmates, for the purpose of assisting to establish the character of the house.

2 Whart. Crim. L. 8th ed. §§ 1451, 1452; Whart. Crim. Ev. 8th ed. § 261; *O'Brien v. People*, 28 Mich. 213; *State v. Smith*, 28 Minn. 193.

Beasley, Ch. J., delivered the opinion of the court:

The defendant was indicted in the usual form, as the keeper of a disorderly house. It appeared upon the trial that he was the agent of the landlord of the premises; and, as has been found by the jury, that "having the control and renting" of such premises he had, at the time stated, rented the same with the knowledge that the house was to be kept as a house of prostitution, and that it was so kept by the tenant.

The first objection urged against the course of proceedings, which resulted in a conviction, was that a person who rents a house as the representative of the owner does not become in any sense the keeper of such house and cannot be indicted as such. But if this argument be tenable, neither is the landlord himself, with the object to promote social disorder, indictable in that character. In one sense he is no more the keeper of the house so demised than the agent is who procured the tenant. But in the view of the criminal law all persons who assist, aid or contribute to the erection of a public nuisance are principals and may be prosecuted as such.

It is obvious that the agent must stand on the same footing as the owner, for if he has knowledge of the unlawful use to be made of the property, and the owner is in ignorance, he, the agent, and the tenant would alone be the breakers of the law. A case in point is that of *People v. Frick*, 4 Denio, 129, the indictment being against the landlord as the keeper of the house.

The court said: "In this case the owner of the property, as well as the woman, has been directly charged with keeping the house. The indictment is right; and we think the instructions given to the jury were substantially correct. The man who demises a house to be kept as a disorderly house and which is kept with his knowledge * * * may well be called the keeper of the house and be punished as such."

The rule of law thus stated was cited with approval in the case of *State v. Williams*, 1 Vroom, 106, and in this latter case it is assumed that the owner may be charged as the keeper of the house. The principle underlying these decisions is that the owner contributes by his act to the production of the nuisance; and as there are no accessories in misdemeanors he thereby becomes a principal, and may be indicted in that character. It is plain that the agent of the owner stands within the scope of the principle. The charge of the judge upon this matter was, therefore, unobjectionable.

The next objection to the conduct of the cause was that the State was permitted to

prove that the house in question had been kept during two years previous to the renting in question, by the tenant to whom the defendant made the demise, as a house of prostitution, and that the defendant on sundry occasions had been there during such prior years. This evidence was admitted in order to prove the defendant's *scienter*, and it was proper for that purpose.

If the defendant was aware that the person to whom he, as agent, let the premises had for the two antecedent years acted the part of a prostitute and converted the house into a brothel, there could be no doubt, with respect to his knowledge, that by continuing such tenancy he was aiding in the perpetuation of a nuisance. The state of the defendant's mind when he made the demise in question could hardly be proved, except by showing that he was conversant with the antecedents of the tenant as connected with the premises. The evidence followed the usual line and was altogether legal.

The judgment should be affirmed.

STATE, Oliver DUNSTER, *Prosecutor*,
v.

Calvin D. SMITH, Collector of Bernards Township, Somerset County.

*1. The power of a township committee to assign limits and divisions of the highways, under section 37 of the Road Act, could not be exercised in any township where the overseer was elected by the inhabitants of the road district, after such an election, during that year.

2. It is proper for a township committee to refuse to recognize a claim for work done by a road overseer in the absence of or in excess of an appropriation to his district.

(Decided December 1, 1886.)

ON certiorari bringing up an assessment for taxes against the prosecutor, and the proceedings thereon. *Affirmed.*

The facts and questions presented are stated in the opinion.

Argued before Scudder and Reed, JJ.

Mr. John A. Frech, for prosecutor.

Mr. Alvah A. Clark, for defendant.

Reed, J., delivered the opinion of the court:

The question argued in the briefs of counsel is whether the prosecutor, who is the overseer of a road district in the Township of Bernards in the County of Somerset, was entitled to an allowance of \$31.50 from his tax bill for the year 1888, on account of his having worked out that amount upon the roads in his district.

He was assessed for the year 1882 the sum of \$224.64 of which \$83.56 was for roads. He claims that he had done, as overseer of District No. 8 in the said township, work amounting

*Head notes by REED, J.

to \$31.50 and that he was entitled to an allowance of that amount for his tax bill; which allowance was refused by the township committee. The committee refused to recognize an expenditure in excess of \$18. He paid the remainder of the tax, and now claims that this court should exert some judicial action to remedy an alleged error in not allowing the additional \$18.50 of his claim. He grounds his claim to the entire amount upon the fact that he was elected an overseer of Road District No. 3, at a meeting of the voters of that district held in the spring of 1883.

By the provisions of an Act of 1861 (P. L. 1861, p. 156) it was provided that the overseers of the highways in certain townships, including Bernards, should be elected by the legal voters of the several districts as they may be arranged from time to time by the township committee. The Act provided for the posting of notices and for the time at which said meeting should be held, namely: the Saturday next previous to the annual town meetings in said townships.

By an Act (P. L. 1879, p. 178) the time for holding such election was changed to Friday next preceding the second Tuesday of April.

By an Act (P. L. 1880, p. 56) the time was changed to Thursday next succeeding the regular annual meeting which by the Township Act (Rev. p. 1202, § 50) is held on the second Tuesday in March. It provides that the existing overseer shall set up two notices in two public places in the road district, five days before the day of the meeting; and in case of a failure to give such notice, then the township committee is to appoint the overseer.

There is some evidence that the prosecutor was elected in 1883 an overseer of District No. 3. He took upon himself the unquestioned execution of the office and I shall regard his incumbency of that office as a recognized fact in this case. The township committee on March 28, 1883, changed the limits of District No. 3, by cutting the territory over which it ran into two districts; or, speaking more accurately, by carving another district out of the old territory, which new district they numbered 56. At the same meeting the committee apportioned to the new district No. 3 the sum of \$46, and to the new district No. 56 the sum of \$41.

The prosecutor, however, proceeded as if no change had been made. He says that he worked the roads within the whole of the old territory, and did himself and hired work done to the amount of \$80, and should have been credited with that amount.

His contention is that after he was elected, there was no power in the township committee to make any alteration in his district, and also that he had no notice of such change.

The township committee has the power to assign the limits and divisions of the highways within the townships. Rev. p. 1002, § 37.

Unless the Acts which provide for the election of overseers in the Township of Bernards, or by implication repealed the provisions for the assignment of districts, the latter power existed at the time it was exercised. I say unless section 37 in this respect was repealed by implication, for there are no express words of repeal in the subsequent Acts. Such implied

repeal must be gathered from the impolicy of changing the limits of a district in which an overseer has been elected by the inhabitants of the district.

This question has no importance beyond the solution of the rights of the parties in the present case, for the matter has since then been regulated by the Act of 1885, p. 12, which provides for the making of the assignment in January or February of any year to take effect on or before the first of the following March.

I am of the opinion that the power to alter the limits of a district was not abrogated by the fact that the office of overseer was filled by the votes of the inhabitants of a district, instead of the votes of the inhabitants of the township. But I think that the power of the committee to make such alteration was at an end whenever under the former law it had made an assignment of an overseer to a particular district or under the new system a person had been elected for any district.

It could never have been the intention of the Legislature to provide that the people of the district should select their officer, and yet leave in the hands of the township committee the power to nullify the selection by stripping such officer of half his territory or by adding to it other territory peopled by voters who had had no voice in his selection. The result in either instance would be that the overseer would work a district of which he had been elected overseer by voters other than the legal voters of the district.

I conclude, therefore, that the attempt to divide his district was nugatory.

But there is another difficulty which confronts the prosecutor.

No apportionment in excess of \$46 was made to his district; nor do I think he stands in a position to claim both appropriations. He knew of the action of the committee in regard to the change of the district. The evidence taken in the cause satisfies me that he received the notice of the attempted change. Under the circumstances, the appropriation in two sums to two districts supposedly existing was quite different from an appropriation of a single sum.

The right of an overseer to rely upon an appropriation by a committee rests upon a clearly proved act of the committee setting apart the amount for the specific purpose. The overseer cannot rely upon the fact that there have been previous appropriations of a certain amount and upon the probability that such amount will not be changed. He is bound to know the exact sum appropriated to his district for the then present year. If he chooses to expend money in ignorance of whether there is any appropriation, or if so to what amount, he does so at his own risk. *Callahan v. Township of Morris*, 1 Vroom, 187.

This the prosecutor did. He made no inquiry about the appropriation. He knew there had been a change in the district announced by the committee, and he concluded to ignore the committee's action and rely upon the fact that about \$80 was usually appropriated to that district.

The action of the committee in refusing to recognize his claim for an amount in excess of his part of the appropriation was correct and is affirmed, with costs.

LEFFERTS, *Piff. in Err.*,

STATE of New Jersey.

- *1. The testimony of a person in regard to his own signature is not evidence of a grade superior to the testimony of a witness acquainted with the handwriting of such person.
2. The defendant in a criminal case produced written complaints and, being a witness, testified that such complaints were signed by the prosecutor in his presence; the court refused to receive the same thus proved, and required the prosecutor in such complaints to be called to prove his own signature; such prosecutor was produced and was a witness hostile to the defense. Held, that such judicial action was error, entitling the defendant to a reversal of the judgment.
3. A bill of exceptions is amendable.

(Decided November 17, 1886.)

ERROR to the Quarter Sessions of Middlesex County, to review a judgment on conviction on an indictment. *Reversed.*

Statement by **Beasley, Ch. J.**:

The indictment charged a justice of the peace with having obtained money of one Margaret McCarten by falsely pretending that "Three several complaints in writing, under oath, had been filed before him, charging her with having sold to sundry persons intoxicating drinks, she having no license, such complaints being the commencement of prosecutions to recover certain penalties denounced by the city ordinances;" and that the said justice obtained from the said Margaret the penalty, and costs, in one of such prosecutions. The indictment then negated the filing and existence of such complaints.

Mr. Schenck, for plaintiff in error.

Mr. J. Kearney Rice, for defendant in error.

Beasley, Ch. J., delivered the opinion of the court:

The State alleged that the defendant, being a justice of the peace, had obtained money from the person named in the indictment, by falsely pretending that there were three complaints against such person filed with him by virtue of a municipal ordinance that denounced penalties against persons selling intoxicating liquors without license. It was charged that by this fraudulent fiction the defendant had been paid, by the party that pretended to be incriminated, one of such penalties. The indictment then averred that no such complaint had ever been made before the defendant.

At the trial, in the course of his defense, the defendant produced his docket and likewise three papers that purported to be such complaints as were referred to in the indictment, and being examined on his own behalf as a witness, he stated that these documents were signed and sworn to by the person whose name

was subscribed to them as prosecutor. The complaints thus proved were offered in evidence and were rejected by the court, on the ground that the best evidence of their authenticity had not been produced; such evidence, in the judicial estimation, being that of the prosecutor who had made such complaints and had put his name to them. This view was plainly erroneous. The testimony of the man who signed the documents, with respect to the genuineness of his signature, was not of a higher grade of evidence than the testimony of a man who had seen him make such signature or who was acquainted with his writing and deposed as to his opinion. The rule adopted by the court would require, in proving a promissory note or other unattested writing, the production of the maker of the instrument to the exclusion of all other evidence, as primary proof. The rejection of these papers under the conditions stated was erroneous.

It is true that the papers in question were subsequently admitted in evidence, but such introduction was allowed only after the defendant had been obliged by the ruling of the court to call the person who had subscribed the complaints and who was a witness hostile to the defense, and who by his testimony had cast suspicion upon the papers referred to. The substance of his testimony was to the effect that he could not tell whether the signatures were his or not, that he had never knowingly made such complaints, as he was friendly with the person against whom they purported to have been made.

It is manifest that such testimony, impairing as it did the essential fact of his defense, was highly prejudicial to the defendant on the merits of the case. That the court announced that the defendant might treat this witness as a hostile witness did not repair the wrong; he might not have been prepared to show that the witness had made statements out of court inconsistent with his testimony or that his reputation for veracity was bad, even if such circumstances existed.

The judgment must be reversed.

The question of the amendability of the bill of exceptions is not necessarily involved in the present decision. The bill was amended at the instance of the State, and the case has been decided in favor of the defendant on the basis presented in the amended bill. In the absence of such emendation the facts would have made a case somewhat stronger for the defense. Our decision being adverse to the State, taking the matter in this stronger aspect in favor of the prosecution, it is not necessary for the court to consider it in its weaker aspect. Nevertheless, as the matter is of importance in practice and as it has been examined by the court, it has been thought proper to express our view upon the subject.

In this case the bill of exceptions as originally signed and sealed by the court of quarter sessions stated that the three complaints already mentioned were rejected when offered by the defense; but it failed to state, as was proper, that they were afterwards admitted and were placed before the jury. The State giving notice to the defendant, of the motion, applied to the court of quarter sessions to amend the bill, so as to make it embrace the matter inadvertently

* Head notes by **BEASLEY, Ch. J.**

omitted. The amendment was made and the legality of that act was challenged by the counsel of the defendant in his argument before this court. But the denial of the right to amend a bill of exceptions does not seem to be countenanced by any rule of practice or principle of jurisprudence. If such a power does not exist, such a condition of affairs is anomalous and does not accord with the usual course when error has been discovered in the other parts of judicial procedure.

Originally at common law it would seem as though every step of a suit, from its commencement to its close, was alterable by the court, for it required an Act of Parliament in the time of Edward the First to prevent the exercise of such power with respect to judgments that had been formally enrolled. But this statutory restriction went no further than that, and from that era to the present almost all the other proceedings in a suit at law have been amended in the most liberal manner by the English courts. The same practice has prevailed in this Commonwealth, as is exemplified by a train of decisions. Thus a faulty verdict, although accredited by a justice, signed by the judge, has been always deemed amendable and the record has been remitted to that end by a court of error. *Delaware etc. R. R. Co. v. Toffey*, 9 Vroom, 525.

In the case of *Appgar's Admr. v. Hiler*, 4 Zab. 808, this course was taken with a judgment that had been improperly entered. There are many similar and analogous cases in our reports to which it is unnecessary to refer.

This being the condition of the law with respect to the correction of judicial proceedings in these important respects, it seems difficult to suggest any reasonable ground on which it can be claimed that a bill of exception is exempt from such a beneficial control. If a mistake has been found in a bill of exceptions, why should it not be expunged and the statement verified?

In the case in the Exchequer Chamber, of *Mersey Docks and Harbour Board v. Hurlst. & N. 339*, this question was argued, and Chief Justice Cockburn in the course of the argument suggested, as a reason why the power perhaps did not exist, this consideration: "If a judge is at liberty to amend a bill of exceptions after he has sealed it, it might happen that the bill of exceptions, when sealed, contained the real directions given to the jury; and any misdirection might be avoided by altering the bill of exceptions and inserting the direction which ought to have been given."

But if there is a probability that there would, in some cases, be danger that a judge would thus vitiate a bill of exceptions, is there not a similar danger with reference to the other parts of the proceedings? And if the faculty of rectification is to be withheld, on the ground indicated in the former class of cases, ought it not to be withheld in every case? May not the unworthy judge falsify the justice, in the judgment as well as the bill of exceptions? In point of fact no part of the proceedings appears to be less exposed to falsification than this latter document, for it relates to matters taking place in open court, and which have been committed to writing and judicially attested. The allegation that error has intervened could in such

case be made neither with plausibility nor with impunity.

All judicial powers are liable to be abused, but such possible abuse has never prevented their delegation. The authority now being considered is a prerogative highly important to a just administration of the law. That a litigant should lose his judgment from the inadvertence of his opponent's counsel, in misstating or in omitting to state some necessary part in the bill of exceptions, such inadvertence being unnoticed by the judge, would be a hardship that could not occur in any legal system containing proper adjustments and safeguards. Our scheme of law is not defamed by the presence of such an imperfection. The bill of exceptions is correctible as all other procedures in a suit are correctible. Even if such power of rectification were not inherent in the general rules of judicial practice, it would necessarily be held to have been introduced into our legal methods by the provision contained in the 188th section of our Practice Act, which declares that it shall be lawful for the court or judge to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not.

STATE, John MICHAELIS, *Prosecutor*,

BOARD of FIRE COMMISSIONERS of JERSEY CITY.

1. The transfer of an employee in the the Jersey City Fire Department from his position of engineer to that of stoker, which last position is attended with different duties and decreased pay, is invalid under the Act (P. L. 1885, p. 130) regulating the terms of officers and men in fire departments.
2. Such employee is protected, although he was appointed without filing an application sworn to and having a physician's certificate showing his physical condition, according to the requirements of a rule adopted by a preceding board of fire commissioners.

(Decided December 1, 1886.)

CERTIORARI to review proceedings of Board of Fire Commissioners of Jersey City. *Proceedings set aside.*

The prosecutor brings up certain proceedings to remove him from the office or employment as engineer of Engine Company No. 1 to the position of stoker of Engine Company No. 8.

Argued before Dixon and Reed, JJ.

Mr. Chas. H. Voorhis, for prosecutor:

The transfer was void. It removes firemen from higher to lower office, contrary to Laws 1885, p. 130, prescribing tenure of office of firemen.

Fitzgerald v. New Brunswick, 18 Vroom, 479.

The Board's rule, requiring an application properly sworn to and a physician's certificate of physical condition, was waived as to prosecutor. He has served for years under his appointment; the Board has accepted his services and paid him therefor.

Mr. A. L. McDermott, for defendant.

Reed, J., delivered the opinion of the court: The prosecutor attacks the resolution of the Board of Fire Commissioners of Jersey City which made the transfer above mentioned. He claims that by the terms of the Act of 1885 (P. L. 1885, p. 130) no power was vested in the Board to make the transfer.

This Act provides that the officers and men employed by municipal authority in the fire department of any city shall severally hold their respective offices and continue in their respective employments during good behavior, efficiency and residence in said city. It then provides for the removal of such officers or employees for certain causes.

I think that he held his employment as engineer protected by the terms of that Act; and any attempt to transfer him without his consent was a removal from office or employment.

The place of stoker was a different position, inferior in dignity, dissimilar in its work and attended with decreased wages. It was, within the meaning of the Act, a different employment or office.

The defendants, however, contend that he never held the position of engineer by municipal authority. He was promoted to his position as engineer June 1, 1885. But it is in evidence that there was at that time in existence a rule of the Board which reads thus: "No appointment in this department shall be legal until the applicant has filed an application properly sworn to and having a physician's certificate attached thereto showing his physical condition." This rule of the Board was adopted in August, 1881, and has never been readopted or rescinded since.

Inasmuch as the power to appoint and remove officers was (until the Act of 1885) lodged in the board of each year, without any restriction except such as the board of that year might adopt, no resolution of a board of 1881 could restrict the power of appointment of the Board of 1885.

There is no evidence of any action of the Board of the last named year, in reference to the resolution. In fact it seems to have been disregarded.

Besides, the rule seems to have prescribed what was to be done by a candidate before he could be considered eligible to be appointed.

It seems to have been a rule which was designed for the convenience of the Board, and which it could in its discretion disregard.

Certainly, after permitting an appointee to exercise an employment and receive pay for months it can hardly be said that they have not waived the performance of the preparatory steps which the rule contemplates.

If the appointee is physically unfit to perform the duties attached to his employment, he is removable under the Act of 1885.

The resolution is set aside.

Samuel LEWIS *et al.*,

v.

Paul HASKEL.

*A sheriff who, in answer to a rule to bring in the body of a defendant, returns

*Head note and statement by REED, J.

N. J.

that he discharged the defendant from custody upon his giving bond and complying with the requirements of the Insolvent Debtors' Act, will not be amerced.

(Decided November 18, 1886.)

RULE on sheriff to show cause. *Discharged.* Haskell, the defendant, was arrested by the sheriff of Middlesex County by virtue of a writ of *capias ad respondendum*. He was admitted to bail by the sheriff on the 14th day of December, 1885. He failed to put in special bail and on January 2, 1886, the sheriff was ruled to bring in the body of the defendant so as to have it before the court on January 18, 1886.

The sheriff on June 7 returned the rule with the following indorsement:

"The said defendant having made out and delivered to me a true and perfect inventory, under oath, of all his goods and chattels, rights and credits, lands, tenements, hereditaments and real estate, and having also given bond to the plaintiffs, with sufficient security, with such condition as is required by the Act entitled 'An Act for the Relief of Persons Imprisoned on Civil Process', approved March 27, 1874, I, therefore, in pursuance of the provisions of the said Act, discharge the defendant from custody, and do forthwith return the same with the said bond and inventory.

Dated May 7, 1886.

Patrick Convery, Sheriff.

Returnable January 18, 1886."

On January 27, a rule was entered that the sheriff show cause before this court why he should not be amerced in any sum not exceeding the plaintiffs' debt, with costs.

Argued before Depue, Dixon and Reed, JJ.

Mr. James S. Wright, for the rule.

Mr. Robert Adrain, *contra*.

Reed, J., delivered the opinion of the court:

The rule upon the sheriff to show cause why he should not be amerced was taken under the provisions of section 77 of the Practice Act, Rev. p. 861. It provides that if, on a return that he hath taken the body, or C. C., the sheriff or other officer shall not return bail and a copy of the bail bond, or if the plaintiff be dissatisfied with the bail taken by such sheriff or other officer and the defendant shall fail to appear and give special bail within the time prescribed, the court or a judge shall order, by a rule of court, such sheriff or officer to bring in the body of the defendant at a certain time in said rule specified; and if said sheriff or officer fail to do so he shall be amerced by the court at the next term in any sum not exceeding the plaintiff's debt or demand, with costs.

As already appears the plaintiffs did not take an assignment of the bail bond taken by the sheriff; the defendant did not appear and give special bail at the prescribed time; and the sheriff, when ruled to bring in the body, failed to do so. He rests his defense to the rule for amercement upon his discharge of the defendant, in accordance with the requirements of section 2 of the Act for the relief of persons imprisoned on civil process. Rev. p. 497.

This is the language of that section:

person or persons who may be arrested or held in custody by any sheriff or other officer, in any civil action upon mesne process or processes of execution or upon an attachment for not performing an award, or who may be surrendered in discharge of his or their bail, shall be discharged from arrest or custody of such officer," provided he shall do certain things which were done by the present defendant before his discharge.

The question mooted is whether the return of the sheriff shows a sufficient excuse for not bringing in the body, in accordance with the provisions of section 77 of the Practice Act.

The provision contained in section 77 is substantially the twenty-sixth section of the Act of 1879, drawn by Judge Patterson and found in his revision. The practice relative to bail before that Act was passed was that of the Court of Kings Bench.

This was asserted in the case of *Armstrong v. Davis*, Coxe, 110, decided in the year 1791. In drafting the statute Judge Patterson was guided by the practice of that court. *Parker v. Ogden*, 1 Pennington, 147.

In the interpretation of the statute, then, we are to read it in connection with the practice of the Court of Kings Bench which the Act was intended to codify.

The course of procedure in the several English courts varied somewhat in details but were substantially identical.

It was well settled that upon the issuance of a *capias ad respondendum* to the sheriff, he was required by statute to take bail if responsible sureties were offered; and if such security was not proffered, he was required to take the defendant into actual custody.

After the sheriff had discharged the defendant upon bail, his control over the person of the defendant ceased.

The bail so taken was to the sheriff; and that officer was responsible for the appearance of the defendant upon the return of the writ. This responsibility was ended if the defendant did one of two things: either surrendered himself, and was accepted by the sheriff before the return day of the writ, or appeared within a stipulated time and gave special bail.

As already appears, the *capias ad respondendum* was in the present case returned C. C., which meant that the defendant had given bail to the sheriff, and the defendant did not put in special bail upon the return of the writ. A rule was taken upon the sheriff to bring in the body of the defendant.

Under the practice of the Court of Kings Bench the rule itself conferred no power upon the sheriff over the person of the defendant. It was intended to fix the liability of the sheriff for his failure to have the defendant in court at the time of the return of the writ or the failure to put in special bail. It was a warning to the sheriff, to the effect that inasmuch as he had returned the defendant in custody he should bring him into court within a specified time, or proceedings would be taken against him for his default. He could answer the rule by bringing the body into court or by putting in special bail. 1 Tidd, Pr. p. 311.

While he had no power to arrest the defendant, there were methods provided by which he

could obtain the custody of the body. He could put in special bail himself without defendant's consent; and the sureties could immediately surrender the defendant; and these sureties might do this without having justified. *Berchere v. Coloor*, Str. 876; Wats. Sheriffs, p. 120.

The sureties on the bail to the sheriff having no power to surrender their principal (1 Chitty, 329) could also put in special bail, either before or after the return of the *capias ad respondendum* (but not before the return, under our statute), for the purpose of having the latter sureties surrender the defendant. Petersdorf, Bail, p. 288; 1 Tidd, Pr. p. 248.

Such surrender relieved the sureties upon the bail bond to the sheriff from responsibility, as the surrender of the principal is considered equivalent to putting in special bail. Petersdorf, Bail, p. 397.

Therefore the sheriff should, as soon as he is served with the rule to bring in the body, give notice thereof to the bail and to the defendant, in order that bail may be put in and perfected, or the defendant may be rendered in discharge of his bail; which being done the rule is complied with. Wats. Sheriffs, p. 121.

So it is perceived that when the rule has been taken upon the sheriff and he had not the body in actual custody, either he or the bail to the sheriff or the defendant can put in and perfect special bail; and this is an answer to the rule. Or either the sheriff or the bail to him can put in special bail, who can at once surrender the defendant into custody of the sheriff who can return the body into court; which is also an answer to the rule.

He is not, however, bound to bring the defendant actually into court. If he show that he is in custody, it is sufficient. *McLeod v. Marsden*, Barnes, 27.

It is perceived, therefore, that it is possible for the sheriff to have had the body in custody upon the return of the rule, either by an accepted surrender of the defendant by his own act before the return of the *capias ad respondendum* (*Florence v. Shumar*, 5 Vroom, 455), or, by a surrender by special bail put in by the sheriff or the bail below, at any time before the return of the rule.

In the first instance, the defendant would have been in custody under mesne process, and in the second by surrender in discharge of his sureties, both of which junctures of affairs are mentioned in the second section of the Insolvent Debtors' Act, as conditions upon the existence of which a person can seek his discharge under the Act.

The return of the sheriff is in effect that he had the defendant in custody in the course of the proceeding set on foot to secure the defendant's presence to answer the action against him, and that being so held in custody the defendant complied with all the formalities requisite to entitle him to his discharge.

In exercising the power to amerce the sheriff in the amount of the plaintiffs' claim it should be clear that he has been in default. His return presents if true (and we must assume its truth) a legal excuse for failing to have the defendant in court on the return day of the rule; and the rule to show cause why the officer should not be amerced is discharged.

PENNSYLVANIA.
SUPREME COURT.

C. A. GODCHARLES & Co., *Pliffs. in Err.*,
v.
Frank WIGEMAN.

1. A custom making 2240 pounds a ton is **not good when opposed to a statute making 2000 pounds a legal ton.**
2. Rules posted up on an employer's premises based upon **such a custom are not binding upon the employees, unless by special contract or knowledge which will raise a presumption of contract.**
3. A statute which prevents persons who are *sui juris* from making their own contracts is an infringement of the constitutional rights of citizens of the United States, and is consequently **void.**
4. Sections 1, 2, 3 and 4, of the Act of June 29, 1881, providing that all persons, firms, etc., engaged in mining coal, ore, etc., shall settle with their employees at least once a month and pay them in lawful money, or by cash orders, is unconstitutional and **void.***

(Decided October 4, 1886.)

ERROR to the Common Pleas of Northumberland County, to review a judgment on a verdict for plaintiff in an action of assumption. *Reversed.*

Wigeman claimed to recover from Godcharles & Co., the defendants, whose business was that of rolling iron and manufacturing nails, payment for puddling iron at the rate of \$4 per ton of 2,000 pounds.

On the trial of the case before Rockefeller, P. J., the plaintiff testified that he went to work for the defendants as a puddler in their rolling mills on March 29, 1883; that his employer "told him that he would give him \$4 a ton on the condition same as he hired all the men;" that plaintiff quit on January 1, 1884, in consequence of a notice posted up in the mills, reducing the wages to \$3.60 per ton.

The defendants offered evidence to prove that before and during the time the plaintiff was employed a set of rules was posted in their mills providing, *inter alia*, that the price for puddling would be "\$4 per ton of 2240 pounds," and that that was what the other puddlers received. The plaintiff denied all knowledge of this rule. The defendants also offered, as an offset to the plaintiff's claim, orders for coal and other articles, which were honored by the parties on whom they were drawn and afterwards paid by the defendants. These orders were in the following form: "William P. Stout, let Frank Wigeman have coal to the amount of \$4.25. [Signed] C. A. Godcharles & Co." The defendants also offered as a further set-off, assigned claims for goods purchased by the plaintiff from Albert Johnson, a storekeeper. During the time of plaintiff's employment, the defendants had regular monthly pay days, when they

furnished each employee with an envelope with indorsements made in the following manner: "Mr. F. Wigeman;" and in one column: "Drugs, \$1.10; coal, \$4.25; store, A. J. \$20; cash, \$3; rent, \$5;" and in another column: "cash, \$13.25." This latter amount, whatever it might be in any case, was paid to the employee. The court excluded these offers of set-off, on the ground that they were prohibited by the Act of June 29, 1881, P. L. 147. *Sixth and seventh assignments of error.*

The first section of the Act enacts that "All persons, firms, companies, corporations or associations in this Commonwealth, engaged in mining coal, ore or other mineral, or in the manufacture of them or either of them, or manufacturing iron or steel or both, or any other kind of manufacturing, shall pay their employees as provided in this Act."

Section 2. "All persons, firms, companies, corporations or associations engaged in the business aforesaid, shall settle with their employees at least once in each month and pay them the amounts due them for their work or services in lawful money of the United States, or by a cash order as described and required in section 3 of this Act; *Provided*, That nothing herein contained shall affect the right of an employee to assign the whole or any part of his claim against his employer."

Section 3. "It shall not be lawful for any person, firm, company, corporation or association, their clerk, agent, officer or servant in this State to issue for payment of labor any order or other paper whatsoever, unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at legal rate, made payable to employee or bearer and redeemable within the period of thirty days by the person, firm, company, corporation or association giving, making or issuing the same. And any person, firm, company, corporation or association engaged in the business aforesaid, their clerks, agents, officer or servant who shall issue for payment of labor any paper or order other than the one herein specified, in violation of this section, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding \$100, in the discretion of the court, which shall go to the common school fund of the district wherein the crime shall have been committed."

Defendants' counsel offered to prove that it is the universal custom in mills of the character of that owned by defendants, in Pennsylvania, to fix the rate of wages for puddling, at so much for 2240 pounds: the evidence that plaintiff recognized this custom and acted upon it, by settling with defendants on their several pay days upon this basis, being already in. This for the purpose of showing the contract between the parties, as to the amount of wages the plaintiff was to receive. Objected to.

Per Curiam: The evidence of a custom to pay for puddling at a rate different from what the law of the State declares shall be a ton we think is inadmissible to bind the plaintiff. But if this mill had rules stating the price to be paid for puddling a ton of 2240 pounds, and the plaintiff knew of these rules, I think he would be bound. The objections are sustained the evidence rejected. *First, second and third assignments of error.*

*Cf. Millett v. People (Ill.) 5 West. Rep. 155.

The defendants requested the court to charge the jury, *inter alia*, as follows:

1. If the jury believe that it is the universal custom in mills of the character of defendants' to have rules fixing the terms upon which puddling is done, and if the jury believe that the rules of defendants' mill were conspicuously posted in the mill and office, it was the duty of the plaintiff seeking employment at the mill to inquire what the rules of the mill were; and the fact that the rules were so posted would affect him with notice as to what they were, and he would be bound by them.

Ans. This perhaps would be so if there was any evidence that the plaintiff knew of the existence of such a custom; but in the absence of such evidence, I cannot say that as a matter of law the mere posting of the rules in conspicuous places in the mill and office would affect the plaintiff with notice as to what they were, and that he would be bound by them.
Fourth assignment of error.

2. If the jury believe that one of the rules of defendants' mill was that 2240 pounds of iron should be puddled for a ton, and that plaintiff at the time of hiring with defendants had either actual or constructive notice of such rules, this rule then became a part of the contract and plaintiff must make 2240 pounds for a ton.

Ans. This is so if the plaintiff had actual notice of such rule. You have the evidence as to the posting of the rules in conspicuous places in and about the defendants' mill, and you are to determine from all the evidence in the case whether the plaintiff had notice of the rule.
Fifth assignment of error.

Messrs. P. L. Hackenberg & Son and William F. Derr, for plaintiffs in error:

Where a custom to do a thing in a certain manner or upon certain terms exists in any particular business or trade, those engaged in that business or trade are presumed to contract with reference to that custom; and the proof of such custom is evidence to go to the jury, as to the intention of the parties at the time the contract was made.

Sampson v. Gazzam, 30 Am. Dec. 583; *Thompson v. Hamilton*, 23 Am. Dec. 621; *Wilcocks v. Phillips' Exrs.* Wall. Jr. 64; *McMasters v. Pa. R. R. Co.* 69 Pa. 377.

The purpose of proving the custom was to affect the plaintiff with notice of the rules; to impose upon him the duty of inquiry, and thus affect him with constructive notice of these rules.

Lincoln Bank v. Page, 6 Am. Dec. 53; *McMasters v. Pa. R. R. Co. supra*; *Whitesell v. Crane*, 8 Watts & S. 373; *Hottenstein v. Lerch*, 12 W. N. C. 6; *Leonard's App.* 95 Pa. 196; *Wright v. Trainer*, 1 W. N. C. 198.

The Act of June 29, 1881, is unconstitutional and void, as being in conflict with article 3, § 7, of the Constitution, which declares, among other things: "The General Assembly shall not pass any local or special law, regulating labor, trade, mining or manufacturing, granting to any corporation, or individual, any special or exclusive privilege or immunity."

It is an Act regulating labor, mining and manufacturing; and it also grants to individuals special or exclusive privileges or immunities; and it at the same time imposes on other indi-

viduals, associations or corporations, special and exceptional duties and obligations.

The title of the Act, "To secure to operatives and laborers engaged in and about coal mines, manufactories of iron and steel, and all other manufactories, the payment of their wages," etc., sufficiently stamps upon it its special or objectionable character, and the title must be read as a part of the Act. The first and second sections preserve this express limitation in their application to laborers in manufactories and mines.

There seems to have been an effort to save the third section from the evil of special legislation, by giving it a general application, but it must be construed with reference to the title to the Act, or it becomes unconstitutional, on the ground that its subject matter is not expressed in the title.

Sedgwick says the best definition is that given by Dwarrris: "That public Acts relate to the public at large, and private acts concern the particular interests or benefit of certain individuals or of particular classes of men."

See also 1 Bl. Com. 39; 1 Kent, Com. 460; 2 Const. Debates, 590.

Messrs. M. L. Snyder and C. R. Savidge, for defendant in error:

By Act of April 15, 1834, § 17, P. L. 527, 2000 pounds make a ton. It is error to admit evidence of custom to control a statute.

Evans v. Myers, 25 Pa. 114; *Weaver v. Fegely*, 29 Pa. 27.

In the absence of positive enactment, custom in regard to trade, etc., would perhaps prevail, and further than this the authorities do not go.

In *Wright v. Trainer*, 1 W. N. C. 198, the rules were known to the employee.

The Act applies to any kind of manufactory, and is therefore a general enactment.

We have the decision of Judge Ewing, of Allegheny County, one of the strongest judges in the State, in the case of *Kettering v. Imperial Coal Co.* 15 Pittsb. Legal Jour. 359, sustaining the constitutionality of the Act.

Mr. Justice Gordon delivered the opinion of the court:

The first five assignments of error cannot be sustained. They are in fact, but five exceptions to a single ruling of the court, or what might properly have been embraced in one ruling. The offer, with its variations, was to prove a custom among iron mills, of the character of that owned by the defendants, making the ton 2240 pounds; but the court held that the custom if proved was not good, because opposed to the statute which fixes the legal ton at 2000 pounds, and that the former could not be imposed on the plaintiff, except by proof of a special contract or of such knowledge by him of the rules of the establishment as would raise the presumption that he was working under them; hence, the proposed evidence was rejected.

It requires no argument to establish the correctness of this ruling; hence, we attempt none. The seventh assignment must be sustained. The orders given by the defendants and received by the plaintiff constituted a proper set-off.

The first, second, third and fourth sections of the Act of June 29, 1881, are utterly uncon-

stitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts.

The Act is an infringement alike of the rights of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.

The judgment of the court below is now reversed and a new venire ordered.

William H. BUSH, *Plf. in Err.*,
v.

James H. BREINIG.

1. A contract made by a person so intoxicated as not to know the consequences of his acts is voidable and may be avoided by himself, although the intoxication was voluntary and not procured by the circumvention of the other party to the contract, and unknown to him.
2. The drunkenness must be such that the party undertaking the contract did not know what he was doing; such as to suspend the use of reason and understanding.
3. Money paid in part performance of such a voidable contract can be recovered back.
4. In an action to recover back hand money paid at the time of signing the conditions of the sale of real estate, at auction, the question to be submitted to the jury is the capacity of the plaintiff to make a contract at the time of signing the agreement and paying the money, and not his capacity at the time of the bid.
5. The allowance of a question, objected to on the ground that it was admitted out of order, but which proves to be harmless by the subsequent testimony, is no ground for reversal, although the question may also be objectionable in form.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Lehigh County, to review a judgment on a verdict for plaintiff in an action of assumpsit. *Affirmed.*

The following facts appeared on the trial before ALBRIGHT, P. J.:

On October 4, 1883, the defendant, Bush, offered real estate at public sale. The plaintiff made a bid of \$13,400, and the property was struck down to him. About an hour later he signed the conditions of sale and a note for \$845, and paid \$495 down, these amounts making 10

per cent of the purchase money, as required by the conditions of sale. This suit was brought November 24, 1883, to recover back the hand money, on the ground that the plaintiff was so intoxicated at the time of the payment of the money that he could make no contract.

The court charged the jury, *inter alia*, as follows:

"[The money which Mr. Breinig paid, he paid in affirmance of the contract which was made to purchase this hotel property; and the only ground which he has laid, supported by evidence, upon which he can recover it is that the contract did not bind him, because he was intoxicated to such a degree that he did not know what he was doing at the time he paid the money and signed the conditions of sale. Under the evidence we have, Mr. Breinig is bound by the contract, and is obliged to fulfill it; he certainly cannot sue in avoidance of his contract; he cannot recover back the money now in question, unless he can show that it was not his contract. The law is that where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing, the contract is void, and he cannot be compelled to perform it.]

"Drunkenness, to relieve a party from his contract, must be so complete as to have suspended the use of reason and understanding. It is not enough to entitle a party to repudiate the contract to show that he had been drinking. He must show that his mind was so impaired by the use of the intoxicant that he no longer had the power to exercise reason and understanding. If that is shown, then the contract as between the parties to it cannot be enforced. [You will inquire, gentlemen, whether the plaintiff has proved that he was so drunk, at the time he paid the money and signed the conditions of sale, that he did not know what he was doing. Had he the use of reason and understanding? If he had been drinking and still knew what he was doing, then he is bound, and the point of time you are to direct your inquiry to is the time when the money was paid and the conditions signed. The question is, Was he then capable of making a binding contract?]"

"Evidence has been received here bearing upon his condition a little earlier in the afternoon, and also later on in the afternoon and evening. It was received on the theory that it had a bearing on his condition at the time the money was paid, and in view of the plaintiff's own testimony that he drank nothing afterwards on that afternoon. The defendant, however, asserts that he has proved that he drank afterwards. Then, gentlemen, viewing the testimony in that way, you will inquire whether it is proved that Mr. Breinig, at the time he paid the money, was so drunk that he did not know what he was doing. Witnesses have testified as to how often he drank that afternoon; when the drinks were taken; and witnesses also on both sides have testified that they saw Mr. Breinig that afternoon, before and after the paying of the money. You will inquire what is proved, bearing in mind that the burden is upon the plaintiff to show that he is to be relieved from the contract on the ground of drunkenness. If he has not shown that, he will fail in his action, and your verdict will be in favor of the defendant."

The defendant's points were as follows:

1. In the absence of unfair advantage, the drunkenness which will relieve the party from his contract must be such as utterly deprives the party of his reason and understanding.

Ans. The alleged drunkenness of plaintiff, to relieve him from the contract, must have been such that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding; further answer is declined.

2. A contract reasonable in itself entered into by a person in a state of excitement from excessive drink will not be avoided in law or equity.

Ans. Affirmed. Excitement from excessive drink alone will not avoid the contract. The reasonableness of this contract, however, as this case is presented, has nothing to do with the question in this case.

8. If the jury believe that at this public sale the plaintiff purchased the property of the defendant and entered into the conditions of sale and paid the down money sought to be recovered, and the fact of intoxication was unknown to the defendant and his agents, he will be held to the terms of the contract.

Ans. Negatived.

4. If the jury believe that the plaintiff purchased the property understanding the conditions of sale, and the contract of purchase was read to the plaintiff, he cannot now disaffirm the contract and recover back the money.

Ans. Negatived.

The assignments of error specified the answers to the points, the portions of the charge in brackets above, and the allowance of the following question to the plaintiff:

Question. What did Mr. Bush tell you while you were in an intoxicated condition, in regard to this property, when you walked out to the shed?

Objected to on the ground that there is no evidence of intoxication.

The Court: The court understands the plaintiff's allegation to be that at this point of time the plaintiff was intoxicated. In view of that position this question may be answered. The objection is overruled and a bill sealed for the defendant.

Ans. He told me there was a fortune in it, if I would buy this property.

Messrs. Harry G. Stiles and John D. Stiles, for plaintiff in error:

"Drunkenness must rise to that degree which may be called excessive, where the party is utterly deprived of the use of his reason and understanding."

Story, Eq. § 231.

When the property was struck down was the point of time when the plaintiff became liable to comply with the conditions of sale.

McClure v. Mausell, 4 Brewst. 126.

An agreement by a person in a state of complete intoxication is void.

Pitt v. Smith, 8 Camp. 33.

Where in a suit for a specific performance of an agreement the defense set up was incapacity at the time of executing it, on the ground of intoxication, held, that it could not assist in getting rid of the agreement on the mere ground of intoxication, no fraud having been alleged.

Shaw v. Thackray, 17 Jur. 1045.

The courts as a matter of public policy decline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time.

Cooke v. Clayworth, 18 Ves. 12; *Newland*, Cont. chap. 22, p. 365; *Rich v. Sydenham*, 1 Ch. Cas. 202; 1 Madd. Ch. Pr. 239; *State Bank v. McCoy*, 69 Pa. 204.

The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes and retraction. When the bid is thus withdrawn before acceptance there is no contract; and if not withdrawn, the contract stands and the purchaser is held to his bid.

Fisher v. Seltzer, 23 Pa. 308.

To render a contract obligatory, it must be acceded to by both parties at the time.

Johnston v. Fessler, 7 Watts, 48.

A purchaser having paid part of the purchase money, and refusing to comply, cannot recover back what he has advanced, the vendor being willing to do his part.

Hansbrough v. Peck, 5 Wall. 497 (72 U. S. bk. 18, L. ed. 520); 7 Am. Law Reg. and notes, 74-80; *Rounds v. Barter*, 4 Greenl. 454; *Morton v. Chandler*, 6 Greenl. 142.

In *Booser v. Cessna*, 62 Pa. 148, the defendant bid at public sale \$2,600 for a tract of land; he paid nothing and signed no conditions. The property was resold and brought \$491.50 less than the first sale. The vendor sued the first vendee for the difference. It was held that the contract was binding, and that vendee must respond in damages.

See *Poulson v. Ellis*, 60 Pa. 134, where it is held that money paid on account of purchase money could be recovered only on the ground of mutual rescission; also *Mellingar v. Duly*, 56 Pa. 245.

In *Payne v. Cave*, Benj. Sales, 62, citing 3 T. R. 148, it was held that a bidder at an auction may retract his bidding any time before the hammer is down.

So also *Warlow v. Harrison*, decided in the Queen's Bench and afterwards in the Exchequer Chamber, cited in Benjamin on Sales, 626.

Mr. Marcus C. L. Kline, for defendant in error:

To relieve a party from a contract on the grounds of intoxication, he must at the time be incapable of clearly perceiving and assenting, and must be intoxicated to such a degree that the party cannot assent understandingly.

Van Wyck v. Brasher, 81 N. Y. 262; *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441; *Wade v. Colvert*, 12 Am. Dec. 652; *Bates v. Ball*, 72 Ill. 108; *Gore v. Gibson*, 13 Mees. & Welsb. 623; *State Bank v. McCoy*, 69 Pa. 204; 1 Chitty, Cont. 11th Am. ed. p. 192; 2 Kent, Com. p. 452-584; Benj. Sales, § 33, p. 42.

The rule now is that such an intoxication as entirely deprives a party of the use of his reason must avoid an engagement entered into by him while in this state, even although it be procured by his own folly, and although no actual fraud be intended or practiced.

1 Chitty, Cont. 11th Am. ed. p. 192; *Bar-*

rett v. Buxton, 2 Aikens, 167; 16 Am. Dec. 601; 1 Chitty, Cont. p. 192; *Seymour v. Delancy*, 3 Cow. 445; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70; 3 Am. Dec. 602.

Bush must have had notice of his condition, having seen him drink, by his manner, hand writing, and other attendant circumstances. Notice may be inferred from circumstances sufficiently strong to cast a shade on the transaction.

Story, Notes, § 198; *Cone v. Baldwin*, 12 Pick. 545.

In *Gore v. Gibson*, 18 Mees. & Welsb. 623, Parke, B., says: "A person who takes an obligation from another under such circumstances is guilty of actual fraud."

See also *State Bank v. McCoy*, 69 Pa. 208.

A parol contract for the purchase of land may be disaffirmed; on it there is no legal liability to take and pay for the land. Damages can only be recovered on the parol agreement.

Browne, Stat. Frauds, 8d ed. § 134; *Wilson v. Clarke*, 1 Watts & S. 554; *Bousser v. Cesena*, 62 Pa. 148.

A sale of lands by public auction is within the Statute of Frauds.

1 Chitty, Cont. 11th Am. ed. p. 418; *Walker v. Constable*, 1 Bos. & Pull. 806; *White v. Proctor*, 4 Taunt. 209; 1 Sugd. Vend. & P. 18th Am. ed. 42-148; Browne on the Statute of Frauds, 8d ed. §§ 264, 265.

A vendor cannot maintain an action to recover the purchase money on a verbal agreement for the sale of land, not put in writing according to the statute.

Meason v. Kaine, 63 Pa. 335; *Wilson v. Clarke*, 1 Watts & S. 554; Browne, Stat. of Frauds, 8d ed. § 134.

A contract for the purchase of land, not put in writing, passes to the purchaser no interest in the land, and furnishes no right in law or equity to demand a specific performance.

Bender's Admrs. v. Bender, 37 Pa. 37.

In Pennsylvania a parol contract for the sale of land is not absolutely void; the statute restrains the effect.

Kurtz v. Cummings, 24 Pa. 37.

Chief Justice Shaw, in *Gill v. Bicknell*, 2 Cush. 358, says: "It is now well settled by authorities that a sale of real estate at auction, where the name of the bidder is entered by the auctioneer, or by his clerk under his direction, on the spot, and such entry is so connected with the subject and terms of the sale as to make a part of the memorandum, is a contract in writing so as to take the case out of the Statute of Frauds."

In *Morton v. Dean*, 13 Met. 385, it was held that the putting down the name of a bidder was not a sufficient memorandum because it was not under such a caption, and did not definitely refer to any catalogue, advertisement, written or printed, or conditions of sale, as to make them part of the memorandum.

See also 1 Chitty, Cont. pp. 418, 414, 11th ed.

"As sales at auction are clearly within the Statute of Frauds (*Hinde v. Whitehouse*, 7 East, 568; *Kenworthy v. Scofield*, 2 Barn. & C. 945; *Brent v. Green*, 6 Leigh, 16), the assent would not be binding unless in writing, if the case came within the terms of that Statute."

1 Pars. Cont. p. 479.

PA.

Payne v. Cave, 3 Term R. 148, and *Warlow v. Harrison*, cited in Benjamin on Sales, pages 62 and 626, cited by the plaintiff in error, have no application to the case at hand. They determine disputes in relation to the sales of personal property. There is a wide difference in the law relating to the sales of realty and personalty by reason of the Statute of Frauds. The purchaser of personalty at parol sale may be held for the contract price; the purchaser of realty at parol sale cannot be held for the contract price.

The deposit may be recovered upon the common count for money had and received, although the contract for sale was under seal.

1 Chitty, Cont. p. 439; *Greville v. Da Costa*, Peake, Add. Cas. 118.

Mr. Justice Trunkley delivered the opinion of the court:

When the plaintiff's bid was accepted the bargain was struck, and there was an oral agreement for the sale and purchase of the land on the terms stated in the conditions of sale. That agreement was not void, but voidable. Neither party could have compelled specific performance. Either would have a right of action for damages resulting from nonperformance by the other; but the vendor could not tender a deed and recover the purchase money, for that would be enforcing specific performance; he could only recover the actual loss.

Upon the signing of the conditions, *prima facie* there was a contract that could be specifically enforced. Money paid on either the oral or written contract could not be recovered unless there was cause for rescission. Here, it is conceded that there was an oral contract; but the plaintiff denies that he made a written contract and paid money and a note thereon, because at the time his signatures and money were given he was incapable of making a contract by reason of drunkenness. If he was without reason and understanding, the payment of the money ought not to be treated as voluntary, nor his signature as creating a new obligation. The conditions of sale may have been read in his hearing at the auction, and he may have understood them when he bid; but he paid no money until the time of signing the alleged contract, and if he was then bereft of reason, he may avoid the apparent obligation made while in that condition.

It is not a question whether what he did was the carrying out of a fair and reasonable oral contract, or whether the property was worth the sum bid; it is a question of his capacity to make a contract at the time he signed the conditions and paid the money. The subject of the contract was not necessary for himself or family; he took nothing into his possession and therefore had nothing to restore in the act of rescission; and he brought suit so promptly that at the trial the question of delay in rescinding was not raised.

The rule formerly was that intoxication was no excuse and created no privilege or plea in avoidance of a contract, but it is now settled according to the dictates of good sense and common justice that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable,

and may be avoided by himself, though the intoxication was voluntary, and not procured by the circumvention of the other party. 2 Kent, Com. p. 451.

A drunkard when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract in general; but his contract is voidable only and not void, and may therefore be ratified by him when he becomes sober. Benj. Sales, § 38.

The learned judge of the common pleas instructed the jury that the plaintiff could recover only on the ground that the contract did not bind him because he was intoxicated to a degree that he did not know what he was doing at the time he affixed his seal and gave the money; that if he was in such a state of drunkenness as not to know what he was doing, he cannot be compelled to perform the contract; and that if at the time of signing the contract he was able to comprehend the nature and effect thereof, the alleged intoxication is no defense. All that accords with principles so well settled as to be found in approved text books. They apply to a case like this; not where an intoxicated man gave his negotiable paper which had passed to an innocent holder for value, as was the case in *State Bank v. McCoy*, 69 Pa. 204.

In answer to the defendant's first point the court charged that the drunkenness of the plaintiff to relieve him from the contract must have been such that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding. There is no error in that. True, the word "utterly" is omitted, which is used in the defining of the state of drunkenness, in Story, Eq. Jur. § 281; but the sense is not materially different; and that word is omitted by many in the attempt to define the degree of intoxication, and absence of reason.

The point was well answered; its simple affirmation might have misled the jury; "unfair advantage" was not a question submitted.

The fifth assignment is not sustained. Although the question ought not to have been allowed when put, for the reason stated in the objection, very soon there was testimony that the witness was intoxicated at the time referred to in the question. No objection was made to its form and its admission out of order was harmless.

None of the remaining assignments require special remark.

Judgment affirmed.

APPEAL OF S. P. JOHNSON, Guardian of the Minor Children of P. J. Falconer.

1. The **orphans' court** in its limited sphere is a court of equity powers, and in all matters within its **jurisdiction** has full authority to grant relief.
2. The orphans' court has the power of **reviewing** and modifying its proceedings and **decrees for mistake** involving injury.
3. It may **set aside** a private sale previously ordered by it of the real estate of a minor after deed made by his guard-

ian for the mutual mistake of the parties in the amount of the land sold.

4. The **petition in such case** should set out the title of the minor and show that it was derived by descent or last will.

(Decided October 4, 1886.)

A PPEAL from a decree of the Orphans' Court of Warren County, setting aside a guardian's private sale of real estate made by a guardian with the approval of the court, *Affirmed.*

The petition of the original guardian (subsequently succeeded by the present appellant) praying an order to make such sale was as follows:

"The petition of G. C. James, guardian of Patrick H. Frank E., and Rose T. Falconer, minor children of P. J. Falconer, deceased, respectfully represents: That the said minor children are seised in fee of, and in a certain piece or parcel of land situate in Limestone Township, Warren County, Pennsylvania, in the northwest corner of tract No. 5234, bounded on the northeast by the line of said tract, on the south by the Forest County line, and on the northwest by tract No. 5233, being that part of said tract No. 5234 lying in Warren County, and containing 200 acres, be the same more or less. Your petitioner says he has been offered the sum of \$2,000 for said land, by W. A. Grove and J. G. Dale, and that the sale can be effected provided an order or decree can be obtained from this honorable court, authorizing a private sale thereof. Your petitioner further says that the price or sum offered is satisfactory to him, and that he believes it is as much if not more than it would bring if sold at public sale, and that it is for the interest and advantage of said minors that the same should be sold. He therefore prays your honorable court to grant him an order to sell the said land to the proposed purchasers for the said sum of \$2,000 cash in hand.

Warren County, ss:

G. C. James, being duly sworn, says that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge and belief.

G. C. James, Guardian.

Sworn and subscribed before me this 7th day of April, A. D. 1882.

G. W. Kinnear, Clerk, O. C."

The facts are fully stated in the opinion.

Messrs. Johnson, Lindsey & Parmlee, for appellant:

The orphans' court has no power to grant the relief prayed for and no right to interfere to help purchasers out of the consequences of their own mistakes, when the transaction, as in this instance, is completed to the last requisites of a judicial sale—the delivery of the deed, the confirmation of the sale and the payment of the whole of the purchase money.

Brightly, Eq. Jur. §§ 915, 916; *Commonwealth v. Judges*, 4 Pa. 303; *Brinker v. Brinker*, 7 Pa. 55; *Ake's App.* 74 Pa. 116.

The supreme court, in the case of *Evans v. Maury*, 18 W. N. C. 377, 3 Cent. Rep. 137, in reversing the action of the court below in setting aside, on motion, a sheriff's sale after confirmation and delivery of the deed to the purchaser, has reviewed and answered the cases which the appellees rely on as establishing a contrary

doctrine. This court says substantially that the power of the court to summarily interfere, for the correction of supposed evils, ceases with the delivery of the deed.

"A confirmation by the orphans' court of a sale of real estate by an executor, made in pursuance of its authority, is not complete until the purchase money be paid and a deed delivered."

Leshey v. Gardner, 8 Watts & S. 314; *McRee's Est.* 6 Phila. 75.

"The sale, even after confirmation, does not divert the title of the heirs of the decedent until a deed has been executed and delivered."

Demmy's App. 43 Pa. 168.

A completed orphans' court sale is a judicial sale, to which the rule of *caveat emptor* applies.

Scott, Intestate Law, p. 367, 368; *For v. Mensch*, 8 Watts & S. 446; *King v. Gunnison*, 4 Pa. 172; *Kennedy's App.* 4 Pa. 153; *Sackett v. Twining*, 18 Pa. 202; *Bickley v. Biddle*, 83 Pa. 276; *Schug's App.* 14 W. N. C. 49; Rorer, Jud. Sales, 161, 167-9; Rawle, Cov. title, 622, note.

In the case of *Miles v. Dizen*, 6 Watts, 148, this court says that even if an administrator has made false representations as to quantity, etc., before his sale, as the purchaser had no right to rely on them, his only redress, if he did not get what he was thus led to suppose he was buying, was by application to the orphans' court before confirmation to set aside the sale.

Penn Square Build. Association's App. *81 Pa. 330; *Simmond's Est.* 19 Pa. 441; *Dellaren's App.* 16 W. N. C. 87.

In *Gilmore v. Rodgers*, 41 Pa. 120, this court, speaking of a decree of confirmation of a sale, says: "Standing unreversed and unappealed from, and the time for an appeal having gone by, which, by the 8th section of the Act (of April 18, 1853), in question, is twenty days, the decree is now, so far as appears in this case, unimpeachable."

Messrs. Osmar & Freeman and W. G. Trunkay, for appellees:

By the second section of the Act of March 29, 1853, the orphans' court is "declared to be a court of record, with all the qualities and incidents of a court of record at common law."

2 Purd. Dig. 11th ed. 1279, pl. 3; P. L. 190.

While it is true that it is a court of limited jurisdiction, if regard be had to the derivation of its powers, and the subjects of its jurisdiction, yet within its appointed orbit its jurisdiction is exclusive, and therefore necessarily as extensive as the demands of justice.

Shollenberger's App. 21 Pa. 337.

In matters within its jurisdiction, it proceeds on the same principles as a court of chancery; and it is essentially such in its proceedings and decrees, within the limited sphere of its jurisdiction.

Guier v. Kelly, 2 Binn. 299; *Commonwealth v. Judges*, 4 Pa. 301; *Kitera's Est.* 17 Pa. 423; Bright, Eq. Jur. 680, 681, §§ 916, 917. See also *Brinker v. Brinker*, 7 Pa. 53, 55; *George's App.* 12 Pa. 260.

The exceptions to the conclusiveness of decrees of the orphans' court therefore are, as in other courts, fraud, gross mistake or misapprehension amounting to fraud, and want of jurisdiction.

Mitchell v. Kinteer, 5 Pa. 216; *Jackson v. Summerville*, 13 Pa. 359; *George's App.* 12 Pa.

260; *Milne's App.* 99 Pa. 483; *Torrance v. Torrance*, 53 Pa. 505.

Courts will relieve against mistakes, resulting in injury, occasioned by the misconduct or misrepresentations of the officer conducting the sale, or even of third persons.

Schug's App. 14 W. N. C. 49; *DeHaven's App.* 16 W. N. C. 87; *Moulton's Est.* 12 W. N. C. 307; *Johnson's Est.* 15 Phila. 543; *Campbell v. Gardner*, 11 N. J. Eq. 423; *Woodward v. Bullock*, 27 N. J. Eq. 507; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Mutual Life Ins. Co. v. Goddard*, 83 N. J. Eq. 482; *Collier v. Whipple*, 13 Wend. 224; *Tripp v. Cook*, 26 Wend. 143; *Veeder v. Fonda*, 3 Paige, 94.

Courts of equity have power to set aside sales made under their authority, after confirmation, payment of purchase money and delivery of the deed, on the ground of accident, misapprehension or mistake of fact, resulting in injury.

Collier v. Whipple, *Tripp v. Cook*, *Veeder v. Fonda* and *Campbell v. Gardner*, *supra*; *King v. Platt*, 37 N. Y. 155; *Brown v. Elliott*, 17 N. J. Eq. 353; *Klopping v. Stellmacher*, 21 N. J. Eq. 328; *Mutual Life Ins. Co. v. Goddard*, Id. 482; *Heintze v. Bentley*, 34 Id. 562; *Gove v. Colborn*, 37 Id. 319.

The rule of *caveat emptor* applies with as much if not greater force to contracts between individuals as it does to judicial sales. When a contract between individuals for the sale of land in gross has been fully executed by payment of purchase money and delivery of the deed, where the deficiency is so great as to naturally raise the presumption of fraud, imposition, or gross mistake in the very essence of the contract, courts of equity will not enforce the rule of *caveat emptor*, but grant the purchaser relief.

Stebbins v. Eddy, 4 Mason, 414, 420; *Kreiter v. Bomberger*, 82 Pa. 59; *Glen v. Glen*, 4 Serg. & R. 488; *Harrison v. Talbot*, 2 Dana (Ky.) 265; *Portman v. Mill*, 2 Russ. Ch. 570.

Reasonable diligence is all that is required, and a party will not be deprived of his right to equitable relief, simply because he has not exercised the highest possible degree of care.

Bisp. Eq. 3d ed. 247; *Jenks v. Fritz*, 7 Watts & S. 201, 203; *Snyder v. Ives*, 42 Iowa, 162; Bright, Eq. Jur. 63, § 48.

The power of the orphans' court to set aside a sale of real estate, made in pursuance of its own order, is a matter that rests within the sound discretion of the court, and its exercise, as a general rule, will not be reviewed, unless the record shows palpable and gross abuse.

Bowers' App. 84 Pa. 311; *Haslage's App.* 87 Pa. 440; *Neeld's App.* 70 Pa. 113.

In order to give the orphans' court jurisdiction to decree a sale under the provisions of the Act of April 18, 1853, most clearly the petition for leave to sell must state that the real estate with respect to which application is made, was acquired either by "descent," or "by last will."

Torrance v. Torrance, 53 Pa. 505; *Jones v. Jones*, 12 Pa. 355; *Hampton v. Speckenagle*, 9 Serg. & R. 212, 221; Scott, Intestate Law, 366-7 and authorities cited; 15 Am. Law Reg. N. S. 213, note by Judge Redfield; *Denning v. Corwin*, 11 Wend. 647; 1 Sm. Lead. Cas. 6th Am. ed. part II, *816, 833 *et seq.*; *Overseers v. Overseers*, 23 N. J. Law, 169, 173; *Turner v.*

Bank of North America, 4 Dall. 8, 11 (4 U. S. bk. 1, L. ed. 718, 719); *Robertson v. Crease*, 97 U. S. 646, 649 (Bk. 24, L. ed. 1057, 1058); *Eaton v. Badger*, 38 N. H. 228, 237; *Morse v. Presby*, 5 Foster (N. H.) 302; *Striker v. Kelly*, 7 Hill, 9.

Mr. Justice Paxson delivered the opinion of the court:

This was an appeal from a decree of the orphans' court setting aside a private sale of real estate made by G. C. James as guardian of the minor children of P. J. Falconer, deceased. The sale was made under the authority and approval of the orphans' court; it had been confirmed, the purchase money paid and the deed delivered to the purchasers.

About two years after the sale the purchasers presented their petition to the orphans' court, praying that the sale be set aside and the purchase money refunded by S. P. Johnson, the present guardian, who succeeded G. C. James in the said trust. The court below referred the petition to an auditor (who is erroneously termed examiner and master throughout the proceedings), who after taking testimony reported a decree in accordance with the prayer of the petition, which report was substantially sustained by the court and a decree made setting aside the sale.

The ground upon which both the auditor and the court below proceeded was that there was a mutual mistake in regard to the quantity of land. That there was a mutual mistake, and of a very serious character, was found by the auditor and is not denied. Indeed, the auditor's findings of fact were accepted by both sides and are not now disputed. The land was sold as a tract of timber land, containing 200 acres at \$10 per acre. In point of fact, as found by actual survey, there were but 52 acres and some perches. No fraud in fact was imputed to the guardian in making the sale. He appears to have had no knowledge as to the quantity of land. The sale was effected by one Z. H. Eddy, who was a surveyor and the grandfather of the minor children. He professed to have measured one of the lines and said there were 212 acres in the tract, but would sell it for 200. Eddy appears to have been a go-between; the auditor finds he was not the agent of the guardian, and he does not appear to have been the agent of the purchasers. The latter relied upon his representations as to quantity in good faith and did not discover the mistake until they had sold off 100 acres, when in surveying the tract in order to set off the part sold, they discovered that it contained altogether but about 52 acres. The guardian was at once notified of the deficiency and a demand made to have the mistake rectified. Some negotiation followed, resulting in nothing, when this petition was filed in the court below.

If the orphans' court possessed the power to set aside the sale under the circumstances, it was certainly a clear case in which to exercise it. It was so gross a mistake as to amount to a legal fraud.

The decree of the orphan's court restores the parties to the position they occupied before the sale. The guardian gets back the land in the condition it was when sold, and he is required to return the money to the purchasers. There is no interference with the rights of third par-

ties. That the guardian cannot retain the money in equity and good conscience is too plain for argument. The whole matter comes down to a mere question of the power of the orphans' court.

A number of authorities were cited on both sides, a few only of which have any bearing upon the case. Many of them were applications to set aside sales before confirmation and payment of the purchase money; others were applications to set aside sales made by the sheriff. The power of the common pleas to set aside a sheriff's sale after confirmation, delivery of the deed and payment of the purchase money, was considered in the recent case of *Evans v. Maury*, 18 W. N. C. 377, 3 Cent. Rep. 137.

In that case the application was made by the defendant in the execution, alleging a fraud practiced upon him by the purchaser at the sheriff's sale, who was also the execution creditor. The proceeding was upon a rule to show cause why the confirmation should not be opened, the sale set aside, and the deed delivered up to be canceled. We held, for the reasons there stated, that the court could not, in this summary manner, deprive the purchaser of his property, but must be left to his remedy by bill in equity, or by ejectment. Some stress was laid upon the fact that the proceeding was summary in its nature, depriving the party of his right to a trial by jury, or of the careful consideration of the case which would follow a bill in equity and a reference to a master, in both of which forms of procedure the whole proceedings could be reviewed in an orderly manner by this court. The further reason was given that after the confirmation of the sale, delivery of the deed, and payment of the purchase money, the matter was ended and the court lost its grasp of the case. The parties and the subject matter were out of court. Moreover, there was no pretense that a fraud had been practiced upon the court. Under such circumstances, to bring a party into court by no other process than a rule to show cause, and upon such a rule to wrest from him his title to real estate, seemed to us an unwarranted exercise of power.

It requires but a moment's consideration to see that the facts of that case bear but little analogy to the case in hand. In *Evans v. Maury* the proceeding was upon the common-law side of the court, and was completed. Neither the parties, the subject-matter nor the fund were in court which, without any fraud practiced upon it, had given final judgment, and in effect dismissed the parties without day. In the case in hand, the proceeding was not in the form of a rule to show cause, but was a petition in the orphans' court; a court which, in its limited sphere, is a court of equity powers, and in all matters within its jurisdiction has as full authority to grant relief as any chancellor ever had. It was proceeded in precisely as if a bill had been filed on the equity side of the common pleas. There was the petition, which in the orphans' court is the equivalent of a bill in equity in the common pleas; there was an answer and a reference to an auditor to find the facts, and if desired, an issue might have been demanded and sent to the common pleas for trial; so that, so far as the form of pro-

ceeding is concerned, it differs in no essential degree from a bill in equity filed in the common pleas. No one doubts that relief could have been given in such a case in the latter form of proceeding.

Moreover, the orphans' court still retains its grasp over the guardian and the fund. Both are absolutely within its control. The purchase money for this land was paid to the former guardian and is now held by the present guardian. If he cannot retain it in equity and good conscience, who is better fitted to say so than the court which controls both the guardian and the fund? It would be a lame conclusion to refer such a question to a common-law court, or to another court of equity, whose equity powers in this particular matter are no greater than those of the orphans' court itself.

We must not lose sight of the fact that it is the purchasers who invoke the action of the orphans' court. They come into court and tender back the deed or a reconveyance of the property, and ask to have a palpable error corrected by which they have been obliged to pay a considerable sum of money for which it is admitted they have received no consideration. Surely the guardian, who acts under the control of that court, has no standing to object to its jurisdiction in a matter which affects the execution of the trust and the disposition of the funds in his hands. We are not embarrassed by the possible case of a purchaser who has paid his money and received his deed, and who objects to his property being wrested from him by that court.

The precise point involved has not been ruled in this State. Perhaps the nearest approach to it is *George's App.* 12 Pa. 260, where it was held that a bill of review, to correct a clear mistake in fact, on which a decree in partition was made, will lie more than three years after the decree, purchasers not having become interested in the estate.

It was said in that case by *Justice Bell*: "It must be admitted that a court of chancery would not in a case like this, entertain a bill of review; for here is neither suggestion of new matter discovered since the decree published, nor the averment of error apparent upon its face, one of which is said to be necessary to found such a prayer; 2 Madd. Ch. 537 *et seq.*; *Wilson v. Webb*, 2 Cox, 3; *O'Brien v. O'Connor*, 2 Ball & B. 154; nor can the decree complained of be regarded as wholly against the complainant; a feature also essential to a review in equity. *Glover v. Portington*, Freeman, Ch. 182; *S. C.* 1 Ch. Cas. 51.

"But where it is shown an injurious mistake exists, though in part ascribable to the party averring it, we do not think the orphans' court ought to be deterred from its correction by the sole fact that it is not apparent in the unassisted record. * * * In regard to the subject more immediately before us, we have recently had occasion to observe, more than once, that the orphans' court has from the beginning exercised the power of reviewing and modifying its proceedings and decrees, as an authority necessarily inherent and essential to the right discharge of its duties. On this point no statutory direction was given till the Act of October, 1840, which, however, is confined to reviews of alleged errors in the settled accounts of executors, administrators and guardians. This limits the

period within which a review may be had in such cases to five years, but it leaves untouched the pre-existing practice in all other instances. Being thus unrestrained by the written law, I see no objection to the liberal exercise of the right to rehear and redress for the correction of manifest mistake, involving injury, tempered, however, by the application of a sound discretion, seeking to protect the rights of third persons, and which, in most cases, would dictate a refusal to interfere when the relative position of the original parties was materially changed, or the interests of third persons might be put to hazard."

The petition in this case is in the nature of a bill of review, a proceeding which it is believed the orphans' court has ample power to entertain. As was observed by *Justice Bell* in *George's App.* above cited, the power of reviewing its decrees had been exercised by the orphans' court prior to the passage of the Act of 1840. The object of said Act was to limit the exercise of this power to five years in certain cases, but it leaves untouched the pre-existing practice in all other cases. See also *Downing's Est.* 5 Watts, 90; *Briggs' App.* Id. 91; *Clauser's Est.* 1 Watts & S. 215; *Stoever's App.* 3 Watts & S. 154; *Bunting's App.* 4 Watts & S. 469; *Pennypacker's App.* 14 Pa. 430.

In the recent case of *Milne's App.* 99 Pa. 483, it was said by our brother Gordon that "We have no doubt about the power of the orphans' court to revise and correct its former adjudications, if in those adjudications it discovered a palpable mistake, produced either by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough in the absence of any other, for so holding. Nevertheless, other authority will be found, and that directly in point, in *George's App.* 12 Pa. 260, where the subject is so fully discussed that further argument from us is unnecessary."

This language is applicable here. It is no answer to this to say that *Milne's App.* was a bill of review under the Act of 1840, to correct an error in a previously confirmed administrator's account, for the Act of 1840, as before observed, did not confer a new power upon the orphans' court; it merely gave a bill of review as a matter of right in certain cases, and limited the time within which it might be exercised in those cases.

We are of opinion that the orphans' court has ample power to make the decree complained of. We also think it was not only justified upon the merits, but that it was required by the principles of common honesty. It would be a reproach to the law were it to fail to correct such a mistake as is disclosed by this record.

We desire to say also, in order to avoid misapprehension in the future, that it is at least doubtful whether the petition filed in this case upon which the sale was had, sets out sufficient facts to give the court below jurisdiction. It is admitted that the petition was filed under the Act of 1853. Indeed I do not know of any other Act which gives the orphans' court the power to order a private sale of the real estate of a minor. Said Act provides: "In all cases where real estate shall have been acquired by descent or last will, the orphans' court, and in all other cases the court of common pleas of the

respective counties of this Commonwealth, shall have jurisdiction to decree the sale * * * of such real estate."

The petition in this case is of the most informal character, and does not set out any explanation of the title, nor is there even an averment that the title of the minors was derived by descent or last will, which is absolutely essential to give the orphans' court jurisdiction. Such a loose way of dealing in matters affecting the title to real estate is not to be commended, and may lead to serious trouble hereafter.

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

John W. MATTERN, *Plff. in Err.*,

v.

Nathan G. McDIVITT, Admr. of David Whitesel, Deceased.

1. **Mutual accounts**, to prevent the operation of the **Statute of Limitations**, must be such as **concern the trade of merchandise**, and upon which an action would lie.
2. Where there is a **book account** on one side and a **demand** on the other, to toll the statute the **demand must also be a book account**.
3. The **cases of *Van Swearingen v. Harris*, 1 Watts & S. 356; *Adams v. Carroll*, 85 Pa. 209, and *Chambers v. Marks*, 25 Pa. 296, explained**.
4. A **demand by an attorney at law, for professional services, will not toll the statute** on a claim by the client, based on a demand for farm produce furnished.
5. The **refusal by a party to a suit to produce at the trial thereof papers then admitted to be in his possession, having been duly notified so to do, but no order to produce them having been asked for—does not justify denunciation by the court in its charge, by reason of the tendency of such denunciation to mislead and prejudice the jury**.
6. A **rule of court providing that a copy of a book account sued on, duly filed and verified by affidavit, shall be admitted in evidence without further proof, unless the defendant file an affidavit that he believes injustice will be done if the plaintiff be not held to strict proof of his claim, construed and held to apply to a case where the suit is by an administrator on a decedent's book account**.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Huntingdon County, to review a judgment on a verdict for plaintiff in an action of debt. *Reversed.*

This action was brought May 22, 1882, on a book account beginning November 21, 1867, and ending June 18, 1879, against John W. Mattern, attorney at law, for farm produce furnished by plaintiff's intestate, who died in June, 1881.

The account, verified by affidavit of the administrator, was duly filed in accordance with the following rule of court:

"When the action is brought in whole or in part on a book account, if the plaintiff shall file with his declaration a copy of his book entries, with a statement of the credits to which he admits the defendant to be entitled, verified by an affidavit setting forth: that the copy of the charges filed is correctly taken from the plaintiff's book of original entries; that such charges were made at or about the time of their respective dates; that the goods were sold and delivered or the work done, at or about the time the charges were made in the book; that the charges are correct and the account just, and that the defendant is not entitled to any credits or to any other than there given, the account shall be deemed admitted; and on the trial such copy and statement, so verified and filed, shall be read to the jury, and shall be evidence of all such items as the book or books, if produced and duly proven, would be evidence; unless the defendant before or at the time of putting in his plea shall file his affidavit that he verily believes that injustice will be done to him, unless the plaintiff be compelled to produce his books, and subject himself to a cross examination, or held to strict proof of his claim; in which case such verified statement and copy shall not be received as evidence."

Pleas, *nil debet*, payment with leave, etc., and the Statute of Limitations.

The book account, sworn to by the administrator, was admitted in evidence, under objection that the rule of court did not apply to the book account of a decedent. *First assignment of error.*

Defendant claimed set-off by reason of professional services rendered the decedent. There was testimony showing that defendant was counsel for decedent in three suits against him, begun in 1877; that one was decided by arbitration in that year and no appeal taken; that another was marked "continued" January 21, 1879, and that the third was marked "continued," January 12, 1880.

The defendant was duly notified to produce at the trial all books or papers in his possession, explaining the matters in question in the cause. He admitted the possession of receipts from decedent, but refused to produce them. No order for their production was asked for.

The court, Hoy, *P. J.*, charged, *inter alia*, as follows:

"[It is argued here that there were payments and credits on this account which would take it out of the statute, and receipts that are within the knowledge and in possession of the defendant. The defendant admitted on the witness stand that he had receipts from this plaintiff's intestate, David Whitesel.]

"Mr. Whitesel is dead and cannot appear before you, to give his version of the affair. If he were here, there would be less difficulty in arriving at what is the truth and real facts connected with the account, and these receipts if produced might throw much light upon it. But the receipts were not produced. He admitted on the stand that he had them, and on request of counsel for plaintiff to produce them, refused to do so. This conduct we say, gentlemen of the jury, is for your consideration.

"It is a very pertinent inquiry in a case like this, we think, whether it is honest and fair for a lawyer, who is the defendant, to go upon the stand and admit under oath that he has receipts in his possession of a man that is dead, and refuses to deliver them in court at the trial. It certainly does not go to show that he desired a fair and equitable trial of the case. [Where a man admits that he has papers in his possession that will throw light upon and explain accounts and papers of a dead man's estate, and refuses to produce them when called upon for the purpose, such conduct is neither fair, just nor honest; and we say to you that we have no patience with such conduct and think it is highly reprehensible.] Courts cannot and will not, we think, encourage any such conduct as that. There was, however, no way, as the case was presented, to compel the defendant to produce the receipts, or it would have been done. We do not think that it is creditable in anybody to withhold that which might throw light on a case of this kind on the one side or the other. * * * [But we say, according to the record and evidence, those services closed on the 12th of January, 1880; at that time John W. Matern had a claim against David Whitesel for services. So far as the record and the evidence in this case show, that was the end of his services rendered to this decedent.]" *The second assignment of error* specified the portions of the charge above in brackets.

The court further charged, *inter alia*, as follows:

"The plaintiff would be entitled to recover, in this case, whatever his account amounts to for six years back from the 12th of January, 1880, which would take you back to January, 12, 1874. You will go back to that time and include all the accounts up to the 12th of January, 1880." *Third assignment of error.*

The fourth and fifth assignments of error were to the same effect.

Messrs. R. Bruce Petriken and John W. Matern, for plaintiff in error:

Cited and relied upon Act March 27, 1713, §1; *Hay v. Kramer*, 2 Watts & S. 137; *Lowber v. Smith*, 7 Pa. 381; *Marseilles v. Kenton's Exrs.* 17 Pa. 238; *Ingram v. Sherard*, 17 Serg. & R. 347; *Adams v. Carroll*, 85 Pa. 214; *Overton v. Tracey*, 14 Serg. & R. 323; *Evans v. See*, 23 Pa. 88; *Wickersham v. Russell*, 51 Pa. 71; *Foster v. Jack*, 4 Watts, 334; *Lichty v. Hugus*, 55 Pa. 434; *Chambers v. Marks*, 25 Pa. 296; *Hale's Exrs. v. Ard's Exrs.* 48 Pa. 22.

Messrs. J. R. Simpson and Jno. M. Bailey, for defendant in error:

The court below is the best exponent of its own rules and its construction is accepted by the higher court as conclusive.

Duiley v. Green, 15 Pa. 118-128; *Coleman v. Nantz*, 68 Pa. 178; *Gannon v. Fritz*, 79 Pa. 303.

An administrator may make the affidavit.

Schupp v. Schupp, 17 W. N. C. 236; *McCloy v. Maffett's Admrs.* 59 Pa. 344.

To take an account out of the Statute of Limitations that would be otherwise barred by it "there must be mutual demands; each party must have a demand or right of action against the other."

Adams v. Carroll, 85 Pa. 209.

It is settled in Pennsylvania that an attorney

has a right of action for his professional services.

Balsbaugh v. Frazer, 19 Pa. 95.

Notwithstanding the evidence of a reciprocal demand was introduced by defendant, it becomes evidence for the plaintiff.

Moses v. Bradley, 3 Whart. 272; *Porter v. Seiler*, 23 Pa. 424.

"Where there have been mutual accounts between the parties within six years, the Statute of Limitations does not apply to any part of either account."

Chambers v. Marks, 25 Pa. 296; *Van Swearingen v. Harris*, 1 Watts & S. 356.

Where a party suppresses evidence in his power, the presumption is that if produced it would make against him.

Church v. Church, 25 Pa. 278.

Testimony often consists in what is not proved as well as what is proved.

Frick v. Barbour, 64 Pa. 120.

Mr. Justice Trunkey delivered the opinion of the court:

"All actions upon account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants," shall be commenced or sued within six years next after the cause of such action or suit, and not after. This limitation in the Statute of 1713 is in identical phrase with the Statute of 21 James 1, chap. 16, upon the same subject, and had the courts construed it in accord with the legislative will as expressed, there would have been no difficulty in understanding it in the same way as it was finally understood in England, where it was settled that a transaction will not constitute an account, within the meaning of the exception, unless it is such that it would sustain an action of account, or an action on the case for not accounting. *Inglis v. Haigh*, 8 Mees. & W. 769; *Cottam v. Partridge*, 4 Scott, N. R. 819.

In commenting upon the Statute of Maine, the exception being in the same words, **Chief Justice Marshall** remarked: "It may reasonably be conceived that the Legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account. The account must be one 'which concerns the trade of merchandise.' * * * It is not an exemption from the Act attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be not an ordinary traffic between a merchant and any ordinary customer, but between merchant and merchant. This 'trade of merchandise' which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant." *Spring v. Gray's Exrs.* 6 Pet. 164 [31 U. S. bk. 8, L. ed. 358].

While the decisions of this court upon the statute are to be followed, it is well to keep the statute itself in view, not only for better understanding of judicial expression, but for guidance on points not yet adjudicated.

Among the cases relied on by the plaintiff to sustain the ruling of the court below is *Van Schoerengen v. Harris*, 1 Watts & S. 856, where the entire opinion touching the interpretation of the statute is as follows: "When there are mutual demands, if any item of such account be within six years before the commencement of the suit, such item is deemed equivalent to a subsequent promise reviving the debt. * * * It takes the case out of the statute, and it is immaterial whether the parties are merchants or not, as it goes on the ground of implied promise."

The latest case cited by him, *Adams v. Carroll*, 85 Pa. 209, rules that to constitute mutual accounts there must be mutual demands. And the exception to the statute has no application where the demand is altogether on one side although payments on account have been made.

He also refers to *Chambers v. Marks*, 25 Pa. 296, which reiterates that where there have been mutual accounts between two persons within six years, the statute does not apply to any part of either account; and it is added that a credit, to have the effect of taking an account out of the operation of the statute, must be proved to have been intended as a payment on the account.

It is manifest that the word "demand" in the cases cited is used in the sense of "account." It was never meant that where there was an account on one side, that a demand on the other, founded on note, bond, record or the like, constituted mutual accounts between the parties, within the exception.

In *Louber v. Smith*, 7 Pa. 381, the subject of the exception is defined thus: "A mutual account is when each has a demand or right of action against the other; as, for example, when A and B, dealing together, A sells B an article of furniture, or any other commodity, and afterwards B sells A property of the same or a different description, this constitutes a reciprocal demand, because A and B have a demand or right of action against each other. But this is not so when the sale is only by one to the other, whether it is to be paid for in cash or in kind; the manner of payment can surely make no difference. Nor will an overpayment alter this result."

As defined the account on each side relates to trade in merchandise. This may include labor or anything that is provable by book or original entry. Such account on one side is not enough. A demand on the other side founded on anything else "than such accounts as concern the trade of merchandise," is not sufficient to bring the account of the other within the exception.

The plaintiff's account consists of more than two score of items, beginning November 21, 1867, and ending June 18, 1879. There is no proof that during all that time the defendant sold and delivered anything to the plaintiff which is the subject of account as the word is used in the statute. There is testimony tending to show that the defendant performed professional services as attorney at law for the decedent in his lifetime, the value of which he claims as a set off. These services were rendered in suits at law, begun in 1877, and the court below assumed that the relation of attorney and client ceased on January 12, 1880. If

this was so, the defendant's right of action for the value of the services accrued on that date. *Footer v. Jack*, 4 Watts, 384; *Lichty v. Huges*, 55 Pa. 484.

Is such a demand an account that concerns the trade of merchandise? No decision of this court compels us to say so and, in the teeth of the statute, to declare that it takes the plaintiff's account out of its operation. The plaintiff's demand is for a particular service, which no more constitutes an account than would a demand for loaned money. If not sued, or pleaded as a set-off, within six years from the time it became due, the statute would bar recovery. It had no effect upon the running of the statute against the plaintiff's account. Mutual demands or debts do not extinguish each other. Nor does either prevent the statute running against the other, unless both are such accounts as bring the case within the exception.

We discover no evidence to justify the court in instructing the jury that the defendant's services closed and he had a right of action on the 12th of January, 1880. But this is of little moment. The grave error was in instructing the jury that the case came within the exception in the Statute of Limitations. The second, third, fourth and fifth specifications of error are sustained.

The extracts from the charge set out in the first assignment were more likely to prejudice the jury against the defendant when read with the context than if read by themselves. The portion of the charge where these extracts occurred was well calculated to lead the jury to consider the court's opinion of the defendant's conduct, that it was unfair, unjust, dishonest and highly reprehensible, and that courts will not encourage any such conduct.

Moreover, the jury must have understood that there was no way to compel the defendant to produce books and papers containing pertinent evidence, or it would have been done. Of course the learned judge knew that the plaintiff had been content in serving a notice on the defendant to produce books and papers, which merely laid ground for him to prove contents in case they were not produced; and no steps had been taken for an order to produce such books or papers. The denunciation of the defendant by the learned judge was uncalled for by anything in the testimony or record, and must have had a tendency to mislead the jury from the evidence to the court's expressions respecting the defendant's conduct. *Stokes v. Miller*, 10 W. N. C. 241; *Linn v. Commonwealth*, 96 Pa. 285.

There was no error in the admission of the copy of the account which was filed with the declaration, as provided by the rule of court.

Judgment reversed and a venire facias de novo awarded.

LEHIGH VALLEY R. R. CO., *Plff. in Err.*,
v.

Ernestina GREINER *et al.*

1. A person who occupies a place of known danger upon a railroad car, after he has been warned of the dangerous character of the same, is guilty of contribu-

tory negligence as a matter of law; and his widow and heirs will be precluded from claiming damages, for his death, when caused by injuries received while in such a position.

2. **In a question of negligence where the facts and inferences therefrom are undisputed and are such that a rule of duty may be accurately defined, the question is for the court and not for the jury.**

(Decided October 4, 1886.)

ERROR to the Common Pleas of Luzerne County, to review a judgment on a verdict in favor of plaintiffs in an action on the case for negligence of defendant, causing the death of plaintiffs' intestate. *Reversed.*

The plaintiffs' intestate, John C. Greiner, was employed by defendant Company in its repair shops at North Wilkesbarre. A shifting engine with a small platform car attached as a tender, and a long open car with benches in it called a "gondola" was by permission of the Company run from the shops to the lower part of the city for the purpose of carrying the workmen to their homes.

The engineer and brakemen on this train were in the regular employ of the Company but were paid additional compensation for this service by contribution levied on the persons who rode. The train had no regular schedule time and was run purposely to accommodate the men and stopped at those parts of the route where the men were in the habit of getting off.

The long, open car stood on a truck eleven inches higher than the truck of the tender, or tank car.

Greiner was in the habit of riding on the rear end of the tender, sitting on the platform, ten inches wide, with his feet dangling over the side or placed in the iron step depending from the side of the platform. He had been repeatedly warned that this was a dangerous place. Drummheller, the master mechanic, had told him not to sit there. The other men who used the train had also warned him that this was a dangerous place.

On the afternoon of the day when the accident happened which caused his death the train started from the shops as usual, except that it was about an hour earlier. There was room in the gondola car and in the tender where some of the men then, and habitually, sat. The engine stopped as usual at the places where the men got off, not at any regular stopping place or stations; and while standing at a private telegraph station of the Company it was run into by an engine which had been taken from the shops without authority, by a fireman who was running it down, for his own accommodation, to a switch below that point.

The gondola, or long open car, being higher than the tank car, was tilted up so that its forward bumpers were pushed over and upon the platform of the latter; and Greiner, who was sitting upon the platform, with his feet dangling over the side, was caught between the side of the car and the bumpers of the gondola, and so injured that he died within a few hours.

This action was brought by his widow and heirs to recover damages therefor.

On the trial before Rice, P. J., the jury rendered a verdict for plaintiffs, upon which judgment was entered; and defendant took this writ, assigning, *inter alia*, as error:

4. The action of the court in negating defendant's fourth and fifth points which were as follows:

4. That from the uncontradicted evidence, the deceased was, at the time of the accident, in a place of known danger, where he persisted in remaining in spite of repeated warnings; and that his negligence contributed to cause the accident by which he lost his life, and therefore the plaintiffs cannot recover. 5. That under all the evidence in the case the plaintiffs cannot recover.

5. The answer of the court to defendant's sixth point, which point and answer were as follows: If the jury believe the testimony of the witnesses in the case, the following facts have been established:

1. That at the time John Charles Greiner was killed, he was sitting between the tank car and gondola on a platform ten inches wide. 2. That the position was dangerous. 3. That he had been frequently warned not to occupy that place because it was dangerous. That under such a state of facts the said Greiner's conduct contributed to bring about the injury that caused his death and therefore the plaintiffs cannot recover in this suit.

Answer: We decline to charge as requested in that point, not because the jury may not be justified in inferring that the deceased was guilty of contributory negligence from these facts, but because it undertakes to have the court state, as matter of law, that contributory negligence would result from these facts, when we think it should be submitted to you as a question of fact. The point is therefore answered in the negative.

The evidence relied upon by defendant to support its fourth, fifth and sixth points is set forth in the opinion.

Messrs. H. W. Palmer and E. P. & J. V. Darling, for plaintiff in error:

It is not necessary to consider the relation of the deceased, Greiner, to the fireman, whose alleged negligence caused the accident; although this case is clearly to be distinguished from *O'Donnell v. R. R. Co.* 59 Pa. 239.

Even conceding Greiner to have been a passenger; the case is one of clear and undoubted contributory negligence on his part. He had been repeatedly warned of the dangerous character of the place where he sat.

R. R. Co. v. Jones, 95 U. S. 439 (Bk. 24, L. ed. 506); *Camden & At. R. R. Co. v. Hoosey*, 99 Pa. 492.

Riding upon the engine, even with the consent of the engineer, has been held negligence *in se*.

Illinois Cent. R. R. Co. v. Doggett, 34 Iowa, 284.

In *Little Rock & Fort Smith R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10, the plaintiff in shipping a car load of cattle was directed by the station agent, with whom he had arranged the shipment, to ride on the top of the car in which his cattle were. He did so and was injured by the train running off the track. It was held that he was guilty of contributory negligence and could not recover.

In this State it has been held contributory negligence for a passenger to ride in a baggage car, even with the assent of the conductor in charge of the train.

Pa. R. R. Co. v. Langdon, 92 Pa. 21.

The rule laid down in that case is the same as that adopted by Mr. Wharton (Whart. Neg. § 367), and both the rule and the reasoning of Mr. Justice Paxson in his opinion have received the unqualified approval of the later text writers.

See Beach, Cont. Neg. §§ 54, 55.

Where a traveler voluntarily puts his arm out of a window, it must be regarded as negligence *in se*; and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law. The negligence consisted in putting his limbs where they ought not to be and where they were liable to be broken without his ability to know whether danger was approaching.

Pittsburg & C. R. R. Co. v. McClurg, 56 Pa. 298.

On the same general point see *Kentucky Cent. R. R. Co. v. Thomas*, 79 Ky. 160; *Houston & Tex. Cent. R. R. Co. v. Clemmons*, 55 Tex. 88; *Peoria & R. I. R. R. Co. v. Lane*, 83 Ill. 448; *Taylor v. Danville, O. & Ohio R. R. Co.* 10 Bradw. (Ill.) 311.

It has been held that the Act of April 4, 1868, § 1, P. L. 58, Purd. Dig. 1268, pl. 6, applies to a person permitted to travel upon the railroad of a company, as a mail agent of the government.

Pa. R. R. Co. v. Price, 96 Pa. 256.

In *Hand v. London, etc. R. Co.* Q. B. May, 6, 1867, cited in 2 Wood, Railway Law, 1044, it was held that a person traveling as an employee is not a passenger.

The negligence complained of was that of a coemployee. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, although it may be in different departments or grades of it, are coemployees who are held in law to assume the risk of one another's negligence.

Beach, Cont. Neg. § 109.

There may be a common employment, notwithstanding the two are employed in entirely different and separate departments of the common employment.

Thus, an engineer and a telegraph operator.

Slater v. Jewett, 85 N. Y. 61.

An engineer of a switch engine and a car repairer.

Boldt v. New York C. R. R. Co. 18 N. Y. 482; *Chicago, etc. R. R. Co. v. Murphy*, 53 Ill. 386; *Valdez v. Ohio, etc. R. Co.* 85 Ill. 500.

An engineer and the servants of a contractor, engaged in furnishing wood to the railroad under the contract, being on the same train.

Chicago, etc. R. R. Co. v. Keefe, 47 Ill. 108; *Ryan v. Cumberland, etc. R. R. Co.* 23 Pa. 384.

If the rule were otherwise, "How," says the court in the case last cited, "could the wearied laborer be allowed to ride home with the driver, without danger that the employer should be called to account for an accidental tilting of the cart?"

A conductor and a brakeman on another train.

Pittsburg, etc. R. R. Co. v. Devinney, 17 Ohio, 197.

A conductor and the servants of a contractor working upon his train.

Illinois, etc. R. R. Co. v. Cox, 21 Ill. 20.

A conductor and a station baggage master.

Colorado, etc. R. R. Co. v. Martin, 4 W. C. Rep. 563.

A brakeman and a car inspector.

Mackin v. Boston, etc. R. R. Co. 135 Mass. 201; *Smith v. Potter*, 46 Mich. 258; *Ballou v. Chicago, etc. R. Co.* 54 Wis. 259.

A brakeman and the mechanics in a repair shop.

Wonder v. Baltimore, etc. R. R. Co. 32 Md. 418; *Bezel v. New York, etc. R. R. Co.* 70 N. Y. 171.

A carpenter or other employees of a railroad and the men in charge of the train on which they are carried to their work.

Seaver v. Boston, etc. R. R. Co. 14 Gray, 466; *Gillshannon v. Stony Brook R. R. Corp.* 10 Cush. 228; *Morgan v. Vale of Neath R. Co.* 5 Best & S. 736; *S. C. L. R. 1 Q. B.* 149, and 14 Week Rep. 144; *Vick v. N. Y. etc. R. R.* 95 N. Y. 267; *Brick v. Rochester, etc. R. R.* 98 N. Y. 211.

Car repairer of cars on track in yard and "car dropper."

Campbell v. Pa. R. R. Co. 17 W. N. C. 73; *S. C. 2 Cent. Rep.* 46, and cases cited.

The general rule is that where a servant in the employment of his master does an act which he is not employed to do, the master is not responsible.

Towanda Coal Co. v. Heeman, 86 Pa. 418; *Sheridan v. Charlick*, 4 Daly, 388, cited and approved in *Towanda Coal Co. v. Heeman, supra*; *Bard v. Yohn*, 26 Pa. 482.

It was not necessary to show a want of authority from the Company to run the engine.

Flower v. Pa. etc. R. R. Co. 69 Pa. 210.

Messrs. S. J. Strauss and John Lynch, for defendants in error:

If the act of Carman in running the engine was unauthorized, it was a matter for positive proof in defense and for the jury.

Lackawanna & B. R. Co. v. Chenevix, 52 Pa. 382; Whart. Neg. §§ 167, 171, 179.

The moment Greiner quit work for the day and left the shop on his way home, the relation of master and servant between him and the Company ceased. He was no longer, if so at any time, a fellow servant of Carman.

Baird v. Pettit, 70 Pa. 477.

"A passenger is a person who rides upon the company's trains, with its assent, not at the time being in its employ; and any evidence which shows such assent is sufficient to create the relation."

Pa. R. R. Co. v. Price, 96 Pa. 256; Wood, Ry. Law, § 298, p. 1045; *Phila. etc. R. R. Co. v. Derby*, 14 How. 468 (55 U. S. bk. 14, L. ed. 802); Wood, Ry. Law, 1040, note 2.

It is sufficient that a person is upon the train with the assent of the company, although he is to be carried free.

Phila. etc. R. R. Co. v. Derby, supra; *Crosby v. Pa. R. R. Co.* 86 Pa. 189.

Greiner had quit work for the day, at the shops where he was employed. He was no longer "engaged or employed," and was not

therefore included in the "third class" designated by *Mr. Justice Paxson* in *Pa. R. R. Co. v. Price*, 96 Pa. 256.

See also *Baird v. Pettit*, 70 Pa. 477.

"No matter how negligent I may have been in putting myself in a particular position, I can recover for injuries inflicted on me by a party who could have avoided injuring me by the exercise of the ordinary care which is usual with prudent persons under the circumstances."

Whart. Neg. §§ 325-327. See also *Priest v. Nichols*, 116 Mass. 401.

Where a passenger upon a railway car was himself guilty of a want of care, but it did not contribute to the accident whereby he was injured, or only remotely contributed to it, he will not thereby be prevented from recovering.

Thirteenth, etc. R. Co. v. Boudrou, 92 Pa. 475; *Creed v. Pa. R. R. Co.* 86 Pa. 139.

To defeat recovery the negligence of the party injured must have been of such a character as to draw on him the injury.

Whart. Neg. § 130.

The doctrine of contributory negligence ceases when the person inflicting the injury was guilty of gross negligence.

Whart. Neg. § 131.

The plaintiffs' case did not establish negligence on the part of Greiner which contributed to his injury. That was a part of the defense, and was therefore for the jury.

Weiss v. Pa. R. R. Co. 79 Pa. 387; *Pa. R. R. Co. v. Weber*, 76 Pa. 157; *Schum v. Pa. R. R. Co.* 16 W. N. C. 305; *Johnson v. West Chester & Phila. R. R. Co.* 70 Pa. 857; *Germantown, etc. R. Co. v. Walling*, 97 Pa. 55.

Where a man is guilty of negligence which produces mischief to another, he has no right to say part of that mischief would not have occurred, if you had not been guilty of wrong; when the plaintiff's negligence forms no part of the immediate cause of the accident it cannot be set up.

Greenland v. Chaplin, 5 Wels. H. & G. 243.

So where plaintiff, contrary to the rules of the company, is in one part of the mine where he is injured by insufficient machinery, this is no defense.

Shearm. & Redf. Neg. p. 32, note 2.

While standing on the platform of one of a train of cars going very slowly over a long bridge in Pennsylvania just after leaving the depot, plaintiff was injured by a collision resulting from a defect in a car. He sued the company. Held, that under all the circumstances the question of his contributory negligence was for the jury.

Goodrich v. Pa. & N. Y. R. R. & Canal Co. 29 Hun, 50.

A passenger on a ferry boat approaching the landing bridge stood outside of the chain. The boat collided with the wharf or bridge; the passenger was injured. Held, not a question of contributory negligence and for the jury.

28 Alb. L. J. 3. See also *Stringham v. Stewart*, 1 Cent. Rep. 779.

A company which, although not doing a general business as a carrier of passengers, uses a track, an engine and cars to carry its workmen to and from their work, and allows other passengers to ride, and receives payment for such carrying, is bound to keep its means of transportation reasonably safe and sufficient,

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and is liable to a person who, while carried for pay on its engine, is injured by a defect which might have been prevented.

Millwood Coal and Coke Co. v. Madison, 1 Cent. Rep. 836.

It is not contributory negligence *per se* for a passenger to ride on the lower step of the front platform of a crowded street car without objection by the driver.

West Phila. Pass. R. Co. v. Gallagher, 16 W. N. C. 418.

Mr. Justice Clark delivered the opinion of the court:

It is a principle of law, well settled in this State, that where a man negligently and without excuse places himself in a position of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened. *Gould v. McKenna*, 86 Pa. 302.

The true test is found in the affirmative of the question, Did the plaintiff's negligence directly contribute in any degree, to the production of the injury complained of? If it did, then there can be no recovery; if it did not, it is not to be considered. *Creed v. Pa. R. R. Co.* 86 Pa. 139; *Phila. City Pass. R. Co. v. Boudrou*, 92 Pa. 480.

The question of negligence is ordinarily a question of fact and ought to be submitted, under proper instructions, to the determination of a jury. Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or where the measure of duty is ordinary and reasonable care and the degree varies according to the circumstances, the question cannot, in the nature of the case, be considered by the court, it must be submitted to the jury. *Gramlich v. Wurst*, 86 Pa. 78.

But where the facts and the inferences therefrom are undisputed, where the precise measure of duty is determinate, the same under all circumstances, where a rule of duty in a given exigency may be certified and accurately defined, the question is for the court and not the jury. *McCully v. Clarke*, 40 Pa. 406; *Reeves v. R. R. Co.* 30 Pa. 454; *Schum v. Pa. R. R. Co.* 107 Pa. 8.

It has been held in a number of cases that it is the plain, imperative duty of a traveler, before crossing the track of a railroad, to stop, look and listen for approaching trains; and his failure so to do in case of injury has been declared, not to be evidence of negligence merely, but negligence *per se*, and therefore a question for the court. *R. R. Co. v. Heileman*, 49 Pa. 60; *Pa. R. R. Co. v. Beale*, 73 Pa. 504; *Reading & C. R. R. Co. v. Ritchie*, 102 Pa. 425.

So, in *O'Donnell v. Allegheny Valley R. R. Co.* 59 Pa. 239, it was held that, regardless of the rules of a railroad company, the baggage car of a passenger train is an improper place for a passenger to ride, unless under the circumstances it appears that he is riding there by the permission of the conductor and for the benefit of the company.

In *Pa. R. R. Co. v. Langdon*, 92 Pa. 21, it was said the baggage car is a known place of danger; it differs from the cowcatcher and the platform in this respect only in degree; and a passenger who voluntarily left his proper place in the passenger car of a railroad company, in violation of the rules, to ride in the baggage car, or other known place of danger, could not recover for an injury thus received partially in consequence of his own act.

So in *Camden & At. R. R. Co. v. Hoosey*, 99 Pa. 492, a passenger, owing to the crowded condition of the cars, was unable to find a seat; although there was standing room inside, he stepped outside under the pretense of finding a seat in another car, but remained upon the platform, where by a jolt of the cars he was thrown to the ground and injured; it was held that he had been guilty of such contributory negligence as to preclude his right of recovery, and that the court should so have instructed the jury. "Assuming for the present," says our brother Sterrett in that case, "that the company was justly chargeable with negligence resulting in injury to the plaintiff below, and that under the circumstances he was not guilty of contributory negligence, in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be gross negligence in him to voluntarily take a position near the outer edge of the platform and remain there until by an ordinary jolt of the car he lost his equilibrium and was thrown off?"

So in *Payne v. Reese*, 12 W. N. C. 97, an employee of a mining company while engaged in the performance of his duties, fell into a hole in the ground caused by steam escaping from an underground waste way, and it was held, Gordon, J., that if at the time and place of the injury, the plaintiff saw the steam issuing from the ground and deliberately walked into it, and was thus precipitated into the excavation, he was, as matter of law, guilty of negligence which contributed to the accident, and that he could not recover.

In *Phila. W. & B. R. R. Co. v. Stinger*, 78 Pa. 219, it is declared to be the duty of an engineer, when his train is approaching a public highway, if danger is to be apprehended, to give a proper warning, by the whistle or otherwise, and that a failure so to do is negligence *per se*.

On the other hand, in *Pa. R. R. Co. v. Barnett*, 59 Pa. 265, it was said to be negligence to sound the alarm whistle under a bridge, while a traveler was in the act of passing over it.

In all these cases the act complained of, whether of omission or commission, was an act unaffected by any circumstance which might vary or shift the standard or degree of care; and in cases of this character when the facts and inferences fairly arising therefrom are undisputed, the question of negligence is one for the court and not for the jury.

In the case at bar it is undisputed that Greiner, at the time of the injury, was riding on the rear end of the tender, sitting upon the platform, which was only ten inches wide, with his legs and feet extending down over the end of the platform at the side of the tender. This was, of course, a place of known danger; any man of common sense must have known that this was a place of great peril, and especially was

this so, on account of the peculiar construction of the gondola, and of the tender, of which the deceased had been informed; the former stood upon a truck eleven inches higher than the latter; so that, in the event of a slight collision, the truck of the gondola was liable to mount and ride upon the truck of the tender.

As was said in *Little Rock, etc. R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10: "There are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy and so plainly not designed for his reception that his presence there will constitute contributory negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position; a passenger who voluntarily and unnecessarily rides upon the engine or the tender, or upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind and of ordinary intelligence."

The gondola had been fitted up expressly for the purpose; it was provided with seats for the workmen to occupy, and it is not alleged that there was insufficient room for all; there was no necessity and therefore no excuse for anyone to leave the place provided, to sit upon the narrow platform of the tender. Nor is it disputed that Greiner had been warned, repeatedly warned, of the danger he incurred. His fellow workmen on many different occasions, some of them referring to their experience as railroad men, told him not to sit there; that it was a dangerous place; to some, he said he could get off easier, to others, that he could take care of himself and to others, it was none of their business. Matthew Watt told him it was a dangerous place; he showed him how little it required to raise the gondola over the bumper or platform of the tender in front of it, not more than a couple of inches, and that if the engine should run off the track, or any accident occur and he should happen to lose his hold and fall off, he was in a place of the greatest danger. The answer he made to this was "Mind your own business."

Mr. Drumbheller, the master mechanic, testifies:

Q. Where do you work?

A. At the Lehigh Valley shops.

Q. What is your business there?

A. Master mechanic.

Q. How long have you been there at work?

A. I have been there since the shop has been built, since '72 or '71.

Q. Were you acquainted with Greiner?

A. Yes, sir.

Q. Whether in coming down on that train had you noticed him sitting between the cars?

A. I have, yes, sir.

Q. Did you ever say anything to him on the subject?

A. I did.

Q. State what you said to him?

A. I told him that was a dangerous place; it was dangerous for him to sit there.

Q. Did you tell him that more than once?

A. I did.

Q. How many times?

A. I cannot tell you how many times, a number of times, though.

Q. Was it a dangerous place?

A. It was a dangerous place. He was in danger of dropping off on to the rail and having the rear car run over him.

Q. Was it dangerous on any other account?

A. There was danger of being run into—anything like that, the cars colliding, being in between them.

Q. Whether that is not the most dangerous place on the train?

A. I should think so. I should consider it so.

Q. What did Greiner say when you warned him that that was a dangerous place?

A. Oh, he said that he was all safe there; would leave the place reluctantly; that was on one or two occasions he done that.

Q. That is to say, when you spoke to him he got out of it?

A. Yes, he got out, but he got out reluctantly; he thought he was safe there, perfectly safe.

Q. That is what he said, is it?

A. Yes, sir.

He was, therefore, at the time of the injury in a place of known danger; he had been repeatedly warned of the fact; he was ordered by his employer to occupy some other place, which order he sometimes sullenly obeyed. He put himself in this place of danger voluntarily, and recklessly and persistently continued to occupy it, in violation of the express direction of Mr. Drumheller, and in disregard of the often repeated warnings of his friends and fellow workmen. It is beyond all contradiction that the occupancy of this place of danger caused or contributed to his death; if he had been sitting on the gondola, or even upon the engine or the tender, he could not have been harmed, the only effect of the collision being to cause the gondola to ride on the platform of the tender, where the deceased was sitting.

Very similar to this is the case of *R. R. Co. v. Jones*, 95 U. S. 439 [Bk. 24, L. ed. 506]; Jones was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box car was assigned to their use. Although on several occasions forbidden to do so, and warned of the danger, Jones on returning from work one evening rode on the pilot or bumper of the locomotive when the train, in passing through a tunnel, collided with cars standing on the track, and he was injured. There was ample room for him in the box car; all in it were unhurt. It was held that as he would not have been injured had he used ordinary care and caution, he was not entitled to recover against the company.

Mr. Justice Swayne, delivering the opinion of the court, says: "The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little if not less time than it took to climb to the pilot. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late and that he must hurry, this

was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

If the testimony in this case is true, and it is neither contradictory nor conflicting, nor are the witnesses discredited, Greiner was, without doubt, guilty of the grossest negligence, and the court should have so instructed the jury.

The fourth and fifth assignments of error are therefore sustained.

The view we have taken of this case renders it wholly unnecessary that we should consider the remaining questions upon the record.

The judgment is reversed.

Lewis HECK, *Plff. in Err.*,
v.

Eugene BORDA.

1. A lease of an iron property, which was to continue as long as a royalty of \$1,000 a year was paid and which gave the lessor the option to terminate the lease upon the nonpayment of the royalty and further contained a provision for expending 25 per cent more than the first year's royalty in putting the furnace in working order, is a lease from year to year and not a lease at will.
2. In an action upon a covenant in such a lease, it was error for the court below to grant a nonsuit on the ground that it was a lease at will and that the tenant, before breach, had assigned his interest; the case should have been submitted to the jury on the evidence tending to prove breach of covenant.

(Decided October 4, 1886.)

ERROR to Common Pleas No. 3 of Philadelphia County, to review a judgment of compulsory nonsuit. *Reversed.*

This was an action of covenant brought by Lewis Heck, the lessor, against Eugene Borda, the lessee, for a loss by fire. The claim is based on the two following covenants:

"Should this lease terminate from any cause, the said party of the second part agrees to leave the property in as good condition as when put in blast, wear and tear excepted."

"In case of stoppage, the party of the second part agrees to furnish a watchman, or protect the property by insurance."

The material provisions of the lease are set out fully in the opinion.

The lessee, Borda, remained in possession under the lease until 1882, when he transferred the lease to Knotwell who went into possession and afterward, on May 11, 1882, the furnace property was injured by fire. Whereupon this suit was brought on the above covenants.

It was conceded that the fire took place during a "stoppage" and that there was no insurance, and there was some evidence that no watchman had been employed by the defendant.

The defendant, at the conclusion of the plaintiff's testimony, moved for a compulsory nonsuit, on the ground that the lease created an estate at will only and that the assignment prior to the fire put an end to it. The nonsuit was granted and subsequently the court *in banc* refused to take it off. Plaintiff took this writ assigning for error this action of the court.

Mr. J. Howard Gendell, for plaintiff in error:

It may be conceded that an estate at will is so infirm in its nature that it cannot be assigned, but an assignment with notice to the landlord puts an end to it. But this rule applies only to estates at will of the simplest kind; that is, to those which are absolutely terminable at any time, at the mere will or caprice of either party, without prior notice, according to the definition in Co. Litt. 55 a.

Any strengthening whatever of the tenant's estate will give him an interest which can be assigned. No one, for instance, doubts the assignability of an estate from year to year.

Taylor, Land. & T. § 58; 4 Kent, Com. 114.

There is nothing in the words of the lease or in the mode of creating the estate to prevent it being an estate for life. The words, "lease," "lessor," "lessee," "demise," "grant," etc., etc., apply to estates for life as well as to those for years, etc.

2 Bl. Com. 317, 318; Litt. 57 (Co. Litt. 42 b.)

Where no definite term is mentioned, the grant is construed to convey the largest estate possible; *i. e.*, where there are no words of inheritance, an estate for life.

2 Bl. Com. 120, 121; 4 Kent, Com. 25; Taylor, Land. & T. § 52.

Every indefinite estate is an estate for life, although it may terminate earlier, even if the termination is by the act or default of the lessee. This rule is quoted in all the text books, from 2 Bl. Com. 121, Co. Litt. 42 a.

Among the examples of life estates given by Coke (*supra*) are these—"If a man grant an estate to a woman *dum sola fuit, or durante viduitate, or quamdiu se bene gesserit*, * * * or so long as the grantee dwell in such a house, or so long as he pay £10, * * * or for any like uncertain time, which time as Bracton saith, is *tempus indeterminatum*."

"If a man make a lease of a manor that at the time of the lease is worth £20 per annum to another, till £100 be paid, in this case because the annual profits of the land are uncertain he hath an estate for life."

This passage from Co. Litt. is cited as law in all the text books.

Woodfall, Land. & T. 5th Lond. ed. 1843, 70; Taylor, Land. & T. § 53; Wood, Land. & T. § 56; 4 Kent, Com. 26; Bisset, Life Est. 7; Cruise, Real Prop. 106, §§ 6-8; 1 Washb. Real Prop. 88, 89.

Our case falls within the very words of one of the examples given. The estate was to continue as long as the lessee paid a certain sum.

A lease to a tenant as long as he may desire to use the house for a drug store creates an estate for life, determinable by failure to use it.

Thomas v. Thomas, 2 C. E. Green, 256.

So, a lease during the time that salt works should be erected and used on the land creates an estate for life, subject to be defeated.

Hurd v. Cushing, 7 Pick. 169.

The introduction of words of inheritance would make the estate a fee simple determinable. A demise to A. B., his heirs and assigns for such time as he pays rent, etc., is a perpetual lease. On default, the lessor only and not the lessee may elect to consider it forfeited.

Folts v. Huntley, 7 Wend. 210.

A lease for 100 years, with provision that the lessee, his heirs and assigns, may hold the premises so long as he and they shall think proper after the expiration of the term, at the same rent, is not determinable by the lessor after the end of the term; at least not without making compensation for improvements.

Lewis v. Effinger, 30 Pa. 281, 286.

If we are wrong respecting the life interest, this is at least an estate from year to year, and therefore assignable.

Taylor, Land. & T. § 58; 4 Kent, Com. 114.

"At this day a tenancy at will cannot arise without express grant or contract. All general tenancies * * * are by implication and constructively from year to year."

2 Preston, Abstracts of Title, 25.

There are no express words in this lease reducing the term from such an estate to one at will only. The presumption is that it is from year to year.

Wood, Land. & T. § 22, p. 66.

A tenancy at will exists only nominally, and is, in fact, a tenancy from year to year.

Logan v. Herron, 8 Serg. & R. 478; *Clark v. Smith*, 25 Pa. 137.

In no authority is the rule stated weaker than in Taylor's Landlord & Tenant, §§ 55, 59 and 61, in which it is said in substance that if any circumstances, payment of rent or otherwise, appear referable to an annual holding, the term is from year to year, and not at will.

Certain cases in Massachusetts were cited by the defendant in the court below. These are not authority, for in Massachusetts and Maine there is no tenancy from year to year.

Taylor, Land. & T. § 61.

It is admitted to be a breach of the covenant to restore in good condition, unless that covenant is affected by a subsequent clause.

Hoy v. Holt, 91 Pa. 88.

That subsequent clause "In case of destruction by fire or storm, necessitating the stoppage of the furnace, the repairs of the same will be a matter of mutual agreement." Being an independent covenant, it neither supercedes, qualifies, nor restricts the prior covenant. A covenant to repair is neither superseded, nor qualified, nor restricted as to amount by a covenant to insure for a specified amount.

Dugby v. Atkinson, 4 Campb. 275.

The covenant to furnish a watchman or protect by insurance was also broken. The burden of proof of compliance with this covenant was on defendant. Where a matter is peculiar-

ly within the knowledge of the other party, he must prove it.

Greenl. Ev. §§ 74, 79.

Messrs. Crawford & Dallas, for defendant in error:

"Leases for an uncertain time are *prima facie* leases at will."

Wood, Land. & T. ed. 1881, p. 32.

"A person who goes in under an agreement that he may occupy * * * until a certain contingency happens, and generally, without stopping to recapitulate all the special instances in which a tenancy at will may arise, it may be said that in all cases, where a person enters into the possession of the premises of another by his permission, no definite term of occupancy binding upon the parties being agreed upon, he is a mere tenant at will, and this, too, irrespective of the question whether he occupies rent free, or pays rent therefor."

Id. p. 38, 84.

"In order to create a tenancy into a tenancy for an uncertain period from year to year, there must be a reservation of an annual rent; and unless there is such a reservation, the tenancy is *prima facie* only a tenancy at will."

Id. pp. 84-6.

"The courts latterly are inclined to construe all leases at will at an annual rent, as leases from year to year. But when the lease in terms creates only a tenancy at will, the fact that rent is reserved, and paid in pursuance of such reservation, does not change the character of the tenancy. The intention of the parties if clearly expressed will control."

Id. pp. 87-8, referring to *Bastow v. Cor*, 11 Q. B. 122, where the court held that the meaning of the reservation is that the tenant shall pay at such rate during the time for which he may occupy.

The reservation of a yearly rent is not inconsistent with a tenancy at will.

Dixie v. Davies, 7 Wels. H. & G. 89; Co. Litt. 556; *Walker v. Giles*, 6 C. B. 662.

In *Murray v. Cherrington*, 99 Mass. 229, a written lease of a house at a certain annual rent for a term to begin when said house is suitable for occupancy by the lessee, and undefined in duration, except by a stipulation that if, after two years from the time when the lessee should move in, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such term as may be agreeable to us both," was held to create only a tenancy at will and the provision respecting the two years was held not to change that construction.

This lease was in writing, and it is only parol leases that are by statute made leases at will only, in Massachusetts, where leases from year to year do exist. The plaintiff in error is in error in stating that there is no tenancy from year to year there. See the references to his citation of Taylor, Land. & T. p. 61; *Aukley v. Warner*, 11 Gray, 48.

See also *Gardner v. Hazleton*, 121 Mass. 494; *Say v. Stoddard*, 27 Ohio St. 478; *Lewis v. Effinger*, 30 Pa. 281-5; and *Effinger v. Lewis*, 32 Pa. 367.

It is the lessee's will which was exercised here, so that it is not material to consider the effect of the will of the lessor.

The suggestion that if the tenancy were at

the will of the lessee, by the old law it must also be at the will of the lessor (Wood on Landlord & Tenant, page 81 and references there), and therefore the lessor could, after the lessee had made large expenditures for material, terminate the lease to the lessee's great injury, is an error, as in Pennsylvania a lease at the will of the lessee would not have that consequence.

Lewis v. Effinger and *Effinger v. Lewis*.

If it were a license merely, revocable at will, if on the faith of it the licensee had made large expenditures, the licensee would have an equity against revocation without compensation, an estoppel founded on equity only, not a common-law term of years under a lease, although such a lease or license would still be at the will of the lessee or licensee.

It is not disputed that a tenant at will may end his tenancy at any time he pleases, *instantly*, and without notice. And any act of the tenant declaring it at an end, or inconsistent with his tenancy, as by assignment and notice thereof to his landlord, will terminate it.

Wood, Land. & T. pp. 47, 49.

And the defendant's letter of May 11, 1882, one year before the fire, declared both his termination of his own tenancy and his assignment to Knotwell.

Notwithstanding the prevalent theory that the general rule is well expressed by saying that the burden of proof lies on the party who asserts the affirmative of the issue, yet the true view is that the burden is upon the party undertaking to prove a point. Whether the party desiring the judgment of the court asserts an affirmative or a negative proposition, on him lies the burden of proof. And such is the Roman law.

Wharton on Evidence, 2d ed. §§ 353-355.

Whenever the plaintiff bases his action on a negative allegation, the burden is on him to prove such allegation.

Id. note 1, p. 308; *Id.* § 357; and cases referred to; 1 Phillips, Evidence, *812; *Amos v. Hughes*, 1 Moody & R. 464; *Mills v. Barber*, 1 Mees. & W. 427; *Peck v. Houghtaling*, 35 Mich. 127.

See also *Sonard v. Leggett*, 7 Carr. & P. 615; *Belcher v. McIntosh*, 8 Carr. & P. 720; *Osborn v. Thompson*, 9 Carr. & P. 337; *Shilcock v. Passman*, 7 Carr. & P. 291; *Bell v. Reed*, 4 Binn. 127; *Chambers v. Jaynes*, 4 Pa. 39; *Sartwell v. Wilcox*, 20 Pa. 117; *Hubbard v. Wheeler*, 17 Pa. 425; *Patterson v. Bank*, 4 Watts & S. 42.

Mr. Justice Sterrett delivered the opinion of the court:

This action of covenant by lessor against lessee, for damages by fire, is based on the two following covenants in the lease, viz.: 1. "Should this lease terminate from any cause the said party of the second part agrees to leave the property in as good condition as when put in blast, wear and tear excepted." 2. "In case of stoppage the party of the second part agrees to furnish a watchman, or protect the property by insurance."

The lease under seal, dated January 17, 1882, was duly executed, acknowledged and recorded. After describing the demised premises, consisting of about fifteen acres of land on which

were erected a blast furnace and other buildings used in connection therewith, the lease provides as follows: "This lease or grant to continue as long as the said party of the first part receives a revenue of no less than \$1,000 a year royalty on account of iron made, or on account of iron to be made; and the said party of the first part further agrees that he will at any time within three years of this date sell and convey by good and sufficient warrantee deeds, all of the above described property for the sum of twenty thousand dollars (\$20,000) payable, etc. * * * and the party of the first part further agrees that he will allow one half of the expense of putting the furnace in working condition; provided however that his half shall not exceed \$1,250." In consideration thereof the lessee agrees to pay "fifty cents per ton of twenty-two hundred and sixty-eight pounds for each and every ton he may make at said furnace. Payments to be made at the furnace office on or before the 15th day of each month."

"The amount to be expended in putting the furnace in working order (the half of which as herein before stated is not to exceed \$1,250) is to be paid out of the first accruing rent."

"It is also expressly understood that in case the party of the second part fail to pay to the party of the first part a royalty of at least \$1,000 per year, this lease shall at the option of the party of the first part become null and void."

If the lease gave defendant no greater interest in the premises than a mere tenancy at will, it must be conceded that the judgment of nonsuit was rightly entered; but, on the other hand, if it vested in him at least a tenancy from year to year, as we think it did, the case should have been submitted to the jury on the evidence tending to prove the breaches of covenant declared on. It is unnecessary to refer to the evidence tending to sustain the breaches assigned. Suffice it to say, the testimony on that subject is quite sufficient to have warranted its submission to the jury.

The provisions of the lease above quoted clearly show it was intended to create at least a tenancy from year to year. It is to continue as long as the royalty of \$1,000 a year is paid. The express authority to terminate the lease in the event of nonpayment of the minimum annual royalty tends also to exclude the inference of power to terminate it at will. It cannot be an estate at will unless terminable at the will of either party. The provision of expending 25 per cent more than the first year's minimum royalty in putting the furnace in working order also shows conclusively that the tenancy at will was not contemplated by the parties. The lease given in evidence should have been construed to be a lease from year to year, and the case should have been submitted to the jury on the evidence tending to prove breaches of covenant on the part of the lessee.

Judgment reversed and a procedendo awarded.

Clinton LEVAN *et al.*, *Plffs. in Err.*,

Mary A. MILHOLLAND *et al.*

1. A judgment against administrators *de bonis non*, of a deviser, with notice

to his devisees for life and in remainder, under section 24 of Act of June 16, 1836, *Purd. Dig.* 108, pl. 28, has all the effect of a judgment *de terris*; and a sheriff's sale under such judgment divests a title under the devise.

2. In actions against executors or administrators of a decedent who has left real estate, where the plaintiff intends to charge such real estate with the payment of his debts, the widow and heirs or devisees, or the guardians of such as are minors, are proper parties.

3. A sheriff's return, that he served the summons in a case on the guardian of a minor, cannot be contradicted in a collateral action.

4. A reversal of a judgment, after a sheriff's sale of real estate thereon, cannot affect the title of the purchasers at such sale.

5. After acknowledgment of a sheriff's deed the title of the sheriff's vendee cannot be affected by mere irregularities, however gross.

6. An erroneous judgment or an irregular execution, not void, can be set aside only by direct and appropriate action by parties having an interest in the same, and not by a collateral attack under cover of any other proceeding.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Berks County, to review a judgment in favor of defendants in ejectment. *Affirmed.*

The facts and questions raised are stated in the opinion.

Mr. E. H. Deysher, for plaintiffs in error:

The Act of February 24, 1834, § 34, P. L. 77, provides that "In all actions against the executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debt, the widow and heirs or devisees, and the guardians of such as are minors, shall be made parties thereto. * * * And if notice of such writ shall not be served on such widow and heirs or devisees and their guardians, the judgment obtained in such action shall not be levied or paid out of the real estate of such widow, heirs or devisees as shall not have been served with notice of such writ."

The plaintiff should first proceed on a judgment against the executor or administrator. Having obtained such a judgment, the next step is a *scire facias* against the owners of the land.

Atherton v. Atherton, 2 Pa. 112.

The record of the action admitted in evidence shows upon its face that a rule to arbitrate was taken in the action before a guardian was appointed for the minor children of Albert Miller, and before application to the court for the appointment of such guardian, and that at no time during these proceedings was there an appearance for them by guardian or otherwise, and that it does not show that at any time was there a guardian appointed for them. This method of procedure is in direct violation and utter disregard of the provisions of the Act of June 13, 1836, § 88, art. III, P. L. 587.

The return of the sheriff was not conclusive as to the guardianship of Bright, as was held by the court below.

Act March 29, 1882, §§ 2, 5, P. L. 190; *Meredith v. Shevall*, 1 Penr. & W. 495; *Coulter v. Selby*, 39 Pa. 358; *Mitchell v. Hamilton*, 8 Pa. 486; *Dengler v. Kiehner*, 13 Pa. 88; *Drum v. Kelly*, 34 Pa. 415.

The purchaser of the real estate at a sheriff's sale, based upon the judgment, was bound to take notice of the defects appearing upon the face of the proceedings in which it was obtained. The rule of *caveat emptor* applies to sheriffs' sales. In a sheriff's sale there is no warranty of title.

Smith v. Painter, 5 Serg. & R. 223.

Messrs. Louis Richards and Cyrus G. Derr, for defendants in error:

The award of arbitrators in the case of Solomon Ely against the administrator *cum testamento annexo* of Anthony F. Miller, deceased, and against his devisees, has the effect of a judgment of the court.

Sec. 24, Compulsory Arbitration Act, June 16, 1886, Purd. Dig. 108, pl. 28.

The joining, as defendants, of the devisees with the administrator *cum testamento annexo* in the action of Solomon Ely was, under the provisions of the Act of February 24, 1884, § 34 Purd. Dig. 530, pl. 112, correct and proper.

Murphy's App. 8 Watts & S. 165; *Atherton v. Atherton*, 2 Pa. 112; *Dingman v. Amstink*, 77 Pa. 114.

A mistake in practice will not render a judgment void, nor will it avoid the title of a purchaser at a sheriff's sale, held pursuant to process issued upon such judgment.

Freem. Judg. § 185; Act 1705, § 9, Purd. Dig. 597, pl. 152; *Speer v. Sample*, 4 Watts, 376; *McFee v. Harris*, 25 Pa. 102; *Wilkinson's App.* 65 Pa. 189; *Atkinson v. Tomlinson*, 91 Pa. 284; *Hering v. Chambers*, 108 Pa. 172.

The return of the sheriff that he had served the summons personally on "Francis Bright, guardian of the minor children of Albert Miller," etc., was conclusive of the fact that Francis Bright was the guardian of the said children; and the said return cannot be contradicted.

Kleckner v. Lehigh Co. 6 Whart. 66; *Kennard v. R. R. Co.* 1 Phila. 41; *Patton v. Ins. Co.* 1 Phila. 896; *Commonwealth v. R. R. Co.* 1 Pears. 241; *Mentz v. Hamman*, 5 Whart. 150; *Flick v. Trozsell*, 7 Watts & S. 65; *Zion Church v. St. Peter's Church*, 5 Watts & S. 215; *Bennwood Iron Works v. Hutchinson*, 12 W. N. C. 495; *Troubat & H. Pr.* § 260; Act June 18, 1886, § 82, Purd. Dig. 71, pl. 6; Freem. Judg. § 181.

Mr. Justice Sterrett delivered the opinion of the court:

Both parties to this action of ejectment claim under Andrew F. Miller, who in 1868 devised the land in controversy to his wife and sister for their joint lives and the life of the survivor, with remainder in fee to the children of Albert Miller, who were then minors, but are now adult plaintiffs, claiming as devisees in remainder. The defendants claim through a sheriff's sale on a judgment against the administrator *de bonis non*, etc., of Andrew F. Miller, the devisor, with notice to his devisees for life and in remainder.

In the suit against the administrator, the summons was returned by the sheriff, served on the administrator, *de bonis non*, etc., the life tenants, and "Francis Bright, guardian of the minor children of Albert Miller." Arbitrators, chosen after due notice, awarded in favor of plaintiff and against the defendants in that suit. The award unappealed from had all the effect of a formal judgment *de terris*. A writ of *feri facias* was issued, and in due course a writ of *renditioni exponas* was issued, on which the property was sold to Benjamin Tyson for \$78,000. The purchase money having been paid to the sheriff, part of it was applied to judgments obtained against Andrew F. Miller, the devisor, in his lifetime, and the residue was ordered paid to the administrator *de bonis non*, etc., upon his giving bond as required by Act of Assembly.

Under the devise to them in remainder, plaintiffs of course have a *prima facie* case; but defendants, having acquired title by mesne conveyances from the purchaser at sheriff's sale, contend that they are invested with such title as the devisor had at and immediately preceding his decease; and consequently the title which otherwise would have been complete under the devise was divested by the sheriff's sale. This position is undoubtedly correct, unless there is some radical defect in the judgment itself, or in the proceedings thereunder, that rendered the sheriff's sale not merely irregular and voidable, but absolutely void.

It is claimed by plaintiffs, in the first place, that they were improperly joined as defendants in the original suit against the administrator *de bonis non*, and for this they rely mainly on what was said in *Atherton v. Atherton*, 2 Pa. 112, as to the proper practice in such cases.

The Act of 1884 provides that "In all actions against the executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debts, the widow and heirs or devisees, or the guardian of such as are minors, shall be made parties thereto," etc. The course pursued in the case at bar would appear to be strictly conformable to the Act; but, assuming the correct practice to be as stated in the case above cited, making the devisees defendants with the administrator *de bonis non*, was at most an error in practice, which might have been corrected, but which, passing unnoticed, did not affect the validity of the judgment. The court undoubtedly had jurisdiction of all the parties as well as of the subject matter; and conceding for the sake of argument that there were irregularities or even errors that might have been corrected if they had been complained of in time, it does not follow that either the judgment or the proceeding thereunder was void. That question has been so often considered and uniformly decided against the contention of plaintiffs that it is useless further to discuss the matter.

Another ground of objection to the judgment, not apparent on the face of the record, is that the devisees in remainder, the present plaintiffs, had no guardian at the time the summons, according to the return of the sheriff, purports to have been served on "Francis Bright, guardian," etc.; and they proposed to prove, in direct

contradiction of the sheriff's return, that such was the fact. It is scarcely necessary to say that the conclusive effect of the sheriff's return cannot be evaded in that way. If it could, what security would there be in titles based on sheriffs' and other judicial sales? The most that can possibly be said of the judgment, on which the property was sold, is that it might have been reversed, if its regularity had been called in question; but even the reversal of the judgment after the sale could not affect the title of defendants as purchasers at the sheriff's sale.

The Act of 1705 provides "That if any of the said judgments which do or shall warrant the awarding of the said writs of execution, whereupon any lands, tenements or hereditaments have been or shall be sold, shall at any times hereafter be reversed for any error or errors, then and in every such case none of the said lands, tenements or hereditaments, so as aforesaid taken or sold, or to be taken or sold upon executions, nor any part thereof, shall be restored, nor the sheriff's deed or delivery thereof awarded; but restitution in such cases only of the money or price for which such lands were or shall be sold."

The record of the judgment in question discloses nothing that was clearly erroneous, certainly nothing that rendered the judgment void or insufficient to sustain the execution. Being thus regular on its face, the purchaser was not bound to inquire as to the truth of what is there averred. He had a right to accept all the essential averments as verity.

In *Speer v. Sample*, 4 Watts, 376, it was adjudged that "An execution issued upon a judgment after the death of the defendant is not absolutely void, but only voidable; and a sale of land upon such execution vests in the purchaser a good title."

In the interest of debtors and on grounds of public policy courts have always inclined to sustain judicial sales, especially when made under the judgments or decrees of courts possessing general jurisdiction of the subject and after being fairly carried into execution. After acknowledgment of a sheriff's deed in open court, the title of the sheriff's vendee cannot be affected by mere irregularities however gross. *McFee v. Harris*, 25 Pa. 102.

The same principle is reiterated in many cases, among which are: *Wilkinson's App.* 65 Pa. 189; *Atkinson v. Tomlinson*, 91 Pa. 284; *Hering v. Chambers*, 103 Pa. 172.

In *Wilkinson's App. supra*, an execution had been issued on award of arbitrators, immediately after filing the award and before the time for appeal had elapsed, and the court in sustaining the sheriff's sale made by virtue of the execution said: "It is settled, if anything can be, that an erroneous judgment or an irregular execution (not void) can be set aside only by direct and appropriate action by parties having an interest in the same and not by a collateral attack under cover of any other proceeding."

A return of *nulla bona* to the writ of *fieri facias* was not a prerequisite to the issuing of the *venditioni exponas*.

It is unnecessary to notice the remaining specifications of error. There is no merit in either of them.

Judgment affirmed

APPEAL OF James HOAR and Adam D. Swope.

Persons who would be first entitled to letters of administration in case of intestacy are, unless disqualified, entitled to **letters of administration pendente lite** granted in the case of a contested will.

(Decided October 4, 1886.)

A PPEAL from a decree of the Orphans' Court of Lancaster County, revoking letters of administration granted to appellants by the register. *Reversed.*

November 18, 1885, John B. Hoar died, leaving eight children. His will dated December 19, 1881, named William C. Hoar his brother, as executor. Probate thereof was resisted before the Register of Wills of Lancaster County by a portion of the children, on the ground of want of testamentary capacity. The register after a hearing refused to admit the will to probate, and also to grant letters of administration to the executor named therein, but granted letters to James Hoar, the eldest son, and Adam D. Swope, a son-in-law of decedent. On appeal by a portion of the children to the orphans' court these letters were revoked and the register was directed to grant letters of administration *pendente lite* to William C. Hoar, whereupon said James Hoar and Adam D. Swope appealed.

Messrs. D. G. Eshleman, Z. Swope and B. Frank Eshleman, for appellant.
Mr. A. C. Reinoehl, for appellee.

Mr. Justice Green delivered the opinion of the court:

When the register of wills granted letters of administration *pendente lite* to the appellants, he certainly had abundant authority of law for his action. Had it been a case of unquestioned intestacy he would have been obliged under the Act of March 15, 1832, par. 22, *Purd. Dig.* 410, to appoint James Hoar or some one in the same class and not disqualified. As James Hoar was not disqualified there was no reason why he should not be appointed, and as Swope was a son-in-law and not disqualified there was good reason for his appointment also.

As the alleged will of the decedent was not probated and a contest over its validity was initiated, there was no sufficient reason for passing by those entitled in case of intestacy and there was nothing to impeach the correctness of the register's action in granting letters to the appellants. We think therefore the learned court below was in error in reversing the appointment made by the register and we feel it to be our duty to reverse the decree of the orphans' court granting letters *pendente lite* to William C. Hoar, who is not one of the class of those entitled, and to reinstate the persons appointed by the register.

Now October 4, 1886, the decree of the Orphans' Court is reversed, and it is ordered that the Register grant letters of administration *pendente lite* to James Hoar and Adam D. Swope upon their giving bond in the sum of \$20,000, to be approved by him. The costs of the appeal to be paid by the appellee.

APPEAL OF C. M. REED *et al.*

1. The special Act of February 20, 1867, repealing so much of an Act as authorized the treasurer of Washington County to grant a license to vend intoxicating liquors by the quart, is inoperative, and does not prevent the granting of licenses to sell intoxicating liquors by the quart in said county, the Act of 1856 having already repealed the Act relating to treasurer's license and vested the power to license in the court of quarter sessions.
2. The omission of the word "moral," in the certificate accompanying the applicant's petition, is not a fatal defect.

3. The action of the court in granting or refusing licenses under the Act of March 22, 1867, being a matter in the discretion of the court, and no appeal being allowed, will not be reviewed.
4. The necessity for a license, under the Act of 1867, is to be ascertained by the number and character of the petitioners for and against each application.
5. The petitions must be directed for or against a particular application or they may be disregarded.
6. The petitioners may be male or female, if they are citizens.

(Decided November 1, 1886.)

NOTE.—Probably no question of practice in the State of Pennsylvania has given rise to so much difference of opinion in the various judicial districts as the exercise of the discretion of the court in granting or withholding licenses to sell intoxicating liquors. As it is not a subject of review, the lower courts have had little light from the supreme court on the proper interpretation of the statute. The language of *Judge Agnew*, in *Schlaudecker v. Marshall*, 72 Pa. 206, has been generally accepted as expressing the duty of the court: "The discretion which the court exercises is a sound judicial discretion, upon the circumstances of each case as it is presented to the court, and not a general opinion upon the propriety or impropriety of granting licenses."

The diversity of opinion arises as to what shall influence the court in exercising this discretion, or, to state the question in another way, what, under the Act of Assembly, shall constitute the evidence of necessity, to move the discretion of the court to exercise the discretion.

The Act of March 11, 1834, empowering the court of quarter sessions to grant licenses provided, § 3, that "No court shall license any inn or tavern which shall not be necessary to accommodate the public and entertain strangers and travelers." After defining, in § 4, the fitness of the person and the accommodations required, section 5 provided that "No court shall license any person to keep an inn or tavern, unless from the petition and certificate, or from their own knowledge, or from evidence sought for and obtained, they shall be satisfied of the fitness of the person applying, and of the sufficiency of the accommodation as aforesaid."

The Act of April 14, 1855, was passed "to restrain the sale of intoxicating liquors."

The Act of March 31, 1856, "to regulate the sale of intoxicating liquors," provided that "licenses should be granted," and in section 7, that "All persons applying or making objections to applications for license may be heard by evidence, petition, remonstrance or counsel."

The Act of April 20, 1858, enacted that licenses should be granted whenever the requirements of the laws on the subject were complied with by the applicant, provided the court should grant or refuse a license in accordance with the evidence.

The Act of April 14, 1859, provided that it shall be lawful for the court "to hear petitions, in addition to that of the applicant, in favor of, and remonstrances against, the application * * * and thereupon to refuse the same whenever, in the opinion of said court, *such inn, hotel or tavern*, is not necessary for the accommodation of the public and entertainment of strangers and travelers;" and providing that the courts "shall have and exercise such discretion, and no other, in regard to the necessity of inns and taverns" as is given by the Act of 1834.

The Act of March 22, 1867, § 1, is as follows: "When an application is made to any court of quarter sessions of this Commonwealth for license to sell intoxicating drinks, it shall be lawful for said court to hear petitions, in addition to that of the applicant, in favor of and remonstrances against the application for such license, and in all cases to refuse the same whenever, in the opinion of the court, having due regard to the number and character of the petitioners for and against such application, *such license* is not necessary for the accommodation of the public and the entertainment of strangers and travelers." It will be seen that this language differs from that of the Act of 1859 in

adding the clause in regard to the number and character of the petitioners, and in using the expression "such license," in place of "such inn, hotel or tavern."

The Act of March 27, 1872, known as the Local Option Act, was passed to permit voters to vote upon the question of granting licenses to sell intoxicating liquors.

The Act of April 12, 1875, repealing the Act of 1872, provided that licenses may be granted and re-enacted § 7 of the Act of 1856, in regard to evidence.

In some districts it is held that it is the necessity for the hotel and not the necessity for a license to sell liquors, which determines whether or not the license shall be granted. *Justin's Application*, 2 Pa. C. C. R. 22; *Boldridge's Application*, 2 Ches. Co. R. 237; *Floyd's License*, 2 Ches. Co. R. 502.

The contrary opinion relies upon the change in the language of the Act of 1867 from that of 1859, and the legislative debates showing that the change was intentional. *King's Application*, 2 Pa. C. C. R. 17; *Derr's Application*, 2 Ches. Co. R. 505; 1 Legislative Record, 523, 524; 2 Ches. Co. R. 151.

These latter citations are also referred to as holding that the necessity is to be determined according to the will of the people in the immediate neighborhood, and the discretion exercised accordingly.

The courts are not bound by the result of a simple count of the names, but may consider also their character, their business relations, their local prominence, and such other circumstances as seem to give value to their opinions, to determine the sentiment of the locality, considering adult women as well as voters. *King's Application*, *supra*. See, also, *Keifer's Application*, 2 Pa. C. C. R. 40.

It has been maintained, on the other hand, that to decide by the majority of petitioners for and against the application is to establish local option, and this could not be the intention of the Legislature as the Act of 1875 expressly repealed the Local Option Act of 1872. In *Re License Applications*, 2 Pa. C. C. R. 30.

Other cases, asserting that the standard of necessity is the accommodation of the public and entertainment of travelers, hold that the sentiment of the neighborhood should prevail, in the absence of absolute necessity or in doubtful cases. *Grant's License*, 2 Ches. Co. R. 73; *Keifer's Application*, 2 Pa. C. C. R. 40; *Severn's License*, 2 Pa. C. C. R. 75; *Smith's License*, 2 Pa. C. C. R. 74.

Necessity must be found affirmatively by the court, but former license is *prima facie* evidence of necessity. This, however, may be rebutted by evidence, or facts within the knowledge of the court, as decrease of travel, the custom of private entertainment of strangers by members of religious societies, etc. *Severn's License*, 2 Pa. C. C. R. 75; *Bourjohn's Application*, 2 Pa. C. C. R. 33.

Applications for renewals are granted where there are no remonstrants. *Justin's Application*, *supra*.

Where a license is revoked, a new application should be treated as for a new house; but that the house was recently licensed should be considered, on the question of necessity. *Rutherford's License*, 2 Pa. C. C. R. 79.

The above cases indicate the diversity of opinion existing in the various districts. The opinion of the supreme court in the case reported above is timely and will no doubt rank with *Schlaudecker v. Marshall*, *supra*, as a leading case on the subject.

[J. M.]

CERTIORARI and Appeal from a decree of the Quarter Sessions of Washington County, granting a license to vend spirituous, malt and brewed liquors by the quart. *Affirmed.*

The petition of Julius B. Clark represented that he was a citizen of the United States, of temperate habits and good moral character, that it was necessary for the accommodation of the public and the citizens of Washington Pa., and vicinity, that liquors be sold in the said Borough of Washington, in quantities less than a gallon. He therefore prayed the court to grant him license to sell vinous, spirituous, malt and brewed liquors, and admixtures thereof, with or without other goods, wares and merchandise, in quantities not less than a quart.

The certificate accompanying the petition, with the names of fourteen signers, certified: "That we are personally acquainted with the petitioner and know him to be a citizen of the United States whose habits are temperate and character good. And we further certify that in our opinion and from our knowledge of him, he is a proper and safe person to be licensed to vend liquors, and in the conduct of said business would observe the letter and spirit of the laws relating thereto."

A supplementary petition, signed by some 700 names, asserted "that, in their judgment, it is necessary for the accommodation of the public and the citizens of Washington, Pa., and vicinity, that the application of the said Julius B. Clark be granted."

A number of different remonstrances, signed by more than 2,000 petitioners, of whom some 1,500 were women, denied that any such necessity existed. They alleged that for all necessary purposes, mechanical, manufacturing or medicinal, alcoholic liquors could be lawfully obtained without this license. Granting the license prayed for would result simply in opening a place for supplying intoxicating liquors as a beverage, without any of the reasons which might be assigned for a hotel license. The remonstrances further asserted in substance that evil influences would result to individuals, the colleges of the town and the community at large, by the granting of the licenses.

The court, *HART, P. J.*, granted the license, in the following opinion:

"The application in this case has been duly advertised. The papers are regular and in substantial compliance with the Act of Assembly. The evidence is uncontroverted that the applicant is a citizen of the United States, a resident of the Borough of Washington, and a man of temperate habits and good moral character; and the bond filed is in due form, and the sureties are substantial.

"But the application is met with a remonstrance, signed by men and women of the borough and vicinity, to the number of about 2,000. On the other hand it is supported by the petition in its favor of more than 700 of those who are represented as legal voters, resident within the same limits.

"These petitions for and remonstrances against the application are made, in a sense, legal evidence by the Act of Assembly—at least the court is bound to receive them, and to allow them such weight as they are fairly entitled to.

468

"It is claimed by the remonstrants that, as the granting or refusal of a license is within the discretion of the court, the judge may refuse to grant, upon such merely moral, social and economic considerations as convince his judgment that a license to vend intoxicating liquors as a beverage cannot be taken to be a necessity in any supposed case whatever, but is and must be in every case wholly unnecessary, and productive of unmixed evil. But the proposition, considered with reference to the legal discretion of the court in such cases, is untenable. If it be so that the court has an arbitrary discretion to grant or refuse licenses, without limitation or control, then, as was well observed in a recent case by the President Judge of the Twenty-Eighth Judicial District, it is in the power of the fifty or sixty quarter sessions judges of the State, outside of the large cities, to practically abrogate the license laws entirely; to substitute in their place a prohibitory law or regulation of their own, and thereby set themselves up above the only constitutional law-making power of the Commonwealth.

"But the nature of the discretion intrusted to the courts in such cases has been defined by the supreme court in *Schlaudecker v. Marshall*, 72 Pa. 200.

"In order to properly understand that case it is necessary to briefly outline the facts as officially reported. By special Act of May 10, 1871, the Court of Quarter Sessions of Erie County was required to appoint annually a board of licensers, with the same authority to grant licenses as the court of quarter sessions had. Schlaudecker, among others, had filed his petition in due form for an eating-house license, and a proper bond, conditioned according to law. The board declined to grant the license. Schlaudecker then obtained a rule from the court of common pleas on the board to show cause why a writ of *mandamus* should not issue to compel them to grant him a license. The board, in response to the rule, showed, *inter alia*, that there were before them, at the time they refused license to Schlaudecker, thirty-one applications for tavern license, eight for wholesale liquor license and ninety-five for eating-house license; of which the board granted twenty-five tavern licenses, six wholesale liquor licenses and thirty-nine eating-house licenses, and they say: 'Judging that they had granted a sufficient number of licenses in those different branches to accommodate the public and entertain strangers and travelers, the respondents did adjudicate upon said application (Schlaudecker's, to wit) and refused the same.' The court of common pleas, after hearing, discharged the rule and refused to grant the *mandamus*; and thereupon Schlaudecker sued out a writ of error. The opinion of the supreme court, affirming the action of the common pleas, was delivered on the 6th of January, 1873—the law being the same then as now in regard to the question of the discretion vested in the courts in regard to the granting and refusal of licenses—the Act of 1875 having, in my judgment, made no change in that respect.

"On the nature and true character of the discretion to be exercised by the court, *Judge* *Le* new says: 'No subject has been productive of more difference of opinion and practice than

this in the different judicial districts of the State; some judges holding it to be obligatory on the court to grant every license where the applicant has brought himself within the provisions of the law as to the terms of his application, and others holding that they are not bound to grant license in any case whatsoever. Clearly, neither opinion is right; the discretion which the court exercises being a sound discretion upon the circumstances of each case as it is presented to the court, and not a general opinion upon the propriety or impropriety of granting licenses. Whether any or all licenses should be granted is a legislative and not a judicial question. Courts sit to administer the law fairly as it is given to them, and not to make or repeal it. The law of the land has determined that licenses shall exist and has imposed upon the court the duty of ascertaining the proper instances in which the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law. The act of deciding is judicial and not arbitrary or willful. The discretion vested in the court is therefore a sound judicial discretion; and to be a rightful judgment it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been heard and duly considered; in other words, to be exercised upon the merits of each case, according to the rule given by the Act of Assembly. To say that I will grant no license to any one, or that I will grant it to everyone, is not to decide judicially on the merits of the case, but to determine beforehand without a hearing, or else to disregard what has been heard. It is to determine, not according to law, but outside of law, and it is not a legal judgment, but the exercise of an arbitrary will.

"That the nature of the discretion, thus clearly defined by Judge Agnew has not, in the opinion of the supreme court, been changed by the Act of 1875, is apparent from *Toole's App.* 90 Pa. 376, decided in June, 1879.

"In the case before us the evidence is, on the one side, that there is no place within the county where liquors can now be lawfully sold as a beverage in less quantities than one gallon. On the other hand it is objected that there is no necessity for a quart license in this borough, or in any other part of the county; that the granting of such license will be productive of great and deplorable evils, and the court is asked by a very large number of citizens generally and specially by ministers of the Gospel, representing nearly all the churches of the town, by the faculty of the College, by the representatives of the Female Seminary, by the members of the Washington Temperance League and by others, to reject this application and save the community from a flood of evils which will, as they believe, surely follow the granting of the license prayed for. All these classes are certainly entitled to be heard, and, in fact, their objections and remonstrances have received the most anxious and respectful consideration. But their reasons for remonstrance are, in my opinion, such as address themselves to the conscience and judgment of the Legislature, rather than to the judicial discretion of the court. They furnish us with most weighty and convincing reasons why the existing state of the law in relation to quart licenses should be repealed; but,

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I regret to say they do not, in my judgment, present any reason why, under the law as it now is, this license should not be granted.

"As the law now stands it distinctly recognizes the right of the people to use intoxicating liquors as a beverage and for domestic uses. The same law provides, among other things, for the granting of quart licenses to accommodate the public. There is, at present, no such license extant in the county. More than half the voters resident in the town and many in the vicinity have signed petitions asking that such license be now granted. The applicant appears to be a proper person with whom to intrust such license, and his papers are all in substantial compliance with the law. There is therefore in law no good reason why the court, in the exercise of a judicial—not arbitrary—discretion, should not direct the license to issue.

"At the argument of this cause, our attention was directed by counsel for remonstrants to the special Acts of 1867 for this county, as bearing upon the questions both of discretion and authority. The first of these Acts is that of January 14, 1867, P. L. 190, which provides that the quarter sessions of this county shall not be compelled to grant any tavern license 'unless satisfied that the granting of the same would be for the good of the people and promote the public welfare.'

"As this Act relates exclusively to tavern licenses, I am at a loss to perceive how, on any fair rule of interpretation, it can be construed so as to enlarge the discretion of the court in regard to the granting or refusing of quart licenses. In point of fact, it is apparent that the gentleman who drafted the bill, the late Joseph Henderson, Esq. of this bar, could not have had the subject of quart licenses in his view; for, in common with many others of that time, he was laboring under the erroneous impression that under the law as it then stood the granting of licenses to sell by the quart in this county was vested in the county treasurer. Consequently he, a few days later, had passed the special Act of February 20, 1867, P. L. 226, which provides that so much of any Act or Acts as 'authorizes the Treasurer of Washington County to grant a license to vend any intoxicating liquors by the quart or greater quantity, be, and the same is, hereby repealed.' Of course this was an entirely nugatory piece of legislation. It was merely a 'blow in the air' and accomplished nothing; and hence it is, to my mind, perfectly clear that it did not operate to take from the quarter sessions of the county the power, then and ever since entrusted to it, to grant quart licenses.

"Upon the whole case I am of opinion that the license prayed for should be granted, and it is so ordered."

The assignments of error specified the action of the court: 1, in holding that the special Act of February 20, 1867, was nugatory; 2, in refusing consideration to the remonstrances because "they do not present any reason why, under the law as it now is, this license should not be granted;" 3, in neglecting and refusing to exercise the discretion and judgment required by the Act of March 22, 1867; 4, in making the decree granting the license; and 5, in arriving at the conclusion that the papers of the peti-

469

tioner "are all in substantial compliance with the law," for the reason that the word "moral" is left out of the certificate of good character.

Messrs. A. W. & M. C. Acheson, Aiken & Duncan and J. P. Sayer, for appellants:

"Statutes are to be construed so as may best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute and, when discovered, it ought to be followed with judgment and discretion in the construction; though that construction may seem contrary to the letter of the statute."

Big Block Improvement Co. v. Commonwealth, 94 Pa. 455.

"For the rule is, that a statute shall be so construed that it may all stand and no part be rejected or declared inoperative."

Ihmsen v. Monongahela Nav. Co. 82 Pa. 157.

"Words which are plain enough in their ordinary sense may, when they would involve any absurdity or inconsistency or repugnance to the clear intention of the Legislature, to be collected from the whole of the Act or Acts *in pari materia* to be construed with it, or other legitimate grounds of interpretation, be modified or altered so as to avoid that absurdity, inconvenience or repugnance, but no further."

Miller v. Salomons, 7 Wels. Hurl. & G. 546.

"The best exponents of the legislative mind are the words of the statute, where they are free from ambiguity. But where they are not, we must resort to legislation on kindred subjects, the spirit of our institutions and the habits of the community, to discover the intent of the Legislature."

Commonwealth v. Pa. Ins. Co. 13 Pa. 166.

An examination of the special Acts of the Legislature of the years 1866 and 1867 will disclose that the intention of the Legislature was to comply with a popular demand for a restriction of the whole license system.

Acts of 1866, P. L. 333, 337, 339, 560, 658, 679, 785, 896; Acts of 1867, P. L. 40, 190, 226, 229, 372, 440, 591, 731, 740, 825, 893, 1178, 1288; and especially the Act of 1867, P. L. 190, relating to Washington County.

"A remedial Act shall be so construed as most effectually to meet the beneficial end in view and to prevent a failure of the remedy."

Dwar. Stat. p. 718.

"There can be no question that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy. 'It is by no means unusual in construing a remedial statute,' says a late case, 'to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief.'"

Id. p. 735.

By the Act of March 22, 1867 (Purd. p. 1080, pl. 33) the Legislature threw the burden on the courts of quarter sessions, and on the people, requiring the courts to refuse license in all cases in which public sentiment, embodied in remonstrances, was against the granting of license, and denied the necessity of license in any particular application.

The court below fell into the error of rejecting and refusing consideration to the remonstrances because the denial of the necessity for license was not accompanied by good and sufficient reasons. No reasons accompanied the petitions

which averred the necessity for the license. The law does not require them on either side. The question of necessity is a question of the weight of public opinion and not of evidence.

The certificate of the petitioner, signed by twelve citizens leaves out the word "moral."

Act of 1853, Purd. 1078, pl. 17.

Mr. J. M. Braden, for appellee:

The Courts of Quarter Sessions of Washington County, have jurisdiction by the Act of 1854. Where the courts have a jurisdiction it can only be taken from them by the express words of an Act of the Legislature, or by necessary implication.

Dwar. Stat. 231.

"We are to look at the words in the first instance, and when they are plain to decide on them."

Leonard v. Commonwealth, 3 Cent. Rep. 628.

When the words are plain the best rule to arrive at the meaning of the Legislature is to abide by them in their ordinary meaning and import, for they are the best exponents of the legislative mind.

Commonwealth v. Pa. Ins. Co. 13 Pa. 166; Brightly, R. 9.

The remonstrances did not deny the necessity of the license to accommodate those who desired to purchase liquors for domestic uses or use as a beverage.

The Act of 1875, 2 Purd. p. 1077, pl. 15, expressly provides that "All persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel." The court may, therefore, hear evidence in addition to the petition and remonstrance.

In *Schlaudecker v. Marshall*, 72 Pa. 203, it was held that the ascertainment of the necessity of a house for public accommodation as a hotel or eating house "involves the number of each in the particular locality." The same rule would apply to applications similar to the present one.

The Act of Assembly gives no appeal and the grant or refusal of a license is entirely within the discretion of the court below.

Toole's App. 90 Pa. 376.

Error cannot be assigned for matters in the discretion of the court below.

Dubois v. Glaub, 52 Pa. 238; *Waldron v. Waldron*, 55 Pa. 281; *Pringle v. Pringle*, 59 Pa. 281.

It must be a flagrant abuse of the discretion vested in the court below which will induce the supreme court to reverse.

Christine v. Whitehill, 16 Serg. & R. 98; *Robson v. Whitesides*, Id. 230.

A *certiorari* only brings up the record for review. The opinion of the court is no part of the record. This court only examines the regularity of the proceedings, and cannot look into the evidence, though incorporated in the opinion of the court.

Shenango v. Wayne, 84 Pa. 184; *Re Church Street*, 54 Pa. 353; *Re Kensington, etc. Turnpike Co.* 97 Pa. 260.

The Act of 1856 does not require a certificate from applicants for quart licenses, similar to the one required of applicants for tavern license. It is sufficient if the applicant for quart license satisfy the court that he is a person of temperate habits and good moral character. The court so decided upon the evidence, and it is not reviewable.

Per Curiam :

It is probable that the framer of the Act of February 20, 1867, intended thereby to prevent altogether the granting of licenses to sell intoxicating liquors by the quart in the County of Washington; but if so, he made a serious mistake, for the statute as framed is wholly nugatory. The Act of 1856 had already deprived the treasurer of the power to grant such licenses, and had vested it in the quarter sessions, so that the Act of 1867, had nothing on which to operate, and was, therefore, as we have said, of no validity.

The action of the court in granting the license complained of is something that we cannot review, that being a matter of discretion, though we are satisfied that there was a misapprehension of the intent of the Act of March 22, 1867.

The legislative mind is therein very clearly expressed, and ought not to be mistaken. The court is to hear petitions in addition to that of the applicant in favor of, and remonstrances against the application for such license, and in all cases to refuse the same whenever, in the opinion of the court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, and entertainment of strangers and travelers.

In this we see that the petitions and remonstrances are for the sole purpose of determining, without regard to the character of the applicant, whether such license is, or is not, a matter of public necessity. Furthermore, the Legislature has prescribed the method by which this necessity shall be ascertained, that is, by the number and character of those petitioning for or against such application. We may, also, here call attention to the fact that the remonstrance, as well as the additional petition, must be special, not general; that is, for or against a single or particular application; otherwise it may be disregarded. In the case in hand the remonstrance conforms to the Act, so that no objection can be taken to it in that respect. But the Act does not require that either the petitioners or remonstrants shall be voters; it is enough that they be citizens, whether male or female; hence, it is a mistake to pass over women, and count only voters.

The Act is a valuable one if properly administered, but whether it was so administered in this case, we cannot determine. The petitions, *pro* and *con*, are not matters of record, but in the nature of evidence for the information of the conscience of the court, and, as a consequence, we cannot review them, or reverse the action of the judge of the quarter sessions on a *certiorari*.

Moreover, no appeal has been given we have no power to take cognizance of the complaint of the appellants.

Decree affirmed, and appeal quashed.

Catharine BROSSMAN, *Plff. in Err.*,

LEHIGH VALLEY R. R. Co.

1. A servant who contracts for the performance of hazardous duties assumes such risks as are incident to their dis-

charge from open and obvious causes which he has had an opportunity to understand.

2. By continuing in the master's service after learning its dangerous character, the servant takes upon himself all risks incident to the service.
3. After two months' service a freight-brakeman on a railroad will be presumed to have become acquainted with the low bridges over the track, and no action can be maintained against the railroad company if, during the discharge of his duties in the night, he is struck by a bridge and killed.
4. It is immaterial that the road on which he is employed does not use the danger signals common upon other roads, for the absence of signals did not deceive him as to the degree of danger incurred.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Northampton County, to review a judgment of compulsory nonsuit in an action of trespass on the case for negligence. *Affirmed.*

In this action the plaintiff sought to recover damages for the death of her husband, William Brossman, who was killed by striking a bridge while employed on one of the defendant's trains as a brakeman. The facts as they appeared at the trial before Schuyler, J., are sufficiently stated in the opinion.

Messrs. Edward J. Fox & Son, for plaintiff in error:

Brossman was not guilty of contributory negligence.

No one can be charged with carelessness when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness.

Brown v. French, 104 Pa. 604.

An error of judgment at such a time ought not to prevent a recovery.

Schall v. Cole, 107 Pa. 1.

Where in the darkness and solitude of the night one suffers grievous injury from the culpable commission or omission of another, the carelessness which would excuse ought certainly to be of a very gross character made apparent by direct and circumstantial proof.

Beatty v. Gilmore, 16 Pa. 463; *Wild v. Gaslight Co.* 2 Eng. C. L. 350; *Hays v. Gallagher*, 72 Pa. 136.

But this question was one of fact to be determined by a jury under proper instructions.

Schum v. R. R. Co. 107 Pa. 9; *Born v. Plank Road Co.* 12 W. N. C. 283; *McIlwaine v. Lantz*, Id. 267; *Fritch v. Allegheny*, 91 Pa. 226.

The master must adopt, provide and maintain appliances and means which will permit the servant to discharge his duties with reasonable safety and without exposure to unnecessary or extraordinary risk.

If there be any evidence of negligence on the part of a master, it must be submitted to the jury; it is error to direct a nonsuit.

Murphy v. Crossan, 98 Pa. 495; *McCully v. Clarke*, 40 Pa. 406; *Baker v. Fehr*, 97 Pa. 70; *Rummell v. Dilworth*, 1 Cent. Rep. 905, 908.

"One may not justifiably, or even excusably, place a dangerous pitfall, wolf trap or a spring gun, purposely to catch and injure even willful trespassers poaching upon his grounds. The common feeling of mankind, guided by the second branch of the great law of love, and the common sense of jurors must be left in such a case to pronounce upon the facts."

Hydraulic Works Co. v. Orr, 83 Pa. 386.

Where there is any doubt whether the employee was acquainted, or ought to have been acquainted, with the risks, the determination of the question is, necessarily, for the jury.

Rummell v. Dilworth, 17 W. N. C. 90, S. C. 1 Cent. Rep. 905, 908.

Messrs. R. E. Wright, Wm. Fackenthal, B. F. Fackenthal and H. S. Drinker, for defendant in error:

A person will be presumed, by remaining in employment where he is exposed to danger, to assent to the risks and hazards to which he is thereby exposed. Thus where a brakeman six feet tall who had for four years continued to brake on a portion of the railroad where bridges crossed the track but five feet above the cars, so that riding on the top of the cars it was necessary for him to stoop to pass under them, it was held that he should be deemed to have taken the risk of injury therefrom.

Wells v. R. R. Co. 2 Am. & Eng. R. R. Cas. 248.

There is no legal obligation on the part of a railroad company to build its bridges over public roads with an elevation so great that one of its employees standing upright on the top of a car will not be endangered; and consequently, if an employee while thus standing, in the course of his business, be struck by such bridges, he cannot recover for such injury.

Baylor v. R. R. Co. 40 N. J. L. 28; *R. R. Co. v. Stricker*, 51 Md. 47; *Rains v. R. R. Co.* 71 Mo. 164; *Oren v. R. R. Co.* 1 Lans. 108; *Sherman v. R. R. Co.* 17 N. Y. 153; *Faulkner v. R. R. Co.* 37 N. Y. 468.

Where a person of full age and sufficient capacity continues to discharge the duties of a service which he knows to be hazardous, and continues without objection to operate machinery which he has full information exposes him to constant and certain danger, he will be presumed to take upon himself all the risks of his service.

Umback v. R. Co. 8 Am. & Eng. R. R. Cas. 99. And see *Sweeney v. R. R. Co.* 8 Am. & Eng. R. R. Cas. 151.

The contract to serve as brakeman is made with reference to things as they then exist and are known to be. The employee assumes the risk of low bridges.

Clark v. R. R. Co. 2 Am. & Eng. R. R. Cas. 240; *Clark v. R. R. Co.* 18 Id. 81.

If a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to ob-

viate the danger or hold him liable for damages in case of injury.

Fleming v. R. R. Co. 6 N. W. Rep. 448; *Gibson v. R. Co.* 63 N. Y. 449; *Dillon v. R. R. Co.* 3 Dill. 320; *Owen v. R. R. Co.* 1 Lans. 108; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *R. R. Co. v. Welch*, 52 Ill. 183; *Devitt v. R. R. Co.* 50 Mo. 302; *Baylor v. R. R. Co.* 40 N. J. L. 28; *Clarke v. Holmes*, 7 Hurlst. & N. 937; *Woodley v. Metropolitan Dist. R. Co.* L. R. 2 Exch. Div. 384.

A master is not bound, as to his servants, to employ the latest and most approved machinery, but only such as is suitable. A servant who, knowing the defective condition of the machinery, yet exposes himself to danger from it, even in the necessary execution of his duties, assumes the risk and cannot charge the master with damages resulting to him from such exposure.

Salters v. Del. & Hud. Canal Co. 3 Hun. 338; *Ford v. R. R. Co.* 110 Mass. 240; *Dougan v. Champlain Trans. Co.* 56 N. Y. 1; *Wonder v. R. R. Co.* 32 Md. 411; *DeGraf v. R. R. Co.* 3 Thomp. & C. 255.

Whenever the facts of a negligence case are undisputed and it appears clearly that the party injured has been guilty of contributory negligence, it is the right and duty of the court to take the case from the jury and to give binding instructions to find for the defendant or award a nonsuit.

R. R. Co. v. Evans, 53 Pa. 250; *R. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Dascomb v. R. R. Co.* 27 Barb. 221; *R. R. Co. v. Stout*, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745); *R. R. Co. v. Van Steinberg*, 17 Mich. 99; *R. R. Co. v. Righter*, 2 Am. & Eng. R. R. Cas. 220; *Smith v. Hestonville M. & F. Co.* 2 Am. & Eng. R. R. Cas. 12; *Johnson v. R. R. Co.* 8 Am. & Eng. R. R. Cas. 471.

Mr. Justice Trunkley delivered the opinion of the court:

William Brossman had been in the employ of the defendant as brakeman on a freight train for over two months. He made one round trip each day, and his duties required him to be on the top of the box car. There was a number of bridges over the road, so low that a man could not stand erect on the car as it passed under, without striking; the bridge where the accident occurred was about four feet above the top of the cars. That Brossman knew of these bridges, including the one that threw him from the car, is as certain as that he had passed under them daily, when on duty, from the date of his employment.

At the time of the accident Brossman and Hart were together, both familiar with the situation of the bridge; the night was dark and a heavy rain falling, and neither of them gave the slightest attention to the impending danger. Hart says they were not watching for the bridge; had their minds on their work. No lights or any other signal had been on or near the bridge for more than six months—to warn the brakemen when near it.

During all the time of Brossman's service the hazards of his occupation were the same as when he was employed; no change had been made in the bridges or height of the cars. It is obvious that the bridge was dangerous to the

lives of the brakemen, as all bridges are when so near the top of the cars; and it may be taken as proved that a number of men were injured and some killed by it, before the death of Brossman. It also appears that danger signals had been in use at this bridge, but some time before Brossman was employed they were abandoned; and such signals are used by some other railroad companies.

Many points in the argument on behalf of the plaintiff were pressed, much as if the deceased had stood in other relation to the defendant than employee. It is hardly necessary to remark that most decisions in cases against railroad companies, where passengers were injured or where persons were injured at street crossings and the like, have little bearing on the main question presented in this record, namely: Did the deceased, after knowledge of the hazardous duties of the place, assume the risks incident to their discharge? Upon this fact there is no conflict of testimony; he knew the danger and risks as well as anybody else, if not at the date of his employment, immediately after he began performance of its duties.

When an employee after having the opportunity of becoming acquainted with the risks of his situation accepts them, he cannot complain if subsequently injured by such exposure.

By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain. *Whart. Neg.* § 214. This is the general rule.

In *Ballou v. R. Co.* 5 Am. & Eng. R. R. Cas. 480, the deceased was killed by reason of a defect in the ladder of a freight car, and it was held that his representative could not recover. A well prepared note, reviewing the cases upon the subject, upon the point which touches the case in hand, page 506, states the doctrine as follows: "It seems clear, if a person in the employment of a railroad company discovers that the appliances with which he is working are or have become through use unsafe, and continues, without any special order of the company and without making any complaint, to use the said appliances, that he will be held to have either run the risk of being injured, or to have been guilty of contributory negligence; and hence, in case of injury to him, occasioned by such defect, the company will not be liable. And this is true, even though the defect be such a one as under ordinary circumstances the company would be bound to repair." If a servant, after discovering the danger of using some appliance, continues to work when he must of necessity use it, he assumes the risk, and the master is discharged from liability. *R. R. Co. v. Shertle*, 2 Am. & Eng. R. R. Cas. 158, note.

Thus has the rule been applied in cases of defects in the cars or appliances; but the doctrine in its application to a case like the present is settled, as well as anything can be, by repeated adjudications. And its application is less difficult in proportion as the hazard is more certain to be observed by the employee, and being unconnected with the machinery and cars. Where the service of a brakeman is extra hazardous and dangerous on account of a bridge being of insufficient height, of which the brakeman had knowledge while employed, and he

continued in the service without objection, he assumed the dangers incident to the service from the bridge in question, and there can be no recovery on account of his death caused by the bridge. The negligence of the employer is waived by the employee remaining in employment without protest or promise of amendment. This waiver cannot be affected by the rapidity or promptness with which he may be required to act at the time of the accident. *Wells v. R. R. Co.* 56 Iowa, 520.

Where a railroad company negligently plans an obstruction over its roadway, dangerous to the lives of its employees, it fails in its duty to them and, therefore, if a person enters the service of the company in ignorance of such danger, and remains ignorant thereof until injured or killed by it, the company is liable for damages. But if the employee had knowledge of the nature and degree of the peril when he entered the service, or continued in the service after such knowledge without protest and promise of amendment, the case is different. The employer has no right to subject his employee to an unnecessary peril without his consent; but it is well settled in the courts of this country and in England that if a servant chooses to enter into an employment involving danger of personal injury, which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed.

If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injury. *Clark v. R. R. Co.* 28 Minn. 128.

By continuing in the master's service after being fully apprised of its dangerous character, the servant takes upon himself all risks incident to such service. *Unback v. R. Co.* 8 Am. & Eng. R. R. Cas. 98.

Decisions in accord with those cited are multitudinous, and the able counsel for plaintiff has adduced none to the contrary. They are too well grounded to be overruled, save by legislative power. When the hazards incident to the duties of the employee are open, before his eyes, meet him every day of his service, and would knock him down if he did not stoop to avoid them, and he continues in the service without promise of amendment, clearly, he accepts the risks of the situation. It is no matter whether danger signals are on other roads, for he was not deceived as to the degree of danger he incurred. Nor is it necessary to consider his rights, or the liability of his employer for damages in case of injury, under a different state of facts.

Judgment affirmed.

James MCGREW *et al.*, *Plffs. in Err.*,
v.

A. J. FOSTER.

1. The vendee of land under an unrecorded written contract, who has never

NOTE.—See *Orne v. Coal Co. ante*, 731.

been in possession and has paid only part of the purchase money, **can not, without first paying or tendering the balance of the purchase money, maintain against the legal owner trespass for cutting timber.**

2. In a contract in writing for the sale of land there is no implied covenant to give the vendee possession before the conveyance is executed.
3. A mere temporary occupancy for the purpose of making a survey or taking off timber, by one having no right of possession, is not such an actual occupancy as defeats the constructive possession of the owner.
4. Lapse of time, change of circumstances, and indifference on the part of a vendee of land, are circumstances to induce a chancellor to refuse a decree of specific performance.
5. An unexplained neglect for twenty-nine years to pay the balance of purchase money of land sold by contract in writing is laches on the part of the vendee and fatal, in a court of equity, to all his original rights under the contract.

(Decided October 4, 1883.)

ERROR to the Common Pleas of Warren County, to review a judgment on a verdict for the plaintiff in an action of trespass. *Reversed.*

This was an action of trespass *quare clausum fregit* begun by *capias* in 1883 to recover the penalty prescribed by the Act of March 29, 1824, § 3 (8 Sm. Laws, 283; *Purd. Dig.* 1635) for cutting and converting timber trees on the plaintiffs' land.

The facts as they appeared at the trial before Brown, P. J., are stated in the opinion.

The court charged, *inter alia*, as follows:

"We say to you that, under the undisputed evidence in the case, in our opinion the plaintiff is entitled to recover, although the deed from Ansel St. John to Thomas P. St. John, and from Thomas P. St. John to Samuel Lilly, are absolute conveyances clear from conditions or qualifications; yet, in the conveyance from Samuel Lilly to Ludlow, Martin and Sawyer, the conveyance is subject to all contracts and articles of agreement made by Lansing Wetmore. * * * Tracing their own title back to Ansel St. John, they would find the power of attorney from St. John to Lansing Wetmore, and although the record would give no information that Wetmore had ever article'd any of the land, it was noticed that Wetmore had the power to sell, which was notice that he possibly had sold some of the land described in a deed by Samuel Lilly, a contingency subject to which Lilly by his deed had expressly made his conveyance of the land. Samuel Lilly treated any contracts of sale that might have been made by Wetmore as subsisting ones, and imposed upon his vendees the obligation so to regard them. The title shown by the plaintiff gives him such a right of possession as entitles him to recover; and, as we before stated, we think that under the undisputed evidence the plaintiff is entitled to a verdict at your

hands, and you will have simply to determine the amount."

The defendants' points were to the effect that the recorded conveyances from Ansel St. John to Thomas P. St. John and from Thomas P. St. John to Samuel Lilly transferred the title to the *locus in quo* to Lilly, as against the unrecorded contract of Samuel Ward, and therefore the plaintiff could not recover; and that there was nothing in the deed from Samuel Lilly and wife to Ludlow, Martin and Sawyer, which amounted to a reservation or exception from the grant, of the articles of agreement from Ansel St. John to Samuel Ward, or which amounted to notice to subsequent purchasers.

Ans. "The several points, in so far as they present views contrary to the general charge, are answered in the negative."

By agreement of counsel a verdict was taken for \$116 single damages in favor of the plaintiff. Judgment was entered accordingly.

Whereupon the defendants took this writ, assigning as error the answer to their points and the portions of the charge quoted.

Messrs. D. L. Ball, C. H. Noyes and C. C. Thompson, for plaintiffs in error:

After such a lapse of time as to raise the presumption of law that any obligations given by the vendee for the purchase money are paid, a recital in a deed is *prima facie* evidence of the payment of the consideration as against an unrecorded contract with the vendor.

Brum v. Dubois, 43 Pa. 265.

It must follow that Thomas P. St. John and Samuel Lilly each acquired a good title to the land from which the timber in controversy was taken; and having a good title, Samuel Lilly could convey a good title, whether his vendees had notice of the Samuel Ward contract or not.

Bracken v. Miller, 4 Watts & S. 102; *Mateer v. Hissim*, 3 Pen. & W. 160; *Sailor v. Hertzog*, 4 Whart. 264; *Church v. Ruland*, 64 Pa. 444; *Filby v. Miller*, 25 Pa. 264; *Mott v. Clark*, 9 Pa. 404.

In the deed from Samuel Lilly and wife to Wetmore, Henry & Orr, this land was not reserved or excepted. The deed conveyed "all those several pieces or parcels of land, etc.," five in number. The description of each piece after the first, and also that portion claimed by the defendant in error as a reservation or exception, is introduced by the word "also." "Also" means "in like manner." In like manner as the preceding five tracts or parts of tracts were conveyed, so were conveyed "all contracts and articles of agreements for any part of the aforementioned tracts," which are not previously conveyed by specific description.

The word "also" does not take from or lessen the previous grant; nor is that part of the deed under discussion notice to subsequent purchasers of Samuel Ward's contract with St. John. It is too equivocal and uncertain to be notice to anybody, every presumption is made in favor of the subsequent purchaser; and recitals even in the very deed under which he claims are not, without caution and many exceptions, to be held equivalent to notice.

Barlow v. Beall, 20 Pa. 179; *Boggs v. Varner*, 6 Watts & S. 473.

The record of a deed of land, the locality of

which is not given, nor any definite marks of identification, is not notice to a purchaser at a judicial sale.

Banks v. Ammon, 27 Pa. 172.

Before the plaintiff could have maintained an action of ejectment against the owner of the legal title he must have paid or tendered the purchase money.

Gore v. Kinney, 10 Watts, 139; *Vincent v. Huff*, 4 Serg. & R. 297; *Brindle v. McIlwaine*, 7 Serg. & R. 345.

The contract under which he claims gave him no right to the possession. Where the contract is silent as to possession, the vendor retains it until payment of the purchase money.

1 Sugd. Vend. p. 270, note b.; *Irvine v. Bleakley*, 67 Pa. 28; *Smith v. Patton*, 1 Serg. & R. 84; *Baum v. Dubois*, 43 Pa. 260; *Weakland v. Hoffman*, 50 Pa. 517.

The vendor had a right to enter the premises when the vendee was in default and refused to perform his contract, even if the latter had been given a right of possession, if the former could make such entry peaceably.

Welch v. Emerson, 95 Pa. 257; *Bell v. Clark*, 17 W. N. C. 44, 1 Cent. Rep. 852.

It is this right of possession in the owner of the legal title which entitles him to maintain ejectment against the vendee under articles. To recover in ejectment the plaintiff must have the right of entry and of possession at and before the bringing of the suit. This right he has from his legal title.

Smith v. Webster, 2 Watts, 485; *Decling v. Williamson*, 9 Watts, 318.

An action of ejectment by the vendor for the recovery of possession, though in some sort regarded by us as an equitable proceeding, subject to be arrested by payment of the purchase money, is yet in contemplation of law founded in the legal seisin remaining in the vendor, and drawing to it the right of possession.

Jones v. Patterson, 12 Pa. 153.

This legal title and legal seisin draws to itself the right of possession of lands of that character. Having the legal title, and the rights of entry and possession of the premises, the defendants were not trespassers in making their entry thereon. Where the right to enter upon the land of another exists, the abuse of it will not sustain an action of trespass. The remedy is case.

Edelman v. Yeakel, 27 Pa. 26.

To maintain trespass, there must be in the plaintiff either actual possession, or the right to immediate possession flowing from the right of property; and he must have been deprived of it by the tortious act of another.

Weitzel v. Marr, 46 Pa. 463; *Waldron v. Haupt*, 52 Pa. 409; *Rifener v. Bowman*, 58 Pa. 313.

The plaintiff's claim is stale. The contract under which he claims is dated the 10th of April, 1854. This suit was begun on the 12th of June, 1883. Between these two dates not one cent was paid upon the purchase money.

If a plaintiff in ejectment ask for specific execution of a contract for the sale of land, he cannot recover, if it appear that he has been guilty of laches and such conduct as was calculated to induce the other party to suppose that he has abandoned his contract; and especially if he had permitted so long a time to PA.

elapse that a legal title would be barred by the Act of Limitations. See generally upon stale claims:

Zeigler v. Houtz, 1 Watts & S. 533; *Patterson v. Martz*, 8 Watts, 374; *Callen v. Ferguson*, 29 Pa. 247; *Wengert v. Zimmerman*, 33 Pa. 508; *Dubois v. Baum*, 46 Pa. 537; *Miller v. Henlan*, 51 Pa. 265; *Cadwalader's Appeal*, 57 Pa. 158; *Dohnert's Appeal*, 64 Pa. 311; *Russell v. Baughman*, 94 Pa. 400.

In courts of equity twenty years is a positive bar to any claim.

Bull v. Towson, 4 Watts & S. 557.

Messrs. Wilbur & Schnur, for defendant in error:

The acceptance of a deed by the grantee makes its recitals evidence against him, and also against his grantees, they having notice of it, if the deed is recorded.

Schuykill R. R. Co. v. McCreery, 58 Pa. 304, 307.

Recitals are evidence against parties and privies to the conveyance.

Meals v. Brandon, 16 Pa. 225.

Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding.

Lodge v. Simonton, 2 Pen. & W. 445-6.

A loss from ignorance must be borne by him who refuses to investigate.

Kirk's App. 87 Pa. 247; *Jaques v. Weeks*, 7 Watts, 261.

A purchaser from one whose deed is unrecorded is affected with notice of an unrecorded mortgage mentioned in the receipt for purchase money, at the foot of such unrecorded deed.

Steckel v. Deah, 12 W. N. C. 180.

The owner of the legal title has no right to take possession, as against his vendee, and cut timber and set off its value against the unpaid purchase money.

Brewer v. Fleming, 51 Pa. 103; *Longwell v. Bentley*, 23 Pa. 102; *Siter's App.* 26 Pa. 180; *Morgan v. Scott*, 26 Pa. 51; *Ives v. Creas*, 5 Pa. 118.

When a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold and the purchaser as a trustee to vendor for the purchase money. He is seised of the estate and must bear any loss and will be entitled to any benefits affecting the land.

Robb v. Mann, 11 Pa. 304; *Weed v. Hall*, 101 Pa. 596.

The owner of wild und cultivated land is to be deemed in possession so as to maintain trespass, until an adverse possession is clearly made out.

Baker v. King, 18 Pa. 144.

The last installment of purchase money was due Ansel St. John April 10, 1856; May 7, 1855, he conveyed this land by deed to Thomas P. St. John, and thus put it out of his power to perform his contract and make title when the last installment fell due, and was not in a position to call for specific performance on his part.

Wheeling, etc. R. R. Co. v. Gourley, 99 Pa. 176.

His only remedy after this conveyance was to sue on the articles for the purchase money and tender a deed in accordance with his covenants.

Nicol v. Carr, 35 Pa. 381.

Denying the vendee's right to perform his covenants, it does not lie in the mouths of the plaintiffs in error to say the vendee's rights are gone because he did not perform them.

Onq v. Campbell, 6 Watts, 397; *Morony v. Townsend*, 5 Phila. 357.

Mr. Justice Clark delivered the opinion of the court:

The facts in this case are not disputed; the title to the fifty acres of land, from which the timber in controversy was cut, was originally in E. J. Pettibone, who August 15, 1846, conveyed the same with other lands to Ansel St. John. The plaintiff below claimed title under an unrecorded contract in writing dated April 10, 1854, between Ansel St. John (executed by his attorney in fact Lansing Wetmore) and Samuel Ward, by the terms of which St. John, in consideration of the sum of \$100, agreed to sell and convey to Ward, the premises now in question. The purchase money was payable, \$25 in hand and \$75 in two equal annual installments with interest; the deed to be delivered, free from incumbrance, upon payment of the purchase money.

The hand money was paid at the execution of the contract, but the residue of the purchase money still remains unpaid. After his purchase, Ward had a trial survey made to ascertain the lines approximately; a resurvey, however, by a regular surveyor was contemplated. He cut some timber, but never went into the actual possession, by residence or cultivation. On March 28 Samuel Ward assigned his interest to Archibald Ward, who, April 8, 1867, assigned the same interest to A. J. Foster, the plaintiff below.

The defendants claimed title through a series of recorded conveyances, embracing with other tracts the lands in dispute; in part, as follows: Ansel St. John and wife to Thomas P. St. John, dated May 7, 1855, recorded June 6, 1855; Thomas P. St. John and wife to Samuel Lilly, dated August 23, 1859, recorded September 28, 1859; Samuel Lilly and wife to A. H. Ludlow, William Martin and Adna Sawyer, dated December 7, 1859, recorded March 14, 1860. In the deed last recited, after the description of the several tracts embraced therein, is contained a clause as follows: "Also all contracts and articles of agreement for the purchase of said tracts, and all balances due and unpaid on any contracts and articles of agreement made by Lansing Wetmore for the sale of any portion of the above described tracts of land,—it being the true intent and meaning of these presents to convey to the said party of the second part, all the right, title and interest of, in and to the above described premises which was conveyed to Samuel Lilly by Thomas P. St. John by deed dated August 24, 1859."

By various conveyances in due form, and duly recorded, the title of Ludlow and Martin to the 400 acres of tract No. 223, described in the deed from Ansel St. John, became vested in the Great National Petroleum Company, and the title of Adna Sawyer in the same tract became vested in James McGrew. Each of these deeds recited a consideration, and acknowledged the receipt thereof.

The plaintiffs in error, who were the defendants below, contend: first, that Thomas P. St.

John and Samuel Lilly, under whom they claim, were *bona fide* purchasers for value, and that they are, therefore, not affected by the unrecorded contract of April 10, 1854; that the clause above quoted from the deed of Samuel Lilly to Ludlow, Martin and Sawyer is not a reservation or exception of the fifty acres from the grant contained in the deed, nor was it notice to subsequent purchasers of the contract with Ward upon which the plaintiff relies; and second, that in any event, before the plaintiff could bring and maintain this action, he must have paid or tendered the purchase money; that standing upon the terms of his contract, he would be met at the threshold with his own default.

It is not necessary for us to consider the first ground of this contention, as the second in our opinion is certainly decisive of the case.

In *Minaker v. Morrison*, 2 Yeates, 346, the general rule was declared that a purchaser of lands, who seeks redress under his articles, must bring his money into court, in order to show his readiness to perform his contract.

This case was recognized and followed in *Gore v. Kinney*, 10 Watts, 139, an ejectment brought by an equitable vendee against the vendor; it was there held that the plaintiff must not only tender the money due and unpaid, before suit brought, but he must have it in court, ready to be paid to the defendant, in case of a verdict for the plaintiff. *Yount v. Martin*, 3 Serg. & R. 432; *Peebles v. Reading*, 8 Serg. & R. 496, and *Moody v. Vandyke*, 4 Binn. 41 are cited as authority for the doctrine thus stated.

So in *D'Arras v. Keyser*, 26 Pa. 252, **Mr. Justice Woodward**, referring with approval to *Gore v. Kinney*, *supra*, says:

"There can be no question about the soundness of the principle that in an equitable action of ejectment, the plaintiff, to be entitled to recover, must not only tender the money before suit brought, but must also have it in court ready to be paid in the event of a verdict in his favor." This rule as stated, is restricted in its application, however, to cases where the defendant's possession is a lawful one, for in the case last cited it was held that if the vendee is once fairly in possession of the land under articles of purchase, and is ousted by fraud, force or other illegal means, he is entitled to recover in ejectment, without bringing the money into court.

So in *Eberly v. Lehman*, 100 Pa. 542, it was said that the rule did not apply when the vendor, before payment, has put the vendee into possession under the contract, and induced him to make valuable improvements, and afterward by collusion or other unfair practice regained the possession; citing *Harris v. Bell*, 10 Serg. & R. 39; *Dixon v. Oliver*, 5 Watts, 509; *Grey v. Patterson*, 9 Watts & S. 208; *Wykoff v. Wykoff*, 3 Watts & S. 481; *D'Arras v. Keyser*, 26 Pa. 249. To the same effect, are *Heft v. McGill*, 3 Pa. 256; *Brewer v. Fleming*, 51 Pa. 102; *Chase v. Irwin*, 87 Pa. 290.

Similar in some respects, to the case under consideration, is the very recent case of *Bell v. Clark*, 111 Pa. 92, 1 Cent. Rep. 852. Bell, by articles dated July 1, 1870, agreed with Adeline Clark, on payment of \$732.48 within two years, to convey certain lands to her, of which

in the meantime she was to have possession. This possession she took and maintained until within four years before suit brought, but paid no purchase money. Bell, finding the premises vacated, entered into the possession, wherefore Mrs. Clark brought ejectment.

Mr. Justice Gordon, delivering the opinion of the court, says:

"Under these circumstances, it cannot be said that, in thus resuming dominion over the property, the vendor was guilty of either a fraudulent or unlawful act." "The rule may be stated thus: where the possession of the vendor is lawful his vendee cannot maintain ejectment against him, without proof of previous tender of the purchase money, and he must also maintain that tender, by producing the money in court."

In the case at bar, there is no express covenant on part of the vendor to deliver the possession to the vendee. "As a general rule," says *Agnew, J.*, in *Weakland v. Hoffman*, 50 Pa. 517, "a contract to sell does not, *ipso facto*, carry a right of possession until conveyance, in the absence of a covenant to let the party into possession. It is very common, it is true, to let the purchaser in upon a sale, but we know of no rule of law by which the possession, so important a security to the rights of the vendor, shall pass from him without his covenant or his consent." See also *Smith v. Patton*, 1 Serg. & R. 84; *Baum v. Dubois*, 43 Pa. 260; *Irvine v. Bleakley*, 67 Pa. 28.

Nor is there any evidence that actual possession was at any time taken, under or in pursuance of the contract. It appears that after his purchase, Ward made a trial survey, to ascertain the probable boundaries of his purchase, and cut some timber; whether these acts were known or approved by St. John does not appear. It is clear, however, that Ward never assumed the actual possession of the land. A mere temporary occupancy for the purpose of making a survey or taking off timber, by one having no right of possession, is not such an actual occupancy as defeats the constructive possession which the law casts upon the owner. *Harlan v. Harlan*, 15 Pa. 507; *Brewer v. Fleming*, 51 Pa. 115.

The defendant was the legal owner of the land, and as he had not conveyed or yielded the possession to any other person, he was at all times constructively in the possession. Under his title he had a right at any time to enter and occupy the land, subject of course to the equity of the vendee, to whom for any injury to the freehold he might under some circumstances be answerable, not as a trespasser, but in another form of proceeding. *Edelman v. Yeakey*, 27 Pa. 26.

To maintain trespass the plaintiff must either have actual possession or the immediate right to it, flowing from the right of property; and it is plain that he had neither. It is not pretended that he was at any time in the actual occupancy of the land, and he could only be entitled to that right, upon the footing of a specific performance of his contract. The contract of purchase was made in the year 1854; at which time only \$25 of the purchase money was paid; no part of the residue has ever been paid, or offered to be paid; almost thirty years had elapsed before the alleged trespass was

committed. During remained unoccupied since 1867, until the act appears to have been, in assertion of to that time the stripped of the time money, by the intple in amount. the vendor might have been abando certainly hesitate tance.

A vendee by arti his purchase; he w a course of conduc vendor into the bel done, and, when sources of the co demand perform of circumstances of a vendee of la duce a chancellor performance. *Patt*

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NOTE.—Children incapable of contr of law. *Kay v. R. B* months old; *Masch* child three years ol old; *Taylor v. Dela* 623, eight years old. "The difficulty is

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ERROR to Common Pleas of Erie County, to review a judgment on a verdict for plaintiff in an action on the case for personal injuries. *Affirmed.*

The facts are stated in the opinion.

The Court, **GALBRAITH, P. J.**, was requested by the defendant to charge the jury, *inter alia*, as follows:

3. That even if the driver did see the child so close that it might reach the horses or car before they passed, it was not necessarily negligence of the driver not to stop. He was not bound to stop, if it seemed improbable to him that the child would reach the horses or car; and he had a right to presume that a child of her age would not negligently run into an apparent danger.

Ans. What would and what would not constitute negligence is a question for the jury, under all the circumstances of the case as disclosed by the evidence. It is for the jury to say whether under the facts shown there was or was not negligence. The point is refused as being for the jury and not for the court. *First assignment of error.*

7. If the jury believe from the evidence that the plaintiff was allowed to play in the street unattended, or was sent into the street by its parents on an errand that required her to cross the street, such act was such negligence as will prevent a recovery by the plaintiff in this case. In such a case the negligence of the parents will be imputed to the plaintiff. Refused. *Second assignment of error.*

8. That under all the evidence in the case the plaintiff is not entitled to recover.

Ans. This is also refused. It is for the jury to say under all the evidence whether the plaintiff is entitled to recover or not. *Third assignment of error.*

Mr. John P. Vincent, for plaintiff in error:

The driver had a right to presume that even a child would not heedlessly run into an apparent danger.

R. Co. v. Connell, 88 Pa. 520.

He was attending to passengers and did not see the child; there was therefore no evidence of negligence.

Woodbridge v. R. R. Co. 16 W. N. C. 55-57; *R. Co. v. Connell*, *supra*.

Whether a particular state of facts constitutes negligence is generally a question of law;

whether a particular negligence contributes to the catastrophe is a question of fact. The court should, therefore, have stated the law as requested in our points and left the question of fact to the jury.

R. R. Co. v. Armstrong, 52 Pa. 282.

The consequences of negligence on the part of the parents or other person having charge or control of an infant *non sui juris*, and himself incapable of negligence, are imputable to the infant.

Fitzgerald v. R. Co. 8 Am. & Eng. R. R. Cas. 310 and the following cases there cited: *Hathfield v. Ruper*, 21 Ind. 15; *Mangam v. R. R. Co.* 88 N. Y. 455; *Wright v. R. R. Co.* 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Holly v. Boston Gas Light Co.* 8 Gray, 123; *Brown v. R. Co.* 58 Maine, 384; *R. R. Co. v. Huffman*, 28 Ind. 287; *R. Co. v. Grable*, 88 Ill. 441; *Meeks v. R. R. Co.* 52 Cal. 602.

The case of *Kay v. R. R. Co.* 65 Pa. 269-277, rules this case in principle.

Messrs. Benson, Brainerd & Olds, for defendant in error:

The defendant owed a duty to travelers at the crossing.

R. R. Co. v. Heilman, 49 Pa. 60, 64; *Mangam v. R. R. Co.* 88 N. Y. 455.

The question of the driver's negligence was properly submitted to the jury as a question of fact.

R. R. Co. v. Heilman, *supra*; *Orissey v. R. Co.* 75 Pa. 88.

A child of the age of five years and over cannot be charged with contributory negligence. *Mangam v. R. R. Co. supra*; *R. Co. v. Connell*, 88 Pa. 520; *R. Co. v. Childwell*, 74 Pa. 421; *Kay v. R. R. Co.* 65 Pa. 269; *Rauch v. Lloyd*, 31 Pa. 358.

Mr. Justice Trunkay delivered the opinion of the court:

At the date of the plaintiff's injury she was nearly four years of age. She was on her way to a neighboring store, having been sent alone by her parents. The injury was inflicted on the north walk of a street crossing, where people were accustomed to cross on foot. There is no evidence of special hazard at that crossing, occasioned by large amount of travel or otherwise. The driver had stopped his car at the south walk, and there was little time or distance for his team to gain much speed. He first saw the

in regard to that age when it cannot be said that its capacity is such that it should or should not be held responsible as an adult. In such cases, as in all others where the matter is uncertain, it is to be tried, and tried by a jury under proper directions from the court." *Duffy v. R. R. Co.* 2 West. Rep. 200.

"If the plaintiff was too young and inexperienced to appreciate the danger to which he was exposed, then conduct on his part which would be negligence in one aware of the danger might not be imputed as negligence to him. But if the jury should find that he was aware of the danger to which he was exposed, any negligence on his part which contributed directly to his injury will defeat his action." *Dowling v. Allen*, 5 West. Rep. 372.

All that is required of a child, is care and prudence equal to its capacity. *Ind. R. R. Co. v. Pitzer*, 4 West. Rep. 250, and note at page 258.

The following are some of the recent cases where the question of contributory negligence was left to the jury: *Mattoy v. Whittier Machine Co.* 1 New Eng. Rep. 432, child six and a half years old;

Nolan v. R. R. Co. 1 New Eng. Rep. 526, child seven years old; *Saare v. R. Co.* 2 West. Rep. 533, child ten years old.

In *Messenger v. Dennie*, 1 New Eng. Rep. 759, a child nine years old was held guilty of contributory negligence; in *Wright v. R. R. Co.* 2 New Eng. Rep. 725, child between six and seven.

The negligence of a father, driving a vehicle, is not imputed to a minor child riding with him, so as to prevent recovery by the child. *R. Co. v. Radie*, 1 West. Rep. 88.

The negligence of a driver will not prevent one riding with him without hire from recovering against a negligent third party. *Borough of Carlisle v. Brisbane*, *ante*, 508.

The negligence of a father in charge of his child of tender years may be imputed to the child. *Stillson v. R. R. Co.* 67 Mo. 671.

Allowing a child four years old to go on the street is not negligence such as to debar a recovery by the parent. *Chicago v. Heising*, 83 Ill. 204; *Stallford v. Rubens*, 1 West. Rep. 640; *Collins v. R. R. Co.* 2 New Eng. Rep. 649 and note. [J. M.]

child under the tongue when the horses jumped; he had given his attention to passengers between the south and north walks. Other persons saw the child in danger and endeavored to get him to stop.

At the time of the injury to this child the driver was charged not only with driving and managing the horses, but also with collecting the fare; no change box was in the car. Upon the driver rested the entire duty of collecting fares, caring for the convenience of passengers and that of proper driving. His stop at the south walk had no tendency to warn the child or anybody else to keep off the north walk or be run over. Had he kept lookout while between the crossings, he could readily have seen the child.

In response to the defendant's request, the jury were instructed [1] that if the horses were moving at a moderate rate of speed and ran upon the child before she could be seen, and without time for the driver to stop the car; or [2] if the child suddenly came in the way of the horses, unseen by the driver and without giving him time to stop the horses; or [6] if the injury did not happen from any want of ordinary care in the management of the horses at the time of the accident—the plaintiff could not recover; and upon that instruction the questions of fact were submitted. Much more was said in the general charge, but nothing to weaken the affirmance of the defendant's first, second and sixth points.

The first alleged error is that the court refused to charge "That even if the driver did see the child so close that it might reach the horses or car before they passed, it was not necessarily negligence in the driver not to stop. He was not bound to stop, if it seemed improbable to him that the child would reach the horses or car; and he had a right to presume that a child of her age would not negligently run into an apparent danger;" but instead submitted to the jury whether, under all the facts and circumstances shown, there was negligence by the defendant.

The instruction prayed in the third point was based upon the assumed fact that the driver saw the child "so close that it might reach the horses or car before they passed." In the printed argument of plaintiff in error it is said: "There is not one word of evidence in the case to show that the driver saw the child before the horses struck her."

That is true. The driver testifies that he did not see her before, and no witness says he did. Instruction upon things imagined should not be blended with instruction upon things of which there is evidence. The testimony of the driver tended to show that he was looking ahead, just as he ought to have done, at and immediately before the moment the child was struck; other testimony tended to show that he was looking back and speaking with passengers. Here was a real question for the jury, one not to be confounded with anything outside the case. The first assignment cannot be sustained.

The second assignment of error is the refusal of the defendant's seventh point, namely: "If the jury believe from the evidence that the plaintiff was allowed to play in the street unattended, or was sent into the street by its parents

on an errand that required her to cross the street, such an act was such negligence as will prevent a recovery by the plaintiff in this case. In such case the negligence of the parents will be imputed to the plaintiff."

Whether the contributory negligence of a parent will bar recovery by an infant, for injury resulting from the negligence of another, is a question upon which there is conflict of decisions in the States of this country. In Pennsylvania the cases are numerous in which infants have recovered compensation for injuries caused by the negligence of others, and no action has failed because of the negligence of the parent or guardian being imputed to the child.

In *Smith v. O'Connor*, 48 Pa. 218, it was said: "We are asked to approve and apply the doctrine that the negligence or imprudence of the parents or guardians, in allowing a child of tender age to be exposed to injury in a highway, furnishes the same answer to an action by the child as the negligence or other fault of an adult plaintiff would in a similar case. The negligence of the parent or guardian is imputed to the child; and hence, unless the infant plaintiff has exercised the care demanded of an adult, no action can be sustained. This is holding the child responsible for the ordinary care of adults. In our opinion the rule does not rest upon sound reason." And the judgment in favor of the infant plaintiff was affirmed.

The ruling in that case has remained unquestioned until now. But one case is cited by the plaintiff in error. *Fitzgerald v. R. Co.* 8 Am. & Eng. R. R. Cas. 810, with the references therein.

R. R. Co. v. Snyder, 18 Ohio St. 399, a well considered case, and cases in several other States might be cited in support of the ruling in *Smith v. O'Connor*.

For clear and forcible reasoning, in support of the doctrine that where the defendant, discharging his duties carefully, could have avoided injuring the child, no amount of negligence by the child's parents is a defense, reference is made to Wharton, Law of Negligence, §§ 809, 810, 811, 812.

This doctrine has been repeatedly recognized. Among the cases are *Glassey v. R. Co.* 57 Pa. 172, where it was decided that the father could not recover for an injury to his son of tender years, caused in part by his own imprudence, although the infant may; and *R. R. Co. v. Mahoney*, 57 Pa. 187, where it was remarked that if the action was by the father to recover damages by the death of the child, a very different question would be presented. To a child of plaintiff's years, no contributory negligence can be imputed.

In the refusal of the seventh and eighth points there was no error.

Judgment affirmed.

HAMBURG BANK *et al.*, *Appts.*,
v.

Mahlon SEIDEL *et al.*

1. An assignment of a mortgage with verbal directions to the assignee to collect the debt and pay the proceeds to the assignor, if living, or to the brothers

and sisters of the assignee if the assignor is dead, constitutes a special trust.

2. After the death of the assignor the orphans' court has not jurisdiction of the trust, and will not compel the assignee, who is also the assignor's administrator, to account for the proceeds.

(Decided October 4, 1886.)

A PPEAL from a decree of the Orphans' Court of Berks County, sustaining exceptions to the report of an auditor. *Affirmed.*

Nathan Trexler died September 26, 1881. On October 20, 1881, letters of administration were issued to his son Benjamin B. Trexler, who died April 10, 1883. Benjamin filed an account December 2, 1882, to which exceptions were filed by the Hamburg Bank and other creditors of Nathan Trexler, February 15, 1883, and by Oliver Trexler, a son and heir of Nathan Trexler on November 15, 1883.

By the account filed the estate appeared to be insolvent.

The exceptions complained *inter alia* that Benjamin had failed to charge himself with the proceeds of two mortgages: one for \$3,780 and the other for \$700.50, given by Jacob and Caroline Leibensperger to Nathan Trexler, and assigned without consideration on the 12th of April, 1881, by Nathan Trexler, the decedent, to Benjamin Trexler, for the purpose, as the exceptions alleged, of collection.

The court referred the exceptions to William M. Goodman, Esq., as auditor, to pass upon the exceptions, audit, restate and make distribution. The testimony taken by the auditor, in so far as it related to the assignment of the mortgages, is stated in the opinion.

The auditor sustained the exceptions of the creditors and Oliver Trexler, to the account, and surcharged the accountant with the proceeds of the mortgages. The orphans' court reversed this action of the auditor, and struck out the surcharge. From this decree this appeal was taken by the Hamburg Bank, by other creditors and by the administrator *d. b. n.*

Messrs. W. D. Horning and H. Willis Bland, for appellants:

The mother and sister of the accountant were not parties, and they had no direct interest in the result of the litigation. The distribution could not have been made to them if they had not assigned, but must have been made to the administrator *d. b. n.* of the decedent.

Montgomery's Est. 7 Phila. 504; *Lewis v. Ewing*, 18 Pa. 315; *Carter v. Trueman*, 7 Pa. 821; *Commonwealth v. Strohecker*, 9 Watts, 480; *Little v. Walton*, 23 Pa. 166; *Bowman's App.* 62 Pa. 170.

Persons merely collaterally interested may transfer and release such interest, and become thereby competent witnesses.

Forrester v. Kline, 64 Pa. 81; *Carter v. Trueman*, 7 Pa. 315; *Steininger v. Hoch*, 42 Pa. 432.

The rule in the case of *Post v. Avery*, 5 Watts & S. 509, and kindred cases, was not intended to render persons incompetent as witnesses who were competent at common law.

Etans v. Dela, 35 Pa. 457.

It applies only to persons who have assigned a chose in action in which the recovery would have been for their own use, if no assignment

had been made. The assignor in an action in which the claim assigned comes directly in controversy cannot be a witness.

Hartman v. Keystone Ins. Co. 21 Pa. 476.

Nor assignors of a chose in action, called to assist in its recovery with their oaths.

Kirkpatrick v. Muirhead, 16 Pa. 127.

The evidence shows a substantially contemporaneous agreement between Nathan and Benjamin, that the latter should hold the mortgages for collection only. Evidence of an express agreement is not essential.

Rhines v. Baird, 41 Pa. 263; *Plumer v. Guthrie*, 76 Pa. 455-6; *Nicolls v. McDonald*, 101 Pa. 519; *Kunkle v. Wolfersberger*, 6 Watts, 180.

It is not on this day an open question that a conveyance absolute on its face may be shown to be a security for money loaned, and that this may be made to appear by oral testimony.

Sweetser's App. 71 Pa. 273; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Hiestor v. Madeira*, 3 Watts & S. 384; *Houser v. Lamont*, 55 Pa. 311; *Harp-er's App.* 64 Pa. 315.

Parol evidence is admissible to explain a latent ambiguity.

Lycoming Mut. Fire Ins. Co. v. Sailer, 67 Pa. 108; *Coleman v. Eberly*, 76 Pa. 197.

Parol evidence is admissible, in cases of fraud, or of plain mistake in drawing a writing.

Christ v. Diffenbach, 1 Serg. & R. 464; *Caulk v. Eberly*, 6 Whart. 303; *Morrison v. Morrison*, 6 Watts & S. 516; *Bollinger v. Eckert*, 16 Serg. & R. 422; *Gover v. Sterner*, 2 Whart. 75; *Chew v. Gillespie*, 56 Pa. 309.

Or in case of an attempt to make a fraudulent use of it subsequently.

Oliver v. Oliver, 4 Rawle, 141; *Renshaw v. Gans*, 7 Pa. 117.

Conversations and negotiations leading to a written contract are admissible to prove a fraud or trust; but there should be clear evidence that the arrangement continued up to the time of executing the writing.

McGinity v. McGinity, 63 Pa. 38.

Parol evidence, may be received to explain and define the subject matter of a written agreement; *Barnhart v. Riddle*, 29 Pa. 92; *Al-bridge v. Fishleman*, 46 Pa. 420; *Gould v. Lee*, 55 Pa. 99; to prove a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it; *Lewis v. Brewster*, 57 Pa. 410; to establish a trust: *Cozens v. Stevenson*, 5 Serg. & R. 421; to rebut a presumption or equity; *Bank v. Fordyce*, 9 Pa. 275; *Musselman v. Stoner*, 31 Pa. 265; to alter the legal operation of an instrument where it contradicts nothing expressed in the writing; *Chalfant v. Williams*, 35 Pa. 212; to explain a latent ambiguity; *McDermott v. U. S. Ins. Co.* 3 Serg. & R. 604; *Iddings v. Iddings*, 7 Serg. & R. 111; and to supply deficiencies in the written agreement; *Miller v. Fichthorn*, 31 Pa. 252; but, as a general rule, it is inadmissible to contradict or vary the terms of a written instrument. *Hain v. Kilbach*, 14 Serg. & R. 159; *Barnhart v. Riddle*, *supra*; *Miller v. Fichthorn*, *supra*; *Harbold v. Kuster*, 44 Pa. 392; *Lloyd v. Farrell*, 43 Pa. 73; *Ansapach v. Bast*, 52 Pa. 356.

In cases of fraud, accident or mistake, the rule is different. Where equity would set aside or reform the instrument on either of these

grounds, parol evidence is admissible to contradict or vary the terms of the agreement as written. *Christ v. Diffenbach*, 1 Serg. & R. 464; *Idings v. Idings*, 7 Serg. & R. 111; *Miller v. Henderson*, 10 Serg. & R. 290; *Parke v. Chadwick*, 8 Watts & S. 96; *Clark v. Partridge*, 2 Pa. 18; *Renshaw v. Gans*, 7 Pa. 117; *Reurich v. Swinehart*, 11 Pa. 238; *Lippincott v. Whitman*, 88 Pa. 246.

The direction to pay to Nathan's children in case of his death was a testamentary act, and Benjamin's authority was revoked by Nathan's death.

Frederick's App. 52 Pa. 338. Note to *Ellison v. Ellison*, 1 White & Tudor, Lead. Cas. Eq. ed. 1876, p. 446.

The transfer of the mortgages was a legal fraud upon the creditors of Nathan Trexler.

Fowler's App. 87 Pa. 454.

The orphans' court is a court of equity.

Kitteras' App. 17 Pa. 423; *Dundas' App.* 78 Pa. 479-480.

Messrs. F. R. Schell and R. E. Wright & Sons, for appellees:

The right to the fund in controversy depended upon transactions had with Benjamin B. Trexler. He was deceased. His legal representatives were the "assignors of the thing or contract in action," and thus the Act of 1869 removing the disqualification of interest does not apply. The case is covered by the proviso to the Act. A witness is incompetent if the effect of his testimony may be to preserve a fund for the payment of a debt due to himself.

Paule v. Mackey, 3 Watts, 110; *Mishler v. Merkle*, 10 Pa. 509; *Sharp v. Long*, 28 Pa. 433; *Hill v. Hill*, 32 Pa. 511.

Where one party of the "thing" in action is dead, and his rights have passed to another, the Act of 1869 has no application.

Karns v. Tanner, 66 Pa. 297; *Hess v. Gourley*, 89 Pa. 195; *Ewing v. Ewing*, 96 Pa. 381; *Hanna v. Wray*, 77 Pa. 27; *Gardner v. McLallen*, 79 Pa. 398; *Strawbridge v. Catarrach*, 4 W. N. C. 176; *Hunt's App.* 100 Pa. 590.

The releases given to the administrator *d. b. n.* of Nathan Trexler, and the assignment of their shares to him individually did not make the accountant's mother and sister competent witnesses. The doctrine of *Post v. Avery*, 5 Watts & S. 509, is still law.

An assignment of a cause of action which is merely colorable shall not divest the title of the plaintiff so as to make him a competent witness, whatever its legal effect between the parties may be, and every assignment is to be deemed colorable when no other motive for it can be made to appear.

Post v. Avery, 5 Watts & S. 509; *Seiper v. Peirce*, 6 Watts & S. 555; *Patterson v. Reed*, 7 Watts & S. 146; *McUelland v. Mahon*, 1 Pa. 364; *Clover v. Painter*, 2 Pa. 46; *Asay v. Hoover*, 5 Pa. 21; *Montgomery v. Grant*, 57 Pa. 248; *Grayson's App.* 5 Pa. 395; *Graves v. Griffin*, 19 Pa. 176; *Bailey v. Knapp*, 19 Pa. 192; *Lindsley v. Malone*, 23 Pa. 24, and *Hertz v. Snyder*, 26 Pa. 511.

An assignor through whose assignment the plaintiff claims is not a competent witness, when executors, administrators, or guardians are either plaintiffs or defendants.

Vintaman v. Cronshore, 15 W. N. C. 202.

If there was anything for the heirs, the dis-

tribution under the Act of 1884 should properly have been to the administrator *d. b. n.*

Purd. Dig. pp. 94, 95, 99, 100, 425; Scott, Intestates, p. 518; 1 Rhone, Orphans' Court, Pr. p. 285; *Commonwealth v. Strohecker*, 9 Watts, 481; *Carter v. Trueman*, 7 Pa. 319; *Lewis v. Ewing*, 18 Pa. 315; *Austin v. Montgomery*, 7 Phila. 504; *Little v. Walton*, 23 Pa. 166; *Bozman's App.* 62 Pa. 170; *Crossel v. Black*, 4 Pittsb. 327.

But before the Act of 1884 this was not so. The distinction (when an administrator died) between such assets of the decedent as were administered and such as were not was clear and distinct. Such as were not administered and still existed *in specie* or uncollected as the decedent had left them, passed to the administrator *d. b. n.*, and in these it might be said that the interest of the heirs was merely collateral. But such as had been administered and were in the hands of the administrator ready for distribution passed to the heirs, legatees and creditors in the proportions to which they were entitled, and the proceedings to recover them were by the heirs directly.

See *Drenkle v. Sharman*, 9 Watts, 489; *Potts v. Smith*, 3 Rawle, 361-370; Scott, Intestates, p. 518-521; *Slaymaker v. Farmers Nat. Bank*, 14 W. N. C. 842.

It is true the Act of 1884 changed all this, and provided that the administrator *d. b. n.* should be entitled to take in his hands all undivided assets, whether administered or not. But he took them for the use of the heirs, legatees and creditors.

Drenkle v. Sharman, 9 Watts, 485.

In order to convert a deed absolute upon its face into a mortgage by parol evidence, such evidence must be clear, explicit and unequivocal. Subsequent admissions and declarations of the alleged mortgagee only are not sufficient. An agreement must be proved which is substantially contemporaneous with the execution and delivery of the deed.

Nicolls v. McDonald, 101 Pa. 514.

To show by parol that a deed absolute upon its face is a mortgage the proof must be clear, explicit and unequivocal. The proof must establish an agreement substantially contemporaneous with the execution and delivery of the deed, and rely not on subsequent admissions and declarations of the mortgagee only.

Plumer v. Guthrie, 76 Pa. 441; *Kutz's App.* 100 Pa. 75; *Phillips v. Medley*, 15 W. N. C. 225.

The evidence proper to be submitted to a jury for the purpose of revoking a written agreement or altering its terms is only such as would justify a chancellor in reforming the writing, on the ground of fraud, accident or mistake, and must be clear, precise and indubitable.

Murray v. N. Y. Lack. & W. R. R. Co. 13 W. N. C. 218.

Evidence must be of what occurred at the execution of the paper.

Martin v. Berens, 67 Pa. 459.

If there was a trust created by the transfer of those mortgages, it cannot be enforced in this proceeding.

The only evidence of the nature of the trust upon which it is alleged that Benjamin was to hold the mortgages was this:

If Benjamin collected the money in Nathan's

lifetime, he was to pay it to him. If he collected it after Nathan's death, he was to pay it to the brothers and sisters in equal shares.

That the brothers and sisters have ample remedy to enforce their equity under such a trust if there be one is clear upon authority.

American Law Register, January, 1884, p. 1, where Penna. cases are collected; *Justice v. Tallman*, 86 Pa. 147; *Dock v. Boyd*, 93 Pa. 92; *Seventh Nat. Bank v. Cook*, 23 Pa. 483; *First Nat. Bank v. McMichael* (Pa.), 18 Reporter, 698.

Appellants contend that the assignment of the mortgages, as modified by the alleged parol trust, was testamentary in character because not to take effect until Nathan's death, and hence revocable. Even if this were so, it never has been revoked, and hence would become operative.

Turner v. Scott, 51 Pa. 127; *Scott v. Scott*, 70 Pa. 246; *Ritter's App.* 59 Pa. 6; *Book v. Book*, 15 W. N. C. 150; *Frederick's App.* 52 Pa. 389.

There are no parties properly in court against whom the decree asked for by the appellants could be made. The administrator *de bonis non* might have sued to recover the assets in the hands of the decedent.

Act of February 24, 1884, § 31, *Purd.* 99; *Scott*, *Intestates*, p. 518; 1 Rhone, *Orphans' Court*, Pr. p. 285, § 143; *Commonwealth v. Strohecker*, 9 Watts, 481; *Carter v. Trueman*, 7 Pa. 319; *Lewis v. Ewing*, 18 Pa. 815; *Austin v. Montgomery*, 7 Phila. 504.

If the proceeding on the account already filed, and before an auditor, was to be followed out in lieu of a new proceeding by the administrator *de bonis non*, it should have been under the same Act. A *scire facias* should have been issued against the executors or administrators of B. B. Trexler, deceased.

Purd. p. 425, pl. 100; *Id.* p. 124, pl. 94, 95.

If the creditors had any standing and insolvency at the time of transfer were proven, it would not avoid the transfer so as to inure to the benefit of heirs. "None but those intended to be postponed or defrauded are within the protection of the Statute of Elizabeth."

Phippis v. Boyd, 54 Pa. 842; *Bradway's Est.* 1 Ashm. 212.

The representatives of a donor who has made a voluntary conveyance in fraud of creditors can only set it aside to the extent that may be required to pay such creditors.

Pringle v. Pringle, 59 Pa. 286.

Mr. Justice Sterrett delivered the opinion of the court:

Exceptions having been filed by creditors and others to the account of Benjamin B. Trexler, administrator of the estate of Nathan Trexler, deceased, an auditor was appointed by the orphans' court to pass upon the same, restate the account, if necessary, and distribute the balance. The duty of the auditor under this appointment was twofold: 1. To ascertain the correct balance due by accountant; and 2. To distribute the same among the parties entitled thereto. It is only as to the former branch of his duty that any question arises on this appeal. As to the parties who are entitled to participate in the distribution of the balance that may be found due by the accountant, there appears to be no controversy.

One of the exceptions, and the only one involved in this contention, was that accountant should be charged with the proceeds of the Leibensperger mortgages, one for \$3,780 and the other for \$709.50, both of which were assigned by the intestate to his son, the accountant, and collected by him.

It was alleged by exceptants that the mortgages were assigned solely for the purpose of collection, with the distinct understanding that if accountant succeeded in collecting them in his father's lifetime, the proceeds should be paid to him; if not they should be accounted for as assets of his estate. It is conceded that accountant collected the debts secured by the mortgages, and has since died without having accounted for the proceeds. The burden, of course, was on the exceptants to show that the assignment was not intended to invest accountant with the absolute ownership, or title to the mortgages in his own right, but only in trust for the purpose stated.

Accountant's mother and sister having first assigned their respective interests in the estate and executed releases to the administrator *de bonis non*, were called by exceptants and testified in relation to the assignment of the mortgages and the purpose for which it was made. On their testimony in connection with that of other witnesses, the learned auditor found in favor of exceptants, and accordingly surcharged accountant with the proceeds of the mortgages and interest amounting in all to \$5,347.35, ascertained the balance due by him and distributed the same. The orphans' court, however, held that accountant being dead, at the time of hearing before the auditor, his mother and sister were incompetent to testify that the assignment was executed merely for the purpose of facilitating the collection of the mortgages and not with the view of transferring title absolutely to accountant.

We are not prepared to say there was any error in this: but, assuming for the sake of argument that the witnesses in question were competent, their testimony establishes a special trust that is not cognizable in the orphans' court; and for that reason, if no other, there was no error in sustaining the exceptions to the auditor's report.

As to the disposition accountant agreed to make of the mortgage money when collected, the substance of their testimony is that if Benjamin, the accountant, collected the money in his father's lifetime, he was to pay it to him. If he collected it after his father's death, he was to pay it to his brothers and sisters in equal shares. The exact language of Mary Trexler, as we find it on the record is: "My father said to him, Benjamin, that if he collected the mortgages in his lifetime he would have to pay the money over to him, my father; and if he, my father, didn't live, he would have to pay it out to his brothers and sisters. This was at the time the assignments were made; that is, my father said this in the morning, when the assignments were made in the evening of the same day. Benjamin said he would pay it over."

The widow, Mrs. Lydia Trexler, testified as follows: "I was present when my husband assigned the mortgages to Benjamin. After the mortgages were assigned, he, Benjamin, said to me the mortgages were assigned to him for col-

lection. He said that he, Benjamin, was to pay the money back to his brothers and sisters, and if he would collect it in his father's lifetime, he would have to pay it to him." The learned auditor also found as a fact that the assignor of the mortgages intended to create a trust for the benefit of his children in case the money was not collected in his lifetime.

It is conceded the assignor of the mortgages died before they were collected. If an alternative trust, such as was testified to by the witnesses and found by the auditor, was created, it necessarily follows that accountant held the proceeds of the mortgages, not in trust for his father's estate nor for his father's creditors, but in trust for his brothers and sisters. If the assignment was made for the purpose of hindering, delaying or defrauding his creditors, they are the only parties who can assail it. His widow and heirs cannot question its validity; nor can the trustee be compelled to account in the orphans' court until the trust is first stricken down, at the instance of the assignor's creditors, as a fraud upon them to the extent of their respective claims. This has not been done; and we think there was no error in holding that the court had no jurisdiction of a trust created by accountant's intestate in favor of his children.

Decree affirmed and appeal dismissed, at the costs of appellants.

TREXLER'S APPEAL.

(Decided October 4, 1886.)

Mr. Justice Sterrett delivered the opinion of the court:

The questions involved in this appeal are the same as those presented by the record in *Hamburg Bank's App.* [ante, 921], and for reasons briefly given in opinion first filed in that case the appeal in this case is dismissed.

Decree affirmed and appeal dismissed at costs of appellant.

John TRUBY *et al.*, *Piffs. in Err.*,
v.

J. H. PALMER *et al.*

SAME v. SAME.

APPEALS OF ALLEN *et al.* (Two cases.)

In a lease which declares that the land shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any other purpose whatsoever; and that if no oil is found in paying quantities within four years the lease shall be null and void, "oil" is not synonymous with "gas," and accordingly the production of gas alone will not satisfy the conditions of the lease.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Warren County, to review judgments discharging rules to set aside writs of *habere facias possessionem* upon judgments in ejectment entered for the plaintiffs on warrants of attorney. *Affirmed.*

affirmed.

APPEALS from decrees of the said court, discharging rules to show cause why the said judgments in ejectment should not be opened or stricken off. *Affirmed.*

These were two amicable actions of ejectment, by J. H. Palmer and others against John Truby and Allen & Co., in which on April 4, 1884, judgments were confessed by virtue of general powers of attorney contained in two oil leases, one of the north half and the other of the south half of the same tract of land.

With the exception of the parts of the tract to which they related, and their dates, one May 7, 1881, the other January 10, 1883, the leases were identical in terms.

By each instrument the plaintiffs leased to the defendants the land described in it, reserving the right to use the land for agriculture or any other purpose not interfering with the operations of the defendants, for the term of twenty years, provided the covenants, agreements and stipulations therein contained were faithfully kept and performed, for the exclusive purpose of occupying and working for petroleum, rock or carbon oil.

Each lease contained the usual provisions for using timber, drawing casings, plugging, payment of taxes, location of wells near boundaries, keeping records of wells, inspection by the plaintiffs, notification to the plaintiffs when oil-bearing sand was expected, commencement of operations within thirty-five days and employment of sufficient labor and material. It was also stipulated that:

"If no oil is found in paying quantities within four years from this date, this lease shall be null and void; but the parties of the second part or those claiming under them, to complete and test at least one well each and every— from the completion of the first well above stipulated to be put down, should said first well prove to be without oil in paying quantity."

Then followed a covenant for the payment of royalty.

The lease concluded with the usual agreement that a failure to comply with any of the covenants, agreements or stipulations therein contained, should forfeit the lease, and the same should become null and void; and that the parties of the second part thereby authorized the bringing of suit in ejectment against them, the entry of an appearance for them, and the confession of a judgment against them for the land described in the writ, with the same force and effect as upon service of a writ in ejectment, verdict and judgment; and that upon judgment so entered, writ or writs of possession might issue at once with *fi. fa.* for costs, and without stay, thereby waiving and releasing all errors therein.

Upon the filing of copies of the leases, and written confessions of judgment which contained averments, supported by affidavit, that the defendants had failed to comply with the covenants, agreements and stipulations contained in the leases (the first well drilled not being an oil-producing well and the defendants not sinking a second one) judgments were entered. Writs of *habere facias possessionem* at once issued; whereupon, the defendants ob-

tained rules to show cause why the writs should not be set aside and the judgments opened.

Pending these rules the defendants obtained also rules to show cause why the judgment should not be stricken off. At the hearing of the rules the following facts appeared:

In November, 1882, while drilling the first well at the depth of about 1500 feet, a very large gas vein was struck. The flow of gas was so strong, however, that no torpedo could be exploded in the oil-bearing sand rock, to test the capacity of the well for producing oil, on account of the great danger in lowering the shell.

The lessees were hopeful that the gas might soon exhaust itself, as had often been the case in such wells, and that this well might become a paying producer. In the meantime they made an arrangement to utilize the gas, so that it might become a source of profit to both parties. They accordingly made a contract to sell a certain amount of gas, payable monthly, and in December received the first payment, and at once reported to the plaintiffs what they had done, and proposed to do, and paid Mr. Palmer his royalty of one eighth, in accordance with the terms of the lease; and he approved what they had done, and accepted the same each month, and receipted for the moneys as royalty until June, 1883, when he declined to receipt for any more.

The defendants drilled a well on the tract of land covered by the second lease which proved also a gas well and thereafter they made no more efforts to obtain oil.

The court discharged all the rules.

The defendants took these writs, assigning as error the refusal of the court to set aside the execution; and also appealed from the decrees of the court discharging the rules to show cause why the judgment should not be opened or stricken off.

Messrs. Chas. Dinsmoor, Roger Sherman and S. T. Neill, for plaintiffs in error, and appellants:

There can be no presumption *prima facie* that the lessee has been guilty of a violation of a covenant in the lease. The presumption is the other way.

Adams, Eject. *317.

Taking the blank in the lease, to have been intended for the word "year," and concede to the plaintiffs below the right to amend by insertion of the word "year," without which the original judgment had nothing to support it (which right to amend we deny), and they still have to meet the following fatal objections to their judgment:

There is no averment that the first well was then or is now completed, or that the same has not been put down in the shortest possible time.

There is no averment that the four years' time, given by the terms of the lease, for obtaining oil in paying quantities, have elapsed, and it affirmatively appears by the lease that they have not elapsed.

The terms of the power of attorney require the bringing of a suit in ejectment and the issuing of a writ, which has not been done.

The twelfth section of Act of March 21, 1806, 1 Purd. Dig. 635, pl. 1, seems to require the issuing of a writ of ejectment in every case, and to be mandatory.

Execution could not issue without leave of court.

Shaw v. Bayard, 4 Pa. 257; **Connolly v. Miller**, 95 Pa. 513.

The issuing of execution to put the tenants out of possession of the demised premises, on the bare allegation of a forfeiture claimed by their landlords, unsupported by anything except the mere averment of record, by their attorneys, is contrary to the spirit and purpose of the Statute of 8th and 9th William III, chap. 11, (Rob. Dig. 142).

It is true this statute was held not to apply to judgments entered on warrant of attorney to secure the payment of money in several installments.

Longstreth v. Gray, 1 Watts, 63 and many other cases, down to **Templeton v. Shakley**, 107 Pa. 877.

But in every case in this State where it has been so held, the bonds or obligations were simply for the payment of money.

Where the right to issue execution upon a judgment depends upon the existence of a fact or the performance of some collateral act, the existence of that fact or the performance of the act must be judicially determined before execution can issue.

Adams v. Bush, 5 Watts, 289; **Montelius v. Montelius**, Bright. 79; **Holden v. Bull**, 1 Penn. & W. 460; **Harger v. Commissioners Washington Co.** 12 Pa. 251.

In an action on a replevin bond, with warrant to confess judgment, a *scire facias quare executio non* must be issued.

Curtis v. Kearney, 2 Pittsb. 87; **Magill v. Higgins**, Id. 107.

Error lies to this court to the refusal of the court below to set aside the execution.

Jones v. Dilworth, 63 Pa. 447; **Pontius v. Nesbit**, 40 Pa. 309; **Holden v. Bull**, 1 Penn. & W. 460.

Messrs. W. W. Wilbur and R. Brown, for defendants in error, and appellees:

Where a lease is upon condition, the burden is on the lessees of showing performance.

The citations to Adams on Ejectment, by the plaintiffs in error, have no application to leaseholds in Pennsylvania, for the reason that no entry is necessary to enforce a forfeiture.

Sheaffer v. Sheaffer, 87 Pa. 525; **Davis v. Moss**, 38 Pa. 346.

The plain import of the averments is that the first well on each tract proved to be without oil in paying quantities when completed, and that a second well was not completed and tested in one year from the completion of the first as required by the terms of each agreement.

Although the twelfth section, Act March 21, 1806, seems mandatory that a writ must be issued in every case, yet it was decided in **Massey v. Thomas**, 6 Binn. 333, that an amicable action of ejectment is good, although the Act prescribes the form of the writ of ejectment and says it shall not be otherwise.

The cases of **Shaw v. Bayard**, 4 Pa. 257, and **Connolly v. Miller**, 95 Pa. 513, cited by the counsel as sustaining the position that the *habere facias* could not issue except by leave of the court, apply only to conditional verdicts in ejectment.

The writ may issue at once, without leave of the court. A writ of *sci. fa.* is unnecessary,

and it was not intended by the parties when they executed the leases that one should issue before the *habere facias*.

The Statute 8 and 9 William II, chap. 11, § 8 (Rob. Dig. 142), neither in terms nor by the decisions of this court applies to cases where judgments are entered by warrant of attorney. *Jones v. Dilworth*, 68 Pa. 447; *Skidmore v. Bradford*, 4 Pa. 296; *Reynolds v. Lowry*, 6 Pa. 465; *McCann v. Furlley*, 26 Pa. 173.

As to the proof requisite to reform the second lease by changing the word "oil" into "gas," the only evidence given falls far short of the requisites to change the agreement. It shows no fraud or mistake, and is not of that clear and convincing kind of evidence which this court has uniformly ruled necessary for that purpose. Besides, the testimony of one party is flatly denied by the other party without the evidence equivalent to another witness; hence the facts he states are not proven.

Sowers v. Weaver, 78 Pa. 443; *Penn Iron Co. v. Diller*, 1 Cent. Rep. 377.

Per Curiam:

These four cases were argued together. They are based on the same original transaction. That is a written lease dated May 7, 1881. It expressly declares the property "shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any other purpose whatsoever." And "If no oil is found in paying quantities within four years from this date, this lease shall be null and void."

Oil was not so found. It would be a clear perversion of language to hold that gas and oil are synonymous terms. The evidence is insufficient to prove that the word "gas" was omitted from the lease through fraud, accident or mistake. The doctrine of equitable estoppel is not applicable to the facts proved.

There is no error in the judgments nor in the decrees; therefore, judgments and decrees are severally affirmed and the appeals are dismissed, at the costs of the respective appellants.

PENNSYLVANIA CANAL CO., Plff. in Err.,

TOWNSHIPS OF SHIRLEY AND UNION.

A contract entered into by the supervisors of a township, with a canal company, for the use of the tow path of the canal as a public road, the contract being made by decree of court, is *ultra vires*, against public policy and void.

(Decided October 4, 1886.)

ERROR to the Common Pleas of Huntingdon County, to review a judgment on a verdict for defendant in an action of debt. *Affirmed*.

The following facts appeared on the trial before Furst, P. J.:

Viewers appointed by court reported that they laid out a public road along and upon the tow path of the plaintiff's canal. The report was confirmed *nisi*. Exceptions were filed and argued.

Plaintiff offered to prove that, on the hearing of the argument upon the report of the viewers laying out a public road on the towing path of the canal, and the exception of the Canal Company, the court continued the case until the PA.

following court of quarter sessions, stating that in the meantime it would expect the Canal Company and the two Townships to make an agreement for the use of the towing path, and if the agreement was not made, it would give the Townships a road over the end of the mountain. Acting upon that suggestion the petition of 103 citizens of the two Townships was presented to the court, asking for authority to make an agreement for five years, and pay \$100 per annum. The court thereupon made a decree giving the authority, and afterwards the contract was made and executed, the contract reciting the decree of the court.

Plaintiff proposed to follow the offer with proof: That this decree was made by the court, and certified copies given to the supervisors of the two Townships. That after two thirds of the citizens of Union Township requested the supervisors to execute the contract, it was executed by the supervisors of both Townships. That they have had the use of the towing path ever since, and have paid the sum of \$100 for one year. That the contract having been fully executed nothing remains to be done but the payment of the annual sum of \$100.

The contract to follow the offer as above.

By the Court: We are of opinion that the decree of the court of May 23, 1879, did not empower the defendants to make the contract. The contract is contrary to the policy of the law and in violation of the method and only method in which public roads may be laid out and opened by authority of law under the general road laws of this Commonwealth. Said contract is *ultra vires* and therefore not binding on the several Townships, defendants. For these reasons we reject the offer of evidence.

First, second and third assignments of error.

Messrs. Wm. Dorris and John D. Dorris, for plaintiff in error:

"The decisions and *dicta* upon the subject of *ultra vires* are very conflicting, and some absolutely irreconcilable, while the principle itself is become, if not an excrescence upon, at least a very disturbing element in, the legal system."

Green's Brice, *Ultra Vires*, Preface, XI.

"The doctrine is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty."

Bradley v. Ballard, 55 Ill. 417.

By the Act of April 15, 1834, section 3, the several townships are made bodies corporate. They are enabled to take and hold real estate within their respective limits, and also personal property for the benefit of the inhabitants, for such objects and purposes and to make such contracts as may be necessary and proper for the execution of the same objects and purposes.

Dean v. New Milford, 5 Watts & S. 546.

The court had the power to confirm the report of the viewers. In the exercise of the right of eminent domain the franchise of the Canal Company could have been taken.

West Bridge Co. v. Dix, 6 How. 507 (47 U. S. bk. 12, L. ed. 535); *Mills v. St. Clair Co.* 8 How. 569 (49 U. S. bk. 12, L. ed. 1201).

A franchise may be condemned in the same manner as individual property.

Richmond F. & P. R. R. Co. v. Louisa R. R. Co. 13 How. 71 (54 U. S. bk. 14, L. ed. 55).

"If the county jail should be burned, or rendered uninhabitable by infectious disease, or other

cause, and the commissioners, acting in good faith, should hire prisoners kept in some other suitable place, can it be doubted that the county would be liable for the debt thus incurred?"

Allegheny County v. Western Pa. Hospital, 48 Pa. 126.

Where a contract has been fully performed, either by the corporation or the other party, the one who has received the benefit will not be permitted to resist its enforcement by the plea of mere want of power.

Oil Creek, etc., R. R. Co. v. Pa. Trans. Co. 83 Pa. 166; *Wright v. Pipe Line Co.* 101 Pa. 207; *Commonwealth v. Phila. Co. 2 Serg. & R.* 198; *Vankirk v. Clark*, 16 Serg. & R. 290; *Cooper v. Lampeter*, 8 Watts, 125; *Dauphin Co. v. Bleidenhart*, 16 Pa. 458; *Watts' Appeal*, 78 Pa. 391; *Whitney Arms Co. v. Barior*, 63 N. Y. 62; *Bigelow, Estop.* p. 466; citing *Ward v. Johnson*, 95 Ill. 215, 280; *Darst v. Gale*, 88 Ill. 141; *R. Co. v. McCarthy, San Antonio v. Mehaffy, Hitchcock v. Galveston*, 96 U. S. 267, 312, 351 (Bk. 24, L. ed. 693, 816, 659). See also *Bradley v. Ballard*, 55 Ill. 417; *Parish v. Wheeler*, 22 N. Y. 494; *Green's Brice, Ultra Vires*, 2d ed. p. 729.

This rule prevails as to public or municipal corporations.

Thompson v. Lambert, 44 Iowa, 239; 1 Dillon, Mun. Corp. § 10, p. 97; *Gas Co. v. San Francisco*, 9 Cal. 453; *Oakland Township v. Martin*, 104 Pa. 805.

"When there is a *de facto* corporation, and the State does not interfere, its corporate existence and its ability to contract cannot be questioned in a suit brought upon an evidence of a debt given to it."

Commissioners v. Bolles, 94 U. S. 104 (Bk. 24, L. ed. 46); *Spahr v. Farmers Bank*, 94 Pa. 434; *Oil Creek, etc., R. R. Co. v. Pa. Trans. Co.* 83 Pa. 166; *Parish v. Wheeler*, 22 N. Y. 503.

An agreement originally *ultra vires* cannot be impeached after a considerable time.

Smallcombe's Case, L. R. 3 Eq. 769; 1 Add. Cont. § 124.

"The law never sustains a defense of this nature out of regard for a defendant."

Wright v. Pipe Line Co. 101 Pa. 207.

See also *Farnham v. Del. & Hud. Canal Co.* 61 Pa. 271; *Freeland v. Pa. Cent. Ins. Co.* 94 Pa. 504; *Bentley v. Lamb*, 17 W. N. C. 412.

Messrs. Brown, Bailey & Brown and Speer & McMurtrie, for defendants in error:

By the Act of 1834 (2 Purd. 1401), the supervisors of each township elected or appointed in pursuance of this Act, shall perform all the duties imposed by law on the supervisors of the public roads and highways.

By the Act of 1836 (2 Purd. 1278), public roads or highways laid out, approved and entered on record as aforesaid, shall * * * be effectually opened and constantly kept in repair.

By the Act of 1834 (2 Purd. 1366), supervisors may lay a tax for "laying out, opening, making, amending or repairing of roads and highways, and for the making and repairing of bridges, and for such other purposes as may be authorized by law."

But before issuing the duplicate and warrant for their collection, they shall give "notice to all persons, rated for such taxes, by advertisements or otherwise, to attend at such times and places as such supervisors may direct, so as to

give such persons full opportunity to work out their respective taxes."

The opportunity to work out the taxes is a condition precedent to collection by legal process.

Miller v. Gorman, 38 Pa. 309.

Under this contract, the \$100 was to be paid annually in money. There was, and there could be, no opportunity to work out this tax.

Without an order of the quarter sessions, supervisors have no more authority to open a new road, or correct errors in the opening of an old one, than have their fellow citizens.

Holden v. Cole, 1 Pa. 303; *Snow v. Deerfield Township*, 78 Pa. 181; *Bergner v. Harrisburg*, 1 Pears. 291; *Addis v. Pittsburgh*, 85 Pa. 373; *Hague v. Philadelphia*, 48 Pa. 527; *School District of Erie v. Fuess*, 98 Pa. 600.

A quasi municipal corporation has only the powers which are conferred by statute, and acts done by it in excess of such powers, are void.

Wimer v. Worth Township, 104 Pa. 317; *Wolf v. Goddard*, 9 Watts, 550.

A township is a quasi corporation.

Dill. Mun. Corp. § 10; *Union Twp. v. Giboney*, 94 Pa. 534.

Even exercise of legislative power on such subject is doubtful.

Mahanoy Twp. v. Comrs. 103 Pa. 362.

A ratification can only be made when the party ratifying possesses the power to perform the act ratified.

Marsh v. Fulton County, 10 Wall. 676 (71 U. S. bk. 19, L. ed. 1040).

A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the corporate powers, but not otherwise.

Dill. Mun. Corp. § 385.

Upon authorized contracts it is liable as a natural person; but upon contracts that are *ultra vires* there is no liability, and the corporation is not estopped to set up the defense.

Dill. Mun. Corp. § 749.

When the wing walls to a county bridge had been built by an unauthorized contract, the township was held not liable, although the public was enjoying the fruits of it.

Cooper v. Lampeter, 8 Watts, 125; *Pike County v. Rowland*, 94 Pa. 238.

Per Curiam:

The contract of the defendants which the plaintiff seeks to enforce is clearly *ultra vires*. The Act of Assembly prescribes the manner in which public roads shall be laid out and become a charge on the townships in which they are located. The towing path of the plaintiff had not in law become a public highway. It remained the property of the Canal Company. The townships in which it is located had no power to enter into this agreement for the use of it as a public road. If the supervisors can legally bind the Townships in this case, they can exercise the same power in regard to the use of every private road in the Townships. It is wholly unlike the cases of supplying a temporary jail or place of holding court, on the destruction of the established buildings.

No statute gives to the officers of a township the power claimed, and it is clearly contrary to public policy to thus enlarge their powers by construction.

Judgment affirmed. 

INDEX.

The points decided are denoted by the name of the case appended or "*Id.*," other points indexed as "authorities cited" are such as are found in the decisions, either as *dicta* or argument, references to statutes, or in dissenting opinions. The supplemental index points to editorial notes and briefs of counsel.

ABANDONMENT. See MILLS AND DAMS, 7.

ACCOUNT. See AFFIDAVIT OF DEFENSE, 4, 5; EXECUTORS AND ADMINISTRATORS, VIII.; GUARDIAN AND WARD, 8-8; PARTNERSHIP, 8, 7-10; PATENTS, 4-7; POOR AND POOR LAWS, 8; TRUSTS, 6.

1. Equity has jurisdiction to compel an accounting and discovery in aid thereof, and to restrain the manufacture of other than a patent article in violation of the terms of a written contract.

Bovaird v. Dick (Pa.) 40

2. A debt upon a continuous account of book entries, made in the ordinary course of dealing, is entire; and it cannot, without an agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits.

Buck v. Wilson (Pa.) 643

3. Where there is a book account on one side, and a demand on the other, to toll the Statute of Limitations the demand must also be a book account. *Id.* 896

4. Mutual accounts, to prevent the operation of the Statute of Limitations, must be such as concern the trade of merchandise, and upon which an action would lie. Authorities cited. *Id.* 897

5. To constitute mutual accounts there must be mutual demands. Authorities cited. *Id.* 898

ACTION OR SUIT. See ACCOUNT; AFFIDAVIT OF DEFENSE; ANIMALS; APPEAL; ARBITRATION AND REFERENCE; ASSUMPSIT; ATTACHMENT; CERTIORARI; CLOUD ON TITLE; CONTEMPT; CONTRACT, III.; CORPORATIONS, V., COSTS; COURTS; COVENANT; CREDITORS' BILL; CRIMINAL LAW; DAMAGES; EJECTMENT; EMINENT DOMAIN; EQUITY; ERROR; EVIDENCE; EXECUTORS AND ADMINISTRATORS, X.; HABEAS CORPUS; HUSBAND AND WIFE; INJUNCTION; JUDGMENT; LACHES; LIBEL AND SLANDER, MALICIOUS PROSECUTION; MANDAMUS; MORTGAGE, VI.; MUNICIPAL CORPORATIONS, VI.; NEGLIGENCE; NON-SUIT; NUISANCE; PARTITION; PARTNERSHIP; PENALTIES; PLEADING; REPLEVIN; SEQUESTRATION; SET-OFF AND COUNTERCLAIM; SPECIFIC PERFORMANCE; TAXES; TRESPASS; TRIAL; TROVER AND CONVERSION.

1. A debt upon a continuous account of book entries, made in the ordinary course of dealing, is entire; and it cannot, without an agreement to that effect, be split up into separate and distinct demands, so as to form the basis of several suits.

Buck v. Wilson (Pa.) 643

2. An action brought for a part of an entire and indivisible demand, and the recovery therein, will bar a subsequent demand for the residue of the same. Authorities cited. *Id.* 646

3. If parties contract that a debt shall fall due and be payable in installments, they have severed it; and distinct recoveries may be had for the different installments in portions of the debt, according to the agreement, without involving the whole debt; but when the consideration is fully executed, and there is no stipulation of severance, the obligation to pay is ordinarily indivisible and entire. Authorities cited. *Id.* 646

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADULTERATION.

It is essential, to create the offense prohibited by Laws 1885, chap. 188, § 7, as amended by chap. 458, that the article not produced from milk or cream, the manufacture and sale of which is forbidden, should be in imitation or semblance of butter; and this is a question for the jury. An instruction omitting the fact of imitation is error. *Earl and Andrews, JJ.*, dissenting from the reversal, on the ground that it had been proved and assumed on the trial that yellow coloring matter had been put in the oleomargarine in order to give it the semblance of butter.

People v. Arensburg (N. Y.) 542

ADULTERY. See HUSBAND AND WIFE, 84-86.

An indictment for adultery which charges that the defendant, being a married man and having a lawful wife living, did have carnal connection with a woman, naming her, not his lawful wife, is sufficient, without setting out the name of the defendant's wife. The indictment followed the definition in Act of March 31, 1860.

Davis v. Commonwealth (Pa.) 711

ADVANCEMENTS. See DEVISE AND LEGACY, VII.

ADVERSE POSSESSION. See LIMITATION OF ACTIONS, 9-13.

ADVICE OF COUNSEL. See MALICIOUS PROSECUTION, 8.

AFFIDAVIT. See PERJURY; PLEADING, II.

AFFIDAVIT OF DEFENSE.

1. An affidavit of defense, made and filed by one styling himself "attorney for the defendant," and alleging that he transacted all the business in the case and has full knowledge, etc., will not be received.

Griel v. Buckius (Pa.)

507

2. Where an affidavit of defense is made by a stranger, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability on the part of the defendant existed, which prevented him from making the affidavit himself, and the circumstances giving rise to it.

Id.

3. An affidavit of defense setting forth that "the whole bill is in excess of the price agreed upon, and is extortionate, and labor and material charged for which was not furnished," is too vague and insufficient, because not specifying the amount of the excess of the quantity of labor and material charged for and not furnished.

Id.

4. Items of cash paid for the repair, or commissions charged for the sale, of real estate, are not proper subjects of book account, and are not within the affidavit of defense law.

Fenn v. Early (Pa.)

288

5. To authorize judgment, for want of affidavit of defense, against a married woman, for work or labor done or money expended in relation to her real estate, the copy of book entries filed must contain or be accompanied by an averment that the debt was contracted for an act done that was necessary for the use, enjoyment, or preservation of the wife's property.

Id.

AFFRAY. See HOMICIDE, 1, 2.

AGENTS. See PRINCIPAL AND AGENT.

ALDERMEN. See JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS, 7.

ALIENATION. See DEED, 7; DOWER, II.

ALIMONY. See HUSBAND AND WIFE, 39, 40.

ALLEYS. See WAYS, 40.

AMENDMENT. See JUDGMENT, 3, 4; PLEADING, IV.

ANIMALS.

1. Injuries inflicted by animals. A person bitten by a dog may recover damages from the owner, where a previous propensity to bite mankind is shown, if it also be shown that the owner knew of such propensity; whether the previous occasions of biting were in playful mood or ferocious spirit is immaterial.

State v. McDermott (N. J.)

559

C. R., V. IV.

2. A lady who was injured by being butted by a ram while driving cows home from pasture,—*Held*, entitled to recover from the owner of the ram, who had a knowledge of its propensity to butt mankind, and it was immaterial whether this propensity proceeded from an ugly disposition or from the exuberance of a playful spirit. Authorities cited. *Id.*

560

3. Where plaintiff walking in a public street and wearing a red handkerchief was gored by a bull,—*Held*, he was entitled to recover of the owner, who knew of the propensity of the bull to run at anything red, although the animal was ordinarily gentle and quiet, and was not known to have gored any person previously. Authorities cited. *Id.*

Id.

ANNEXATION. See MUNICIPAL CORPORATIONS, I.

APOTHECARY. See INTOXICATING LIQUORS, 9.

APPEAL.

I. WHEN LIES.

II. PRACTICE; RECORD; EXCEPTIONS.

III. QUESTIONS CONSIDERED.

See CONTEMPT, 4, 6, 8; CRIMINAL LAW, IV.; EXCEPTIONS; REPORT AND CASE MADE; REVIEW.

I. WHEN LIES.

1. An order of the orphans' court revoking an order theretofore made by it, extending the time for filing exceptions to claims against an insolvent estate, on the ground that such order was inopportune granted, being discretionary, is not appealable.

King v. Rockhill (N. J.)

836

2. An order quashing a writ of certiorari is appealable to the court of appeals when it adjudicates upon the validity of the proceeding reviewed.

People v. Comrs. of Brooklyn (N. Y.)

774

3. Chapter 418, Laws of 1886, does not authorize appeals from judgments of the City (late Marine) Court of New York directly to the court of appeals. Such judgments must still be first reviewed by the court of common pleas.

Hutkoff v. Demorest (N. Y.)

778

4. An appeal lies directly to the court of appeals from a judgment entered on a verdict after a decision by the general term reversing an order granting a new trial, and from the order of reversal.

Wiedmer v. N. Y. Elevated R. R. Co. (N. Y.)

538

5. A party appealing from a judgment entered upon the decision of the court upon a trial without a jury is not required to make and serve a case under § 997, Code Civ. Proc., but may file exceptions under § 994; and his time to do this, or to make a case under Rule 32 of the supreme court, does not begin to be limited until service upon his attorney of a copy of the decision of the court, with notice of entry of judgment thereon. The service of notice of entry of

judgment, without a copy of the decision, has the effect of limiting the time to appeal only.

Schwartz v. Weber (N. Y.) 772

II. PRACTICE; RECORD; EXCEPTIONS.

6. By § 2545 of the Code of Civil Procedure, the practice upon appeals from a surrogate's decree upon the trial of an issue of fact is assimilated to that upon appeals from a judgment by a court or referee; and specific errors are required to be pointed out in order to be available on appeal.

Angevine v. Jackson (N. Y.) 795

7. A general exception to a surrogate's decree rendered upon the trial of an issue of fact is useless. *Id.*

8. Alleged errors in the charge are not open to review unless excepted to at the trial. A stipulation by counsel, "that a general exception should give the defendant the benefit of a particular exception to any part of the charge," will not avail.

People v. Buddensiek (N. Y.) 787

9. Where a bill of exceptions sets out two rulings of the court, but the exception taken is so ambiguous that it cannot be ascertained which of the rulings was excepted to, the court will disregard the bill altogether.

Thaw v. Ritchie (D. O.) 597

III. QUESTIONS CONSIDERED.

10. A former decision must be regarded, though it may have proceeded upon an erroneous principle. Authorities cited.

Appeal of Church (Pa.) 97

11. Parties in suits in which evidence is taken before an examiner will not be permitted to appeal to the chancellor from the decision of a vice-chancellor, nor to have a rehearing before him upon questions arising upon appeal from rulings of the examiner admitting or rejecting evidence.

Pullen v. Pullen (N. J.) 72

12. Where there is no dispute as to the right to damages because of an injunction, and there is some evidence that damages were sustained, the court of appeals, having nothing to do with the weight or cogency of evidence, will not interfere with the result reached in the lower court.

Lyon v. Hersey (N. Y.) 126

13. The court of appeals has no power to pass upon a question of fact arising upon conflicting evidence in an action originating in a surrogate's court and reviewed in the supreme court; but only to determine whether there is any evidence upon which the decision of the court below might fairly and reasonably stand. Chapter 229, Laws 1888, amending subdivision 11 of § 8847 of the Code of Civil Procedure, has not enlarged the powers of the court of appeals in this respect.

Hewlett v. Elmer (N. Y.) 851

14. An auditor's finding upon a pure question of fact, when the court is not satisfied that a mistake has been committed, must be confirmed.

Schiele's Appeal (Pa.) 667

15. To justify the supreme court in reversing. C. R., v. IV.

ing a judgment for the erroneous exclusion of evidence, it must appear that such exclusion worked an injury to the appellant.

Taylor v. Brown (Md.) 848

APPLICATION. See PAYMENT, 5.

APPOINTMENT. See EXECUTORS AND ADMINISTRATORS, I.

ARBITRATION AND REFERENCE.

Under Code Civ. Proc. § 888, subd. 5, a commission to take testimony out of the State can issue in a reference of a disputed claim against a decedent's estate, under Rev. Stat. pt. 2, tit. 8, art. 2, § 8687.

Paddock v. Kirkham (N. Y.) 127

ARMY AND NAVY.

The Supreme Court of the District of Columbia has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court martial.

United States v. Whitney (D. C.) 154

ARREST. See CONTEMPT; FALSE IMPRISONMENT; HABEAS CORPUS.

ASSESSMENTS. See MUNICIPAL CORPORATIONS, IV.; WAYS, 9, 14-16, 20, 21.

ASSIGNMENT. See DOWER, II.; INSURANCE, 5-13; LANDLORD AND TENANT, V.; LIMITATION OF ACTIONS, 7; MASTER AND SERVANT, II.

1. Whether an assignee can sue in his own name is sometimes a technical question, and sometimes one that is essential. When it is technical, the *lex fori* is to decide. Authorities cited.

Glenn v. Bussey (D. C.) 614

2. The assignee of the borrower has no rights superior to those of the borrower himself.

Lancaster Co. Nat. Bank v. Huver (Pa.) 672

3. Orders drawn by a contractor upon a county treasurer, on account of work contracted to be done for the county, under a contract providing for a cancellation of the contract in case of delay on the part of the contractor, no money being at the time due on the contract, can operate only as an assignment of money expected to become due; and they become inoperative if, by force of the provisions of the contract, no money should afterwards become due to the contractor.

Conselyea v. Blanchard (N. Y.) 872

4. A promise by a contractor to pay for materials furnished, out of money to become due on his contract, does not operate as an equitable assignment of the fund, or give an equitable lien thereon. *Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The title acquired by an assignee for the benefit of creditors, although good as to the property assigned, is, as to assets in other States, whose policy it is not to recognize, as against the claims of creditors of the assignor domiciled therein, the validity of general assignments with preferences, liable to be

defeated by attachments sued out of the courts of such other States, by creditors domiciled therein, to recover their debts out of such assets.

Kimball v. Lee (N. J.)

332

2. Where a person appointed as trustee has negligently failed to make collections, the fact that such trustee, prior to his appointment, was the attorney for a certain creditor in actions against the insolvent, will not impose upon such creditor any liability for the negligence of such trustee.

First Nat. Bank of N. J. v. Kimball (N. J.)

591

8. In a suit by an assignee to rectify the deed of assignment, made in New York, because of the absence therefrom of words of inheritance, and to so make it that it may convey the realty in this State in fee; where defendant's object is to get a decree in his favor for a debt due by the assignor, and to collect the same out of his property situated in this State, a cross bill is not necessary. He cannot involve complainant in this suit for the purpose of establishing his debt. The allegations in the cross bill, tending to establish the debt, may be regarded, so far as complainant is concerned, as averments that defendant is a creditor in this State, and of the firm, and is therefore entitled to resist the application to rectify the deed.

Van Winkle v. Armstrong (N. J.)

538

4. A clause in a lease providing that the lessor shall have a lien for rent upon all goods and other personal property of the lessee, a retail dealer, which then are or may be thereafter put upon the premises, and providing that the lessor may, in case of default of payment of rent, take and sell such goods, etc., in the same manner as in the case of a chattel mortgage, and providing that the lessee may continue in the possession of the goods, and sell the same in the regular course of his business, and buy other goods with the proceeds, although valid as between the parties, is fraudulent on its face as to bona fide creditors of the lessee, and cannot be enforced by the lessor, as an equitable lien upon the goods, against the rights of an assignee of the lessee for the benefit of creditors in possession of the goods.

Reynolds v. Ellis (N. Y.)

232

5. Foreign assignments for creditors are not recognized as against claims of residents. Authorities cited.

Van Winkle v. Armstrong (N. J.)

538

6. A foreign attachment, issued in any county where the property of a nonresident is situated, after the execution in another State of an assignment for the benefit of creditors, but before the assignment is recorded in the county, has priority over the assignment.

Steel v. Goodwin (Pa.)

659

ASSOCIATIONS. See BUILDING ASSOCIATIONS; RELIGIOUS SOCIETIES.

ASSUMPSIT.

In assumpsit against an administrator, his bond not being in suit, judgment should be entered for the damages laid in the declaration. R., V. IV.

tion simply, and not for the penalty of the bond.

Neale v. Hermanns (Md.)

161

ATTACHMENT.

1. Where, in an attachment, under the Act of March 17, 1869, the defendant gives a bond according to § 8 of the Act, for the release of the goods attached, and subsequently the attachment is dissolved for want of sufficient evidence of fraud, the plaintiff cannot, after proceedings *in personam* to judgment and ineffectual execution, maintain an action of debt on the bond.

Fernau v. Butcher (Pa.)

748

2. The bond required in attachment, under Act of March 17, 1869, does not dissolve the attachment. It is superadded security, and falls with the attachment. *Id.*

3. Query, whether attachment, under the Act of March 17, 1869, lies when the affidavit for the writ charges fraud as to only part of the debt for which the writ issues. *Id.*

4. A foreign attachment, issued in any county where the property of a nonresident is situated, after the execution in another State of an assignment for the benefit of creditors, but before the assignment is recorded in the county, has priority over the assignment.

Steel v. Goodwin (Pa.)

659

5. An existing indebtedness from the defendant to the plaintiff in foreign attachment, being undisputed, the question whether the debt is or is not presently due is for the jury. *Id.*

6. That the debt may be shown, by evidence dehors the record, not to be presently due, is not sufficient ground for quashing a writ of foreign attachment, at the instance of the defendant's assignee for the benefit of creditors, under an assignment made in another State. *Id.*

7. The power to quash a writ of foreign attachment is limited to proceedings that are irregular, defective, or improper. Authorities cited. *Id.*

661

8. The title acquired by an assignee for the benefit of creditors, although good as to the property assigned, is, as to assets in other States, whose policy is not to recognize, as against the claims of the creditors of the assignor domiciled therein, the validity of general assignments with preferences, liable to be defeated by attachment sued out of the courts of such other States, by creditors domiciled therein, to recover their debts out of such assets.

Kimball v. Lee (N. J.)

332

9. Attachment will not lie for unliquidated damages, and hence will not lie for damages for breach of covenant in a mine lease to pay royalty for ore mined, and to remove a stipulated quantity per annum.

Heckscher v. Trotter (N. J.)

77

10. Defendant may give bond and have his personal property discharged, after appearance and plea. *Id.*

11. An attachment will lie where the cause

of action is **founded upon contract**, and is of such a nature that plaintiff would formerly have been entitled to hold defendant for bail upon filing an affidavit of the cause of action. When the cause of action arises **ex delicto**, or is of such a nature that bail could not have been required without the order of a court or judge, resort cannot be had to this remedy. *Id.*

12. Attachment can be used only when the demand is for a sum certain. Authorities cited. *Id.* 78

13. **Unliquidated damages** resulting from breach of contract cannot be recovered by attachment, unless the contract affords a certain measure or standard for ascertaining the amount of damages; and such standard must be shown by the contract without the aid of extrinsic facts or circumstances. Authorities cited. *Id.* 79

14. Attachment will not lie for damages arising out of a breach of a covenant in a charter-party to employ a vessel at a certain sum per month for a designated voyage, the length of the voyage being conjectural, and hence the damages being uncertain. Authorities cited. *Id.*

15. Attachment lies for a deficiency caused by a sale of goods inferior in quality to those warranted. Authorities cited. *Id.*

16. Plaintiff's preliminary affidavit is not conclusive as to the nature of his claim. Authorities cited. *Id.* 80

ATTORNEY AND CLIENT.

1. Where a person appointed as trustee has negligently failed to make collections, the fact that such trustee, prior to his appointment, was the attorney for a certain creditor in actions against the insolvent, will not impose upon such creditor any liability for the negligence of such trustee.

First Nat. Bank of N. J. v. Kimball (N. J.) 591

2. An affidavit of defense, made and filed by one styling himself "attorney for the defendant," and alleging that he transacted all the business of the case and has full knowledge, etc., will not be received.

Griel v. Buckius (Pa.) 507

3. An attorney agreed to defend certain suits, the client agreeing to give him half of all the property or money recovered. The suit was lost. A deed procured by the attorney for one half of other property which client owned, representing that it was for his compensation under the agreement, —*Held*, fraudulent and void.

Cleins v. Englebrecht (N. J.) 69

4. A demand by an attorney at law for professional services will not toll the statute on a claim by the client based on a demand for farm produce furnished.

Mattern v. McDivitt (Pa.) 896

5. An attorney who causes void or irregular processes to be issued in an action, occasioning loss or injury to the party against whom it is enforced, is liable for the damages thereby occasioned.

Fischer v. Langbein (N. Y.) 215

ATTORNTMENT. See LANDLORD AND TENANT, I.

AUCTION AND AUCTIONEER.

1. An auctioneer is liable to an action by the bidder, to recover the deposit, where the latter has sufficient reason not to proceed to complete the sale, and the money has not been paid over to the principal. Authorities cited.

Read v. Riddle (N. J.) 830

2. In an action to recover back hand money paid at the time of signing the conditions of the sale of real estate, at auction, the question to be submitted to the jury is the capacity of the plaintiff to make a contract at the time of signing the agreement and paying the money, and not his capacity at the time of the bid.

Bush v. Breinig (Pa.) 889

AUTREFOIS ACQUIT AND CONVICT. See CRIMINAL LAW, I.

BAIL AND RECOGNIZANCE. See BASTARDY.

1. In an action of covenant, defendant cannot be held for bail as of course, unless the covenant be for the payment of a sum certain. Authorities cited.

Heckscher v. Trotter (N. J.) 79

2. The lien of a recognizance is indefinite, but is subject to the legal presumption of payment after twenty years. Authorities cited.

Hayes v. Bald Eagle V. R. R. Co. (Pa.) 458

3. A sheriff who, in answer to a rule to bring in the body of a defendant, returns that he discharged the defendant from custody upon his giving bond and complying with the requirements of the Insolvent Debtors' Act, will not be amerced.

Lewis v. Haskell (N. J.) 885

BAILMENT. See PLEDGE AND COLLATERAL SECURITY.

In cases of gratuitous bailment, gross negligence has been defined to mean the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. Authorities cited.

Mark v. Hudson River Bridge Co. (N. Y.) 207

BANKRUPTCY. See INSOLVENCY.

1. A debt discharged by proceedings in bankruptcy is revived by a subsequent absolute and unconditional promise, by the debtor, to pay it, and by a partial payment.

Huffman v. Johns (Pa.) 658

2. A discharge in bankruptcy, prior to the accruing of the liability on which contribution is sought, will not avail a cosurety sued for contribution.

Wyckoff v. Gardner (N. J.) 181

3. Where the subscription price of the stock of an incorporated company is only to be paid in such installments and at such times as it may be called for, and at the time of the bankruptcy of the stockholder and his discharge in bankruptcy, no call for the

payment of his subscription has been made, a call subsequently made for an unpaid installment thereof is not a provable claim against the bankrupt's estate in the bankruptcy proceedings; therefore the bankrupt's discharge is no bar to an action for such unpaid installment. Authorities cited. *Id.* 133

BANKS AND BANKING.

1. On a bill for account by a bank, **alleging an embezzlement** made by the defendant a number of years ago, and concealed by him, while **cashier** and president, an answer setting up the **Statute of Limitations**, and that the embezzlement, if any, must have been known to the officers of the bank and to the cashiers, who succeeded the defendant,—*Held*, sufficient.

Somerset Co. Bank v. Veghte (N. J.) 406

2. A lender who, before paying over money on a borrower's discounted note, **discovers that the borrower is insolvent**, may tender back the note and **refuse payment** of the money. The assignee of the borrower has no rights superior to the borrower.

Lancaster Co. Nat. Bank v. Huser (Pa.) 672

3. The **deposit of negotiable railroad bonds** with a bank, as collateral security for a debt, passes the title, as against the bank, notwithstanding the **antecedent pledge** of the same stock.

Gibson v. Lenhart (Pa.) 105

4. **Delivery** to the bank, depositee, is delivery to the pledgee. Authorities cited. *Id.*

5. **Evidence of the antecedent pledge** is **inadmissible**, in an action of replevin against the bank for the bonds, in the absence of *mala fides* or notice of the pledge on the part of the plaintiff. *Id.*

6. Where the bonds were **deposited** in the bank in a **package** indorsed with the pledgee's name, the bank is **estopped**, in an action of replevin for the bonds, from alleging that the bonds in the package are not the original bonds pledged to the plaintiff. *Id.*

7. A bank received a cashier's check of another bank, as a **conditional payment** of a debt of a third party; the latter bank made an assignment in trust for creditors, and the check was not paid on presentation. At the time of the assignment, there was, on the books of the first bank, a **credit** to the insolvent bank of the **proceeds of notes** indorsed and discounted for the latter's accommodation. In an action by the first bank against the debtor, for the debt,—*Held*, that this deposit was not a valid **set-off** against the debt.

Union Nat. Bank v. Cannonsburgh Iron Co. (Pa.) 262

8. The absence of **entry of discount** of renewal notes, upon the books of a bank, will not defeat an action by the bank upon these notes.

Moseby v. Bedford Co. Bank (Pa.) 268

9. The **managers** of a savings bank stand in the relation of **trustees** to the **depositors**, so that the **Statute of Limitations** will not be a bar against a **charge of mismanagement** on their part which occurred six

years before the filing of the bill. Authorities cited.

Somerset Co. Bank v. Veghte (N. J.) 407

BASTARDY.

1. Upon conviction of **fornication and bastardy**, a defendant may be sentenced, under Act of March 31, 1860, to pay a fine of \$100, to pay the costs of prosecution, to give **bond** for the performance of any subsequent order of maintenance, and to stand **committed until compliance**.

Commonwealth v. Cook (Pa.) 710

2. Payment of **lying-in expenses** and an order of **maintenance** are not required to be imposed as part of the sentence; or at least it is not error to refuse to impose them after the defendant has been **discharged** from custody under the **insolvent laws**. *Id.*

3. A defendant convicted, sentenced, and in custody, in proceedings for fornication and bastardy, may, after three months' imprisonment, obtain his **discharge** under the **insolvent laws**, without complying with any part of the sentence. *Id.*

BAWDY AND DISORDERLY HOUSES.

The **agent of the owner** renting a house knowingly for the purpose of a brothel may be **indicted as the keeper** of such house.

Troutman v. State (N. J.) 680

BILLS AND NOTES.

1. **Receiving promissory notes on account** of a claim will not imply an **extension** of the time of payment, or an agreement to sever the debt in an action on a book account.

Buck v. Wilson (Pa.) 643

2. The absence of **entry of discount** of renewal notes, upon the books of a bank, will not defeat an action by the bank upon these notes.

Moseby v. Bedford Co. Bank (Pa.) 268

3. A **negotiable note** made by an **intoxicated man** may be collected by an innocent holder for value. Authorities cited.

Bush v. Breinig (Pa.) 593

BOATS. See SHIPS AND SHIPPING.

BONDS. See ATTACHMENT; BAIL AND RECOGNIZANCE; BASTARDY; INJUNCTION, 10, 11; PARTY-WALL; PRINCIPAL AND SURETY; RAILROAD COMPANIES, 8.

1. The statute (Acts 1874, chap. 483, § 31) requires **tax collectors** "to pay at such times as the law shall direct," the bond given by a collector provided "for payment at such times as the county commissioners shall by law direct." *Held*, that the **variance** was immaterial.

Myers v. State (Md.) 344

2. The facts that a **tax collector** reappointed to office was, at the time, in default under a former appointment, and that the **sureties** on his new bond were not notified by the appointing authorities of his **existing defalcation**, will not avail as a defense to the sureties. *Id.*

8. Sureties on an official bond are **stopped from denying the official capacity** of their principal. *Id.*

4. The provision in the bond of a **tax collector** for Carroll County, that he shall "pay to the county commissioners or their order" money which he shall receive, is not impaired by the Act of 1872, chap. 282, making it the duty of the treasurer of Carroll County to "receive the proceeds of all taxes levied in the county." **Payment to the treasurer is, in law, payment to the commissioners.** *Id.*

5. A **payment by a tax collector**, of money collected by him on the taxes for one year, in discharge of the taxes for previous years with which he is chargeable, is a **breach of his bond.** *Id.*

6. Where suit is brought upon a bond to the **Commonwealth**, conditioned for the payment of certain sums at different periods to another, **judgment should be entered in favor of the Commonwealth for the amount of the penalty.** This is an essential prerequisite to liquidation in favor of the use plaintiff. *Id.*

Kiehl v. Commonwealth (Pa.) 695

7. Suit was brought on a bond to the **Commonwealth** to secure judgment for support of defendant's wife and children, and judgment entered for the amount then due, which was paid and satisfaction entered. Subsequent sums accruing, a second suit was brought on the bond. The court refused to allow judgment to be entered, but, on application, struck off the satisfaction, opened the judgment, and ordered that judgment should be entered for the penalty, on discontinuance of the second suit and payment of its costs. *Held*, although the proceedings were irregular, they should not be reversed. *Id.*

8. The **obligors** in a bond for the performance of a contract are **released** from liability by a new contract in relation to the same subject-matter, with different security, entered into by the parties after breach of the old contract and before notice or demand upon them.

Whelan v. Boyd (Pa.) 651

BOOK ACCOUNTS. See ACCOUNT; AFFIDAVIT OF DEFENSE, 4, 5.

BOROUGHES. See MUNICIPAL CORPORATIONS.

BOUNDARIES. See WATERS AND WATERCOURSES, 1-3.

BRIBERY.

1. The general Bribery Act embodied in the **Penal Code** covers the whole subject of bribery, and was intended to furnish the only rule governing the crime and punishment of bribery.

People v. Jaehne (N. Y.) 165

2. The crime of bribery, committed by a member of the common council of the city of New York, is punishable, under § 72 of the **Penal Code**, providing for imprisonment for not more than ten years, etc.; that section having superseded § 58 of the New York City Consolidation Act (Laws of 1882,

c. R., v. IV.

chap. 410), providing for imprisonment not exceeding two years, etc. *Rapallo and Earle, JJ., dissenting.* *Id.*

3. Section 73 of the **Penal Code**, relating to bribery, being a later statute covering the same subject-matter as § 58 of the Consolidation Act, and embracing new provisions, operated to **repeal the prior Act**, although the two are not in express terms repugnant. *Id.*

4. In the absence of any rule of court prohibiting the **viewers** from being **entertained by the petitioner**, and upon finding of the court that it was done under circumstances evincing no sinister purpose or effort to unduly influence the viewers, the proceedings were not set aside.

Re Road in Drumore Township (Pa.) 88

BRIDGES.

When a **boat** becomes entangled with a **bridge**, without fault on the part of the bridge owner, and becomes a nuisance which the **bridge owner has a right to remove**, in exercising that right the bridge owner must use ordinary care to do no unnecessary injury to the boat, and will be liable for injury unnecessarily inflicted.

Mark v. Hudson River Bridge Co. (N. Y.) 203

BUILDING ASSOCIATIONS.

1. Substitution of new mortgage, with surrender of shares at withdrawal value, for old mortgage; **rescission of contract; restoration of consideration.**

Doughten v. Camden Build. & L. Assn. (N. J.) 827

2. A mortgage borrower became in arrears for interest and taxes, and, by agreement with the association, assigned his shares at their withdrawal, and not at their actual value, and executed another mortgage for the balance due after allowing for the withdrawal value of the shares, but failed to perform his agreement to pay taxes; when the association by resolution rescinded, and contracted a foreclosure of the original mortgage. Afterwards, and before the bill to foreclose was filed, the borrower paid the taxes and other liens. On a bill to foreclose the original mortgage, — *Held*, that the association had not restored the borrower to his former position, and the rescission was incomplete. *Id.*

CAMP MEETING.

Where lots have been sold with **reference to a plan** or map, indicating that a space of 600 feet wide extending to the ocean should remain open for an auditorium and camp meeting purposes, — *Held*, that on complaint of purchasers of the lots made with reference to such plan, the grantor should be restrained from dividing the open space into lots, and appropriating or conveying the same for the erection thereon of dwelling-houses.

Lennig v. Ocean City Assn. (N. J.) 808

CARRIERS.

I. OF GOODS.

II. OF PASSENGERS.

a. Ejecting Passengers; Tickets; Regulations.

- b. *Boarding Train.*
- c. *Alighting from Car.*
- d. *Occupying Dangerous Parts of Train.*
- e. *Joint Negligence; Evidence.*

See NEGLIGENCE, II.; RAILROAD COMPANIES.

I. OF GOODS.

1. Where **goods** in the hands of a common carrier are **injured** by the negligent act of a **third party**, to which the negligence of the carrier contributed, and an action is brought by the owner **against the third party**, the carrier's contributory negligence is a **good defense**. Authorities cited.

Borough of Carlisle v. Brisbane (Pa.) 511

II. OF PASSENGERS.

a. *Ejecting Passengers; Tickets; Regulations.*

2. Where defendant company made a public notice by posting at its stations a rule that mileage and round-trip tickets would not be accepted on a limited express train, and plaintiff, having entered such train with a round-trip ticket, was ejected by the conductor, after tendering his fare in cash, at a place distant from a station, in violation of a rule of the company, in the night time, in the midst of railroad tracks and switches, and trains, moving and stationary, and, after walking some distance, was injured by a moving train, — *Held*, that, although the passenger was bound to know the regulations, and the company could lawfully eject him at a station, yet, the evidence as to actual notice being conflicting, and the ejection having been willfully made at a dangerous place, the company was liable for **exemplary damages**, and a judgment for \$48,750 was affirmed.

Lake S. & M. S. R. Co. v. Rosenzweig (Pa.) 712

3. In determining whether a conductor on a railway acted in reckless disregard of the rights of a passenger, the jury may consider that in ejecting the passenger the conductor violated an express rule of the company, calculated to promote the safety of passengers. *Id.*

4. While a passenger is bound by reasonable rules and regulations not appearing on his ticket, his ignorance of regulations may excuse his acts done in violation of regulations unknown to him, so as not to constitute him a trespasser. *Id.*

5. A passenger who enters a car by mistake is not a trespasser; and while the railway company may eject him, it must not put him off at an improper place. *Id.*

6. Where a conductor ejects a passenger at an improper place, the company is liable for proximate injuries, or those which were the natural and probable consequence of the act of the conductor, such as, under the circumstances of the case, might and should have been foreseen by the conductor as likely to flow from his act. *Id.*

7. Where a railroad company adopted a rule and posted it at the station house, that after a certain time passengers would not be carried on freight trains unless they had tick-

ets, — *Held*, that the rule was reasonable, but that a passenger who before that time had been accustomed to ride without a ticket, and who was ejected from the train, after tendering the fare in money, at a place distant from a station, could recover therefor, in the absence of evidence of express notice or actual knowledge of the rule. Authorities cited. *Id.* 720

8. If a conveyance is not going in the direction the passenger wants to go, or is one which, by the contract, the passenger has no right to take, the carrier's duty is to inform the passenger, and put him off at a proper place. Authorities cited. *Id.* 731

9. A carrier owes no duty to one who, not being a passenger, stands on the platform of a railroad station, and is injured thereby. Authorities cited. *Id.*

b. *Boarding Train.*

10. In an action to recover damages for the death of plaintiff's intestate, the evidence showed that deceased, who was well acquainted with the station and its surroundings and the manner of operating the trains, endeavored, together with two other persons, to board an elevated railway train after it had begun to move from the station. The two other persons, who were slightly in advance of deceased, either pushed back the car platform gate, or it was drawn back for them by the conductor, the gate having either been closed or was then being closed by the conductor, and succeeded in boarding the train. Deceased took hold of the stanchions of the car, placed one foot on the platform, and was in the act of passing on to the car, when the conductor closed the gate, and deceased, clinging to the car, was carried a few feet until he came in contact with a projection from the station platform, and received injuries from which he died. *Held*, that deceased was guilty of contributory negligence, and that a nonsuit was properly directed. Miller and Danforth, JJ., dissenting. *Solomon v. Manhattan R. Co.* (N. Y.) 775

11. The presumption of negligence in the case of one attempting to board a moving train is stronger even than in the case of one attempting to alight from a moving train. *Id.*

12. Where the passenger was thrown against a platform while attempting to get aboard a train while in motion, — *Held*, a nonsuit was properly entered. Authorities cited. *Id.* 778

13. In an action against an elevated railway company for damages for the death of an intending passenger, the evidence showed that after the car platform gate was closed and the train in motion, the deceased had hold of the platform stanchions, and clung to them as the gateman was pushing him away, and was injured while thus clinging to the car. *Held*, that the plaintiff should have been nonsuited. *Card v. Manhattan R. Co.* (N. Y.) 799

c. *Alighting from Car.*

14. Negligence can not be imputed to a passenger, although a woman advanced in preg-

nancy, in jumping from a car to the ground in obedience to an instruction from the conductor, the train having been stopped at a place other than the usual platform.

Balt. & O. R. R. Co. v. Leapley (Md.) 253

15. The agents of a carrier of passengers must observe the utmost care, proportionate to the age and condition of the passenger. They will be held to be able to distinguish from others a woman in an advanced state of pregnancy, and to know what would be safe or unsafe for her to do. *Id.*

16. The failure of a railroad company to put a passenger, a woman advanced in pregnancy, off at the usual platform, without good reason, is an act of negligence for which such passenger can recover, if injured by reason thereof without fault on her part. *Id.*

17. In an action against a street railway company for personal injuries, evidence on the part of the plaintiff that she, while alighting from one of the defendant's cars and carrying a child on her left arm, tried to reach with her right hand the handle of the rear dasher, but that as another passenger, though there were empty seats in the car, was standing in the way, she missed the handle, and, slipping on ice which remained on the step from the previous day, fell, receiving severe injuries, makes out a case for a jury, and a nonsuit is error, although it appears that the plaintiff knew there was ice on the step, and might, by changing the child to the other arm, have grasped with her left hand the handle on the end of the car.

Neslie v. Second & Third Sts. Passenger R. Co. (Pa.) 699

18. It is presumptively a negligent act for a passenger to attempt to alight from a moving train, and it is not sufficient to rebut the presumption that the trainmen acquiesced in the act of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble and inconvenience; but to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment. Authorities cited.

Solomon v. Manhattan R. Co. (N. Y.) 778

19. In a suit for damages for injuries sustained by a passenger on a gravity railroad in alighting while the train was moving, no faster than a man can walk, past the point at which the conductor had promised to let him off, there was a conflict of testimony as to whether the conductor ordered him to get off or cautioned him against getting off until the train stopped. *Held*, that the fact of the passenger's negligence was for the jury.

Del. & H. O. Co. v. Webster (Pa.) 638

20. It is not negligence *per se* for a passenger to get off a car that is moving slowly, in response to an invitation by a person in charge of the train. *Id.*

21. If the train is moving so rapidly as to render it clearly dangerous to attempt to

get off, the passenger who does get off is negligent. *Id.*

22. Where there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury. *Id.*

d. Occupying Dangerous Parts of Train.

23. Regardless of the rules of a railroad company, the baggage car of a passenger train is an improper place for a passenger to ride, unless under the circumstances it appears that he is riding there by the permission of the conductor and for the benefit of the company. Authorities cited.

Lehigh Valley R. R. Co. v. Greiner (Pa.) 901

24. A baggage car is a known place of danger; it differs from the cowcatcher and the platform in this respect only in degree; and a passenger who voluntarily leaves his proper place in a passenger car, in violation of the rules of the company, to ride in the baggage car or other known place of danger, cannot recover for an injury thus received partially in consequence of his own act. Authorities cited. *Id.* 902

25. There are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his occupation, that his presence there will constitute contributory negligence as a matter of law, and preclude him from claiming damages while in such position. A passenger who voluntarily leaves his seat and rides upon the engine, or upon the pilot or bumper of the locomotive, or upon the top of the car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence. Authorities cited. *Id.* 902

e. Joint Negligence; Evidence.

26. Where a passenger is personally injured by the joint negligence of the carrier and another party, his remedy is against his carrier alone. Authorities cited.

Borough of Carlisle v. Brisbane (Pa.) 511

27. Where a passenger in a street railway car was injured by a collision with a steam railroad train, — *Held*, in order to recover against the company operating the steam railroad train, the plaintiff must show not only that the injury resulted from defendant's negligence, but that the negligence of the carrier company did not contribute to the result. Authorities cited. *Id.*

28. A conductor's written statement, giving details of an accident immediately after it happened, is not admissible in evidence; but the facts must be proved by the conductor or others who witnessed the occurrence. The conductor may use such written statement to refresh his memory.

North Hudson Co. R. Co. v. May (N. J.) 81

CASE STATED. See REPORT AND CASE MADE.

CERTIORARI. See JUSTICES OF THE PEACE, 2; POLICE AND POLICE DEPARTMENTS, 8, 4; WAYS, 6.

1. When a **special tribunal** is proceeding summarily in a proceeding for which it has not legally acquired jurisdiction, it is within the discretion of the supreme court to allow a **certiorari** to review its action, before the final determination of the matter.

Mowery v. City of Camden (N. J.) 866

2. The title of the members of a board of public works cannot be questioned on a **certiorari** to review the proceedings of the board. The title of **de facto** public officers cannot be collaterally attacked.

State v. Jersey City (N. J.) 842

8. Where a judgment has been rendered in a justice's court in favor of plaintiff in an action of trespass *quare clausum fregit*, and it is made to appear that title to lands came in question before the justice, a **certiorari** will lie to review the judgment as one rendered without jurisdiction.

State v. Stanger (N. J.) 562

4. Upon **certiorari** of road proceedings, the presumption is that the road was laid at a proper grade whenever practicable.

Re Road In Drumors Township (Pa.) 88

CHALLENGES. See JURY.

CHARGE OF COURT. See TRIAL, 2-5.

CHARGE ON LAND. See DEVISE AND LEGACY, IV.

CHARTERS. See CORPORATIONS, 1-10; MUNICIPAL CORPORATIONS, I., VII.; RAILROAD COMPANIES, I.

CHATTEL MORTGAGE. See MORTGAGE.

CHECKS.

Where a cashier's check is given by a debtor to a creditor for a pre-existing debt, the presumption of law is that it was intended only as a conditional payment. Surrender by the creditor of the note of the debtor will not overcome such presumption.

Cannonsburgh Iron Co. v. Union Nat. Bank (Pa.) 258

CHURCHES. See RELIGIOUS SOCIETIES.

CITIES. See MUNICIPAL CORPORATIONS.

CLASSIFICATION. See CONSTITUTIONAL LAW, II.

CLIENT. See ATTORNEY AND CLIENT

CLOUD ON TITLE.

1. The right to maintain a suit, under the statute, to quiet title by removing the cloud caused by a sale for alleged illegal taxes, may be lost through laches in failing to question the validity of the tax by **certiorari**.

Baldwin v. City of Elizabeth (N. J.) 825

2. A bill is not maintainable, under the Act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same" (Rev. p. 1189), unless com-

c. R., v. IV.

plainant is in peaceable possession of the land under a claim of ownership; but the proceeding may, if the facts warrant it, be supported as a suit *quia timet*, irrespective of the statute.

Nixon v. Walter (N. J.) 876

8. The removal, by defendant in an action to remove a cloud on title, of sand from the strip of land the title to which complainant desires to have cleared, and payment of taxes thereon, are not evidence of possession thereof by defendant.

4. Equity will set aside, as a cloud upon title, a deed purporting to convey a part of complainant's land, being a strip of water front bounded by the high-water line, where in fact the land intended to be conveyed was other and different land, which, from the receding of the high-water line through natural causes, has been submerged and has disappeared, and extrinsic evidence is necessary to show the fact.

5. Where a fire insurance company which has insured mortgaged premises takes an assignment of a first mortgage thereon, within a year after a loss on the premises by fire, it cannot, in a suit by a purchaser of the premises under a second mortgage, brought to have the first mortgage declared paid and removed as a cloud upon his title, set up as a defense that suit was not brought upon the policy within a year, as limited therein; the company having taken the place of the holder of the first mortgage, whose duty it was to recover the money due on the policy to the amount of his mortgage.

Pearman v. Gould (N. J.) 185

COLLATERAL SECURITY. See PLEDGE AND COLLATERAL SECURITY.

COLLISION. See NEGLIGENCE, 7-12, 15, 17, 24, 84.

COMMISSIONS. See EXECUTORS AND ADMINISTRATORS, IX.

COMMITMENT. See CONTEMPT.

COMPENSATION. See OFFICE AND OFFICER, 2-5.

COMPLAINT. See PLEADING, I.

COMPTROLLER. See MANDAMUS, 4-7; MUNICIPAL CORPORATIONS, 10-12.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN; RAILROAD COMPANIES, II.; WAYS, II., III.

CONFESSIONS. See CRIMINAL LAW, III.; HOMICIDE, 5, 6; JUDGMENT, 1.

CONFLICT OF LAWS.

1. A foreign attachment, issued in any county where the property of a nonresident is situated, after the execution in another State of an assignment for the benefit of creditors, but before the assignment is recorded in the county, has priority over the assignment.

Steel v. Goodwin (Pa.) 659

2. **Foreign assignments** for creditors are not recognized as against claims of residents. Authorities cited.

Van Winkle v. Armstrong (N. J.) 58

3. The title acquired by an **assignee** for the benefit of **creditors**, although good as to the property assigned, is, as to assets in **other States**, whose policy is not to recognize, as against the claims of the creditors of the assignor domiciled therein, the validity of general assignments with preferences, liable to be defeated by attachment sued out of the courts of such other States, by creditors domiciled therein, to recover their debts out of such assets.

Kimball v. Lee (N. J.) 382

4. Power of a State to regulate the **transfer of all property within its territory** is well established. Authorities cited.

Steel v. Goodwin (Pa.) 661

5. **No State is bound** to recognize and enforce a **contract injurious** to its own interests or those of its subjects, although valid by the law of the place where made. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.) 109

6. The validity of a **contract** is to be determined by the law of the **place where made**, unless it is to be performed in another country; in which case it is governed by the law of the place of performance. Authorities cited. *Id.*

7. The **decree** or judgment in a court of competent jurisdiction of a sister State has the same credit, validity, and effect in the **courts of another State** which it had in the State where it was rendered; but the question of **jurisdiction** of the court rendering such judgment is **always open**. Authorities cited. *Id.*

8. **Servitudes** and easements and other **charges on lands** are deemed to be, in the sense of the law, immovables, and governed by the **lex rei sitæ**. Authorities cited. *Id.*

9. The disposition of **real estate**, whether by deed, descent, or other mode, must be governed by the laws of the State where the land is situated. Authorities cited. *Id.*

10. Where the **subject-matter** of the suit is strictly **local**, jurisdiction depends upon such locality, and can only be exercised in the State where the subject-matter is located. Authorities cited. *Id.*

11. If the **object of the suit** is to directly deal with and **affect the person** of the defendant party, and not the subject-matter itself, and the **decree** when rendered and the relief when granted would, in fact, directly **affect** and operate upon the **person** of the defendant only, and would not directly operate upon the subject-matter, then the suit may be maintained in any State where the court obtains jurisdiction of the person of the defendant, although the subject-matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another State. *Id.*

12. Though a person having the legal title **C. R., V. IV.**

to land in one State may be decreed by a court of equity in another State to **convey the land**, yet neither the decree, nor any conveyance by virtue of it by one not having the title, can operate beyond the jurisdiction of the court. Authorities cited. *Id.*

13. When two corporations of different States become a consolidated corporation, such **consolidated corporation**, when acting in its corporate capacity in either of the States, acts under the authority of the charter of that State, and the **legislation of the other State has no operation** beyond its territorial limits. *Id.*

14. Foreclosure proceedings in New York are ineffectual to pass title to property in Pennsylvania. *Id.*

15. Whether an **assignee** can **sue in his own name** is sometimes a technical question, and sometimes one that is essential. When it is technical, the **lex fori** is to decide. Authorities cited.

Glenn v. Bussey (D. C.) 614

CONSIDERATION. See **CONTRACT**, 6-8.

CONSOLIDATION. See **RAILROAD COMPANIES**, I.

CONSTITUTIONAL LAW.

I. ENACTMENT; ENTITLING.

II. SPECIAL AND LOCAL LEGISLATION.

III. OBLIGATION OF CONTRACTS; REGULATION OF CONTRACTS.

IV. RIGHTS OF PROPERTY.

V. ACTS TO REGULATE TRADE; ADULTERATION.

VI. PUBLIC OFFICERS; COMPENSATION.

See **STATUTES**.

I. ENACTMENT; ENTITLING.

1. The Act of April 25, 1884 (P. L. 1884, p. 265), providing that certain firemen "shall be entitled to have and receive the same * * * advantages in respect to taxes and jury duty as now are or hereafter may be allowed to the National Guard of this State," without setting out the Acts in relation to the exemption of members of the National Guard, is within the Constitutional inhibition that a statute, to **make the acts of a former statute part thereof, must insert those sections of the former Act in the new law.**

State v. McNeal (N. J.) 147

2. An Act of the Legislature which is complete and perfect in itself, the purpose, meaning, and full scope of which is apparent on its face, is valid, although it may provide for actions or means for carrying its provisions into effect by reference to a course of procedure established by other Acts of the Legislature. Authorities cited. *Id.* 148

3. Whether a provision in the charter of a railroad company **authorizing** it to lease or consolidate with any other railroad, and **authorizing any company** to take such lease and operate the same, would be sufficient to confer such authority upon any railroad of the

State, yet, in the present case, the title of the Act incorporating the Mays Landing & Egg Harbor City Railroad Company does **not indicate** such subject, and such provision of its charter is therefore void.

Camden & Atl. R. R. Co. v. Mays Land. & E. H. C. R. R. Co. (N. J.) 801

4. The Act of May 9, 1871, entitled "An Act in Relation to Streets in Several Boroughs of Montgomery County," which provides that the damages for locating streets shall be assessed under the general road laws, does not impose the payment of the damages upon the county, under the general road laws, and the statute is therefore not unconstitutional as containing in its title **no notice** that it **embraced matters relating to the penalty**. Paxson and Green, *JJ.*, concurring in the judgment, on the ground that, while the Act does impose a payment of damages upon the county, the title of the Act sufficiently gives notice to the taxpayers.

Montgomery Co.'s Appeal (Pa.) 808

II. SPECIAL AND LOCAL LEGISLATION.

5. The Act of May 24, 1878, giving the right of appeal from assessments for purposes of taxation, to owners of real estate in counties of less than 500,000 inhabitants, is unconstitutional, under art. 3, § 7 of the Constitution, prohibiting the passage of local or special laws regulating the affairs of counties, cities, townships, wards, boroughs or school districts.

City of Scranton v. Sillman (Pa.) 817

6. A statute upon a given subject which applies to **all the counties** of the State **except one where the legislation is prohibited** by the Constitution, is not local but general legislation.

City of Wilkesbarre v. Meyers (Pa.) 820

7. A statute is local legislation which applies to **all the counties** of the State **except one**, although that one is regulated by a local law on the same subject. *Id.*

8. The Acts of March 6, 1884, p. 58, providing that the clerk of the criminal court in Camden County shall be paid a salary in lieu of fees, and March 11, 1880, p. 247, providing that such salary shall be in lieu of all other compensation, are **special and local**, and therefore unconstitutional.

Halleck v. Hollingshead (N. J.) 570

9. The Act of March 28, 1877, authorizing any of the **prothonotaries and sheriffs** of the several counties of the Commonwealth, within six years after the expiration of their official term of office, to **sue** any one residing out of the county, before a justice of the peace within the county, **for fees** for official services, before or after judgment; authorizing constables to appoint deputies (in the county where the defendant resides) to execute the writ; providing for execution in any county in the Commonwealth; and making a certificate of the prothonotary of the county where suit is brought *prima facie* evidence that such fees are lawfully due and correct,—*Held*, to be **special legislation** and unconstitutional under art. 3, § 7, of the Constitution.

Strine v. Foltz (Pa.) 283

C. R., V. IV.

10. The Act of July 7, 1879, enlarging the jurisdiction of aldermen and justices of the peace, intends to **except only the city of Philadelphia** in its proviso that the Act shall not apply to magistrates in cities of the first class, and is therefore not unconstitutional, under art. 3, § 7, of the Constitution, prohibiting special or local laws regulating the practice or jurisdiction, or extending the powers and duties, of aldermen or justices of the peace,—the Constitution prohibiting the increase of the civil jurisdiction of magistrates in Philadelphia.

City of Wilkesbarre v. Meyers (Pa.) 820

11. The Act of March 18, 1875, regulating the assessment and collection of **taxes in cities of the third class**, which contains a proviso **excluding** from the operation of the Act **all cities of the third class, etc.**, which **do not accept**, by ordinance, the provisions of the Act, offends against art. 3, § 7, of the Constitution of 1874, which prohibits the passage of any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.

Commonwealth v. Halstead (Pa.) 815

12. An Act of Assembly which applies to those only of a **class of cities who accept** its provisions is not sustainable under the rule of classification allowed by law, but is special legislation; and when the subject-matter falls within the prohibition of the Constitution it is void.

Scranton School Dist. v. Lackawanna I. & C. Co. (Pa.) 811

13. The recent decisions of Pennsylvania are to the effect that if **local results** are or may be produced by a piece of legislation, it is unconstitutional as local legislation. Authorities cited. *Id.* 814

14. P. L. 1880, p. 19, to **establish an excise department in cities of over 15,000 inhabitants**, where the power to grant licenses is not vested in a board of excise or court of common pleas, is local and special, and therefore unconstitutional.

State v. Trenton Board of License (N. J.) 83

15. Legislation dealing with the method of granting licenses **must apply to all cities**, or reduce all cities to a uniform system. Authorities cited. *Id.* 85

III. OBLIGATION OF CONTRACTS; REGULATION OF CONTRACTS.

16. A statute (Act of June 29, 1881) providing that all persons, firms, etc., engaged in mining coal, ore, etc., shall settle with their employees at least once a month, and pay them in legal money or cash orders, is unconstitutional and void. The Act is an infringement of the **rights of the employer and employee**. A laborer may sell his labor for what he thinks best. The Act is an insulting attempt to put the laborer under a legislative tutelage.

Godcharles & Co. v. Wigeman (Pa.) 887

17. A mortgage executed before the statute of 1880 (P. L. p. 255), declaring that no decree for deficiency shall be made in a foreclosure

sult, is subject thereto. The Act merely affects the **mode of remedy**.

Toffey v. Atchison (N. J.) 868

18. The **manner of enforcing remedies** upon existing contracts may be changed by statute. Authorities cited. *Id.* 864

19. The rules of evidence are not an exception to the doctrine that all rules and regulations affecting **remedies** are at all times **subject to modification** and control by the Legislature. It may be conceded that a law that should make evidence conclusive which was not so necessarily in itself would be void; but such is not the effect of declaring any circumstances or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party to rebut and overcome it. Authorities cited.

City of Auburn v. Merchant (N. Y.) 855

IV. RIGHTS OF PROPERTY.

20. Whenever a tax or burden is imposed upon property for the public use, and provision is made for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding with regard to the property, as is appropriate to the nature of the case, the judgment in such case cannot be said to **deprive the owner of his property without due process of law**. Authorities cited.

State Board of Assessors v. Cent. R. R. Co. (N. J.) 483

V. ACTS TO REGULATE TRADE; ADULTERATION.

21. It is essential, to create the offense prohibited by Laws 1885, chap. 183, § 7, as amended by chap. 458, that the article not produced from milk or cream, the manufacture and sale of which is forbidden, should be in **imitation or semblance of butter**; and this is a question for the jury. An instruction omitting the fact of imitation is error. Earl and Andrews, *JJ.*, dissenting from the reversal, on the ground that it had been proved and assumed on the trial that yellow coloring matter had been put in the oleomargarine in order to give it the semblance of butter.

People v. Arensburg (N. Y.) 549

22. The Legislature may lawfully **prohibit the sale of adulterated or simulated substances**, and has frequently done so. It may punish as a criminal the ignorant seller of the adulterated or forbidden article. Authorities cited. *Id.* 547

23. A statute **prohibiting the sale of oleomargarine** made in imitation of butter is constitutional. Authorities cited. *Id.* 548

VI. PUBLIC OFFICERS; COMPENSATION.

24. Police officers, serving under the appointment and authority of the board of police commissioners, are not in position to **question the constitutionality of the Act** constituting the board on *certiorari* in proceedings for removal.

State v. Comrs. of Newark (N. J.) 571

25. An order of court, under the Act of April 10, 1878, fixing the **compensation of**

incumbent sheriff, for boarding prisoners, at one sum for one year and at a less sum for another year, **during his term of office**, does not violate art. 8, § 18, of the Constitution, prohibiting the increasing or diminishing of the salary or emoluments of any public officer after his election or appointment, notwithstanding a prior order made during his term, fixing the compensation for the past services of his predecessor.

Peeling v. County of York (Pa.) 87

26. The **compensation** ordered to be paid to the sheriff, by law, for the board of prisoners in the county jail, is an emolument of his office within art. 8, § 18, of the Constitution. Authorities cited. *Id.* 88

CONTEMPT.

1. The superior courts of New Jersey, modeled after the English courts of common law, have authority to punish summarily, by proceedings for contempt, for any words uttered by speech, writing, or printing, **outside of the regular course of litigation**, which are designed to bring contempt upon the courts in the exercise of their judicial functions, 'or to pervert, in a pending cause, the due administration of justice.

Re Contempt of Cheesman (N. J.) 576

2. The **jurisdictional facts** necessary to legalize a conviction for contempt in the superior courts of law are: First, that matters constituting a contempt should appear to the court to be true; second, that the party charged with contempt should have a fair opportunity to confess or deny those matters; third, that he should confess their truth. Outside of these facts, the steps to be taken are matters of **practice only**; and although a regular course of procedure has been established, yet **strict conformity** to it may be **waived** by the person accused. *Id.*

3. A conviction for contempt may be sustained, although there was no **affidavit** preliminary to the **rule to show cause**, no writ of attachment was issued, and no interrogatories were presented. *Id.*

4. On **appeal** from a conviction for contempt under the Statute of 1884, p. 219, this court will not consider the general policy of punishing such contempts as that of which the appellant is guilty. If, according to the law and the facts, the judgment appealed from is lawful and just, it will be affirmed. *Id.*

5. The **failure of an executor to pay** over the amount found against him on judicial settlement, a decree requiring payment, service of decree, and an ineffectual attempt to enforce the decree by execution, make out a case of contempt punishable by the surrogate, under Code Civ. Proc. § 2555.

Re Snyder (N. Y.) 210

6. The surrogate is not necessarily concluded by the uncorroborated affidavit of the executor alleging his **inability to comply** with the decree; and as a decision of the surrogate imposing punishment for contempt involves conflicting evidence and the exercise of discretion, it will not be reviewed by the court of appeals, where the discretion has not been unfairly exercised. *Id.*

7. Where a **commitment** for contempt sets out the facts and proceedings in detail, and otherwise complies with the rule in respect to the contents of a commitment, it will not be held void because it omits to state that the disobedience referred to as a contempt had "defeated, impaired, impeded, or prejudiced" some "right or remedy" of the party in the action who procured it. (Code Civ. Proc. § 14.)

Fischer v. Langbein (N. Y.) 215

8. If parties procuring a commitment of another, as for a contempt, are not liable for damages for the original imprisonment, they are not responsible for the subsequent action of a sheriff or of the court in continuing it, although it is subsequently decided on appeal that the commitment was erroneous.

Id.

CONTINGENT REMAINDERS. See DEVISE AND LEGACY, V.

CONTINUANCE AND ADJOURNMENT. See JUSTICES OF THE PEACE, 8.

CONTRACT.

I. VALIDITY.

II. CONSTRUCTION.

III. ACTIONS.

See ASSIGNMENT; AWARD; BILLS AND NOTES; BONDS; CONFLICT OF LAWS, 5, 6, 15; CONSTITUTIONAL LAW, III.; CORPORATIONS, III., V.; COUNTIES; COVENANT; DESCENT AND DISTRIBUTION, 2-4; FRAUDS, STATUTE OF; GAMING; GIFT; HUSBAND AND WIFE; INSOLVENCY; LANDLORD AND TENANT; LIEN; MASTER AND SERVANT; PATENTS, 4-7; PAYMENT; PRINCIPAL AND AGENT; SALE; SPECIFIC PERFORMANCE; STOCK TRANSACTIONS; SUBROGATION; TENDER; USURY; VENDOR AND PURCHASER.

I. VALIDITY.

1. A contract made by a person so intoxicated as not to know the consequences of his acts is voidable, and may be avoided by himself, although the intoxication was voluntary and not procured by the circumvention of the other party to the contract, and unknown to him. Money paid in part performance of such a voidable contract can be recovered back.

Bush v. Breinig (Pa.)

889

2. In an action to recover back hand money paid at the time of signing the conditions of the sale of real estate at auction, the question to be submitted to the jury is the capacity of the plaintiff to make a contract at the time of signing the agreement and paying the money, and not his capacity at the time of the bid.

Id.

3. A drunkard when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract; but his contract is voidable only, and not void, and may therefore be ratified by him when he becomes sober. Authorities cited. *Id.*

892

4. No State is bound to recognize and enforce a contract injurious to its own interest.

terests or those of its subjects, although valid by the law of the place where made. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.) 109

5. The validity of a contract is to be determined by the law of the place where made, unless it is to be performed in another country; in which case it is governed by the law of the place of performance. Authorities cited. *Id.*

6. An obligation enforceable in equity will support an express promise to pay, and make it sueable at law.

Condon v. Barr (N. J.)

557

7. A mere moral obligation or duty, as an executed consideration, is not a sufficient consideration to support a subsequent express promise to pay. Authorities cited. *Id.*

558

8. A, learning B was about to advertise for bids, induced each of several dealers separately to promise him a commission on his securing a sale from such dealer to B. He did not inform any of them of the name of the purchaser or competitive bidding and submitted a bid himself. — Held, he was not entitled to a commission from the dealer obtaining the contract, there being no consideration for the promise to pay him a commission, and that the agreement therefor was void by reason of the fraudulent suppression of material facts on his part, and as *contra bonos mores*.

Murray v. Beard (N. Y.)

129

II. CONSTRUCTION.

9. Where the words in any written instrument are free from any ambiguity in themselves, or where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves; and evidence *dehors* the instrument, for the purpose of explaining it according to the alleged or surmised intention of the parties, is utterly inadmissible. Authorities cited.

Dwight v. Germania L. Ins. Co. (N. Y.)

532

10. Though the intent of the parties be never so clear it may not take place contrary to the rules of law; nor can the court put words in a deed which are not there, nor put a construction on the words directly contrary to the plain sense of them. Authorities cited. *Id.*

11. What a contract means is a question of law; it is the court, therefore, that determines the construction of a contract. Authorities cited. *Id.*

534

12. No question affecting the interpretation of a contract can properly be submitted to the jury, except those arising upon conflicting evidence as to the terms of the agreement, or when extrinsic evidence raises some doubt over the subject-matter, or the agreements thereunder. Authorities cited. *Id.*

Id.

13. A mortgage given by the grantee of land and accepted by the grantor, in further-

ance of the specific purpose of putting the land out of the reach of the grantor's creditors, will not be enforced.

Rouland v. Martin (Pa.) 760

14. In an action to enforce a contract granting a license to manufacture a patented article, it is no defense to allege that plaintiff had no right to the patent or to grant the license to others.

Bocaird v. Dick (Pa.) 40

15. A contract for the manufacture of a licensed article, giving licensors the option to terminate it and declare the license forfeited at any time when licensees shall make default in making the statements and payments required of them by the contract, cannot be rescinded by licensees' refusing the statement. The licensees are liable as long as they manufacture during the continuance of the patent.

Id.

16. Parol evidence to change written contract considered.

Id.

17. The owners of a tract of standing hemlock entered into a contract by which they sold all the hemlock bark growing thereon, the bark to be cut and removed by vendees in quantities not exceeding a certain amount per year, the period being unlimited. The contract, after a description of the premises, run as follows: "Said lots being in the vicinity of Moose River Tannery, said bark to be used in carrying said tannery on." Subsequently the tannery was conveyed by the vendors to the vendees of the bark and thereafter was accidentally destroyed. Held, the clause "said bark to be used in carrying said tannery on," was neither an exception, reservation, condition, nor limitation, and that the destruction of the tannery did not, as matter of law, annul the contract, so as to entitle the vendors to retain the bark then uncut, or to recover possession of that cut by the vendees under the contract but not removed.

Lyon v. Hersey (N. Y.) 884

18. The ordinary technical words by which a limitation is expressed are *durante*, *dum*, *donec*, etc., but the use of these words would be an unsafe test. The word "proviso" or "provided" may sometimes be taken as a condition, sometimes as a limitation, and sometimes as a covenant. Authorities cited.

Id. 386

19. While no particular form of words is necessary to create a limitation or condition, it is yet essential that the intention to create them shall be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate is to depend upon a contingency. Authorities cited.

Id. 896

20. The nature of an act provided for, and the circumstances surrounding the subject of the agreement, are proper sources of information from which to determine an understanding as to the intent of the parties to make a written contract subject to a limitation or condition. Authorities cited.

Id.

21. In the construction of all contracts under which forfeitures are claimed, it is the duty of the court to interpret them strictly in order to avoid such a result, for forfeitures are not favored in the law. Authorities cited.

Id.

22. Where the owner of a quarry sold so much of the stone therefrom as was needed "for all the purposes of Newton Farm,"—Held, the vendees acquired no right to stone to be used for other purposes than Newton Farm. Authorities cited.

Id. 887

III. ACTIONS.

23. Where the certificate of the promisor's agent, that work has been done in accordance with the contract, is by the terms of the contract prerequisite to payment, the agent's refusal to give the certificate is no defense to a suit for payment, if it is proved that the work was in fact done in accordance with the contract.

Whelan v. Boyd (Pa.) 651

24. One who had agreed to erect certain houses, and was to have a mortgage assigned to him by A, in consideration of their erection, when they were finished, engaged plaintiff to plaster them, and assigned his interest in the mortgage to plaintiff in payment therefor, and released A from his obligation to deliver to him the mortgage, and the plaintiff assigned the mortgage to A's wife, on A's agreeing to pay plaintiff for his work when done, not exceeding the sum mentioned in the assignment. Held, that the plaintiff was entitled to recover from A, on completing the plastering, the amount due him therefor, not exceeding the sum so mentioned, notwithstanding the fact that the builder had not finished the houses.

Id.

25. An attachment will lie where the cause of action is founded upon contract, and is of such a nature that plaintiff would formerly have been entitled to hold defendant for bail upon filing an affidavit of the cause of action. When the cause of action arises *ex delicto*, or is of such a nature that bail could not have been required without the order of a court or judge, resort cannot be had to this remedy.

Heckacher v. Trotter (N. J.) 78

26. Unliquidated damages resulting from breach of contract cannot be recovered by attachment, unless the contract affords a certain measure or standard for ascertaining the amount of damages; and such standard must be shown by the contract without the aid of extrinsic facts or circumstances. Authorities cited.

Id. 79

27. Rescission; restoration of consideration.

Doughten v. Camden Build. & L. Asso. (N. J.) 827

28. One party to a contract cannot rescind it by his own will, and at the same time keep possession of the consideration, in whole or in part; he must, as far as practicable, put the other party *in statu quo* before he can exercise his right of rescission. Authorities cited.

Id. 828

29. One accepting work under a contract, and recovering judgment at law for damages for breach because of inferiority in quality of articles contracted for and delivered, cannot insist, in a suit in equity, that a note given by him in payment be annulled and surren-

dered, without crediting defendant with balance due thereon. The court should decree surrender of the note to plaintiff, and the plaintiff credit the amount still due on the note upon his judgment against defendant.

Orandall v. Grov (N. J.) 70

80. Courts will not relieve a party from the consequences of his intentional, fraudulent act.

Roveland v. Martin (Pa.) 760

CONTRIBUTION. See **BANKRUPTCY**, 2; **PRINCIPAL AND SURETY**, III.

CONTRIBUTORY NEGLIGENCE.
See **NEGLIGENCE**.

CORONER.

1. Where, after the finding of the body of one killed by violence, a person was arrested, without warrant, as the suspected murderer, taken before a coroner's inquest, informed that he was charged with the murder, and the alleged instrument of death was produced, and he was examined on oath before the coroner as to circumstances tending to connect him with the crime, and he denied all knowledge of the crime, the testimony thus given was not a voluntary confession, and (it not appearing that he was informed of his right or that he was not bound to answer questions tending to criminate him) evidence thereof was not admissible upon the prisoner's trial for murder, and its admission was reversible error. *Ruger, Oa. J., and Earl, J., dissenting*, on the ground that it did not appear that he was not informed of his right to refuse to testify, or that objection had been made as to that point on the trial.

People v. Mondon (N. Y.) 857

2. Where a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn, his testimony (should he afterwards be charged with the crime) may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected and that he was suspected of being the criminal will not prevent his being regarded as a mere witness, whose testimony may afterwards be given in evidence against himself. Authorities cited. *Id.* 859

3. If, at the time of examination of a person before a coroner's inquest, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a person accused, and he is to be treated in the same manner as if brought before a committing magistrate; and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense. Authorities cited. *Id.*

4. A statement made under oath before a coroner's jury, while the party is under arrest under suspicion of guilt, is equally voluntary as if made as a witness in a case with which he has no connection. It is certain that the statements of an accused person made under oath are never excluded on account of C. R., V. IV.

any supposed violation of the immunity of the party from self-crimination. Authorities cited. *Dis. op. Id.* 863

CORPORATIONS.

I. CHARTERS; FRANCHISES.

II. FORFEITURE.

III. STOCK.

IV. OFFICERS.

V. ACTIONS; CONTRACTS ULTRA VIRES.

See **BANKS AND BANKING**; **BUILDING ASSOCIATIONS**; **CARRIERS**; **GAS COMPANIES**; **INSURANCE**; **MUNICIPAL CORPORATIONS**; **RAILROAD COMPANIES**; **RELIGIOUS SOCIETIES**; **STREET RAILWAYS**; **TAXES**, 12, 16, 80; **TURNPIKE COMPANIES**; **WATER COMPANIES**.

I. CHARTERS; FRANCHISES.

1. Public grants are to be strictly construed, and whatever is not plainly granted must be understood to have been withheld.

Jersey City Gas Co. v. Consumers Gas Co. of N. J. (N. J.) 330

2. When there is a *de facto* corporation, and the State does not interfere, its corporate existence and ability to contract cannot be questioned. Authorities cited.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 106

3. The invalidity of a charter cannot be inquired into collaterally, and, least of all, by a member who has enjoyed the benefits of its privileges. Authorities cited. *Id.*

4. By the reservation of the power to alter a charter, the Legislature retains the power to impose additional taxation.

State Board of Assessors v. Cent. R. R. Co. (N. J.) 496

II. FORFEITURE.

5. In the absence of legislation conferring jurisdiction upon other tribunals, the common-law courts have exclusive jurisdiction of all questions relating to the forfeiture of franchises.

Jersey City Gaslight Co. v. Consumers Gas Co. of N. J. (N. J.) 330

6. Plaintiff company, having authority to furnish gas of any quality, sought to restrain defendant company from manufacturing and supplying gas, on the ground that, by defendant's charter, it was required under a certain penalty to furnish gas of a certain quality, and that the gas furnished by it was not of such quality. *Held*, that plaintiff was not entitled to an injunction, because such injunction would be equivalent to forfeiting defendant's charter, which can only be done by a proceeding instituted directly for that purpose by the government. *Id.*

7. The charter of a corporation will not be declared to be forfeited, except in a proceeding instituted directly for that purpose by the government granting the charter. Authorities cited. *Id.* 331

8. An injunction will not be granted, under the Act of April 18, 1884, to restrain a corporation from exercising its franchises, in case of nonpayment of tax, where the

corporation has only kept up a formal organization without transacting any business.

Re Faure Electric Light & Force Co. (N. J.) 148

Re New York File & Sharpening Co. (N. J.) 144

9. Under the corporation tax law, the court of chancery has only authority to grant or refuse an injunction against a corporation's **continuing business after failure to pay the tax** assessed against it, and a proper case for such injunction appears when the court is satisfied that the State is not wholly in the wrong.

State v. American Glucose Co. (N. J.) 142

10. Where a corporation has abused its powers or committed an unlawful act, it **continues** to exist as a corporate body until the State or government which created it shall, by a proper proceeding, procure an adjudication and **enforce a forfeiture** of the charter. But all such proceedings are at the instance and on behalf of the State or government. Authorities cited.

Pittb. & S. L. R. R. Co. v. Rothschild (Pa.) 108

III. STOCK.

11. A number of persons signed a **subscription list**, headed as follows: "We, the undersigned, hereby subscribe the amount and the number of shares opposite our names, to the stock of the National Express Co., and bind ourselves, our heirs, etc., to pay said amount in such installments as may be called for by said company, and to pay 1 per cent at the time of subscription." *Held*: (a) That the **company was not the promisee**, it not being in existence at the time of the subscription; (b) That the subscriptions were mutual **promises** by the subscribers to each other, to pay to the corporation when it should come into existence, the amounts subscribed, and each subscription was a **consideration** for the others; (c) That while a **promise** cannot be made to a **person not in existence**, it may be made to a living person, to pay money to another person, natural or artificial, when he or it comes into existence, and is within that class of cases in which a promise made to one for the benefit of another can be enforced by the latter; (d) That in this case the **corporation** is the payee, or third party, and the subscriptions are choses in action due to it, and may be **enforced by suit**; (e) That such a **suit**, if brought in this District, should be in the **name of the corporation**, or, if the debt has been assigned, in its name to the use of the assignee; (f) That whether a suit is to be brought in the **name of the assignor** to the use of the **assignee**, or in the name of the assignee alone, is a question of process to be controlled solely by the *lex fori*, whatever may be the *lex loci* in that respect.

Glenn v. Bussey (D. C.) 609

12. Where the **subscription price** of the stock of an incorporated company is only to be paid in such installments and at such times as it may be called for, and at the time of the **bankruptcy** of a stockholder and his **discharge** in bankruptcy, no call for the payment of his subscription has been made, a call

subsequently made for an unpaid installment thereof is not a provable claim against the bankrupt's estate in the bankruptcy proceedings; therefore the bankrupt's discharge is no bar to an action for such unpaid installment. Authorities cited.

Wyckoff v. Gardner (N. J.) 182

18. A **subscriber** who has not paid his subscription to the stock of a proposed corporation, which has never been chartered, **cannot maintain** an action of **assumpsit against the other subscribers** on a contract made with him by all the subscribers, including himself, in the name of the proposed corporation, for the purchase of his land in consideration of the stock subscribed for by him and an additional sum in cash.

Crow v. Greene (Pa.) 278

IV. OFFICERS.

14. A contract made by an individual, in connection with others, with a railroad corporation in which he is a **director**, binding the corporation to purchase certain property from him and his associates, such director having participated in the action of the corporation in assuming the obligation, is within the rule which invalidates all **contracts** made by a trustee or fiduciary, in which he is **personally interested**, at the election of the party he represents.

Munson v. Syracuse, G. & U. R. Co. (N. Y.) 191

15. Such contract is not rendered valid by the fact that its effect was merely to substitute the corporation for certain of its individual promoters who had previously contracted for the purchase; nor by the fact that the property consisted of real estate, tracks, etc., of another railroad corporation which the present vendors had purchased under a mortgage foreclosure; the transaction in question not being an arrangement for the reorganization of an existing railroad within the provisions of Laws 1878, chap. 710. *Id.*

16. The **secretary, treasurer, and business manager** of an iron manufacturing company, defendant, were jointly **engaged** in the management of a **store** not connected with the iron company. *Held*, that **assignments of wages** claims by the employees of the iron company, in consideration of store bills and cash, were valid assignments, and did not extinguish the claims.

Huntingdon & B. T. R. R. Co's Appeal (Pa.) 706

17. An action seeking to make a **trustee** of a manufacturing corporation personally liable for a debt of the corporation, on the ground of **failure to make the annual report** as required by statute, is an **action for a penalty**; and therefore, under Code Civ. Proc. §§ 528, 537, the verification of the answer therein may be omitted.

Gadsden v. Woodward (N. Y.) 208

V. ACTIONS; CONTRACTS ULTRA VIRES.

18. In an **action for rent**, due from February, 1881, to June 1, 1882, brought by defendant in error against plaintiff in error, upon a lease of defendant's road for the term of 999

years, where it appeared by its **charter** plaintiff in error had been **authorized** to construct a road over the same route within ten years from August 1, 1852, but had not exercised such power, that defendant's charter contained a provision authorizing it to **lease** its road or consolidate with **any other railroad**, thereby authorizing any such railroad to take and operate such lease, but the provision was void because the title of the Act did **not embrace** such **subject**, and the Act embraced more than one object, so that the lease was *ultra vires*, yet,—*Held*, that the **defense of ultra vires** was not available in this action, it appearing that defendant in error had constructed its road in pursuance of a contract with plaintiff in error, made in November, 1871, providing that it would guarantee its bonds and take a lease thereof for 999 years, and had since operated the road, and the annual reports of its directors since that time had referred to the contract and the performance of its terms from time to time, and shareholders had made no objection thereto.

Camden & Atl. R. R. Co. v. Mays Land & E. H. C. R. R. Co. (N. J.) 801

19. An **executory contract, ultra vires, cannot be validated** by the acquiescence of every stockholder of the company; and an *ultra vires* contract fully **executed cannot be receded from**. Authorities cited. *Id.* 802

20. A corporation cannot defend itself against a claim for money paid at its request to one who advanced the price of a steamboat **purchased** for it, on the ground that the purchase was *ultra vires*, although the plaintiff, when he paid the money, knew all the facts. Authorities cited. *Id.*

21. The plea of *ultra vires* cannot be enforced where a **contract has been executed**, and where its allowance will do **wrong to innocent third persons**. Authorities cited. *Id.*

22. The preponderance of American authority appears to be that an *ultra vires contract* but **partly executed** cannot be enforced. Authorities cited. *Id.* 808

23. A private corporation cannot be allowed to interpose the plea of *ultra vires*, where its **contract has been performed** by the other party, and the corporation has had the benefit of the contract and the performance. Authorities cited. *Id.*

24. Where a **foreign corporation**, without authority, has taken lease of real estate, it will be **estopped from pleading ultra vires** in an action for the rent. Authorities cited. *Id.*

25. Where a railroad company has made a **lease ultra vires**, such lessee will be **estopped** from questioning its validity in an action to recover the stipulated rent. Authorities cited. *Id.*

26. **Contracts which are ultra vires, affecting only the interests of stockholders**, may be made good by the assent of the shareholders, so that strangers to them, dealing in good faith with the corporation, will be protected in reliance on those acts. Authorities cited. *Id.*

G. R., V. IV.

27. Where the public is concerned to restrain a corporation within the limit of the power given to it by its charter, **an assent of the stockholders to the use of unauthorized power will be of no avail**. Authorities cited. *Id.*

28. When a **charter has actually been granted** to certain persons, and they are actually in the **possession and enjoyment** of the corporate rights granted, such possession and enjoyment will be held against one who has **dealt with them in their corporate capacity**. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.) 108

29. A **transfer or mortgage of the property** of an incorporated company, although made when the company was insolvent, and **to prefer creditors**, is not prohibited by statute nor objectionable in itself.

Vail v. Jameson (N. J.) 823

30. A **misnomer** of a corporation in a devise, grant, or obligation will not prevent it from taking or recovering in its true name. Authorities cited.

Am. Dramatic Fund Assn. v. Lett (N. J.) 403

31. A complaint seeking the compulsory **production of the books** of a corporation for examination on the part of a stockholder, on the ground only that complainant has been refused permission to examine the books with the aid of an expert accountant, and that he is not advised whether a dividend offered him by the directors is the full amount to which he is entitled, does not present a case for equitable relief.

Stettaner v. N. Y. & S. O. Co. (N. J.) 403

32. The **power conferred upon the chancellor by § 50 of the Act concerning corporations** (Rev. p. 186), to **compel the production of the books** of a corporation, is limited to the special case of a corporation of this State unlawfully keeping its books out of the State; and the Act does not confer upon the court of chancery any power over corporations which it did not theretofore possess, except that which is specifically given. *Id.*

33. A corporation acting through **officers and agents** who are admitted to **testify** in cases where the corporation is a party cannot be said to be under legal disability; and the **opposing party** in a suit can be examined as a witness.

North Hudson Co. R. Co. v. May (N. J.) 81

34. The Society for Establishing Useful **Manufactures is exempt from the tax** imposed by the Act of April 18, 1864, upon the capital stock of corporations. The exemption conferred by the charter of said society extends to the property of such society acquired under a subsequent Act of the Legislature, empowering it to extend its operations by condemning additional lands for the same purposes as those provided for in its charter.

State v. Society for Establishing Useful Manufactures (N. Y.) 139

COSTS. See JUSTICES OF THE PEACE. ⁴ WILL, 9, 10.

The Act of March 23, 1877, **authorizing any of the prothonotaries and sher-**

iffs of the several counties of the Commonwealth, within six years after the expiration of their official term of office, to sue any one **residing out of the county**, before a justice of the peace within the county, for fees for official services, before or after judgment; authorizing constables to appoint deputies in the county where the defendant resides to execute the writ; providing for execution in any county in the Commonwealth; and making a certificate of the prothonotary of the county where suit is brought *prima facie* evidence that such fees are lawfully due and correct.—*Held*, to be **special legislation** and unconstitutional, under art. 8, § 7, of the Constitution. *Strine v. Folte* (Pa.) 288

2. In a suit by an executor to compel production of a will held by a daughter of the testatrix and her husband, defendants, having been in the wrong originally, held liable for costs.

Beckett v. Zane (N. J.)

54

3. The thirteenth section of the Act of September 28, 1791, which makes the costs of justices of the peace in unfounded charges of "having committed a crime" payable "out of the county stock," refers not only to felonies but to misdemeanors, such as cruelty to animals, assault and battery, malicious trespass, larceny, and false pretenses.

Lehigh Co. v. Schock (Pa.)

744

4. In a suit against a county for costs, the docket of a justice of the peace is conclusive evidence that the prosecution for which costs are claimed was discharged as unfounded for want of evidence. *Id.*

COUNSEL FEES. See INJUNCTION, 18.

COUNTERCLAIM. See SET-OFF AND COUNTERCLAIM.

COUNTIES.

1. Orders drawn by a contractor, upon a county treasurer, on account of work contracted to be done for the county, under a contract providing for a cancellation of the contract in case of delay, etc., on the part of the contractor, no money being at the time due on the contract, can operate only as assignments of money expected to become due, and they become inoperative if, by force of the provisions of the contract, no money should afterwards become due the contractor.

Conselyea v. Blanchard (N. Y.)

872

2. An order upon the person liable to pay for work contracted for, drawn by the contractor, in payment for materials used in the work, does not for that reason have priority over an order, the proceeds of which are not shown to have entered into the work. *Id.*

3. If, on default of an original contractor, the county, acting in accordance with the terms of the contract, employs another person, who was a subcontractor for a part of the work, to complete the work, the expense of such new arrangement being authorized to be deducted from the contract price, such subcontractor, on completion of the work by him, is entitled to the amount due both for the

work covered by his original subcontract and for the additional work done by him; and his right to the money, applicable to such payment, is superior to that of holders of orders drawn thereon by the original contractor; and this, although, as matter of convenience, the bill for the whole work against the county was made out and audited in the name of the original contractor. *Id.*

COURTS.

I. JUDGES.

II. JURISDICTION.

See CONFLICT OF LAWS, 7; JUSTICES OF THE PEACE.

I. JUDGES.

1. A judicial officer is protected from an action for damages or prosecution for false imprisonment whenever, in the proceeding, he had jurisdiction, and enough was shown to call upon him for a decision, even though he erred grossly and even intentionally. Authorities cited.

Fischer v. Langbein (N. Y.)

218

2. Civil courts can relieve a person from imprisonment under order of a court-martial only by writ of habeas corpus, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint, there is no right in the civil court to interfere. Authorities cited.

United States v. Whitney (D. C.)

154

3. The Supreme Court of the District of Columbia has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court-martial. *Id.*

II. JURISDICTION.

4. Every thing necessary to give validity to the action of a special tribunal must appear in the record. Authorities cited.

State v. City of Trenton (N. J.)

81

5. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act; and if it nevertheless proceeds and entertains jurisdiction of the proceeding, all its acts are void, and afford no justification to the parties instituting them, as against parties injuriously affected thereby.

Fischer v. Langbein (N. Y.)

215

6. Want of jurisdiction of a court over the subject-matter may be shown at any time; and a judgment rendered in the absence of jurisdiction is inoperative and void. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.)

110

7. Where the subject-matter of the suit is strictly local, jurisdiction depends upon such locality, and can only be exercised in the State where the subject-matter is located. Authorities cited. *Id.*

8. If the object of the suit is to directly deal with and affect the person of the defendant party, and not the subject-matter itself, and the decree when rendered and the relief when

granted would in fact directly affect and operate upon the person of the defendant only, and would not directly operate upon the subject-matter, then the suit may be maintained in any State where the court obtains jurisdiction of the person of the defendant, although the subject-matter of the controversy referred to and described in the decree, and ultimately but indirectly affected by the relief granted, may be situated in another State. *Id.*

9. The superior courts of New Jersey, modeled after the English courts of common law, have authority to punish summarily, by proceedings for contempt, for any words uttered, by speech, writing, or printing, outside of the regular course of litigation, which are designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert, in a pending cause, the due administration of justice.

Re Contempt of Osesman (N. J.) 576

10. The Supreme Court of the District of Columbia, in special term, sitting as an orphans' court, has all the jurisdiction that the orphans' court at any time possessed by virtue of the statutes existing anterior to the adoption of the Revised Statutes of the District.

Re Estate of McIntire (D. C.) 605

11. The question whether an administrator has received and used money for the advantage of the heir in discharging liabilities against the inherited estate, so as to charge the heir therewith, is to be raised and determined in the orphans' court, not in a suit in chancery.

Percival v. Gale (N. J.) 384

12. There is no doubt about the power of the orphans' court to revise and correct its adjudications, if palpable mistakes are discovered therein. Authorities cited.

Appeal of Johnson (Pa.) 895

13. An assignment of a mortgage, with verbal directions to the assignee to collect the debt and pay proceeds to the assignor, if living, or to the brothers and sisters of the assignee, if the assignor is dead, constitutes a special trust. After the death of the assignor, the orphans' court has not jurisdiction of the trust, and will not compel the assignee, who is also the assignor's administrator, to account for the proceeds.

Hamburg Bank v. Seidel (Pa.) 921

14. The surrogate is not necessarily concluded by the uncorroborated affidavit of the executor alleging his inability to comply with the decree; and as a decision of the surrogate imposing punishment for contempt involves conflicting evidence and the exercise of discretion, it will not be reviewed by the court of appeals, where the discretion has not been unfairly exercised.

Re Snyder (N. Y.) 210

COURTS-MARTIAL.

1. Civil courts can relieve a person from imprisonment under order of a court-martial only by writ of habeas corpus, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint, C. R., V. IV.

there is no right in the civil court to interfere. Authorities cited.

United States v. Whitney (D. C.) 154

2. The Supreme Court of the District of Columbia has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of a naval court-martial. *Id.*

COVENANT.

1. In an action for breach of covenant against incumbrances, contained in a warranty deed in the usual form, where an original assessment for opening a street was in existence at the time of the execution of the deed, and afterwards a reassessment was made, —Held, that the lien of the reassessment related back to the lien of the original assessment, and attached when the assessment was affirmed, and not when the work was completed, and that the covenant was broken as soon as made.

Cadmus v. Fagan (N. J.) 809

2. A memorandum indorsed on a lease, signed by the parties, but not dated or under seal, that "it is agreed that the said second parties are not to drill any wells in the barnyard, orchard, or garden without consent of first parties, but nobody else to have the right," —Held, inadmissible in an action of covenant on an oil lease.

Bradford Oil Co. v. Blair (Pa.) 101

3. The measure of damages for the breach of a particular covenant in a lease is not the value of the lease or any part of it, but the loss actually resulting from the breach.

Penn Iron Co. v. Diller (Pa.) 691

4. Attachment will not lie for unliquidated damages, and hence will not lie for damages for breach of covenant in a mine lease to pay royalty for ore mined, and to remove a stipulated quantity per annum.

Heckscher v. Trotter (N. J.) 77

5. Attachment will not lie for damages arising out of breach of covenant in a charter-party to employ a vessel at a certain sum per month for a designated voyage, the length of the voyage being conjectural, and hence the damages being uncertain. Authorities cited. *Id.* 79

6. In an action of covenant defendant cannot be held for bail as of course, unless the covenant be for the payment of a sum certain. Authorities cited. *Id.*

CREDITORS' BILL.

1. A complainant in a creditors' bill may properly make every one a party who is a participator in the fraud therein alleged. He has a right to do this for the purpose of discovery; and the defendants cannot object to the bill for multifariousness, so long as the matters contained in the bill are pertinent to the imputed fraud.

Importers & T. Nat. Bank v. Littell (N. J.) 868

2. Where the bill seeks to set aside a deed made by the debtor and his wife, for fraud, the wife is a proper party defendant. *Id.*

3. In a creditors' bill the complainant is entitled to a discovery as to the consideration of a mortgage given by the debtor, and, where

it is said to have been given to indemnify the sureties for him as guardian, to a discovery of the extent of liability of the sureties and of the estate held by him as guardian. *Id.*

4. Whether the debtor is able to pay his debts or not is a pertinent inquiry in a creditors' bill. *Id.*

5. Next of kin, although not interested in the real estate in question, are proper parties defendant to a creditors' bill seeking to charge a claim against an intestate decedent's estate upon lands formerly owned by decedent and alleged to have been fraudulently conveyed by him in his lifetime, the decedent having at his death left only personal property, and such personality being alleged to be insufficient to settle the estate.

Hunt v. Van Derveer (N. J.) 242

CRIMINAL LAW.

I. WHAT IS CRIME; FORMER JEOPARDY.

II. INDICTMENT.

III. TRIAL; EVIDENCE; CONFESSIONS; VERDICT.

IV. NEW TRIAL; APPEAL.

See ADULTERY; BASTARDY; BAWDY AND DISORDERLY HOUSES; BRIBERY; CORONER; HOMICIDE; INTOXICATING LIQUORS; LOTTERIES; PERJURY; REWARD; SUNDAY.

I. WHAT IS CRIME; FORMER JEOPARDY.

1. The word "crime" is properly applicable both to a felony and to a misdemeanor. *Lehigh Co. v. Schook* (Pa.) 744

2. It is essential, to create the offense prohibited by Laws 1885, chap. 188, § 7, as amended by chap. 458, that the article not produced from milk or cream, the manufacture and sale of which is forbidden, should be in imitation or semblance of butter, and this is a question for the jury. An instruction omitting the fact of imitation is error. *Earl and Andrews, JJ.*, dissenting from the reversal, on the ground that it had been proved and assumed on the trial that yellow coloring matter had been put in the oleomargarine in order to give it the semblance of butter.

People v. Arensburg (N. Y.) 542

3. The hearing of a demurrer to an indictment does not constitute putting the defendant in jeopardy. A man has only been in jeopardy when he has had a trial. Authorities cited. *Id.*

United States v. Phillips (D. C.) 620

4. Where the defendant is in jeopardy under the indictment and evidence, he cannot be again tried under the same indictment; and he will be discharged without day in such case, where the original proceedings are reversed for insufficiency of a special verdict.

Rhoads v. Commonwealth (Pa.) 725

II. INDICTMENT.

5. An indictment for manslaughter by culpable negligence in the construction of a building, under Penal Code, §§ 198-195, which substantially complies with the provision, C. R., V. IV.

sions of the sections and with § 284 of the Code of Crim. Proc., is sufficient.

People v. Buddensiek (N. Y.) 787

6. A conviction will not be reversed for a mere formal defect in the indictment which might have been amended in the court below, or might be amended in this court.

Davis v. Commonwealth (Pa.) 711

7. Where the defendant has been acquitted under a certain count in an indictment, it cannot be urged as error that the trial court refused to compel the prosecution to elect as to which of several transactions set out in that count the State would rely upon for a conviction.

Clark v. State (N. J.) 806

III. TRIAL; EVIDENCE; CONFESSIONS; VERDICT.

8. Section 395, Code Crim. Proc., providing that a confession can be given in evidence, unless made under influence of fear produced by threats, or upon a stipulation for immunity from prosecution, applies only to voluntary confessions, and does not change the statutory rules relating to the examination of prisoners charged with crime. *Ruger, Ch. J.*, and *Earl, J.*, dissenting.

People v. Mondon (N. Y.) 857

9. If, at the time of examination of a person before a coroner's inquest, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not to be regarded as a witness, but as a person accused; and he is to be treated in the same manner as if brought before a committing magistrate; and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense. Authorities cited. *Id.* 859

10. Where a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn, his testimony (should he afterwards be charged with the crime) may be used against him on his trial; and the mere fact that at the time of his examination he was aware that a crime was suspected and that he was suspected of being the criminal will not prevent his being regarded as a mere witness, whose testimony may afterwards be given in evidence against himself. Authorities cited. *Id.*

11. When, in addition to the confession of the party on trial for a crime, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a noncompliance with the requirement of § 395 of the Code of Criminal Procedure, that the confession of a defendant "is not sufficient to warrant a conviction, without additional proof that the crime charged has been committed."

People v. Jaehne (N. Y.) 165

12. It seems that, under said § 395 of the Code of Criminal Procedure, the confession

of the defendant is to be treated as competent proof of the *corpus delicti*, although insufficient, without corroboration, to warrant a conviction. *Id.*

13. Full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required. Authorities cited. *Id.* 172

14. Where defendant was under arrest for the murder of her husband, and a justice of the peace held several conversations with her, in which he told her that three of her children had told all about the crime, "and she might as well tell us, too," but did not add that it would be better for her,—*Held*, her confession was voluntary and admissible. *People v. Druse* (N. Y.) 770

15. The testimony of a person in regard to his own signature is not evidence of a grade superior to the testimony of a witness acquainted with the handwriting of such person. *Lefferts v. State* (N. J.) 888

16. The defendant in a criminal case produced written complaints, and, being a witness, testified that such complaints were signed by the prosecutor in his presence; the court refused to receive the same thus proved, and required the prosecutor in such complaints to be called to prove his own signature; such prosecutor was produced and was a witness hostile to the defense. *Held*, that such judicial action was error entitling the defendant to a reversal of the judgment. *Id.*

17. Counsel cannot, after omission to object to testimony offered, take the chances of the testimony making in his favor, and, if it happens to be adverse, then interpose an objection to it. *Clark v. State* (N. J.) 806

18. The State, for the purpose of showing that defendant would be likely to commit the crime charged, cannot prove that he committed other crimes, although of a like nature. *Id.*

19. While a general verdict of guilty under an indictment will presume that all the elements of the offense have been found, a special verdict must find all the facts essential to support the charge set forth in the indictment. *Rhoads v. Commonwealth* (Pa.) 725

IV. NEW TRIAL; APPEAL.

20. A new trial ought not to be granted even where an exception is well taken, unless the jury could draw, from evidence admitted under it, some unfavorable inference, nor when the party excepting has by his own course of examination destroyed the force of his objection. *People v. Buddensiek* (N. Y.) 787

21. On a judgment of the criminal court sustaining a demurrer to an indictment, the United States has no right of appeal to the general term. Rev. Stat. § 772, does not apply to the criminal court. *United States v. Phillips* (D. C.) 617

22. A bill of exceptions is amendable. *Lefferts v. State* (N. J.) 888

CRUELTY. See HUSBAND AND WIFE, 37, 88.

CUSTOM AND USAGE.

1. A custom making 2 340 pounds a ton of coal is not good when opposed to a statute (Act of April 15, 1834) making 2,000 pounds a legal ton. *Godecharles & Co. v. Wigeman* (Pa.) 887

2. Rules posted up on an employer's premises, to the effect that a ton of coal shall be 2,240 pounds, such custom being opposed to a statute (Act April 15, 1834) making 2,000 pounds a legal ton, are not binding upon the employees, unless by special contract, or knowledge which will raise a presumption of contract. *Id.*

DAMAGES. See INJUNCTION, II.; JUDGMENT; MILLS AND DAMS, 2-7; SET-OFF AND COUNTERCLAIM; TRESPASS, 10-14; WAYS, 4, 5, 9, 12, 14, 15, 16, 20, 23, 24.

1. Statutory authority may justify acts which otherwise would give a right of action for nuisance or for damages. Authorities cited. *Cogswell v. N Y N. H. & H. R. R. Co.* (N. Y.) 229

2. In an action for damages for a continuing nuisance (here, the interference with the natural flow of water by the maintenance of a dam), plaintiff may, under the Act of May 2, 1876 (P. L. 95), permitting the recovery of damages up to the day of trial, give in evidence the condition of the obstruction up to the day of the trial, including all additions, changes, and repairs made after suit brought. *Humphrey v. Irvin* (Pa.) 685

3. One man cannot with impunity invade the premises of another by a nuisance, because the damages may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of plaintiff's right. Authorities cited. *Id.* 687

4. Everyone has the right to the natural use and enjoyment of his own property, and if, while lawfully engaged in such use and enjoyment, without negligence or malice, unavoidable loss occurs to a neighbor, it is *damnum absque injuria*. *Pa. Coal Co. v. Sanderson* (Pa.) 475

5. Where defendant company made a public notice by posting at its stations a rule that mileage and round-trip tickets would not be accepted on a limited express train, and plaintiff, having entered such train with a round-trip ticket, was ejected by the conductor, after tendering his fare in cash, at a place distant from a station, in violation of a rule of the company, in the night-time, in the midst of railroad tracks and switches, and trains moving and stationary, and, after walking some distance, was injured by a moving train,—*Held*, that although the passenger was bound to know the regulations, and the company could lawfully eject him at the station, yet, the evidence as to actual notice being conflicting and the ejection having been willfully made at a dangerous place, the company was liable for exemplary damages, and a judgment for \$48,750 was affirmed. *Lake S. & M. S. R. Co. v. Rosenzweig* (Pa.) 713

6. The general rule in cases of **negligence** is that only compensatory damages can be given. Juries are not at liberty to go further than **compensation**, unless the injury was **done willfully**, or was the result of that **reckless** disregard of the rights of others which is equivalent to it. Authorities cited. *Id.* 720

7. In an action against a bridge owner for **negligence** in removing a boat which had become entangled with the bridge, an instruction that the **burden of proof** was upon the plaintiff to show what damages resulted from the alleged negligent acts of defendant, and to distinguish them from damages for which defendant was not responsible,—*Held*, properly refused where the evidence clearly showed some substantial damages, and it is apparent that the verdict did not proceed upon the theory of charging the defendant in the first instance with the total loss, and then deducting the items for which defendant was shown not to be responsible, thus shifting the burden of proof.

Mark v. Hudson River Bridge Co. (N. Y.) 208

8. In an action for damages on a bond, in proceedings to restrain **tearing down** an alleged **party-wall**, preparatory to building a new building, evidence is admissible, to disprove damages, that the new building erected beside the old wall could have been erected without any detention, with the old wall standing.

Sensenig v. Parry (Pa.)

48

9. **Counsel fees** are not recoverable as legal damages in an **action on an injunction bond** conditioned to indemnify for all damage that may be sustained. *Id.*

10. **Attachment** will not lie for **unliquidated damages**, and hence will not lie for damages for breach of covenant in a mine lease to pay royalty for ore mined, and to remove a stipulated quantity per annum.

Heckacher v. Trotter (N. J.)

77

11. **Attachment** will not lie for damages arising out of breach of covenant in a charter-party to employ a vessel at a certain sum per month for a designated voyage, the length of the voyage being conjectural, and hence the **damages** being **uncertain**. Authorities cited. *Id.* 79

12. **Unliquidated damages** resulting from breach of contract can not be **recovered by attachment**, unless the contract affords a certain measure or standard for ascertaining the amount of damages; and such standard must be shown by the contract without the aid of extrinsic facts or circumstances. Authorities cited. *Id.*

DAMNUM ABSQUE INJURIA. See DAMAGES, 4.

DAMS. See MILLS AND DAMS.

DEATH. See INSURANCE, II.

DEBTOR AND CREDITOR. See ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; CREDITORS' BILL; FRAUD AND FRAUDULENT CONVEYANCE, II.

C. R., V. IV.

DECEDENTS' ESTATES. See ARBITRATION AND REFERENCE; DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; JUDGMENT, 2, 8; WILL.

DECEIT. See FALSE PRETENCES; FRAUD AND FRAUDULENT CONVEYANCE.

DECLARATIONS. See EVIDENCE, IV.; LIEN, 4; WILL, 1.

DEDICATION. See WAYS, I.

DEED.

I. FORM.

II. RECORDING.

III. CONSTRUCTION.

See COVENANT; HUSBAND AND WIFE, III.; MORTGAGE.

I. FORM.

1. A **misnomer** of a corporation in a devise, grant, or obligation will not prevent it from taking or recovering in its true name. Authorities cited.

Am. Dramatic Fund Assn. v. Lett (N. J.) 408

II. RECORDING.

2. That a deed of **assignment** of a limited partnership was at first **indexed** in the "Limited Partnership Docket," and not in the "Deed Book Index," does not invalidate the recording of the instrument.

Sheble v. Bryden (Pa.)

664

3. An **assignment** of policies of insurance made by an association or partnership limited, and **recorded**, is not inadmissible in evidence because it is **not a recordable paper**. *Id.*

4. A deed **left** with the recorder for the purpose of being **recorded** is, in contemplation of law, recorded, and takes effect from the time it was so left. **Actual notice** of a deed is equivalent to its recording. Authorities cited. *Id.* 667

III. CONSTRUCTION.

5. The disposition of real estate, whether by deed, descent, or other mode, must be **governed by the laws of the State where the land is situated**. Authorities cited.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 110

6. Though the **intent** of the parties be never so clear, it may **not** take place **contrary to the rules of law**; nor can the court put words in a deed which are not there, nor put a construction on the words directly contrary to the plain sense of them. Authorities cited.

Dwight v. Germania L. Ins. Co. (N. Y.) 583

7. If one conveys land **in fee simple**, but neither excepts any part, nor reserves to himself anything out of it, but **restricts** the grantee to a separate **use** of the land, this restriction is **void**, as repugnant to the proprietary rights of the owner in fee. Such a restriction may be imposed and **would be good** as

a condition or a covenant, but in no other form. Authorities cited.

Lyon v. Hersey (N. Y.) 887

8. In trespass *quare clausum fregit*, plaintiff claimed title under a deed which had been lost, and in evidence thereof submitted a recital in a subsequent deed from the same grantor for other land, that one of the lines ran "thence by lands of" plaintiff. Held, that such recital was insufficient, and did not indicate that the whole of the line was along such lands.

Rieglesville Del. Bridge Co. v. Bloom (N. J.) 820

9. In a deed of land a reservation of "all the pine and hemlock timber growing on said land" applies only to living trees of suitable size for use at the date of the deed.

Andrews v. Wade (Pa.) 689

10. A mistake in the description of a recorded deed will not be corrected by a court of equity, to the prejudice of the rights of bona fide judgment creditors of the grantee having a lien upon the property.

Ruppert v. Haskes (D. C.) 615

11. Where the owner of land lays it out into blocks and lots upon a map, and designates certain portions thereof to be used as streets, parks, and squares, an implied covenant arises, as appurtenant to lots granted with reference to such plan, not to use the portions so devoted to the common advantage, although not of such a nature as to give rise to public rights by dedication otherwise than in the manner indicated by such map.

Lennig v. Ocean City Assn. (N. J.) 808

12. Where lots have been sold with reference to a plan or map, indicating that a space 600 feet wide extending to the ocean should remain open for an auditorium and camp meeting purposes,—Held, that on complaint of purchasers of the lots, made with reference to such plan, the grantor should be restrained from dividing the open space into lots, and appropriating or conveying the same for the erection thereon of dwelling-houses. *Id.*

18. Land conveyed by a deed, from one who had acquired the same under foreclosure was described therein as bounded on one side by a certain creek; the bank of the stream along the deeded premises was high and precipitous; the water rights in the stream had for a long time been used by the owners of a mill property on the stream just below the deeded property, and no attempt to use the water power had ever been made by the occupants of the deeded property until a short time before the execution of the deed, when it became available to them through the destruction of the milldam below. Held: (a), that, in view of the location and physical condition of the deeded property, title was acquired only to a strip of land along the stream, with no rights in the lands under the water or in the water-power; (b) that the owners of the mill property below should not be restrained from rebuilding their dam.

Hall v. Whitehall W. P. Co. (N. Y.) 222

DEFENSE. See AFFIDAVIT OF DEFENSE.

C. R., v. IV.

DEFINITIONS. See MAXIMS.

1. Also, in like manner.

Morgan's Est. v. Morgan's Trustees (N. J.) 866

2. Crime, applicable to felonies and misdemeanors.

Lehigh Co. v. Schock (Pa.) 744

3. Cross bill.

Krueger v. Ferry (N. J.) 58

4. Furniture embraces everything enjoyed with premises, including plate, linen, china, and pictures.

Endicott v. Endicott (N. J.) 873

5. Gas not synonymous with petroleum oil.

Truby v. Palmer (Pa.) 925

6. Petroleum oil not synonymous with gas. *Id.*

7. Terre-tenant.

Hulett v. Mut. Life Ins. Co. (Pa.) 768

DEMURRER. See PLEADING, III.

DEPOSITION.

1. Under Code Civ. Proc. § 888, subd. 5, a commission to take testimony out of the State can issue in a reference of a disputed claim against a decedent's estate, under Rev. Stat. pt. 2, tit. 3, art. 2, §§ 36, 37.

Paddock v. Kirkham (N. Y.) 127

2. The validity of the execution of a commission to take testimony is not affected by the fact that the commissioner signs himself throughout as a notary public merely, except across the seal of the envelope in which he returns the testimony.

Del. & H. O. Co. v. Webster (Pa.) 638

DEPOSITS. See BANKS AND BANKING, 3, 6-8.

DEPUTY. See SHERIFF, 4.

DESCENT AND DISTRIBUTION.
See DECEDENTS' ESTATES.

1. The disposition of real estate, whether by deed, descent, or other mode, must be governed by the laws of the State where the land is situated. Authorities cited.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 110

2. Where a contract for the sale of realty is one which could, at the time fixed by it for completing the purchase, have been enforced against the purchaser by the vendor, if he had then been living, the rights of the next of kin of the vendor thereunder, after his decease, can not be defeated by the unwillingness of his heir to perform the contract.

Keep v. Miller (N. Y.) 554

3. Where a decedent had entered into a contract for the sale of realty, such as worked an equitable conversion of the land into money at his death, and his widow was willing to have the contract performed but his heir was unwilling, and the administrator of the deceased vendor brought suit to compel specific performance, which failed as against

the vendee because of the time which, without fault of the widow and by fault of the heir, had elapsed since the time fixed by the contract for its completion.—*Held*, that the widow of the vendor was entitled to recover from his heir a distributive share of the purchase money as part of the personal estate of her husband. *Id.*

4. A valid and binding contract for the sale of realty, such as equity will specifically enforce against an unwilling purchaser, operates in equity as a conversion of the land into money. *Id.*

5. Where a will contained a devise to the heirs of testator's deceased sister, and one of the children of such sister died in the lifetime of testator, leaving children, such children will share in the distribution of the devise. In such case the rule is that, as to the real estate, those take who were the deceased sister's heirs at testator's death, and as to the personal estate, those who at that time were her next of kin.

Ward v. Dodd (N. J.)

86

6. Although a will declares that a certain specific devise is given to devisees as his full portion, that provision will not exclude such devisees from participation which the law of Descents or the Statute of Distributions gives him in the residue of which testator died intestate. *So Held*, where the will containing the provision had disposed of all the testator's property, and he did not intend to die intestate as to any of it. *Id.*

7. An unregistered mortgage executed by an ancestor, although prior in date to a judgment recovered against his heir in the ancestor's lifetime, does not, on the ancestor's death, become void, under § 22 of the statute concerning mortgages.

Westervelt v. Voorhis (N. J.)

874

8. So long as the title to lands descended remains in the heir, the debts of the ancestor constitute a lien thereon. Authorities cited. *Id.*

875

9. Next of kin, who alone can take real estate, under Act of April 27, 1833, must be entirely within the blood of the ancestor from whom the realty descended, without regard to other relationship they may bear to intestate.

Ranck's Appeal (Pa.)

46

10. In the distribution of real estate derived from intestate's paternal grandfather, the next of kin, four degrees removed from the intestate on his mother's side, but six degrees removed from the intestate on his paternal grandfather's side, of whose blood they also are, will be excluded in favor of next of kin of the blood of the grandfather, five degrees removed from the intestate. *Id.*

46

11. A divorced wife, however innocent, has no right to a distributive share in the personal estate of her divorced husband, upon his death intestate. Hence, a divorced wife who had been divorced on her own application (for the adultery of her husband), and who had released all interest in her former husband's real estate, is not entitled to notice of proceedings to probate his will.

Re Estate of Ensign (N. Y.)

876

12. No intention to permit an innocent divorced wife to share in the personal estate of her divorced husband, on his death intestate, is to be inferred from the terms of 2 Rev. Stat. p. 146, § 48, providing that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." *Id.*

13. When a woman's claim for widow's exemption out of a decedent's estate rests entirely upon cohabitation and reputation, and her prior cohabitation and reputation as the wife of a man still living is proved by evidence of the same general character, no presumption of marriage with the decedent will arise.

Reading F. Ins. Co. v. Biegel (Pa.)

678

14. A widow cannot claim reimbursement for money expended in the improvement of her husband's property when it appears that such money, in the main, was derived from her husband's business and her earnings therein, and was voluntarily contributed to make such improvement; and it seems probable that a conveyance of real estate, executed to her by the procurement of her husband, secured to her a much larger sum than she possessed at the date of her marriage.

McMonigle v. McMonigle (N. J.)

408

15. Where no one has appeared to claim the realty by descent, the widow is entitled to reasonable compensation for collecting the rents thereon, when she is called upon to account. *Id.*

DESCRIPTION. See DEED, 10-13.

DEVISE AND LEGACY.

I. CONSTRUCTION; GENERAL RULES.

II. DESCRIPTION OF GIFT AND BENEFICIARY.

III. ABSOLUTE ESTATES.

IV. LIFE ESTATES.

V. REMAINDERS, VESTED, CONTINGENT.

VI. WHEN GIFT VESTS.

VII. ADVANCEMENTS.

VIII. POWER OF SALE.

IX. LAPSED GIFTS.

X. PAYMENT; CHARGE ON LAND; ACTIONS. See DESCENT AND DISTRIBUTION; DOWER; EXECUTORS AND ADMINISTRATORS; WILL.

I. CONSTRUCTION; GENERAL RULES.

1. In an action for the construction of a will, the court will not give direction to the executors upon a state of facts which is merely hypothetical.

Hurlbut v. Hutton (N. J.)

409

2. The right of an administrator with the will annexed to apply to the court for instruction is limited to matters of difficulty in his own administration.

Casperon v. Dunn (N. J.)

419

3. A will requested and empowered the survivor or survivors, in case of the death of any of the executors, to appoint other executors. *Held*, that a person so appointed takes the

trust estate, as well as the duties of executorship, in place of his predecessor.

Mulford v. Mulford (N. J.) 589

4. Every last will made when testator had no issue living, wherein any issue he might have is **not provided for** or mentioned, shall be void if, at the time of his death, he leave a child or children or issue, or leave his wife *en ventre* of a child or children which shall be born; and such testator shall be deemed to die intestate. Rev. 1246, § 20.

Coudert v. Coudert (N. J.) 182

5. The Act of April 8, 1833, allowing after-born children to take against the will, applies only to those physically born after the execution of the will, and does not apply to those legitimated after the making of the will.

Appeal of McCulloch (Pa.) 468

6. In arriving at testator's intent, effect is to be given to every part of the will.

McDevitt's Appeal (Pa.) 88

7. Devisees are governed by the intention of the testator, to be ascertained from his words in the will and the circumstances.

Sager v. Galloway (Pa.) 681

8. An expression in a will of an intention on the part of the testator to convey property, at a future time, to his daughter-in-law, can not be construed to be a devise.

Huribut v. Hutton (N. J.) 409

9. To create a devise by inference the implication must be a necessary one; there must be such a strong probability of an intention to devise that an intent to the contrary cannot be supposed.

Id.

II. DESCRIPTION OF GIFT AND BENEFICIARY.

10. **Name.** A devise to the American Dramatic Fund held good as a devise to the corporation, the American Dramatic Fund Association, it appearing that such corporation was intended by the testatrix to be the recipient.

Am. Dramatic Fund Assn. v. Lett (N. J.) 402

11. A misnomer of a corporation in a devise, grant, or obligation will not prevent it from taking or recovering in its true name. Authorities cited. *Id.*

12. A devise of "all the money I die possessed of in several banks and bonds" is not void for indefiniteness.

Re Will of Beckett (N. Y.) 881

13. A will directed that testator's "entire estate be and remain the same as it now is, real, personal, or mixed, including the furniture," etc., to be occupied by his wife during her life; and that at her decease the homestead, furniture, etc., should be used by testator's daughter, during life, or while unmarried. *Held*, that the words "the homestead" were manifestly omitted by mistake from the provision for the wife, and that it was the intention that the homestead should be occupied by her for life; that the term "furniture" embraces everything about the house that has been usually enjoyed therewith, including plate, linen, china, and pictures; that the provision for the wife was in lieu of dower, and, accepting it, she was not entitled to the \$200 exemption; and that, as life tenant, she was

bound to pay taxes and make repairs, but not to insure.

Endicott v. Endicott (N. J.) 871

14. The term "furniture" embraces everything about the house that has usually been enjoyed therewith, including plate, linen, china, and pictures. Authorities cited. *Id.*

872

III. ABSOLUTE ESTATES.

15. Where a devise contains no words of inheritance, it is only by implication that a fee can be claimed. Authorities cited.

McDevitt's Appeal (Pa.) 34

16. The fact that a devisee of real estate is personally charged with the payment of legacies is not decisive that the primary devise was in fee, when a different intention is disclosed.

Vanderzee v. Hansell (N. Y.) 176

17. A devise to one person of all testator's real estate in possession, without words of inheritance, with a gift over in the event only of death of devisee without issue, shows an intention to vest the fee in the primary devisee. In such devise the words refer to death without issue in the lifetime of testator, and the primary devisee surviving the testator takes an absolute estate in fee simple. Authorities cited. *Id.*

179

18. But this rule applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death or other specified event; and slight circumstances will vary their construction and give effect to the language according to its natural import. *Id.*

19. The will gave the widow's income, after her death; the estate in the event of the son's death before reaching thirty and after the death of the widow; and half of the estate upon the death of the widow, in case the son reached thirty—to the executors to be disposed of as they might choose. *Held*, that these were absolute gifts, to take effect in the respective contingencies.

Mulford v. Mulford (N. J.) 589

IV. LIFE ESTATES.

20. Testator directed his executors to sell his real estate, and divide the proceeds into two equal parts, giving one to his wife and the other in trust for the support of his father; and what should remain of the latter fund after the decease of the father, to his nephews. The widow and father of the testator occupied the land until the father's death. *Held*, the provision for the widow was in lieu of dower, and she had no right to the mansion house rent free; the heirs were entitled to one half the value of the use and occupation, and to have it applied to the cost of support of testator's father; executors were chargeable with one half the value of the rent of the land, and were to be credited with one half the taxes and insurance; and exceptions to the account having been sustained, it was not error to decree the executors should pay cost and counsel fees.

Brokaw v. Brokaw (N. J.) 847

21. A will provided, "I give, devise and bequeath unto my wife all my household goods and furniture; also one third of the income or interest of my estate during her widowhood, in lieu of dower." *Held*, that "also" was equivalent to "in like manner," and that the gift of the household goods and furniture was during widowhood only.

Morgan's Est. v. Morgan's Trustee (N. J.) 864

22. If a man devise black acre to one in tail, and also white acre, the devisee shall have an estate tail in white acre also, for this is all one sentence, and so words which make the limitation of the estate go to both. Authorities cited. *Id.* 866

23. A tenant for life is bound to keep down the interest on incumbrances, to pay ordinary taxes, and make necessary annual repairs. A tenant in dower, like other life tenants, is bound to do so. Authorities cited.

Spinning v. Spinning (N. J.) 55

24. One entitled to the interest of a fund for life must pay the tax assessed against the principal of the fund. Authorities cited. *Id.*

25. A will gave testator's widow certain real estate in fee, and gave the residue of the estate to the executors in trust, one half of the income to go to the widow for life, and the other half to testator's son "until he should become thirty years of age." It then gave to the widow and son the use and occupation of certain specified property "during the years above limited." *Held*, that the widow's use and occupation was not limited to the time when the son should become thirty years of age, but was intended to be for her life; that the devisees of the income of the residuary estate are entitled thereto from the death of the testator; and that proceeds of stone taken by the executors from quarries upon testator's land, opened before his death and never abandoned, are part of such income.

Mulford v. Mulford (N. J.) 589

26. A will provided that if the testator's son should die before reaching the age of thirty and the widow survive him, his half of the income should go to the executors, to be disposed of as they should see fit, but made no disposition in that case of the half of the corpus, the income of which was given to the widow. *Held*, that as the legal title to that half was in the trustees in trust only, and not beneficially, it will go to those who, at the testator's death, were his next of kin or heirs at law, according as the property is personal or real. *Id.*

27. A will provided that the executors should invest a specified sum, and pay the interest annually to testator's daughters, "for their support and maintenance in keeping such home as aforesaid." *Held*, that it was testator's intention that this gift should take effect when the use of the homestead by the daughters should begin and not at testator's death, and that it should cease when such use should cease; that it was a special trust and not an absolute gift, and that therefore the daughters were not entitled to the fund itself. The right of the daughters was personal; they could not

rent the premises, and while occupying were liable as life tenants for taxes, etc.

Endicott v. Endicott (N. J.) 871

28. If it appears, from the terms of the gift or the context of the will, that a personal use only was intended, the enjoyment of the gift will be confined accordingly. Authorities cited. *Id.* 874

29. Where the securities (government and municipal bonds and real estate mortgages bearing fixed rates of interest) belonging to a trust fund created by a will, which provided that the "annual interest, income, and dividends thereof" should be paid to a certain person for life, with remainder to others, were sold, after the death of the life beneficiary, for more than the original amount of the trust fund,—*Held*, that the accretion or increase so arising belonged to the remaindermen, and not to the representatives of the life beneficiary.

Re Accounting of Gerry (N. Y.) 796

30. *Held* also, that the fact that the trustee had invested the fund in securities other than those authorized by the will (such action having been ratified by the parties interested) did not change the rule of distribution of the fund. *Id.*

31. A devise of land, without words of limitation, to a married daughter, followed by the words "and I hereby authorize and empower her to sell and dispose of the same as she may think proper, but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided among her children, share and share alike, as they arrive at the age of twenty-one," and in the light of other clauses in the will, gives to the daughter a life estate in the land and a power to appoint, by way of sale or otherwise, to other uses than those specified by the will. A deed in fee by the devisee without joinder of her husband is valid.

Deffenbaugh v. Harris (Pa.) 464

32. A devise to a son of a share to be retained by a trustee for and during the son's natural life, the interest thereof to be paid to the son yearly, and after his death his share to be equally divided among his children if he should have any, or to their issue, creates only a life estate in the son.

McDevitt's Appeal (Pa.) 38

V. REMAINDERS, VESTED, CONTINGENT.

33. When there is no moment that the remainderman in fee would not have an immediate right to the estate on the death of the life tenant, it is a vested remainder.

Thaw v. Ritchie (D. C.) 597

34. A devise of a life estate, and then a devise over in fee to two persons in equal parts, with a devise of the share of him dying first to the survivor, creates a vested remainder in fee; the devise to the survivor being simply an executory devise over of a fee after a fee; a devise over to the life tenant in case she survives the two remaindermen is also such an executory devise. *Id.*

35. The objection to the sale of an infant's estate in remainder, because of the uncer-

tainty of its value, is removed when the life tenant joins in the sale. *Id.*

86. Under a residuary devise "to my said beloved wife (naming her) for the term of her natural life; and upon the decease of my said wife, I do order and direct that all the said residue and remainder of my estate be sold by my executor; and after paying the aforementioned bequests it is my will, and I do order, that the moneys arising therefrom and so remaining shall be divided among my children (naming seven of his nine children), share and share alike; and if any of my last named children be deceased, leaving issue, then it is my will that the share the parent would have been entitled to if living shall go to such issue," the children take **vested remainders in fee** at the death of the testator, his wife surviving.

Richardson v. Richardson (N. J.) 638

87. Where the primary devise was to testator's son, subject to the proviso that "on the death of my son without issue" the estate should go over to testator's grandchildren, and also, "that in case my son should die before the provisions of this will become an act, the devisees last named (the grandchildren) shall perform and fulfill all the conditions required of my son to the legatees named in this my will" (referring to antecedent specific legacies which the will provided should be paid by the son within two years after testator's death), the intention of the testator appears to have been that the **gift over should take effect upon the death of his son without issue**, at any time, either before or after his own death.

Vandersee v. Haswell (N. Y.) 176

88. Where testator devised to his widow one third the income of his estate during widowhood, and she died before the rents for the portion of the current year became due, and it appeared that the gift was intended for support,—*Held*, that the rents should be **apportioned**.

Morgan's Est. v. Morgan's Trustee (N. J.) 864

89. Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of the particular estate, which estate is determined by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is in esse and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Authorities cited.

Sager v. Galloway (Pa.) 685

40. When a remainder is limited to a person not in esse, or not ascertained, as when it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is **contingent**. Authorities cited. *Id.*

41. A will gave a life estate to testator's wife, and then provided that, at her death and after his son A. attained majority, the property should be divided between testator's children E, T, and A, equally. A subsequent clause provided that in case testator's wife died, and A. did not live to majority, the whole estate

should be held in trust for E and T until a certain date, and then be divided between them. The next clause provided that in case either of testator's children should die leaving issue, such issue should receive the share devised to the child so dying. The will also provided that T should have use of testator's interest in business so long as the estate was undivided, and should pay interest on the appraised value thereof. T died before testator's wife, leaving issue. *Held*: (a) That the word "either" was used in the sense of "any;" that testator's children took a contingent and not a vested interest, and that therefore T having died before the period fixed for division of the estate arrived, his share belonged to his children. (b) That, under the circumstances T's children are subject to the same equities to which he would have been had he lived to the time fixed for division, and that therefore their share is to be charged with interest on the value of testator's interest in business.

La Foy v. Campbell (N. J.) 595

VI. WHEN GIFT VESTS.

42. The law favors the vesting of estates, and where there is doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken.

Sager v. Galloway (Pa.) 681

43. A devise to a grandson when he arrives at a certain age, and if he dies before that age the devise to pass to another person, indicates an intention that the devise to the former shall be contingent on his arriving at the age designated. *Id.*

44. Where a testator creates a particular estate and disposes of the ulterior interest, especially in an event which will determine the prior estate, the words descriptive of such event, occurring in the later devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift. *Id.*

45. Where the particular age at which the devise shall pass to the devisee is made a constituent part of the description of the object of the devise, the remainder cannot vest before. The person is not ascertained before the given age. *Id.*

46. The will devised the homestead, when it should be no longer used by testator's daughters, "to such child or children at that time living, and their heirs and assigns forever, and the representatives of any deceased child to have the share of his or her parent." *Held*, that the intent was to give the property to those of testator's children who should be alive at the termination of the use by the daughters, and the issue of those of his children who should then be dead, *per stirpes*; and that neither the gift to the daughters nor in remainder was vested.

Endicott v. Endicott (N. J.) 871

VII. ADVANCEMENTS.

47. Where a will provides that certain loans and advances, made by the testator to his daughter's husband, shall be a part of and be deducted from the daughter's share of his estate, and the securities therefor be assigned

to her; if her share is not sufficient to pay the amount of such loans and advances, she will not be entitled to the securities until she shall have paid the balance.

Hurlbut v. Hutton (N. J.) 409

48. A will provided that if there should be due from the legatees "obligations of any kind or evidence of debt of any kind," they should be deducted from the legacies. *Held*, promissory notes and receipts for advances of money were intended.

Hill v. Bloom (N. J.) 845

VIII. POWER OF SALE.

49. A testator directed his executors to convert real estate into money, "such sale or sales to be made in one year after my decease, and sooner if deemed desirable by them," and gave the proceeds—after paying legacies which were charged thereon and expenses, and after investing a specified sum to raise an income for his wife—to his sons in equal shares. *Held*, that the limitation of the sales to one year after the testator's death was directory merely, and not of the essence of the power to sell, and therefore that the power could be exercised after the expiration of the limited period.

Marsh v. Love (N. J.) 867

50. Where a power to sell is directory merely, it may be exercised after the expiration of the limited period, but where the limitation is of the essence of the power, the power must be executed within the prescribed period. Authorities cited. *Id.* 868

51. A will provided that the executors might sell any of the property, except that the use of which was given to the widow and son, and, in case it could not be advantageously sold, might mortgage it so far as necessary to pay borrowed money or to keep it in repair. *Held*, that the power to mortgage must be confined to the contingency of the inability to sell to advantage, and then exercised only so far as necessary; and that interest on such mortgages should be paid out of the income.

Mulford v. Mulford (N. J.) 589

52. Devise to wife in trust for her own benefit for life, with remainder to testator's children.—*Held*, the widow had a legal estate in fee, and an equitable estate for life, and the children an equitable remainder in fee, and, when required by the necessities of the trust, she would have power to sell, but a purchaser would take the property with notice of the trust.

Fisher v. Fisher (N. J.) 861

53. The exercise of a power given by will to executors, to sell at public or private sale, and to assign, grant, and convey real and personal property on such terms as in their judgment will be most beneficial to the estate, must be left to their discretion, where there is no allegation of abuse or intended abuse of such discretion by the executors.

Hurlbut v. Hutton (N. J.) 409

IX. LAPSED GIFTS.

54. Where an aggregate fund is given to several persons nominatim, to be divided among

them in equal shares, if one of them dies before the testator the share of such decedent will lapse, unless an intention to give a right of survivorship may be deduced from other parts of the will.

Collins v. Bergen (N. J.) 405

55. Where the share which lapses is a part of the residuary estate it does not pass to the other residuary legatees as part of the residue, but must be deemed intestate estate. *Id.*

56. Where a gift is to persons nominatim, the intention to give a right of survivorship may be deduced from other parts of the will. Authorities cited. *Id.* 406

57. Upon the death of the devisee of a specific share of the residue of an estate, in testator's lifetime, such share lapses, but does not sink into the residue; and the testator will be held to have died intestate as to such share.

Ward v. Dodd (N. J.) 86

58. Although a will declares that a certain specific devise is given to devisee as his full portion, that provision will not exclude such devisee from participation which the Law of Descents or the Statute of Distributions gives him in the residue of which testator died intestate. *So held*, where the will containing the provision had disposed of all the testator's property, and he did not intend to die intestate as to any of it. *Id.*

59. A general residuary bequest does not include any part of the residue itself which fails. Authorities cited. *Id.* 87

X. PAYMENT; CHARGE ON LAND; ACTIONS.

60. The presumption is that a legacy is to be paid only out of the personalty; and if that is insufficient the legacy is lost, unless a contrary intention is shown on the face of the will.

White v. Kauffman (Md.) 159

61. Where a will directs a legacy to be paid out of testator's estate by the executor, and no realty is devised to the executor, payment of the legacy will be confined to the personalty; no inference to charge the realty can be drawn from a subsequent residuary clause devising all the remainder of testator's estate, "real, personal, and mixed," to a third person. *Id.*

62. Words charging debts upon the realty will have the same effect when applied to legacies. Authorities cited. *Id.* 160

63. Real estate is not charged with the payment of legacies. It is never charged unless testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and disposition of the will. Authorities cited. *Id.* 161

64. Where a legacy is directed to be paid out of the estate, it is charged on the realty. Authorities cited. *Id.*

65. Where legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the

legacies are a **charge** upon the real as well as personal estate.

Am. Dramatic Fund Assn. v. Lett (N. J.) 402

66. Where a will directed that certain legacies should be paid to the legatees "in notes or bonds or mortgages, transferred to them with respective value at the time by the executors,"—*Held*, it was intended such securities were to be taken by the legatees at their **fair intrinsic value**, and not at the amount due on them.

Beatty v. Cory Universalist Soc. (N. J.) 881

67. Where a will contained a devise to the heirs of testator's deceased sister, and one of the children of such sister died in the lifetime of testator, leaving children, such children will share in the distribution of the devise. In such case the rule is that, as to the **real estate**, those take who were the deceased **sister's heirs at testator's death**, and as to the **personal estate**, those who at that time were her **next of kin**.

Ward v. Dodd (N. J.) 86

DIRECTOR. See CORPORATIONS, IV.

DISCHARGE. See BANKRUPTCY, 8-6.

DISCOVERY. See EXECUTION, 18.

DIVORCE. See HUSBAND AND WIFE, V.

DOCKET. See JUSTICES OF THE PEACE, 5.

DOWER.

I. RIGHT OF DOWER.

II. BAR; ALIENATION; ELECTION.

I. RIGHT OF DOWER.

1. Dower, at common law and under the statutes of Pennsylvania, is an **estate** in the land, and **not a mere lien**.

Defenderfer v. Eschleman (Pa.) 290

2. A widow in possession, under Rev. 320, § 2, giving her the right to hold her husband's homestead until her dower is assigned, is **not a tenant for life**, and is **not bound** to keep down interest on an incumbrance, and to **pay taxes**, and to make necessary annual repairs.

Spinning v. Spinning (N. J.) 55

3. The **estate** given the widow by Rev. 320 is a **freehold** for life, unless sooner defeated by the act of the heir. Authorities cited. *Id.* 56

4. Dower does **not attach**, either at common law or under Rev. p. 320, to real **estate** of which the husband was seised in **joint tenancy**.

Babbitt v. Day (N. J.) 66

5. A widow is **not bound** to **pay rent** for the occupancy of the house in which she and her husband dwelt before his death, **until after the assignment** of her dower.

McMonigle v. McMonigle (N. J.) 408

II. BAR; ALIENATION; ELECTION.

6. A **divorced wife**, however innocent, has no right to a distributive share in personal estate of her divorced husband, upon his death C. R., V. IV.

Intestate. Hence, a divorced wife who had been divorced on her own application (for the adultery of her husband), and who had released all interest in her former husband's real estate, is not entitled to notice of proceedings to probate his will.

Re Estate of Ensign (N. Y.) 376

7. No intention to permit an **innocent divorced wife** to share in the personal estate of her divorced husband, on his death intestate, is to be inferred from the terms of 2 Rev. Stat. p. 146, § 48, providing that "a wife being defendant in a suit for divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate. *Id.*

8. The law regards the act of the wife in joining in the deed or mortgage of her husband as to his land, not as an **alienation** of the estate, but as a **renunciation** of her inchoate right of dower in and of the title or interest created by his conveyance. It follows, therefore, that her act becomes a nullity whenever the interest or title to which the renunciation is incident is itself defeated. Authorities cited.

Hinchliffe v. Shea (N. Y.) 215

9. Where the provisions of a will manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower, it is sufficient, without express words, to put her to her **election** between the **provision** made for her in the **will** and that made for her by law. Authorities cited.

Brokaw v. Brokaw (N. J.) 848

10. The Act of March 29, 1832, charges the widow's dower on the land, in partition proceedings; and the **orphans' court cannot divest** the dower, by decree or otherwise, **unless the widow's consent** is procured in such manner as to pass her estate. Mere knowledge on her part will not operate as estoppel.

Defenderfer v. Eschleman (Pa.) 290

11. **Evidence** that an administrator's deed omits reference to dower, or that the whole of the purchase money was paid to the administrator, or that the assignee of the land understood from his vendor or the scrivener that the land was clear from incumbrance, is inadmissible, where the **widow is not a party** to these transactions. *Id.*

12. The widow's right, under Rev. 320, is a privilege preceding, but in **no wise preventing** or **impeding**, the assignment or **disposal** of her dower. Authorities cited.

Spinning v. Spinning (N. J.) 56

13. When a married woman joins with her husband in a **mortgage** of his land for the purpose of releasing her inchoate right of dower, the mortgage is **defeated** as to both by a **sale** of the husband's interest in the mortgaged premises on execution **under a prior judgment**, and her dower interest in the land cannot be subsequently foreclosed under such mortgage. *So held*, where the purchaser at the sale under the prior judgment conveyed to the wife, and after the husband's death the mortgagee sought to foreclose as to her dower interest.

Hinchliffe v. Shea (N. Y.) 214

DRAINS AND SEWERS.

1. In **proceedings** to drain lands, under Rev. 652, where a married woman's land has been sold under prior proceedings for foreclosure of a mortgage, and conveyed, without change of possession,—**notice** to the owner and to the husband, who occupies the land with his wife under arrangement for reconveyance, is sufficient.

State v. Little (N. J.) 562

2. Delay and **acquiescence**, inducing expenditures of moneys by others, in works of a **quasi** public nature, **waive, irregularities**. Authorities cited. *Id.* 563

3. **Taxes** assessed, under section 131 of the charter of Paterson, at a fixed rate per lineal foot of street **frontage**, based upon the estimated cost of sewers in the drainage district, are **invalid**, because neither assessed according to the true value of the property, nor imposed within the limits of special benefits derived from the improvement.

State v. City of Paterson (N. J.) 246

4. Where a **contractor**, having agreed with the city of Philadelphia to build a sewer, to **receive payment in assessment bills** against the fronting properties, to make no claim on the city for payment, and that the city should not "in any wise guaranty any of said bills to be good and collectible," builds the sewer, receives the assessment bills, and brings suits against property owners who resist the liens, and afterwards the city **councils**, by ordinance, **direct** the chief engineer to draw, and the **city controller** to countersign, in payment for the work, a warrant for \$600, against a survey department appropriation, the court will not, upon the controller's refusal, compel him by **mandamus** to countersign the warrant.

Dechert v. Commonwealth (Pa.) 754

DRUGGIST. See INTOXICATING LIQUORS, 9.

EASEMENT.

1. Servitudes and easements and other charges on lands are deemed to be, in the sense of the law, immovables, and **governed by the lex rei sitæ**. Authorities cited.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 110

2. One claiming an easement over the land of another, by the uninterrupted **adverse enjoyment** thereof for over twenty years, must show that such enjoyment has been in the same place for the period of time required.

South Branch R. R. Co. v. Parker (N. J.) 63

EJECTMENT.

1. Where the **possession of the vendor** of land is **lawful**, his vendee cannot **maintain** ejectment against him, **without** proof of a previous **tender** of the purchase money, and he must maintain that tender by producing the money in court.

Orne v. Kittanning Coal Co. (Pa.) 787

2. **Fraud** which the legal owner of land might have alleged as a defense to the specific performance of a contract in relation to the C. R., V. IV.

land may be **set up by the privies** in his estate, as a defense in an action of ejectment brought by the successors of one claiming an equitable title by virtue of the contract, but never in possession. *Id.*

3. Before a **vendee** can recover in an **equitable action** of ejectment, he must **tender** the purchase **price**, and must also have it **in court** ready to be paid in the event of a verdict in his favor. Authorities cited.

McGrew v. Foster (Pa.) 918

4. In an action of ejectment, **declarations of a deceased grantor** under whom plaintiff claims title, that he had sold the land to the ancestor of the defendants, are admissible.

Swank v. Phillips (Pa.) 461

5. That the plaintiff in an action of ejectment has been permitted to **testify to matters** occurring in the **lifetime** of the deceased **ancestor** of defendants, either with or without objection, does not render the widow and son of the ancestor competent to testify to such matters for the purpose of sustaining the defendants' title. *Id.*

6. In an action of ejectment by a plaintiff claiming as an innocent purchaser for value, without notice, the record of an **agreement** for the sale of the land in dispute, to the plaintiff, **recorded after the commencement** of the action, is admissible as evidence; but its rejection is not ground for reversal if the original agreement was admitted. *Id.*

7. A **tenant in common** is not competent to support the possession of his cotenant, when the latter is defendant in **ejectment** founded on a title **adverse** to the title of both. Authorities cited. *Id.* 464

EMBEZZLEMENT. See LIMITATION OF ACTIONS, 8.

EMINENT DOMAIN. See RAILROAD COMPANIES, II.; SCHOOLS AND SCHOOL DISTRICTS, 2, 3; WAYS, II., III.

1. While the franchises of a corporation are property and may be taken under the power of eminent domain, **yet property taken** by one corporation for a public use **cannot be taken by another** corporation **without** an express **grant** or by necessary implication. Right by implication can arise only from absolute necessity, such as that without it the grant would be defeated. Authorities cited.

Pittsburg Junc. R. R. Co.'s Appeal (Pa.) 267

2. **Statutory authority** may **justify acts** which **otherwise** would give a right of action for **nuisance** or for damages. Authorities cited.

Cogswell v. N. Y. N. H. & H. R. R. Co. (N. Y.) 229

EQUITABLE LIEN. See LIEN, 4.

EQUITY.

I. JURISDICTION.

II. FRAUD; MISTAKE.

III. PLEADING; EVIDENCE; PRACTICE.

See ACCOUNT; ASSIGNMENT, 4; CLOUD ON TITLE; INJUNCTION; LACHES; MAXIMS; PARTITION; PATENTS, 1-3; RECEIVER; REVIEW; SUBROGATION; TRESPASS, 1, 8, 13, 14; TRUSTS.

I. JURISDICTION.

1. He who asks equity must do equity.
Orandall v. Grou (N. J.) 71

2. The laches and nonclaim of the rightful owner of an equitable estate, who is under no disability, and in a case free from fraud, for a period of twenty years, will, where the person in possession has held adversely to such owner, constitute a conclusive bar to all equitable relief. Authorities cited.

Chapin v. Wright (N. J.) 60

3. Though a person having the legal title to land in one State may be decreed by a court of equity in another State to convey the land, yet neither the decree, nor any conveyance by virtue of it by one not having the title, can operate beyond the jurisdiction of the court. Authorities cited.

Pittb. & S. L. R. R. Co. v. Rothschild (Pa.) 110

4. The jurisdiction of courts of equity in cases of trespass is purely preventive; they may restrain a threatened trespass, if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass; but for a completed trespass, which, as a legal wrong, is complete when protection is sought, they can give no redress whatever.

Lords v. Carbon Iron Mfg. Co. (N. J.) 853

5. A court of equity cannot award pecuniary damages in redress of a trespass. A court of equity has no authority to impose an easement on the land of a trespasser, in redress of the wrong done by the trespass. *Id.*

6. Equity has jurisdiction of a bill by a widow against the estate of her deceased husband, to recover money belonging to her, which he received under an express agreement between her and him that he would hold the same in trust for her; she has no remedy at law.

Drost v. Corle (N. J.) 862

7. Commissioners of highways are confined to the procedure prescribed by statute for the removal of obstructions to a highway, and cannot maintain a suit in equity to compel the removal of such an obstruction, or to enjoin future obstructions.

Rozell v. Andrews (N. Y.) 209

8. Equity has jurisdiction to compel an accounting and discovery in aid thereof, and to restrain the manufacture of other than a patent article in violation of the terms of a written contract.

Bovaird v. Dick (Pa.) 40

II. FRAUD; MISTAKE.

9. Equity will leave the parties in the position where they have knowingly and willfully placed themselves. Public policy forbids the intervention of the courts to relieve a fraudulent actor.

Rowland v. Martin (Pa.) 760

O. R., V. IV.

10. Where a bill contains only a general charge of fraud and waives an answer upon oath, discovery in aid of complainant's charge of fraud is waived also.

Somerset Co. Bank v. Veghte (N. J.) 406

11. A mistake in the description of a recorded deed will not be corrected by a court of equity, to the prejudice of the rights of bona fide judgment creditors of the grantee having a lien upon the property.

Ruppert v. Haske (D. C.) 615

III. PLEADING; EVIDENCE; PRACTICE.

12. Bill in equity to enjoin construction of railway track on highway, and for other relief, will support decree requiring removal of track laid after notice of the proceedings.

Pa. R. R. Co. v. Mish (Pa.) 276

13. In a suit by an assignee of a firm to rectify a deed of assignment made in New York, because of the absence therefrom of words of inheritance, and to so make it that it may convey the realty in this State in fee, where defendant's object is to get a decree in his favor, for a debt due by the assignor, and to collect the same out of his property situated in this State, a cross bill is not necessary. He cannot involve complainant in this suit for the purpose of establishing his debt. The allegations in the cross bill tending to establish the debt may be regarded, so far as complainant is concerned, as averments that defendant is a creditor in this State, and of the firm, and is therefore entitled to resist the application to rectify the deed.

Van Winkle v. Armstrong (N. J.) 53

14. Parties in suits in which evidence is taken before an examiner will not be permitted to appeal to the chancellor from the decision of a vice-chancellor, nor to have a rehearing before him upon questions arising upon appeal from rulings of the examiner admitting or rejecting evidence.

Pullen v. Pullen (N. J.) 72

15. In a bill for an account of royalties on patented articles manufactured, articles made in violation of the agreement, but not under letters patent, cannot be included in the account.

Dick v. Bovaird (Pa.) 44

16. In a bill in equity against husband and wife, to establish title to real estate and to compel conveyance of the wife's title, the wife died without having executed a decree ordering conveyance. A bill for partition against the husband and surviving child was sustained, and a conveyance ordered.

Appeal of Church (Pa.) 95

17. The chancellor will rehear decisions advised by a vice-chancellor, only where there appear to be special reasons for so doing.

Pullen v. Pullen (N. J.) 72

18. A matter heard upon petition and answer thereto during the progress of a cause, and disposed of by a decretal order, can not be reheard as a matter of course upon the final hearing of the cause.

Hurlbut v. Hutton (N. J.) 409

19. Upon application, made after final decree,

to file **supplemental or amended answer**, setting out facts known to defendant when the original answer was filed, it must appear that hardship will result to defendant if permission be not accorded, and that he is not in fault for not having set up the defense in his answer originally.

United N. J. R. R. & C. Co. v. Long Dock Co. (N. J.) 56

20. The **new facts** which may be introduced by a **cross bill**, are such, and such only, as are so directly and closely connected with the cause of action on which the original bill is founded as to render the cross suit a mere auxiliary of the original suit, or a graft or dependency upon it.

Krueger v. Ferry (N. J.) 57

21. If a defendant attempts to introduce new and **distinct matter**, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant, or one or more of his codefendants, his pleading will not be a cross bill, but an original bill. Authorities cited. *Id.* 59

22. Where a **cross bill** is not filed as a means of defense, it is "a proceeding to procure a complete determination of a matter already in litigation." Authorities cited. *Id.*

23. A cross bill must be **confined to the matter** contained in the **original bill**, and if defendant attempts to engraft questions not necessary to the proper determination of the complainant's right to relief, his bill must be dismissed. Authorities cited. *Id.*

ERROR. See EXCEPTIONS.

1. The statute limiting the **time** within which a **writ of error** must be sued out does **not apply to a married woman**.

Penn v. Early (Pa.) 288

2. **Assignments of error** should be so complete in themselves as not to require reference to other parts of the record. Each **specification of error** should, in and of itself, present the question to be decided.

Landis v. Evans (Pa.) 656

3. A judgment will not be reversed on an **assignment of a single sentence of a charge of the court** as error, when from the context it is plain there was no error, and that the jury could not have been misled.

Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.) 712

4. A **technical defect in the pleadings** which did not and could not mislead is not ground for reversal after a trial on the merits. The declaration, if it does not set forth the case with accuracy, is **amendable**. *Id.*

5. The **finding of a jury** upon a controverted question of fact is **conclusive** unless the trial judge erred in the admission or rejection of testimony or in his instruction to the jury.

Shoble v. Bryden (Pa.) 664

6. Whether the **verdict** was against the charge and the weight of **evidence** are matters for the **trial court**, and cannot be reviewed on error.

Orange & N. Horse R. R. Co. v. Ward (N. J.) 825

7. The allowance of a **question** objected to on the ground that it was admitted out of **order**, but which proves to be harmless, by the subsequent testimony, is **no ground for reversal**, although the question may also be objectionable in form.

Bush v. Breinig (Pa.) 889

ESTATES OF DECEDENTS. See DECEDENTS' ESTATES.

ESTOPPEL. See LANDLORD AND TENANT, I.; LICENSE, 3; LIEN, 7; PRINCIPAL AND SURETY, II.; SPECIFIC PERFORMANCE, 5.

1. One **not a party to a deed** and who does not claim under it is **not estopped** by its recitals.

Thaw v. Ritchie (D. C.) 597

2. Although the **maker of a chattel mortgage** may, as between himself and the mortgagee, be **estopped from denying the indebtedness** purporting to be secured thereby, yet on **proof** that the **consideration** expressed in the mortgage was greater than the real indebtedness, and that the mortgage was taken to protect the maker's property from his creditors, it may be held fraudulent as to creditors.

Taylor v. Wood (N. J.) 138

3. **Statements by the owner of a mortgage**, as to a **third person's** being **authorized to receive payments** thereon for him, not made to the party liable on the mortgage, and not made to be communicated to him or to influence him, will not estop the owner of the mortgage from afterwards denying the authority of such third person to receive payment.

Maguire v. Selden (N. Y.) 379

4. Where one having a **lien on goods** sets up a **claim hostile to the owner's title** and wrongfully sells the goods, he cannot set up the lien as a bar to the owner's recovery, in an action of trover, for his illegal act.

Andrews v. Wade (Pa.) 689

5. Where an **agent** of one party receives money from another, and the transaction is not completed, so that the payer is entitled to recovery, if the **agent misleads** the payer by giving him **to understand** that he has **not paid over** the money, and thereby induces him to sue for its recovery, the agent will be precluded from setting up as a defense that he has paid it over to his principal. Authorities cited.

Read v. Riddle (N. J.) 820

EVIDENCE.

I. PRESUMPTIONS.

II. RECORDS.

III. PAROL.

IV. DECLARATIONS.

V. OPINIONS.

VI. COMPETENCY; WEIGHT.

See APPEAL, III.; CORONER; CRIMINAL LAW, III.; CUSTOM AND USAGE; DEFINITIONS; EQUITY, III.; ESTOPPEL; GIFT; LOST INSTRUMENTS; LOTTERIES; NON-SUIT; RECORDS; SPECIFIC PERFORMANCE, 1; WITNESS.

I. PRESUMPTIONS.

1. The legal presumption of knowledge of the law does not extend to the by-laws and regulations of private corporations.

Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.) 712

2. To a presumption of law probability is not necessary, but probability is necessary to a presumption of fact. Authorities cited. *Id.* 720

II. RECORDS.

3. A discharge in bankruptcy, granted by the same court in which an issue of *nul tiel record* is on trial, may be proved by the docket entries and original papers. The production of a formal record is not necessary.

Lerian v. Rohr (Md.) 255

III. PAROL.

4. Parol evidence to change written contract, considered.

Dick v. Bovaird (Pa.) 44

5. A defendant who, in an action upon a written contract of sale, alleges as a defense a contemporaneous parol contract which contradicts the terms of the written contract cannot, for the purpose of proving that the parol contract was an inducement to the written contract, testify to the influence of the parol contract upon his mind in inducing him to enter into the written contract.

Cullmans v. Lindsay (Pa.) 747

6. The fact whether or not the parol promise was the inducing cause of the execution of the written contract, especially when the mental purpose is not at the time expressed, is, in general, an inference to be drawn from the facts by the jury. *Id.*

7. A written agreement may be modified, explained, reformed, or altogether set aside, by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing and which induced the other party to put his name to it. *Id.*

IV. DECLARATIONS.

8. The declarations as to the location of pain and suffering, made to his physician by a party injured, are competent evidence in an action to recover damages for the injuries.

Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.) 712

9. A provision in a will by which the testatrix undertakes to dispose of property as her own, being a declaration in her own favor, is not admissible upon the question of ownership of the property, even in rebuttal of declarations made by her, in her lifetime, against her interest.

Taylor v. Brown (Md.) 846

V. OPINIONS.

10. The question, "What proportion of A's time was devoted to B's business?" asked of one who had abundant opportunity to know, C. R., V. IV.

is not objectionable as calling for an opinion. *Rapallo and Andrews, JJ.*, dissenting.

Johnson v. Myers (N. Y.) 773

11. Where a witness who was asked concerning a passenger's position, and whether he had his elbow out of the window, replied, "I should judge that his elbow was out of the window from the position he held in the car," a motion to strike out was denied on the ground that if the answer seemed an opinion, it was in fact not one; it was at least admissible as an opinion founded upon knowledge. Authorities cited. *Id.* 779

VI. COMPETENCY; WEIGHT.

12. The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the Legislature. It may be conceded that a law that should make evidence conclusive which was not so necessarily in itself would be void; but such is not the effect of declaring any circumstances or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party to rebut and overcome it. Authorities cited.

City of Auburn v. Merchant (N. Y.) 255

13. Photographs, proved to be accurate representations of an actual scene, are admissible in evidence, as appropriate aids to the jury in applying the evidence, whether it relates to persons, things, or places.

People v. Buddensiek (N. Y.) 787

14. A conductor's written statement giving details of an accident immediately after it happened is not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence. The conductor may use such written statement to refresh his memory.

North Hudson Co. R. Co. v. May (N. J.) 81

15. An assignment of policies of insurance, made by an association or partnership limited, and recorded, is not inadmissible in evidence because it is not a recordable paper.

Shoble v. Bryden (Pa.) 664

16. A judge is not bound to believe a thing merely because a witness swears to it; but he should test the evidence as other men of discernment would test it, believing what he is convinced is true and discarding what he is convinced is false.

Fuller v. Fuller (N. J.) 88

17. Where witnesses testify to contradictory facts, and both appear upon the witness stand equally fair and honest, the court must be governed by the preponderance of the testimony.

Parker's Admr. v. Parker (N. J.) 67

18. Since the *scintilla doctrine* has been exploded, both in England and in this country, the preliminary question of law for the court is not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. Authorities cited.

Dwight v. Germania L. Ins. Co. (N. Y.) 535

19. If the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the **duty of the court to direct a verdict**. It is **not the rule** that if there is a **scintilla of evidence** in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury. Authorities cited. *Id.*

20. Where the issue is as to whether property undertaken to be **disposed of by a will** made by a **married woman** belonged to the testatrix or to her husband, the **will is not admissible as evidence against the husband, unless** he, with full knowledge, acquiesced in the disposition made by the wife.

Taylor v. Brown (Md.) 846

21. **Facts offered** in evidence to prove an issue are not themselves in issue, and the **judgment is no evidence** in regard to them. Authorities cited.

Belden v. State (N. Y.) 183

EXCEPTIONS. See APPEAL, II.; EXECUTIONS AND ADMINISTRATORS, 50.

1. **Alleged errors** in the charge are **not open** to review **unless excepted to** at the trial. A stipulation by counsel, "that a general exception should give the defendant the benefit of a particular exception to any part of the charge," will **not avail**.

People v. Buddensiek (N. Y.) 787

2. An order of the orphans' court revoking an order theretofore made by it, **extending the time** for filing exceptions to claims against an insolvent estate, on the ground that such order was inopportunately granted, being discretionary, is **not appealable**.

King v. Rockhill (N. J.) 886

3. A bill of exceptions is **amendable**.

Lefferts v. State (N. J.) 883

4. If a judge is at liberty to **amend a bill of exceptions** after he has sealed it, it might happen that the bill of exceptions when sealed contained the real directions given to the jury, and any misdirection might be avoided by **altering** the bill of exceptions and inserting the direction which ought to have been given. Authorities cited. *Id.*

884

EXECUTION.

I. ISSUANCE; WHAT SUBJECT TO.

II. SALE; PRACTICE; DISCOVERY.

See ATTACHMENT.

I. ISSUANCE; WHAT SUBJECT TO.

1. No execution can be issued on a **judgment transferred** from one county to another after the lien of the original judgment had expired, under the Act of April 16, 1840, without revival.

Beck v. Church (Pa.) 257

2. A return of *nulla bona* to the writ of *feri facias* is **not a prerequisite** to the issuing of the *venditioni exponas*.

Levan v. Milholland (Pa.) 906

C. B., V. IV.

3. An execution issued upon a judgment after the **death of the defendant** is not absolutely void, but only **voidable**; and the sale of land upon such execution vests in the purchaser a good title. Authorities cited. *Id.* 908

4. A preliminary injunction will issue at the instance of a trustee, **restraining a cestui que trust** from issuing execution on a judgment in his own name, where there is a dispute as to whether or not the judgment is included in the trust.

Reeser v. Reeser (Pa.) 51

5. Personal property which has passed from its owner by a general assignment is not bound, either actually or constructively, by an execution against the original owner issued **subsequent to the assignment**.

Wheeler v. Lawson (N. Y.) 186

6. An erroneous judgment or an **irregular execution**, not void, can be set aside only by direct and appropriate action by parties having an interest in the same, and **not by a collateral attack** under cover of any other proceedings. Authorities cited.

Levan v. Milholland (Pa.) 903

7. Where the primary **design** of a plaintiff in issuing an execution is to obtain a lien upon defendant's personal property, and **not to sell the same** except in the contingency of a subsequent execution being issued, the **lien of the first execution will be postponed** to the second.

Landis v. Evans (Pa.) 656

8. Where the facts show nothing more than a **disposition** on the part of the execution plaintiff **to treat the family of defendant with due consideration**, by not subjecting them to unnecessary inconvenience or annoyance, as where the plaintiff told the sheriff not to go to defendant's house until next day as the house was torn up, the lien of the execution will not be postponed to that of a later one. *Id.*

II. SALE; PRACTICE; DISCOVERY.

9. A purchaser of real estate at a judgment sale obtains **no title until delivery of the deed**.

Pearman v. Gould (N. J.) 185

10. A **reversal** of a judgment after a sheriff's sale of real estate thereon **cannot affect the title of the purchaser** at such sale.

Levan v. Milholland (Pa.) 906

11. **After acknowledgment** of a sheriff's deed, the title of the sheriff's vendee **cannot be affected** by mere irregularities however gross. Authorities cited. *Id.* 908

12. Where, on a bill filed by one claiming to be owner of personal property levied upon as the property of another, **to restrain** the sale thereof, property is delivered to complainant under order of the court, with leave to use it on his giving **bond** to return it when ordered by the court; on a **dismissal** of the bill the court may **order the complainant to return the property** or account to a receiver for the value thereof, less loss, if any, by inevitable accident.

Moore v. Diamant (N. J.) 811

18. If, under an order for **discovery** in aid of execution, an examination of witnesses be held without personal **notice** to the defendant, the proceedings will be set aside as irregular.

Shannon v. McMurtrie (N. J.)

247

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT.

II. FOREIGN ADMINISTRATORS.

III. ADMINISTRATORS C. T. A.

IV. ADMINISTRATORS PENDENTE LITE.

V. INVESTMENTS; WASTE; JOINT EXECUTORS.

VI. DEBTS; ASSETS; DISTRIBUTION.

VII. FUNERAL EXPENSES.

VIII. ACCOUNTS.

IX. COMMISSIONS; COMPENSATION.

X. ACTIONS.

See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; WILL.

I. APPOINTMENT.

1. In case of the **refusal** or incompetency of all the **kindred** of a decedent, and no creditor applying, the register of the proper county may grant **letters** of administration to **any fit person**, in his discretion.

Frick v. Baldwin (Pa.)

676

2. Generally it is the **duty** of the **register**, in appointing an administrator, to **regard** the **expressed will** of the parties entitled to the estate, whether they reside within or without the State; and, if they are incompetent, the trust should be committed to their nominee, if a fit person; and letters may be revoked on their application, when granted without their assent. Authorities cited. *Id.*

677

3. It is error to create **separate co-ordinate administrations** on the same estate. Authorities cited. *Id.*

4. Although letters may not be void when granted to a **nonresident** who gives the requisite bond, a nonresident has **no right** to the administration. Authorities cited. *Id.*

678

5. A **will** requested and **empowered** the **survivor** or survivors, in case of the death of any of the executors, to **appoint** other executors,—*Held*, that the person so appointed takes the trust estate as well as the duties of executorship, in place of his predecessor.

Mulford v. Mulford (N. J.)

589

6. Persons who would be first entitled to letters of administration in case of intestacy are, unless disqualified, entitled to letters of **administration pendente lite** granted in the case of a contested will.

Appeal of Hoar (Pa.)

908

II. FOREIGN ADMINISTRATORS.

7. Foreign administrators are **not liable** to be sued in their representative character in the courts of this State.

Durie v. Blauvelt (N. J.)

588

C. R., V. IV.

III. ADMINISTRATORS C. T. A.

8. The right of an administrator with the will annexed to **apply to the court** for instruction is limited to matters of difficulty in his own administration.

Casper v. Dunn (N. J.)

419

9. It is the **duty** of an administrator with the will annexed to **take charge** of and preserve **personal property specifically bequeathed** in trust, until a trustee is appointed to receive it. *Id.*

IV. ADMINISTRATORS PENDENTE LITE.

10. **Reimbursement.** An administrator appointed during a contest over the admission of a will to probate, paying the debts of the estate and costs for which it was liable with money borrowed by him for that purpose, and being liable to be called upon to pay the loan, and out of office and without the means of indemnifying himself, is entitled to the assistance of the court of chancery for that purpose.

Woolley v. Pemberton (N. J.)

89

11. The orphans' court having appointed an administrator **pendente lite** may **order** parties before it to **pay** and deliver over moneys and property of the estate received by them since the death of the testator, to such **administrator**.

Re Dietz (N. J.)

837

12. The functions of an **administrator pendente lite**, the litigation having been concluded, are at an end with the exception of **accounting** for what he has received and paying or delivering over whatever, if anything, may appear to remain in his hands to his **successor**. Authorities cited.

Woolley v. Pemberton (N. J.)

90

V. INVESTMENTS; WASTE; JOINT EXECUTORS.

13. An **executor** is **not a guarantor** for the **safety of securities** committed to his charge, and does not warrant such safety under all circumstances, and hence is not liable for a breach of trust on the part of his coexecutor in wrongfully taking and converting securities belonging to the estate, lawfully in the sole possession and charge of such coexecutor, unless it appears that he had knowledge of or assented to the acts of his coexecutor, or had notice which should have put him on inquiry.

Wilmerding v. McKesson (N. Y.)

525

14. If the circumstances are such as to create a doubt in respect to the safety of **uninvested funds** of the estate, an **executor** is **not exonerated** from the duty of vigilance in protecting them and seeing that they are properly invested, by the fact that such funds were never in his possession or under his actual control, but were received by and were in the **exclusive possession** of his **coexecutor**. *Id.*

15. Where an executor has **knowledge**, or by the use of reasonable diligence could have knowledge, that **funds** of the estate in possession of his coexecutor are **not being properly invested**, but are being used in the business of a firm of which the coexecutor is a

member, with allowance of interest thereon, and he fails to endeavor to have such funds properly invested or to remonstrate with his coexecutor, he is liable for loss arising from such use of the funds; but, under the circumstances, interest with annual rests disallowed. *Id.*

16. An executor who had taken no part in the administration of the estate, held, under the circumstances of the case, not to be liable for a waste or misappropriation committed by his coexecutor who had assumed all the active duties of the administration; such waste or misappropriation having been committed without the knowledge of the nonacting executor and without suspicion on his part that it would be committed, and it appearing that an account which purported to be a joint executors' account was, in fact, the separate account of the acting executor only.

English v. Newell (N. J.) 551

17. Where two executors were directed, after making some annual payments, to invest and accumulate the surplus, and one of them received the dividends of stock for several years and misapplied them,—*Held*, the other, not appearing to have any knowledge of such misapplication, was not liable therefor. Authorities cited. *Id.* 558

18. An executor voluntarily placing funds in the hands of his coexecutor, who misapplies them, will be liable therefor. Authorities cited. *Id.* 564

19. A devastavit by one of two executors or administrators shall not charge his companion, provided he has not intentionally or otherwise contributed to it; for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. Authorities cited.

Wilmerding v. McKesson (N. Y.) 528

20. One executor in trust is not answerable for the receipts of the other merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer; he is only answerable by concurring in the application of the assets. Authorities cited.

English v. Newell (N. J.) 553

VI. DEBTS; ASSETS; DISTRIBUTION.

21. The personal estate of a decedent is the primary fund for the payment of his debts; and an heir, or devisee, or a widow has a right to have it so applied in relief of the land which they may take, but this right belongs to them alone. Their alliance or mortgage has no such right. Authorities cited.

Krueger v. Ferry (N. J.) 59

22. On the death of a purchaser who had assumed the payment of an outstanding mortgage, the land, and not the personal estate of the decedent, is primarily liable.

Coudert v. Coudert (N. J.) 182

23. The personal estate of decedent is first liable to discharge his debts. Authorities cited. *Id.*

24. The surviving wife of a testator has no title to his property, except such as devolves upon her by the will; hence, personal property, *v. v. iv.*

erty, controlled by the husband in his lifetime in business pursuits, belongs to the executor of his estate, and not to her. Where the widow never attempted to establish the will, and neglected to perfect the transmutation of the estate by lawful process, or take any steps to reduce the property to her lawful possession, but took actual possession and control, and carried on the business till she died, her administrator can have no better title than she had.

Jenks v. Breen (N. J.) 92

25. Declarations made by her just previous to her death are not admissible to establish title to property, unless made in the presence of the person who afterwards disputes the claim, but at the time acquiesced therein. *Id.*

26. Creditors of her husband's estate having full knowledge of the facts, who neglect to compel an administration of her husband's estate, but instead (by dealing with her) encourage the confusion which has followed, should suffer any loss which may occur from provoking the uncertainty in the ownership of the property, rather than the innocent remaindermen. *Id.*

27. Her estate should be credited for no more than the amount of debts of her husband which she paid, and his executor should be relieved, to the extent of the proportion of such amount as will be due to the creditors of the wife who were paid by him. *Id.*

28. An administrator has no power to increase the amount due upon a mortgage on the real estate of his intestate.

Percival v. Gale (N. J.) 384

29. Under the Orphans' Court Act (Rev. p. 785) the court has power to construe a will so far as necessary to determine to whom distribution or payment of the amount shown by an account filed by an executor or administrator *cum testamento annexo* shall be made.

Hill v. Bloom (N. J.) 845

30. A bond and mortgage, executed by the executor and devisee, to secure a debt against the estate of the testator, on part of the lands of the estate, do not operate to discharge the liability of the estate for the debt.

Alexander v. Bacot (N. J.) 885

VII. FUNERAL EXPENSES.

31. Where an intestate was insolvent, and he and his wife and child were killed in a railroad accident in Texas, the expenses of a physician, of preparing, and transporting, and burying the three bodies, and sodding and curbing the cemetery lot, and erecting a monument over the graves, amounting in all to \$1,980, were allowed, against the objection of a judgment creditor of the intestate. The statute (Rev. p. 784, § 58) providing that "judgments entered of record against the decedent in his lifetime, funeral charges and expenses, and the physician's bill during the last sickness, shall have a preference," does not take away the absolute preference which

the common law accorded. The statute before the revision stated the above items in reverse order. It was not the intention to give a judgment creditor of an insolvent decedent preference over funeral and physician's expenses.

Sullivan v. Horner (N. J.) 842

82. The rule, as against a creditor, is that no more shall be allowed for a funeral than is necessary, and in considering what is necessary, regard must be had to the degree and condition in life of the decedent. Authorities cited. *Id.* 844

83. Funeral expenses are preferred before a debt due the United States. Authorities cited. *Id.*

84. Funeral expenses are, by the common law, to be first paid out of the assets. Authorities cited. *Id.*

85. It has been held that the claim for funeral expenses is not to be regarded as a debt at all, but as a charge upon the estate. Authorities cited. *Id.*

86. An executor or administrator, if he have sufficient assets, is liable upon an implied promise to another person who, as an act of duty or necessity, has provided for the funeral expenses of the decedent. Authorities cited. *Id.*

87. Where a decedent dies away from home, the expense of transporting the body and of a person to accompany it are charges against the estate. Authorities cited. *Id.* 845

VIII. ACCOUNTS.

88. Where executors jointly settle their final account they are jointly liable for the balance in their hands, as ascertained by the decree of the court thereon. Authorities cited. *English v. Newell* (N. J.) 552

89. Where two of four executors filed an account, thirteen months after probate, before the estate was in condition for final settlement, which on its face did not state that it was either final or joint, and it was not signed or sworn to by any executor,—*Held*, notwithstanding the testimony of the surrogate, that it was not intended and did not operate as a joint and final account. *Beatty v. Cory Universalist Soc.* (N. J.) 881

40. Where a person is both executor of a will and guardian of a minor entitled to a portion of the estate under the will, he holds such minor's portion as executor, and not as guardian, until he has settled his account as executor in the probate court; until which time his sureties on his guardianship bond are not liable thereon for his neglect to pay such portion. *Fish's Appeal* (Pa.) 727

41. A guardian, who is also administrator of the estate of the deceased father of his wards, and who has paid claims against the estate out of his own funds, cannot charge such payments against the wards and heirs, unless the claims were duly proved against the estate and the personal estate of decedent is inadequate thereto. *Flynn v. Walsh* (Md.) 155

C. R., V. IV.

42. Administrators cannot maintain a bill to have their coadministrator account for the "good-will" of their intestate's business, continued by their coadministrator with their consent, all the administrators being equally in the wrong for not turning such good-will into cash as an asset of the estate. *Fay's Admr. v. Fay* (N. J.) 241

43. An administrator who has paid the debts of the estate, to an amount exceeding the personal estate, is entitled to be subrogated to the rights of the creditors against the lands of the deceased, and to subject them in the hands of the heirs and devisees to the payment of the money necessary to his reimbursement. *Woolley v. Pemberton* (N. J.) 89

44. The bill for such purpose is not multifarious because it also seeks a settlement and account for rents applied by the administrator to the payment of debts primarily chargeable upon the personal estate, and to establish the equitable rights of the parties entitled to the lands with regard to such application of the rents, where all such parties are before the court. *Id.*

45. The failure of an executor to pay over the amount found against him on judicial settlement, a decree requiring payment, service of decree, and an ineffectual attempt to enforce the decree by execution, make out a case of contempt, punishable by the surrogate, under Code of Civil Procedure, § 2555. *Re Snyder* (N. Y.) 910

46. The question whether an administrator has received and used money for the advantage of the heir in discharging liabilities against the inherited estate, so as to charge the heir therewith, is to be raised and determined in the orphans' court, not in a suit in chancery. *Percival v. Gale* (N. J.) 834

47. An executor's sale of real estate to pay debts, by order of the orphans' court and duly advertised, may be adjourned by the executor through his attorney or agent; and it is not essential that the executor be present in person at the commencement of the adjournment. *Hicks v. Willis* (N. J.) 894

48. The orphans' court has power to determine whether one who files exceptions to the account of an executor or administrator is a creditor of the estate. *Alexander v. Bacot* (N. J.) 836

IX. COMMISSIONS; COMPENSATION.

49. An executor who has discharged his duty with fidelity and economy, and with advantage to the estate, should not be held to have forfeited his right to commissions, merely because he had retained in hand larger balances accrued from the estate than were required to meet expenses; and, it appearing that he had not used such balances for his own private purposes, he should be charged with simple interest only thereon. *Front v. Denman* (N. J.) 879

50. Where, by the provisions of a will, a trust therein is established, is to be executed

by the executor in that **capacity**, and the trust is inseparable from the executorship, the executor is not entitled to **double commissions**, first as executor and then as trustee.

Bruere v. Gulick (N. J.) 832

51. The fact that one undertakes to act in the **dual capacity** of executor and testamentary **guardian** does not lessen his duty as either. Where the funds of the estate were lost through his dereliction of duty as executor, and thus never came into his hands as guardian, this does not excuse his neglect as guardian; and **compensation** for his time and trouble in the latter capacity cannot be allowed.

Fish's Appeal (Pa.) 727

X. ACTIONS.

52. An assignment of a mortgage, with verbal directions to the assignee to collect the debt and pay the proceeds to the assignor, if living, or to the brothers and sisters of the assignee, if the assignor is dead, constitutes a **special trust**. After the death of the assignor the **orphans' court** has not jurisdiction of the trust, and will not compel the assignee, who is also the assignor's administrator, to account for the proceeds.

Hamburg Bank v. Seidel (Pa.) 921

53. In **assumpsit** against an administrator, his **bond** being **not in suit**, judgment should be entered for the damages laid in the declaration simply, and not for the penalty of the bond.

Neale v. Hermann (Md.) 161

54. A bill to enforce a **vendor's lien** for the purchase money of land conveyed by one since deceased is properly brought by the **vendor's administrator**, and the widow and the heirs at law need not be joined; and this, although the heirs had dealt with the vendee directly in reference to the purchase money.

Hubbard's Admr. v. Clark (N. J.) 593

55. The estate of a **deceased coturety** is liable to make **contribution**, whether he died before the liability arose or after. Authorities cited.

Wyckoff v. Gardner (N. J.) 181

56. Upon a suit to foreclose a mortgage made by decedent in his lifetime, instituted after his death, where the mortgagee had obtained a judgment for deficiency against decedent's executors in their representative capacity, he cannot maintain an action to set aside a fraudulent conveyance of real estate made by decedent in his lifetime and to subject such real estate to his judgment for deficiency. The reclamation of **real estate fraudulently conveyed** by decedent must be enforced by the executors, under Laws 1855, chap. 314.

Lichtenberg v. Herdfelder (N. Y.) 887

57. **Next of kin**, although not interested in the real estate in question, are proper **parties** defendant to a creditors' bill seeking to **charge** a claim against an intestate decedent's estate upon lands formerly owned by decedent and alleged to have been fraudulently conveyed by him in his lifetime, the de-

cedent having at his death left only personal property, and such personalty being alleged to be insufficient to settle the estate.

Hunt v. Van Derveer (N. J.) 242

58. A **judgment** against administrators *de bonis non* of a deviser, with **notice** to his **devisees** for life and in remainder, under section 24 of Act of June 16, 1836 (Purd. Dig. 108, pl. 28), has all the effect of a judgment *de terris*; and a sheriff's sale under such judgment divests a title under the devise.

Levan v. Mitholland (Pa.) 906

59. In actions against executors or administrators of a decedent who has left real estate, where the plaintiff intends to **charge** such **real estate** with the payment of his debts, the widow and heirs or devisees, or the guardians of such as are minors, may be proper **parties**. Acts Feb. 24, 1834, and June 18, 1836. *Id.*

60. Under Code Civ. Proc. § 888, subd. 5, a **commission to take testimony** out of the State can issue in a reference of a disputed claim against a decedent's estate, under Rev. Stat. pt. 2, tit. 8, art. 2, §§ 86, 87.

Paddock v. Kirkham (N. Y.) 127

61. An executor is **not**, as such, **incompetent**, under Code Civ. Proc. § 829, to **testify**, on the **probate of the will**, as to personal conversations and transactions with the testator, on the ground that he is a party to the proceeding or interested by way of commissions. Authorities cited.

Re Will of Wilson (N. Y.) 770

62. A rule of court, providing that a copy of a book account sued on, duly filed and verified by **affidavit**, shall be admitted in evidence without further proof, unless the defendant file an affidavit that he believes injustice will be done if the plaintiff be not held to strict proof of his claim, construed, and held to apply to a case where the **suit is by an administrator** on a decedent's book account.

Mattern v. McDivitt (Pa.) 896

63. **Held**, on the facts, where a judgment for money only had been recovered against an executrix in an action against her in her representative capacity, and where the plaintiff's claim had been duly presented before suit brought, that the **unsuccessful defense** of the action was reasonable and proper, and that therefore **costs** should not have been awarded. (Code Civ. Proc. §§ 1835, 1836.)

Johnson v. Myers (N. Y.) 780

64. In a suit by an executor to **compel production of a will** held by daughter of testatrix and her husband, defendants, having been in the wrong originally, — **Held**, liable for **costs**.

Beckett v. Zane (N. J.) 54

65. The surrogate is not necessarily concluded by the uncorroborated affidavit of an executor alleging his inability to comply with a decree; and as the **decision** of the surrogate imposing punishment for **contempt** involves conflicting evidence and the exercise of discretion, it will **not** be reviewed by the court of appeals, where the discretion has not been unfairly exercised.

Es Snyder (N. Y.) 210

EXEMPLARY DAMAGES. See DAMAGES, 5.

EXEMPTION. See TAXES, 1-9.

FALSE IMPRISONMENT.

1. Where a court is called upon to adjudicate upon doubtful questions of law, or to determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it (although afterwards vacated or set aside as erroneous) void, or subject the party procuring it to an action for damages.

Fischer v. Langbein (N. Y.) 215

2. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act; and if it nevertheless proceeds and entertains jurisdiction of the proceedings, all its acts are void, and afford no justification to the parties instituting them, as against parties injuriously affected thereby. *Id.*

3. If parties procuring a commitment of another, as for a contempt, are not liable for damages for the original imprisonment, they are not responsible for the subsequent action of the sheriff or of the court in continuing it, although it is subsequently decided on appeal that the commitment was erroneous. *Id.*

4. A judicial officer is protected from an action for damages or prosecution for false imprisonment whenever in the proceeding he had jurisdiction and enough was shown to call upon him for a decision, even though he erred grossly and even intentionally. Authorities cited. *Id.* 218

FALSE PRETENSES. See FRAUD AND FRAUDULENT CONVEYANCE, I.

Money paid by an heir at law of an intestate, upon false representations, for services supposed to have been rendered in establishing his claim, concerning which there was no ground for litigation,—*Held*, on the facts, to be recoverable.

Rosenthal v. Pools (Md.) 243

FENCES.

A dedication of land to the public cannot be inferred from the mere removal of a fence by the owner; but if such inference obtained, the dedication would not be effectual without acceptance.

Rozell v. Andrews (N. Y.) 209

FIRE INSURANCE. See INSURANCE, I.

FIRES AND FIRE DEPARTMENTS.

1. A house and lot and horses owned by a city and used in operating the fire department of the city are not liable to taxation. *Erie Co. v. City of Erie* (Pa.) 305

2. A "detailed" fireman is within the provisions of the charter of Brooklyn permitting removals of members of the fire department by the commissioners only on conviction of an of-

fense specified; and the removal of such fireman without notice or trial is illegal.

People v. Comrs. of Brooklyn (N. Y.) 774

8. The transfer of an employee in the Jersey City Fire Department from his position of engineer to that of stoker, which last position is attended with different duties and decreased pay, is invalid under the Act (P. L. 1885, p. 180) regulating the terms of officers and men in fire departments. Such employee is protected, although he was appointed without filing an application sworn to and having a physician's certificate showing his physical condition, according to the requirements of a rule adopted by a preceding board of fire commissioners.

State v. Jersey City Fire Comrs. (N. J.) 884

4. Act of April 25, 1884 (P. L. 1884, p. 265), providing that certain firemen "shall be entitled to have and receive the same advantages in respect to taxes and jury duty as now are or hereafter may be allowed to the National Guard of this State," without setting out the Acts in relation to the exemption of members of the National Guard, is within the constitutional inhibition that a statute, to make the Acts of a former statute part thereof must insert those sections of a former Act in the new law.

State v. McNeal (N. J.) 147

FISH AND FISHERIES

1. Oysters planted in a defined bed, in tide waters of a bay or arm of the sea which is a common fishery, where there are no oysters growing spontaneously at the time, are the property of the person who plants them, and the taking of them by another is actionable trespass.

Post v. Kreischer (N. Y.) 219

2. Under a grant from the commissioners of the land office of the State, to the owner of the adjacent upland, of land under water in an arm of the sea which is a common fishery, not a natural oyster bed, and within the limits of the port of New York, within which the dumping of dredging material is prohibited except in the construction of piers, etc., reserving to the people of the State the right of entering upon and using the granted premises until appropriated by the grantee by the erection of a dock, etc., the grantee has no right to dump dredging material upon an oyster bed planted by another within said granted premises, unless that constitutes an actual appropriation within the provisions of the grant. *Id.*

FIXTURES.

1. As between mortgagee and judgment creditors, when a building is erected for a particular purpose, and machinery,—in this case engines, shafting, cranes and blowers used in a furnace for making water and gas pipe—is placed therein and is reasonably necessary therefor, and is in some substantial manner attached to the land or the building, so as to give an idea of permanency and to evince an intention of making a fixture of it, the courts incline to regard such machinery as part of the realty, irrespective of weight or size.

Roddy v. Brick (N. J.) 850

2. Where it is the **intention** of vendor and vendee that **title shall not pass until the consideration money has been paid**, attaching the goods to the freehold, however securely, will not deprive the true owner of them. Authorities cited. *Id.* 851

FORECLOSURE. See MORTGAGE, VI.

FOREIGN ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS, II.; ATTACHMENT.

FOREIGN CORPORATIONS. See RAILROAD COMPANIES, 1-5.

FORFEITURE. See CONTRACT, 21; CORPORATIONS, 5-10; INSURANCE.

FORMER ADJUDICATION. See APPEAL, 10.

FORMER JEOPARDY. See CRIMINAL LAW.

FORNICATION.

Words impliedly charging a single woman with degradation of character, and justifying a jury in finding that the intent was to impute to her an act of fornication, are clearly actionable.

Stoke v. Miller (Pa.) 84

FRANCHISES. See CORPORATIONS, 1-10.

FRAUD AND FRAUDULENT CONVEYANCES.

I. REPRESENTATIONS; UNDUE INFLUENCE.

II. AGAINST CREDITORS.

See CREDITORS' BILL; EJECTMENT, 2; EQUITY, II.; GIFT, 2; LIMITATION OF ACTIONS, 2, 8.

I. REPRESENTATIONS; UNDUE INFLUENCE.

1. **Knowledge of fraud** which will enable vendor to rescind a sale is **essential** to put him to an **election** of remedies. Hence, the bringing of an action for the contract price of the goods sold, unless it was brought with knowledge of the fraud, is not a binding election or a **waiver of the right to rescind.**

Equitable Co-operative Foundry Co. v. Hersee (N. Y.) 189

2. Where, in an action to **set aside** an alleged **fraudulent conveyance**, the evidence as to the fraudulent intent is not strongly preponderating and the plaintiff has been permitted to introduce, in support of the allegation of fraud, oral **testimony** as to the making of a chattel mortgage by the grantor in the alleged fraudulent deed, the defendant should be permitted to show what was done with the mortgage after its execution, and the circumstances under which it was given.

Nugent v. Jacobs (N. Y.) 185

3. The payment by the purchaser, of a **fair consideration**, upon a sale of property, is strong, although **not conclusive**, evidence of the good faith of the transaction; and requires clear evidence of fraudulent intent to overcome it. Authorities cited. *Id.* 186

4. If one who has no right induces the

owner who is in possession to become his tenant, it will require little proof of fraud, or threats, or imbecility, or some undue influence, to dissolve the relation of landlord and tenant, and put the tenant in the situation in which he was before he was induced to sign the lease. Authorities cited.

Ward v. City of Philadelphia (Pa.) 669

5. An attorney agreed to defend certain suits, the client agreeing to give him half of all the property or money recovered. The suit was lost. **A deed procured by the attorney for one half of other property which client owned, representing that it was for his compensation under the agreement, — Held, fraudulent and void.**

Cleins v. Englebrecht (N. J.) 69

6. Fraud is not a marketable commodity; the **right to avoid** or invalidate a **contract**, upon the ground of fraud, unless the fraud be of such a character as to render it absolutely void, is in some sense **personal**. The right to avoid for fraud, however, may pass to another, as an incident of a proper subject of assignment. Authorities cited.

Orne v. Kittanning Coal Co. (Pa.) 749

II. AGAINST CREDITORS.

7. Although fraud is never to be presumed, but must always be proved, great **latitude** is allowed in the **admission of testimony** that may serve to shed light on the alleged fraudulent transaction.

Snyder v. Berger (Pa.) 764

8. Where facts and circumstances proper for the consideration of the jury on the **question of actual fraud** are testified to by the witnesses, it is error to withdraw that subject from the consideration of the jury. *Id.*

9. A **mortgage** given by the grantee of land and accepted by the grantor, in furtherance of the specific **purpose of putting** the land out of the **reach of the grantor's creditors**, will **not be enforced.**

Rowland v. Martin (Pa.) 760

10. An **assignment of policies** of fire insurance, to **pay a debt of the assignor**, is not void as to his creditors because there is no time therein provided for the payment of the debt, or for the return of the surplus to the assignor, and especially where there is no surplus

Sheble v. Bryden (Pa.) 664

11. Where a debtor **assigned** part of his property in trust to **pay certain specified debts**, on a feigned issue to try the ownership of the proceeds of the assigned property, to which the trustee is a party, **evidence** to prove the **insolvency** of the assignor, for the purpose of avoiding the assignment as to other creditors, is **inadmissible.** *Id.*

12. An **assignment by an insolvent assignor** of a portion of his property, to pay certain specified debts, is **not void** as to his other creditors, and the latter cannot participate in the distribution of the fund.

Sheble's Appeal (Pa.) 667

18. Although the maker of a **chattel mortgage** may, as between himself and the mortgagee, be estopped from denying indebtedness purporting to be secured

yet on proof that the consideration expressed in the mortgage was greater than the real indebtedness, and that the mortgage was taken to protect the maker's property from his creditors, it may be held fraudulent as to creditors.

Taylor v. Wood (N. J.)

183

14. Where a drayman transferred the property used in his business to one whom he employed as his clerk,—*Held*, evidence of the clerk that he had paid consideration therefor was not credible in the absence of any evidence to show such payments or the ability of the clerk to make them, and that the property was subject to execution issued by the creditors of the drayman.

Moore v. Diamant (N. J.)

811

15. A transfer or mortgage of the property of an incorporated company, although made when the company was insolvent, and to prefer creditors, is not prohibited by statute nor objectionable in itself.

Vail v. Jameson (N. J.)

838

16. A clause in a lease, providing that the lessor shall have a lien for rent upon all goods and other personal property of lessee, a retail dealer, which then are or may be thereafter put upon the premises, and providing that the lessor may, in case of default in payment of rent, take and sell such goods, etc., in the same manner as in the case of a chattel mortgage, and providing that the lessee may continue in the possession of the goods, and sell the same in the regular course of his business, and buy other goods with the proceeds (although valid as between the parties), is fraudulent on its face as to *bona fide* creditors of the lessee, and cannot be enforced by the lessor as an equitable lien upon the goods against the rights of an assignee of the lessee for the benefit of creditors, in possession of the goods.

Reynolds v. Ellis (N. Y.)

282

17. If property is not the wife's in equity and of right, before conveying it to her through a third person from her husband, then its acquisition from him is in prejudice of the rights of subletting creditors, and is to such extent invalid. Authorities cited.

Flynn v. Walsh (Md.)

158

18. When the interest of a judgment debtor in land is regularly divested by judicial sale, on a valid *bona fide* judgment against him, the purchaser at such sale may lawfully subsequently sell and convey such land to the judgment debtor's wife; and her title cannot be overthrown, as in fraud of his creditors, without affirmative proof of such fraud.

Shank v. Simpson (Pa.)

742

FRAUDS, STATUTE OF.

1. Felling and removing trees and bark from time to time, and the construction of log ways, on unseated lands, by a defendant alleging a parol contract for the purchase of land, will not, without more, amount to such open, notorious, exclusive, and continuous possession, or the making of such improvements thereon, as will take the case out of the Statute of Frauds.

Miller v. Zufall (Pa.)

490

2. A contract for the sale of growing

timber to be taken off by the purchaser, without specification as to time, is an interest in land, within the meaning of the Statute of Frauds. Authorities cited. *Id.*

3. Proof to establish a parol contract should be plain and clear, and preclude doubt or hesitation as to the contract and the equities arising thereunder. Authorities cited. *Id.*

4. To take a case of a parol sale out of the Statute of Frauds, the vendee must take actual, open, notorious, exclusive and continuous possession of the premises in pursuance of the contract; and when the whole purchase money has not been paid, he must have made such improvements thereon as cannot be reasonably compensated for in damages. Authorities cited. *Id.*

5. A parol agreement to extend the time of payment of a mortgage for one year is good.

Measurall v. Pearce (N. J.)

144

FUNERAL EXPENSES. See EXECUTORS AND ADMINISTRATORS, VII.

GAMING. See LOTTERIES.

Speculations in stocks and securities on margins are wagers within the Act to prevent gaming (Rev. p. 458), and therefore unlawful; and securities given to secure a broker against losses therein are void. Equity has jurisdiction on a bill filed against an assignee, taking notes and mortgages given as such securities with notice of such illegality, to order such securities to be delivered up and canceled, and to grant an injunction restraining defendants from parting with them.

Tantum v. Arnold (N. J.)

421

GARNISHMENT. See ATTACHMENT.

GAS COMPANIES.

1. Plaintiff company, having authority to furnish gas of any quality, sought to restrain defendant company from manufacturing and supplying gas, on the ground that by defendant's charter it was required under a certain penalty to furnish gas of a certain quality, and that the gas furnished by it was not of such quality. *Held*, that plaintiff was not entitled to an injunction, because such injunction would be equivalent to forfeiting defendant's charter, which can only be done by a proceeding instituted directly for that purpose by the government.

Jersey City Gaslight Co. v. Consumers Gas Co. (N. J.)

880

2. The expense incurred by a gas company in removing and relaying its pipes, consequent upon the construction of a sewer, is a proper item of expense to be included in the assessment for the sewer, where a city ordinance imposed the duty of such removal and relaying upon the company, and provided for the insertion of the expense thereof in the assessment.

Re Johnson (N. Y.)

856

3. In a lease which declares that the land shall be occupied and worked for petroleum, rock, or carbon oil, and shall not be occupied or used for any other purpose whatso-

ever; and that if no oil is found in paying quantities within four years, the lease shall be null and void "oil" is not synonymous with "gas," and accordingly the production of gas alone will not satisfy the conditions of the lease.

Truby v. Palmer (Pa.)

925

GENERAL DENIAL. See TROVER AND CONVERSION, 2.

GIFT.

1. Where the guardian of an estate, descended to a minor daughter from her mother, pays over the accumulated income to her father who is entitled to it as tenant by the courtesy, and the father, upon receiving it and often afterward until his death, declares to the guardian and others that the money is the daughter's, his declarations are competent to prove an executed gift of the money to the daughter, in an action of assumpsit brought by her after attaining her majority to recover it from his executrix.

Buck v. Henderson (Pa.)

697

2. Where a son enjoyed the confidence of his aged mother and exercised great influence over her, and confidential relations existed between them, the burden of proof is on such son to show, aside from the formal way by which a gift passed to his credit, that it was in fact a gift.

Parker's Admr. v. Parker (N. J.)

67

GOOD WILL. See EXECUTORS AND ADMINISTRATORS, 44; PARTNERSHIP, 8-5.

GUARDIAN AND WARD.

1. Where a person is both executor of a will and guardian of a minor entitled to a portion of the estate under the will, he holds such minor's portion as executor, and not as guardian, until he has settled his account as executor in the probate court; until which time his sureties on his guardianship bond are not liable thereon for his neglect to pay such portion.

Fish's Appeal (Pa.)

727

2. The fact that one undertakes to act in the dual capacity of executor and testamentary guardian does not lessen his duty as either. Where the funds of the estate were lost through his dereliction of duty as executor and thus never came into his hands as guardian, this does not excuse his neglect as guardian; and compensation for his time and trouble in the latter capacity cannot be allowed. *Id.*

3. A guardian, who is also administrator of the estate of the deceased father of his wards, and who has paid claims against the estate out of his own funds, cannot charge such payments against the wards and heirs, unless the claims were duly proved against the estate and the personal estate of decedent is inadequate thereto.

Flynn v. Walsh (Md.)

155

4. It is no defense to a guardian, in accounting to his ward, that he invested part of the ward's estate in real estate at the request of the ward, but without the previous sanction of the court.

Osborne v. Munroe (N. J.)

248

5. A guardian who changes a first mortgage belonging to his ward's estate, to a second mortgage on the same premises, although (by part payment of the first mortgage) the amount of indebtedness upon the premises may not be changed, is yet liable to his ward for the amount of the second mortgage; the mortgaged premises having, on foreclosure, brought only enough to cover the amount remaining due on the first mortgage. *Id.*

6. A guardian cannot charge his wards with advancements, made by him before his appointment, to their mother, out of his own funds.

Flynn v. Walsh (Md.)

155

7. A sheriff's return, that he served the summons in a case on the guardian of a minor, cannot be contradicted in a collateral action.

Levan v. Milholland (Pa.)

906

8. By virtue of the Act of Maryland of 1798, chap. 101, subchap. 12, § 10, the Orphans' Court of this District was empowered to order a sale by a guardian of a part of his ward's real estate for the latter's maintenance and education, and this Act was not repealed by Act of Congress of March 3, 1843.

Thaw v. Ritchie (D. C.)

597

9. The Act of 1798 does not exclude the sale of trust estates, where the trust is purely personal to the infant; for the trust would cease at the moment of the transfer, and the purchaser would take the legal title by operation of the Statute of Uses. *Id.*

10. There is nothing in the Act of 1798, providing for a sale by the guardian for the ward's maintenance, which excludes future interests from being sold equally with estates in possession. *Id.*

11. No particular form of application, or allegation, or proof, is prescribed as necessary to give the court jurisdiction under the Act of 1798. It is sufficient that it is satisfied, in however informal a manner, that the sale is advantageous to the ward, with reference to his maintenance and education; and there need be no record entered of the evidence upon which it decides that fact. A purchaser is not bound to look beyond the decree. *Id.*

12. The "approval" of the decree of the orphans' court, provided by the Act of 1798, to be made by the chancellor, is a revisory and not an appellate proceeding; and as the statute provides no formalities by which the chancellor is to take cognizance of the proceedings in the orphans' court, that is to be adjusted by the practice of the court. *Id.*

13. Without statutory authority, a court of chancery has no power to convert the real estate of an infant into money. Authorities cited. *Id.*

598

14. Where at a guardian's sale fifty-two acres of woodland were sold by mistake for two hundred acres, and the mistake discovered two years thereafter,—*Held*, the purchasers were entitled to a decree rescinding the sale and directing the guardian to pay back the money.

Appeal of Johnson (Pa.)

892

15. A surety on a guardian's bond may,

on his petition for **review**, alleging, on oath, errors in such guardian's account, have a rehearing, within the five years mentioned in the Act of October 13, 1840, of so much of the account as in such petition is alleged to be error.

Fish's Appeal (Pa.)

727

HABEAS CORPUS.

Civil courts can relieve a person from imprisonment under order of a **court-martial** only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere. Authorities cited.

United States v. Whitney (D. C.)

154

HIGHWAYS. See WAYS.

HOMESTEAD.

1. A widow in possession under Rev. 820, § 2, giving her the right to hold her husband's homestead until her dower is assigned, is not a tenant for life, and is not bound to keep down interest on an incumbrance and to pay taxes and to make necessary annual repairs.

Spinning v. Spinning (N. J.)

55

2. A widow while in possession is bound to pay taxes and keep premises in repair. Authorities cited.

Id.

HOMICIDE. See CORONER.

1. Where, during a furious struggle, the accused plunged a knife into the body of the deceased, then a scuffle ensued, and the accused held his antagonist on the floor and choked him until he was helpless or insensible, and afterwards the accused went some distance for an ax and, returning, mutilated the body,—*Held*, there was sufficient evidence to support a conviction of murder in the first degree, it appearing that, although the blow with the knife might have been given in the heat of the **affray** without a purpose to kill, yet the procuring of the ax and the subsequent conduct showed **premeditation** and design to kill, and there was some medical testimony that death resulted from the blows of the ax.

People v. Beckwith (N. Y.)

539

2. For the existence of the **deliberation** required to constitute the statutory crime of murder in the first degree the **time need not be long** and may be short. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design, and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled.

Id.

3. To constitute **manslaughter** there must have been **no design to kill**. If such design be present, the offense is murder in one of its degrees.

Id.

4. After evidence has been given by a defendant, tending to show that the homicide was committed in **self-defense**, he may follow it by proof of the general **reputation of the deceased** for quarrelsomeness and violence; but evidence of specific acts of violence towards third persons is inadmissible.

People v. Druss (N. Y.)

770

C. R., V. IV.

5. Where defendant was under arrest for the murder of her husband, and a justice of the peace held several conversations with her, in which he told her that three of her children had told all about the crime, "and she might as well tell us, too," but did not add that it would be better for her,—*Held*, her **confession** was **voluntary** and admissible. *Id.*

6. Where, after finding the body of one killed by violence, a person was arrested, without warrant, as the suspected murderer, taken before a **coroner's inquest**, informed that he was charged with the murder, and the alleged instrument of death was produced, and he was examined on oath before the coroner as to circumstances tending to connect him with the crime, and he denied all knowledge of the crime,—the testimony thus given was not a **voluntary confession**, and (it not appearing that he was informed of his rights or that he was not bound to answer questions tending to criminate him) evidence thereof was not admissible upon the prisoner's trial for the murder, and its admission was reversible error. *Ruger, Ch. J.*, and *Earl, J.*, dissenting, on the ground that it did not appear that he was not informed of his right to refuse to testify or that objection had been made as to that point on the trial.

People v. Mondon (N. Y.)

357

7. An indictment for manslaughter by culpable **negligence in the construction of a building**, under Penal Code, §§ 193-195, which substantially complies with the provisions of the sections and with § 284 of the Code of Crim. Proc., is sufficient.

People v. Buddensiek (N. Y.)

787

8. In the trial of an indictment for causing the death of a human being by culpable **negligence in the construction of a building**, reports made by the official examiner and inspectors of buildings, and photographs of the building, shown to be accurate representations, are admissible in **evidence**; and for the purpose of confirming the opinion of the witnesses and to enable the jurors to ascertain the material used, a piece of brick and mortar from the building is admissible in evidence. *Id.*

HUSBAND AND WIFE.

I. MARRIAGE.

II. RIGHTS OF HUSBAND.

III. OF WIFE; CONTRACTS; RIGHTS; LIABILITIES.

IV. ACTIONS; TORTS.

V. DIVORCE; ALIMONY; SUPPORT.

See DESCENT AND DISTRIBUTION, 11-15; WITNESS, 7.

I. MARRIAGE.

1. When a woman's claim for **widow's exemption** out of a decedent's estate rests entirely upon cohabitation and **reputation**, and where her prior cohabitation and reputation as the wife of a man still living is proved by evidence of the same general character, no presumption of **marriage** with the decedent will arise.

Reading F. Ins. & Trust Co. v. Reigel (Pa.)

Digitized by Google 678

2. Without proof of subsequent actual marriage it will not be presumed, from continued cohabitation and reputation, that a relation illicit in the beginning has been changed to that of husband and wife. Authorities cited. *Id.* 680

3. Where a man, guilty of illicit intercourse with a woman, supposing her to be pregnant as the result thereof, furnishes her with the means of producing an abortion, and criminal proceedings are lawfully instituted against him for the latter offense, and, being under arrest, he chooses, as a means of release, to marry the woman, the constraint under which he enters into the marriage constitutes no ground for annulling it.

Frost v. Frost (N. J.)

423

II. RIGHTS OF HUSBAND.

4. Real estate acquired before the Code, by the husband, with money furnished by his wife, with her consent, and held in his name for many years, will be considered his, and not as held by him in trust for the wife.

Rynn v. Walsh (Md.)

155

5. A bona fide purchaser of land from a married woman, with knowledge that it was acquired by her from her husband, and that a suit is pending against the husband as surety on a guardian's bond, is sufficiently affected with notice to render the property in his hands liable for the amount of the judgment subsequently recovered in such suit, after the exhaustion of other property improperly acquired from her husband remaining in the hands of the wife. *Id.*

6. If property is not the wife's in equity and of right, before conveyances to her through a third person from her husband, then its acquisition from him is in prejudice of the rights of subsisting creditors, and is to such extent invalid. Authorities cited. *Id.*

158

7. Equity has jurisdiction of a bill by a widow against the estate of her deceased husband to recover money belonging to her which he received under an express agreement between her and him that he would hold the same in trust for her; she has no remedy at law.

Drost v. Corle (N. J.)

862

8. There must be an express promise to repay, to create a liability on the part of a husband for money belonging to his wife, appropriated by him with her consent.

Taylor v. Brown (Md.)

846

9. If money arising from real estate of a married woman is paid to her husband with her knowledge, and she recognizes it as belonging to him, and it is deposited in a bank in their joint names, payable to either of them or to the survivor; then, in the absence of an express promise by the husband to treat the money as the wife's separate estate, he has the right, on her death, to draw it from the bank. *Id.*

III. OF WIFE; CONTRACTS; RIGHTS; LIABILITIES.

10. It is essential to recovery against a C. R., V. IV.

married woman, in an action at law, by force of the statute of 1862, that she be shown to have a separate estate chargeable in equity with the debt contracted by her.

Condon v. Barr (N. J.)

557

11. Where a *feme covert* has no separate estate her contract does not create an obligation which is enforceable in equity, and therefore is not such a consideration as will support her express promise to pay, made after the death of her husband. *Id.*

12. At common law the promise of a *feme covert* could not be enforced against her, unless she had a separate estate. No personal decree could be made against her, but her contract operated as an appointment out of her separate estate. Authorities cited. *Id.*

559

13. The promise of a married woman made during coverture does not furnish a consideration upon which her promise to pay the same debt, made after the death of her husband, can be sustained. Authorities cited. *Id.*

14. A wife's deed or mortgage of her husband's lands cannot stand independently of the deed of her husband, when not executed in aid thereof; nor can she by joining with her husband in a deed of lands to a stranger, in which she has a contingent right of dower, but in which the husband has no present interest, bar her contingent right of dower. Authorities cited.

Hinchliffe v. Shea (N. Y.)

215

15. A certificate of the separate acknowledgment of a married woman, although omitting to state that she delivered, as well as signed and sealed, the deed without compulsion, etc., is not invalid, if otherwise in the usual form; it is a substantial compliance with the statute, and therefore sufficient.

Gable v. Brietch (Pa.)

453

16. The statute limiting the time within which a writ of error may be sued out does not apply to a married woman.

Fenn v. Early (Pa.)

288

17. To authorize judgment for want of an affidavit of defense against a married woman, for work or labor done or money expended in relation to her real estate, the copy of book entries filed must contain or be accompanied by an averment that the debt was contracted for an act done that was necessary for the use, enjoyment, or preservation of the wife's property. *Id.*

18. A judgment against a married woman which does not affirmatively show her liability on a contract within the statute is void; and a sheriff's sale of her property on execution issued thereon will confer no title to the purchaser. Authorities cited. *Id.*

280

19. To sustain a common-law action against a husband and wife, with the view of charging the separate estate of the wife, facts must be averred in the narr. and proved on the trial sufficient to bring the case within the Act. It is not sufficient that a cause of action against the wife be proved; it must also be set forth in the declaration. Authorities cited. *Id.*

20. Where the evidence shows a wrongful

conversion of trust funds by a married woman, her estate is liable in damages, although the trust funds be not identified as a part of her estate. There was no evidence of coercion by the husband.

Appeal of Franklin (Pa.) 322

21. A judgment given by a married woman, when *covert*, before she had applied for the benefit of the Act of April 8, 1872, which secures to a married woman her separate earnings, is not a binding obligation upon her, yet she has a right to pay it, and, having paid interest upon it, cannot recover it back.

Zurn v. Noedel (Pa.) 653

22. A note given by a *feme covert*, after having applied for the benefit of the Act of April 8, 1872, for money borrowed to enable her to engage in business, is valid as against her. *Id.*

23. The law regards the act of the wife in joining in the deed or mortgage of her husband as to his land, not as an alienation of the estate, but as a renunciation of her inchoate right of dower, in and of the title or interest created by his conveyance; it follows, therefore, that her act becomes a nullity wherever the interest or title to which the renunciation is incident is itself defeated. Authorities cited.

Hinchliffe v. Shea (N. Y.) 215

24. In a feigned issue to establish the consideration of a married woman's judgment note, evidence that, on the day the note was given by the defendant to the plaintiff, the plaintiff executed to her a deed of land, in which he recited a consideration for a greater sum than the judgment note, raises a presumption that the note was for the purchase money of the land; and this presumption, in the absence of evidence tending to connect the note with any other transaction, is sufficient to sustain a verdict for the plaintiff.

Hamilton v. Baum (Pa.) 708

25. A married woman's judgment note for the purchase money of land is valid, although it contains no recital of the consideration. Parol evidence of the consideration is admissible. *Id.*

26. A *feme covert* may, without the concurrence of her husband, execute any kind of power, whether given to her when single or married. Authorities cited.

Deffenbaugh v. Harris (Pa.) 463

27. A married woman, to recover as her separate property, under the Code, money due for services, must show that she rendered the services as an independent person, on her own account, and not conjointly with her husband or for his benefit.

Neale v. Hermanns (Md.) 161

28. A wife must bring herself clearly within the provisions of the Code, art. 45, § 7, to entitle her, as a *feme sole trader*, to hold money protected from the debts of her husband.

Flynn v. Walsh (Md.) 155

Cited in *Neale v. Hermanns* (Md.) 163

29. Where the issue is as to whether property, undertaken to be disposed of by a will made by a married woman, belonged to the O. R., V. IV.

testatrix or to her husband, the will is not admissible as evidence against the husband, unless he, with full knowledge, acquiesced in the disposition made by the wife.

Taylor v. Brown (Md.) 346

IV. ACTIONS; TORTS.

30. At common law a husband and wife are jointly liable in an action of damages for the torts of the wife; but the death of the wife terminates the liability of the husband. If the husband dies she may be sued alone, as if she had been *feme sole* when the tort was committed. Authorities cited.

Appeal of Franklin (Pa.) 324

31. While his presence furnishes evidence and raises the presumption of his direction, it may be rebutted by competent evidence; and in the absence of evidence that he was present there is no presumption. Authorities cited. *Id.*

32. A married woman is personally liable for a tort committed by her, unless her husband was both personally present and directed the doing of it at the time. If directed by him, he alone is liable. Authorities cited. *Id.*

33. In a suit by a married woman through her husband as her next friend, the latter, being a nominal party to the suit only, is a competent witness for the plaintiff.

Neale v. Hermanns (Md.) 161

V. DIVORCE; ALIMONY; SUPPORT.

34. To justify a finding that adultery is proved, the court should be satisfied that witnesses swearing to facts showing guilt are honest and are not mistaken.

Fuller v. Fuller (N. J.) 86

35. In a suit for divorce on the ground of adultery committed by the wife, she may set up by way of recrimination cruel treatment on the part of the husband.

Reading v. Reading (N. J.) 134

36. In a suit for divorce upon the ground of husband's adultery, where defendant denies the charge upon direct examination, he may be cross examined about whatever is unhusbandlike, or looks like cruelty, unfaithfulness, or shows an alienation of affection or estrangement on his part, provided it occurred at or about the time of the alleged adultery, and within a reasonable time before the commencement of the suit.

Pullen v. Pullen (N. J.) 71

37. In divorce proceedings, when the evidence shows that the greatly preponderating degree of blame and misbehavior was on the part of the wife, even though the husband was not entirely free from blame, such fault does not constitute a legal bar to his obtaining a divorce; and if the wife's treatment is such as to render his condition intolerable and life burdensome, a divorce should be granted.

Bay's Appeal (Pa.) 281

38. The taking and retention, by a husband, of their engagement ring from his wife, is, in connection with other facts, as the making of

foul charges against her, strong proof of a determination to desert her.

McKean v. McKean (N. J.) 184

39. Under Code, § 1769, the court is authorized from time to time to make and modify orders requiring the husband to pay any money necessary to enable the wife to carry on or defend the action. The allowance thus authorized looks to the future. In this case an additional allowance granted at special term, to pay expenses theretofore incurred, in the absence of an averment that any allowance was needed to oppose the plaintiff's motion for judgment, was reversed. The decision is confined to the precise facts of the case, for the court had no doubt that the allowance to the wife, during the pendency of the action, for some past expenses, might be authorized if it were shown that its payment were necessary to enable her to further carry on the action or her defense thereto. Danforth, J., dissenting.

Beadleston v. Beadleston (N. Y.) 587

40. Where the testimony fully warranted the jury in finding as facts that the respondent had rendered the condition of the libellant intolerable and his life burdensome, and that she was possessed of no separate estate when the marriage took place, and was then a widow well advanced toward middle life, and that she had agreed before marriage that her share in the libellant's estate, in case of his death, should be \$8,000 in lieu of dower, his estate being productive property amounting to \$100,000,—*Held*, that an allowance of \$800 per annum for alimony, and \$500 for costs and expenses of respondent in conducting her defense, was sufficient.

Bay's Appeal (Pa.) 281

41. A divorced wife, however innocent, has no right to a distributive share in the personal estate of her divorced husband, upon his death intestate. Hence, a divorced wife, who had been divorced on her own application (for the adultery of her husband), and who had released all interest in her former husband's real estate, is not entitled to notice of proceedings to probate his will.

Re Estate of Ensign (N. Y.) 376

42. No intention to permit an innocent divorced wife to share in the personal estate of her divorced husband, on his death intestate, is to be inferred from the terms of 2 Rev. Stat. p. 146, § 48, providing that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate."

Id.

43. Suit was brought on a bond to the Commonwealth to secure judgment entered for the amount then due for support of a wife and children, which was paid and satisfaction entered. Subsequent sums accruing, a second suit was brought on the bond. The court refused to allow judgment to be entered, but, on application, struck off the satisfaction, opened the judgment and ordered that judgment should be entered for the penalty, on discontinuance of the second suit and payment

of its costs. *E* were irregular, *Kiehl v. Comm*

IMPRISONMENT; E

IMPROVEMENT AND TENATION, 11.

INDICTMENT AND DISORDERLY LAW, II.; LIQUORS, 9

INFANTS. NEGLIGENCE CHILD.

INJUNCTION:

I. WHEN LI

II. PRACTICE

See PROHIBITION

I

1. Plaintiff cannot furnish gas, of a defendant company supplying gas, on a charter it is a penalty to furnish that the gas furnished is of quality. *Held*, that an injunction would be enjoined against defendant's charter. A proceeding in equity proposed by the government. *Jersey City Gas Co. v. Jersey City* (N. J.)

2. A complaint in equity for an injunction depends upon a showing of injury. Authorities cited.

3. An injunction granted under the Act of April 18, 1875, for the prohibition from operation from a case of nonpayment of a corporation has only a temporary effect. *Re Future Elec.*

Re New York Elec.

4. Under the provisions of the court of chancery, or refuse an injunction continuing to pay the tax assessed in such a case for such an injunction is satisfied in the wrong.

State v. American

5. A municipality has the right of supervision of the public of the streets or injury to the public of the streets. *Jersey City v. C.*

6. A party who

entitled to an injunction to restrain a nuisance, as the unlawful **occupation of the street by a railroad**, without proving the amount of damage.

Pa. R. R. Co. v. Mink (Pa.)

276

7. One who has his **dwelling fronting on a street unlawfully occupied by a railroad** company, held to be specially injured, and entitled to an injunction restraining the occupation of the street without power expressly given or necessarily implied in the franchises of the company.

Id.

8. Equity has jurisdiction to compel an accounting and discovery in aid thereof, and to **restrain the manufacture of other than a patent article in violation of the terms of a written contract**.

Bovaird v. Dick (Pa.)

40

9. A preliminary injunction will issue at the instance of a trustee, **restraining a cestui que trust from issuing execution on a judgment in his own name**, where there is a dispute as to whether or not the judgment is included in the trust.

Reeser v. Reeser (Pa.)

51

II. PRACTICE; DAMAGES; BONDS.

10. Where there is no dispute as to the right to **damages** because of an injunction, and there is some evidence that damages were sustained, the **court of appeals, having nothing to do with the weight or cogency of evidence**, will not interfere with the result reached in the lower court.

Lyon v. Hersey (N. Y.)

126

11. When a temporary injunction to restrain eviction under ejectment, granted on a bill not stating that action had proceeded to judgment, is **continued** after it appears from the answer that judgment had been obtained in said action, complainant must give **bond** to cover damages from commencement of injunction suit.

Snyder v. Seeman (N. J.)

54

12. In an action for damages on a **bond**, in proceedings to restrain tearing down an alleged party wall preparatory to building a new building, **evidence** is admissible, to disprove **damages**, that the new building erected beside the old wall could have been erected without any detention, with the old wall standing.

Sensenig v. Parry (Pa.)

48

13. **Counsel fees are not recoverable** as legal damages in an **action on a bond** conditioned to indemnify for all damage that may be sustained.

Id.

INSANE PERSONS.

1. The evidence certified being that a **deaf mute** was incapable of understanding business or of receiving any communication on the subject, an **inquisition** finding her to be "of sound mind and capable of controlling her property by the selection of a proper person to act for her," set aside.

Re Perrine (N. J.)

63

2. Whether **deaf mutes** are to be treated judicially as persons mentally incompetent to manage their affairs must depend upon the **evidence** they are able to give of the possession of **capacity**. Authorities cited.

Id.

C. R., v. IV.

3. To warrant the court in interfering in behalf of one to protect him against consequences of his own **mental incompetency**, it is **not necessary** that he should be an idiot or a lunatic; it is enough if from any cause, whether by age, disease, affliction, or intemperance, he has become incapable of managing his own affairs. Authorities cited.

Id.

4. A man deaf and dumb from his birth is, in **presumption of law**, an idiot. Authorities cited.

Id.

5. A person **born deaf and dumb but not blind** is **not an idiot**. Authorities cited.

Id.

6. Upon a commission it is not necessary to establish lunacy, but it is sufficient that the party is **incapable of managing his own affairs**. Authorities cited.

Id.

INSOLVENCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY.

1. A lender who, before paying over money on a borrower's discounted note, **discovers that the borrower is insolvent**, may tender back the note and **refuse payment** of the money. The assignee of the borrower has no rights superior to the borrower.

Lancaster Co. Nat. Bank v. Huer (Pa.) 673

2. An order of the orphans' court revoking an order theretofore made by it, **extending the time for filing exceptions** against an insolvent estate, on the ground that such order was inopportune granted, being discretionary, is **not appealable**.

King v. Rockhill (N. J.)

836

3. It is **not essential** to the validity of a **discharge** in insolvency by the circuit court that a **formal order** should be written out and signed by the judge at the time the discharge is ordered.

Lerian v. Rohe (Md.)

255

4. A **discharge** in bankruptcy, granted by the same court in which an issue of *nulla record* is on trial, may be **proved** by the docket entries, and original papers. The production of a **formal record** is **not necessary**.

Id.

5. A defendant convicted, sentenced, and in custody, in **proceedings for fornication and bastardy**, may, after three months' imprisonment, obtain his **discharge** under the insolvent laws, without complying with any part of the sentence.

Commonwealth v. Cook (Pa.)

710

6. A sheriff who, in answer to a rule to bring in the body of a defendant, returns that he **discharged the defendant from custody upon his giving bond** and complying with the requirements of the Insolvent Debtors' Act, will not be amerced.

Lewis v. Haskell (N. J.)

885

INSURANCE.

I. FIRE.

II. LIFE.

I. FIRE.

1. Where the insured applied through a broker to an **agent** for a policy of fire insurance, and the agent, upon receiving the policy

delivers it, with several others for the insured, to the broker, **charges the broker** in a running account with the premium, receives from him at once partial payment, and the balance of the premium after a fire has occurred, **the company cannot**, in an action on the policy, **set up as a defense the failure of the insured to comply with the condition relating to payment of premium.**

Elkins v. Susquehanna Mut. F. Ins. Co. (Pa.) 761

2. An agent of an insurance company who is **authorized to receive applications** for insurance, to forward the applications to the company, to deliver the policies to the insured and to collect the premiums from him, and who is responsible to the company for the payment of the premiums or the return of the policies to the company, **has power to waive a condition** in a policy that the company shall not be liable until the premium is actually paid. *Id.*

8. Where a party holds a policy of insurance in one company at the time of loss, no liability can attach against another company on a policy issued before the fire and **retained by the agent** until after the loss, to be substituted for the first policy, but of which the **assured had no knowledge**; and this, although the assured accepted the substituted policy after the loss, and gave up to the other one for cancellation.

Lancashire Ins. Co. v. Nill (Pa.) 294

4. In an action of debt upon a policy of fire insurance, where the defendant filed a **plea of non est factum**, the plaintiff must offer evidence of the execution of the policy sued upon. Evidence that it was **counter-signed by parties representing themselves to be agents** and in possession of the policy is **not sufficient.** *Id.*

5. A vendor held a policy of insurance on the dwelling-house standing on the premises **sold**; she took a mortgage for a part of the purchase money which was in excess of the amount due on the policy; she did not assign the policy at the time of the conveyance nor until after the house was burned; the **company** tendered the amount due on the mortgage, and demanded an assignment of it, which was refused. *Held*, that the company was entitled to the mortgage. *Held*, also, that in order to carry costs it was not necessary that the company should tender the whole amount of the unpaid purchase money.

Boundbrook Mut. F. Ins. Co. v. Nelson (N. J.) 187

6. An assignment of policies of fire insurance, to pay a debt of the assignor, is **not void as to his creditors** because there is no time therein provided for the payment of the debt, or for the **return of the surplus** to the assignor, and especially where there is no surplus. *Id.*

Sheble v. Bryden (Pa.) 664

7. Where a fire insurance company which has insured mortgaged premises purchases and takes an assignment of a first mortgage thereon, within a year after a loss on the premises by fire, it cannot, in a suit by a purchaser of the premises under a second C. R., V. IV.

mortgage, brought to have the first mortgage declared paid and removed as a cloud upon his title, set up as a defense that **suit was not brought upon the policy within a year**, as limited therein, the company having taken the place of the holder of the first mortgage whose duty it was to recover the money due on the policy to the amount of his mortgage.

Pearman v. Gould (N. J.) 185

8. Where a policy is obtained by the owner of the equity of redemption, with an agreement with the first mortgagee that the money collected by him should go in satisfaction of his mortgage, the money paid by the insurance company on taking an assignment of the first mortgage must be regarded as paid on account of the insurance; and the company is not entitled to subrogation to the rights of the first mortgagee. *Id.*

9. An execution sale, subsequently declared void and set aside, is **not within a provision of a policy** against sales "under a levy under execution." *Id.*

10. A provision in a policy, that it shall be void upon "the passing or entry of a decree of foreclosure," refers to a decree of strict foreclosure, which is an alienation; not to a decree for sale in a suit for foreclosure, which is not an alienation. *Id.*

11. Where a mortgagor had obtained a policy and assigned it to the mortgagee, but, before loss, had sold the property subject to the mortgage which the purchaser had assumed to pay, and the purchaser had taken no assignment of his grantor's interest in the policy, subrogation was decreed. Authorities cited. *Id.* 137

12. Where a building was insured in the name of the mortgagee, for his own security and that of the mortgagor, the latter paying the premium, the insurance company is not on payment entitled to subrogation to mortgagee's rights. Authorities cited. *Id.*

13. Where mortgagee insures for his own benefit his interest as mortgagee, the insurance company on paying the loss is entitled to subrogation to his rights as mortgagee. Authorities cited. *Id.*

14. Keeping a barrel of crude petroleum in a shed adjoining a foundry, to supply, through a connecting pipe five or six feet long, fuel to a steam boiler within the foundry, such use not being a necessary incident to the business, is a breach of a condition in the fire insurance policy, which stipulates that the policy shall become void "if in said premises there be kept petroleum or any chemical oils, without written permission in this policy (except the use of refined coal, kerosene, or other carbon oil for lights, if the same be drawn and the lamps filled by daylight)." *Id.*

White v. Western Assur. Co. (Pa.) 723

15. Actual knowledge on the part of the owner of insured premises, that the neighboring construction of a railroad will increase the risk, must be proved in order to charge him with the duty to give the insurance company notice under a condition in the policy requiring the insured to give notice of any

change or alteration increasing the risk or hazard.

Rife v. Lebanon Mut. Ins. Co. (Pa.) 688

16. In an action of covenant against the insurance company on the policy, for a loss originating from sparks of a locomotive passing on the railroad, it is error to submit to the jury a question whether or not, according to their judgment under the evidence, the risk was so increased as to increase the rate. The question should be whether from all the facts in the case the plaintiff knew that it was so increased. *Id.*

II. LIFE.

17. Parties to an insurance contract have the right to insert therein such lawful conditions as they may agree upon, or which they may consider necessary and proper to protect their interests, which, when made, must be construed and enforced according to the expressed intent of the parties.

Dwight v. Germania L. Ins. Co. (N. Y.) 529

18. Where the insured, in his application, answered "no" to the question whether he was then or had been engaged in or connected with the manufacture or sale of wine, beer, or intoxicating liquors, and the evidence showed that he had kept a hotel wherein no bar was maintained, but where he had a supply of wines and liquors; that he had licenses and permits to carry on the business of selling beer, wines, and liquors at retail to be drunk on the premises; and that he systematically sold wines and liquors in bottles to such of his guests as desired, but not to other persons—the facts constituted a breach of warranty as matter of law; and it was error for the trial court to refuse a nonsuit, and to leave it to the jury to say whether the sales of liquor proved were sales at all, within the intent and meaning of the contract. *Danforth, J., dissenting. Id.*

19. If an insurance policy, in plain and unambiguous language, makes the observance of an apparently immaterial requirement the condition of a valid contract, it cannot be disregarded, nor can a new contract be constructed, by implication or otherwise, in the place of that made by the parties; and such contract is open to construction only when it appears upon the face of the instrument that its meaning is doubtful or its language is ambiguous or uncertain. Authorities cited. *Id.* 532

20. Where, by the terms of a policy of life insurance, the assured warrants the truth of the answers to questions in the application, compliance with such warranty is a condition of the validity of the contract; and any substantial deviation from the truth in such answers is material to the risk and constitutes a breach of the contract, rendering the policy void. Authorities cited. *Id.*

21. Where a "nonforfeiture" policy of life insurance provided (in case of failure to keep up the premiums after the payment of two or more) for the issuance of a new policy for an amount proportionate to the number of annual premiums paid, subject to the payment of interest on outstanding premium notes,—

Held, that the insertion in such new policy of a clause of forfeiture thereof for nonpayment of interest annually on outstanding premium notes on the original policy was authorized and valid.

People v. Knickerbocker L. Ins. Co. (N. Y.) 873

22. The personal representative of the insured has no right of action against the insurance company on a life insurance policy for the benefit of one without an insurable interest.

Bomberger v. United Brethren Mut. Aid Society (Pa.) 694

23. If, at the time a policy of life insurance is issued, the insured is the debtor of the beneficiary, and the policy is taken in good faith for the protection of the creditor, it is not necessary to prove a continuance of the relation of debtor and creditor until the maturity of the policy.

Corson v. Garnier (Pa.) 307

24. The same rule applies where the insurance company, admitting its liability, has paid the money into court, and the controversy is between the beneficiary and the personal representatives of the insured. *Id.*

25. An insurable interest is not necessarily a definite pecuniary interest, such as is recognized and protected at law; it may be contingent, restricted as to time, or indeterminate in amount; but it must be actual, such as will reasonably justify a well grounded expectation of advantage, dependent upon the life of the insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life. *Id.*

26. A nephew has not, from mere relationship, an insurable interest in the life of his aunt. *Id.*

27. In the absence of evidence that a policy on the life of a debtor, in favor of a creditor, is held in trust for the debtor, the presumption is against such trust, and that the rights of the parties appear upon the face of the policy. *Id.*

28. The insurance of the life of a debtor for the sum of \$2,000, in favor of a creditor, where the amount of indebtedness was uncertain when insurance was effected, but afterwards ascertained to be between \$500 and \$750,—*Held*, under the facts of the case, to be no evidence of bad faith, or that the contract was a wager. *Id.*

29. A single woman, under contract to marry, has an insurable interest in the life of her intended husband. Authorities cited. *Id.* 309

30. A young unmarried woman, without property, who for several years had been supported and educated by her brother, who stood to her *in loco parentis*, was held to have an insurable interest in his life. Authorities cited. *Id.*

31. An unmarried woman lived with her brother, who supported or maintained her in his family, under circumstances tending to constitute debtor and creditor. *Held*, the brother had an insurable interest in her life. Authorities cited. *Id.*

82. A creditor has an insurable interest in the life of his debtor. Authorities cited. *Id.*

INTEREST. See USURY.

INTOXICATING LIQUORS. See INSURANCE, 18.

1. P. L. 1880, p. 19, to establish an excise department in cities of over 15,000 inhabitants, where the power to grant licenses is not vested in a board of excise or court of common pleas, is local and special, and therefore unconstitutional.

State v. Trenton Board of License (N. J.) 83

2. Legislation dealing with the method of granting licenses must apply to all cities, or reduce all cities to a uniform system. Authorities cited. *Id.* 85

8. The provision of Laws of 1857, chap. 628, § 11, that "whenever any person is seen to drink in such shop * * * any spirituous liquors or wines forbidden to be drank therein, it shall be *prima facie* evidence that such liquors or wines were sold by the occupant of such premises * * * with intent that the same should be drank therein," is constitutional, but applies only to cases where licenses have been granted to sell liquors in quantities less than five gallons, not to be drank on the premises, and to acts done while such a license was in force.

City of Auburn v. Merchant (N. Y.) 854

4. A statute providing that the delivery of intoxicating liquors in or upon any building or place "shall be *prima facie* evidence of a sale" was held constitutional. Authorities cited. *Id.* 855

5. Under the Act of March 22, 1867, the court of quarter sessions should hear petitions in favor of an applicant for a license and all remonstrance thereto, and refuse a license wherever, in the opinion of the court, having due regard to the number and character of the petitioners for and against the petition, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers, and this without regard to the character of the applicant. The petition and the remonstrances should be special, and not general, and the petitioners or remonstrants need not be voters; it is enough if they be citizens whether male or female.

Appeal of Reed (Pa.) 909

6. The action of the court of quarter sessions in granting or refusing licenses, under the Act of March 22, 1867, being a matter in the discretion of the court, and no appeal being provided by the statute, will not be reviewed. *Id.*

7. The special Act of Feb. 20, 1867, repealing so much of the statute as authorized the treasurer of Washington County to grant a license to vend intoxicating liquors by the quart, is inoperative, because at that time the Act of 1866 had already repealed the statute relating to treasurer's license, and vested the power of licenses in the court of quarter sessions. *Id.*

8. An affidavit, under an ordinance of the city of Camden, prohibiting the sale of

liquors without a license, and prohibiting the sale thereof to a minor, — *Held*, that an affidavit setting forth that complainant verily believed that defendant did on a certain day make sale to a certain minor is insufficient.

Mowery v. City of Camden (N. J.) 566

9. Where defendant was specifically indicted under a statute "as a druggist, for selling liquor without a license, to be used as a beverage," a verdict finding the defendant guilty "of selling liquor without a license" is insufficient; a general verdict of guilty would be sustained, but the special verdict in this case is insufficient, since defendant might sell without license, if he sold in the preparation of medicine or on the prescription of a physician.

Rhoads v. Commonwealth (Pa.) 725

INTOXICATION. See BILLS AND NOTES, 8.

JAIL AND JAILER.

1. Order of court, under Act April 10, 1873, fixing compensation of incumbent sheriff, for boarding prisoners, at one sum for one year and at a less sum for another year, during his term of office, does not violate Constitution, art. 3, § 18, prohibiting the increasing or diminishing of salary or emoluments of any public officer after his election or appointment, notwithstanding a prior order made during his term, fixing the compensation for the past services of his predecessor.

Peeling v. County of York (Pa.) 87

2. The compensation ordered to be paid to the sheriff by law, for the board of prisoners in the county jail, is an emolument of his office within the Constitution, art. 8, § 18. Authorities cited. *Id.* 88.

JOINT TENANTS AND TENANTS IN COMMON.

1. By term "estate of inheritance," in Rev. 820, is meant an estate of inheritance in severalty or in common. Estates in joint tenancy are not included.

Babbitt v. Day (N. J.) 66

2. Dower does not attach, either at common law or under Rev. 820, to real estate of which husband was seised in joint tenancy. *Id.*

3. On the decease of one joint tenant the survivor holds the whole property under the original grant, and holds no part of it in any wise under the decedent. Authorities cited. *Id.*

4. The husband of a tenant in common of coal-bearing lands, in a city, built a dwelling-house and buildings for mining and selling coal. A bill in equity for partition was filed, after the wife's death, against the husband and their minor child. On the master's report the court determined the undivided interests of the cotenants, and decreed that partition should be made. Before commissioners to divide, evidence as to the improvements was received, and the lands containing the improvements were allotted to the husband and minor child at a valuation not including the improvements. *Held*, proper.

Kelsey v. Church (Pa.) 99

5. While a tenant in common is liable to his cotenant for **repairs** absolutely necessary to buildings already erected, which were falling to decay, yet he is not liable to his cotenant for **new and permanent buildings** which the latter erected. Authorities cited. *Id.* 101

6. A tenant in common is not competent to support the possession of his cotenant when the latter is defendant in ejectment founded on a title adverse to the title of both. Authorities cited.

Swank v. Phillips (Pa.) 484

7. Where, under a devise, a father and his minor son took possession of arable land as tenants in common, subject to the payment of certain legacies, and the father paid the legacies, and for a number of years had sole possession of the land, an action of **assumpsit** by the son against the father's executors, for a moiety in value of the crops, the court was equally divided as to whether the action would lie, but on error reversed the judgment of the lower court for a refusal to allow a set-off for lime necessarily spread upon the land, and awarded a new trial.

Luck v. Luck (Pa.) 571

8. Where tenants in common join in a mortgage of the premises held in common, to secure a debt incurred by one of them only, the interests of the others are bound thereby; and this effect of the instrument cannot be overcome by parol. The court can, however, order a sale of the interest of the debtor tenant in common first.

Loree v. Lewis (N. J.) 244

JUDGES. See **COURTS, I.**

JUDGMENT.

I. ENTRY; CONFESSION; AMENDMENT.

II. VALIDITY; CONCLUSIVENESS.

III. LIEN.

IV. PRACTICE; REVIEW.

See **BONDS, 6, 7; DAMAGES; EXECUTION.**

I. ENTRY; CONFESSION; AMENDMENT.

1. An instrument in the form of a **promissory note**, with the addition of the words, "and waiving the benefit of all laws exempting property from levy and sale by execution, and confessing judgment for the said amount," is sufficient; when filed with the proper averment of nonpayment and an express confession signed by an attorney, to authorize the entry of judgment by the **prothonotary**; and a judgment so entered should not be stricken off by the court.

James v. Crownover (Pa.) 287

2. A judgment against an administrator *de bonis non* of a devisor, with notice to his devisees for life and in remainder, under § 24 of Act of June 16, 1836 (Purd. Dig. 108, pl. 28), has all the effect of a judgment *de teris*; and a sheriff's sale under such judgment divests a title under the devise.

Levan v. Milholland (Pa.) 906

3. The date of entry of final judgment against a party deceased after verdict and before judgment (Code Civ. Proc. § 763) is immaterial; and such judgment may be en-

tered **nunc pro tunc** as of the date of the verdict, where the provisions of the Code of Civil Procedure, § 1210, as to entry of memorandum of the party's death are complied with. Notice of motion to attorney of record of deceased defendant is sufficient.

Long v. Stafford (N. Y.) 894

4. Under the Code of Civil Procedure, § 1000, the court may, at any special term held by any judge, modify an order of a trial judge staying judgment on a verdict pending a hearing on exceptions in the first instance at general term, so as to allow entry of judgment.

5. The record may be remitted by a court of error for the purpose of amending a judgment improperly entered. Authorities cited.

Lefferts v. State (N. J.) 884

II. VALIDITY; CONCLUSIVENESS.

6. The decree or judgment in a court of competent jurisdiction of a sister State has the same credit, validity, and effect in the courts of another State which it had in the State where it was rendered; but the question of jurisdiction of the court rendering such judgment is always open. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.) 110

7. Want of jurisdiction of a court over the subject-matter may be shown at any time; and a judgment rendered in the absence of jurisdiction is inoperative and void. Authorities cited. *Id.*

8. The objections which, under the Code of Civil Procedure, § 1939, a defendant not served in an original action may oppose to the judgment therein, when sought to be enforced against him, are limited to legal valid objections which a party to the judgment might make, and must go to the validity and efficiency of the judgment; the objection that the original cause of action has become barred by the **Statute of Limitations** since the original judgment is not available.

Long v. Stafford (N. Y.) 894

9. A judgment in an action of tort, to recover money alleged to have been obtained by fraud, is not a bar to a subsequent action to recover the same money, on the ground that it had been paid under a mistake of fact. *Andrews, J.*, dissenting.

Belden v. State (N. Y.) 180

10. Facts offered in evidence to prove an issue are not themselves in issue, and the judgment is no evidence in regard to them. Authorities cited. *Id.* 183

11. An action brought for a part of an entire and indivisible demand, and the recovery therein, will bar a subsequent demand for the residue of the same. Authorities cited.

Buck v. Wilson (Pa.) 646

12. A judgment is final and conclusive between the parties thereto, as to the facts necessarily adjudicated, and cannot be impeached, except for fraud, in a collateral proceeding.

Snyder v. Berger (Pa.) 704

13. Errors committed by a court, upon the hearing of an action or proceeding which it is authorized to hear, and not affecting any ju-

isdictional fact, do not invalidate its orders, or authorize a party to treat them as void; but can be taken advantage of only by appeal or motion in the original action. Authorities cited.

Fischer v. Langbein (N. Y.) 218

III. LIEN.

14. A mistake in the description of a recorded deed will not be corrected by a court of equity, to the prejudice of the rights of bona fide judgment creditors of the grantee having a lien upon the property.

Ruppert v. Hasko (D. C.) 615

15. No execution can be issued on a judgment, transferred from one county to another after the lien of the original judgment had expired, under the Act of April 16, 1840, without revival.

Beck v. Church (Pa.) 257

16. A mortgage and judgment, in order to stand in the relation of being prior and subsequent to each other, must embrace or cover the same land.

Westervelt v. Voorhis (N. J.) 874

IV. PRACTICE; REVIEW.

17. Although the record of a judgment is evidence for a particular purpose, yet if offered, not for that purpose but for other purposes for which it is not admissible, and rejected, such rejection is not error.

Snyder v. Berger (Pa.) 764

18. Payment being found from the evidence by the auditor.—*Held*, that a judgment which was marked satisfied on the record was not entitled to participate in the distribution of a fund produced by a sheriff's sale.

Moseby's Appeal (Pa.) 627

19. A judgment transferred from one county to another is a quasi judgment, and is only for limited purposes provided by statute; the regularity or merits of it cannot be reviewed elsewhere than in the county in which it was recovered. If the original judgment be set aside, the judgment on the transcript falls with it. Authorities cited.

Beck v. Church (Pa.) 258

20. An execution issued upon a judgment after the death of the defendant is not absolutely void, but only voidable, and the sale of land upon such execution vests in the purchaser a good title. Authorities cited.

Levan v. Mitholland (Pa.) 908

JURISDICTION. See CONFLICT OF LAWS; COURTS, II.; EQUITY, I.; PARTITION, 1-6.

JURY.

Where one summoned as a juror on the trial of an indictment for manslaughter by negligence in the construction of a building said, on his examination as to his qualifications, that he had read about the occurrence in the newspapers, but had formed no opinion as to the guilt or innocence of the defendant, but was of opinion from what he had read that the catastrophe was the result of culpable negligence on the part of some one, and that it

would require evidence to remove the impression; and another juror said that from reading the newspapers he had formed an opinion as to the guilt or innocence of the defendant which it would require evidence to remove, but each also testified that he could nevertheless render an impartial verdict on the evidence—challenges on the ground of bias were properly overruled.

People v. Buddensiek (N. Y.) 787

JUSTICES OF THE PEACE.

1. The Act of July 7, 1879, enlarging the jurisdiction of aldermen and justices of the peace, intends to except only the city of Philadelphia in its proviso that the Act shall not apply to magistrates in cities of the first class, and is therefore not unconstitutional, under article 8, § 7, of the Constitution prohibiting special or local laws regulating the practice or jurisdiction, or extending the powers and duties of alderman or justices of the peace, the Constitution prohibiting the increase of the civil jurisdiction of magistrates in Philadelphia.

City of Wilkesbarre v. Meyers (Pa.) 820

2. Where a judgment has been rendered in a justice's court in favor of plaintiff in an action of trespass *quare clausum fregit*, and it is made to appear that title to lands came in question before the justice, a certiorari will lie to review the judgment as one rendered without jurisdiction.

State v. Stanger (N. J.) 562

3. If, in the court for the trial of small causes, a party files a legal affidavit of the absence of a material witness out of the State, the justice may postpone the trial to a time not exceeding three months from the return day; but if the adjournment is for a less time, a second adjournment to a day beyond thirty days from the return day cannot be made without a further affidavit.

State v. Collins (N. J.) 567

4. The thirteenth section of the Act of September 23, 1791, which makes costs of justices of the peace in unfounded charges of "having committed crime" payable "out of the county stock," refers not only to felonies but to misdemeanors, such as cruelty to animals, assault and battery, malicious trespass, larceny, and false pretenses.

Lehigh Co. v. Schock (Pa.) 744

5. In a suit against a county for costs, the docket of a justice of the peace is conclusive evidence that the prosecution for which costs are claimed was discharged as unfounded for want of evidence. *Id.*

LACHES. See SPECIFIC PERFORMANCE, 2, 4; WAYS, 18; WILL, 5.

1. A court of equity, which is never active against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights or acquiesced for a great length of time. Authorities cited.

Hayes v. Bald Eagle V. R. R. Co. (Pa.) 459

2. Lapse of time and laches (in this case a delay of fourteen months) are not a bar to

the filing of a caveat to test the validity of a will.

Re Estate of McIntire (D. C.) 605

3. The right to maintain a suit under the statute, to quiet title by removing the cloud caused by a sale for alleged illegal taxes, may be lost through laches in failing to question the validity of the tax by certiorari.

Baldwin v. City of Elizabeth (N. J.) 825

4. Delay and acquiescence, inducing expenditure of moneys by others, in works of a quasi public nature, waive irregularities. Authorities cited.

State v. Little (N. J.) 568

5. The laches and nonclaim of the rightful owner of an equitable estate, who is under no disability, and in a case free from fraud, for a period of twenty years, will, where the person in possession has held adversely to such owner, constitute a conclusive bar to all equitable relief. Authorities cited.

Chapin v. Wright (N. J.) 60

LANDLORD AND TENANT.

I. ATTORNMENT; ESTOPPEL.

II. LEASES; AGREEMENTS; COVENANTS.

III. RIGHTS OF THIRD PERSONS.

IV. RENT.

V. ASSIGNMENT; PRIVITY OF ESTATE.

VI. ACTION FOR POSSESSION; MALICIOUS PROSECUTION.

See COVENANT.

I. ATTORNMENT; ESTOPPEL.

1. If an owner of land in possession, and with full knowledge of his own title, takes a lease from a stranger, he will not, in the absence of fraud, misrepresentation, and mistake, be permitted, during the existence of the term, to assert his own title against his lessor, or as a defense to the payment of rent. The same rule applies to a tenant holding over.

Ward v. Philadelphia (Pa.) 662

2. As a general rule a lessee is not permitted to impeach, or in any way to call in question, the title of his landlord, except in cases of fraud, misrepresentation, or mistake. Authorities cited. *Id.* 664

3. If one who has no right induces the owner who is in possession to become his tenant, it will require little proof of fraud, or threats, or imbecility, or some undue influence, to dissolve the relation of landlord and tenant, and put the tenant in the situation in which he was before he was induced to sign the lease. Authorities cited. *Id.* 668

II. LEASES; AGREEMENTS; COVENANTS.

4. An oral promise by a tenant after the execution of a written lease to pay rent monthly in advance, the lease providing otherwise,—*Held*, to be nudum pactum and therefore unenforceable in law.

State v. Winkler (N. J.) 250

5. The death of a joint principal debtor upon a lease does not discharge the o. R., v. IV.

joint liability of the debtors, or the separate liability of his estate.

Long v. Stafford (N. Y.) 394

6. The measure of damages for the breach of a particular covenant in a lease is not the value of the lease or any part of it, but the loss actually resulting from the breach.

Penn Iron Co. v. Diller (Pa.) 691

7. In a lease of a foundry adjoining the lessor's rolling mill, in which the boilers were heated over the furnaces, together with yard space, joint use of pattern shop and engine room adjoining, in which were engine and machinery but no boiler, at a fixed rent and for a definite term, a covenant that the lessor "shall pay fifteen cents per hour for the steam furnished to his engine" does not, without more, impose upon the lessor an obligation to furnish steam to the lessee's engine. It is merely a covenant that if the lessor furnishes steam and the lessee uses it, the lessee shall pay for it at the rate of fifteen cents per hour. It would be otherwise if furnishing steam were a necessary incident to a lease of the premises. *Id.*

8. In an oil lease on royalty, a covenant to use due diligence in operating the premises runs with the land.

Bradford Oil Co. v. Blair (Pa.) 101

9. A covenant in an oil lease, to "continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption for the common benefit of the parties," construed to mean that, in the event of success, exploring and drilling for oil should be continued without interruption, for the common benefit of the parties, as well as gathering and collecting the same. *Id.*

10. The liability of the defendant under this covenant depends on the question whether or not the defendant violated the covenant to use due diligence, under the circumstances of the case. *Id.*

11. The measure of damages for the breach of such a covenant is the value of the oil which the lessor should have received, less the cost of producing it and the value of the oil actually received. *Id.*

12. A memorandum indorsed on a lease signed by the parties, but not dated or under seal, that "it is agreed that the said second parties are not to drill any wells in the barnyard, orchard, or garden without consent of first parties, but nobody else to have the right,"—*Held*, inadmissible in an action of covenant on an oil lease. *Id.*

13. A clause in a lease, providing that lessor shall have a lien for rent upon all goods and other personal property of lessee, a retail dealer, which then are or may be thereafter put upon the leased premises, and providing that the lessor may, in case of default in payment of rent, take and sell such goods, etc., in the same manner as in the case of a chattel mortgage, and providing that the lessee may continue in possession of the goods, and sell the same in the regular course of his business, and buy other goods with the proceeds (although valid as between the parties), is fraudulent on its face as to bona fide credi-

tors of the lessee, and cannot be enforced by the lessor as an equitable lien upon the goods, against the rights of an assignee of the lessee for the benefit of creditors, in possession of the goods.

Reynolds v. Ellis (N. Y.) 232

14. An agreement for a future lien may be sufficient against one who makes no claim to title to the property as purchaser, creditor, or otherwise, and has nothing but a naked possession tortiously acquired. Authorities cited. *Id.* 234

III. RIGHTS OF THIRD PERSONS.

15. A lessor who has, by request of the tenant, made a deep excavation on the premises for a privy well, and left it uncovered and full of water, is not liable in damages for the death of the tenant's grandchild, between two and three years of age, who, visiting the tenant with his mother, and by her left in charge of an aunt acquainted with the premises, strays away and is drowned in the well.

Moore v. Logan, I. & S. Co. (Pa.) 505

16. A provision in a lease of shore front with right to build a pier thereon, that the lease should cease and determine "in case of the destruction of such pier, or failure in operation, or an abandoning of it," will not entitle the lessee to surrender the pier to the lessor so as to cut off a mechanics' lien upon the pier built by the lessee.

Hogan v. Gaskill (N. J.) 849

IV. RENT.

17. A landlord's entry upon demised premises, by forcing the door during the tenant's absence, removing the tenant's signs, locks, and goods, and using the room thereafter for storage, amounts to an eviction, and is a good defense to an action for rent for the balance of the term.

Burr v. Catnach (Pa.) 701

18. The receipt and acceptance of drafts for rent due.—*Held*, under the evidence in this case, to be an acceptance as payment of the rent, by means of which the right to distrain is lost.

Cambria Iron Co.'s Appeal (Pa.) 705

19. A claim of wages for labor, under the Acts of April 9, 1872, and June 12, 1878, is preferred, in distribution of the proceeds of the lessee's property, to the landlord's claim for rent.

Riddleburg Coal & Iron Co.'s Appeal (Pa.) 703

20. Where the property is levied on and sold by the sheriff, on an execution issuing out of the court of common pleas, notice of the wages claim, under the Act of June 12, 1878, need not be given to the landlord, but if given to the sheriff it is sufficient. *Id.*

V. ASSIGNMENT; PRIVILEGE OF ESTATE.

21. As between the transferee of a lease and the original landlord, the rule is that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period ex-

ceeding his whole term, it will, as to the landlord, amount to an assignment of the lease; and the essence of the instrument as an assignment, so far as the original landlord is concerned, will not be destroyed by its reserving a new rent to the assignor, with a power of re-entry for nonpayment, nor by its assuming the character of a sublease; and the assignee, so long as he continues to hold the estate, is liable directly to the original landlord on all covenants in the original lease which run with the land, including the covenant to pay rent. *Stewart v. Long Island R. R. Co.* (N. Y.) 115

22. But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strict reversionary rights, will arise between them. *Id.*

23. Where an assignee of a lease of a railroad for fifty years, together with the right of purchase of the fee at the end of the term, leased the road to defendant for ninety-nine years reserving a different rent from that in the original lease, with a provision for re-entry, but without an assignment of the right of purchase and the defendant covenanted to surrender the premises at the end of the ninety-nine years, to its immediate lessor, the instrument to defendant operated, as between the defendant and the original landlord, as an assignment of the term of fifty years, and during such term there was a privity of estate between defendant and the original landlord, and the legal estate in reversion was in the original landlord during the fifty years; and he or those succeeding to his estate were both legally and equitably entitled to the rents, and had a right of action therefor directly against defendant. *Finch, J.*, dissenting. *Id.*

24. An estate to arise in futuro cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between such lessee and the person to whom he has assigned his term, so far as strictly reversionary rights are concerned, or prevent that relation from existing between such person and the original landlord. *Id.*

25. Where a lessee assigns his whole estate, without making any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving any such reversion, however small, the privity of the estate is not established, and the original lessor has no right of action against the sublessee, there being neither privity of contract nor of estate between them. *Finch, J.*, dissenting. *Id.*

26. Where the assignee of a lease demised the premises for the residue of his term, reserving the right to delivery of possession by his assignee to him on the last day of the term, and the right to intermediate possession in case the building should be de-

stroyed by fire, such reservations were held sufficient to characterize the demise as a sublease, and not an assignment. Authorities cited. *Id.* 119

27. The question of **privity of estate** between the original lessor and the lessee of his lessee **depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right of security for breach of condition are immaterial.** Authorities cited. *Id.* 120

28. Where a **lessee for a term of ninety-nine years, with the option of purchasing the fee simple in reversion, granted a lease for a term exceeding the residue of his own term, such lease established a privity of estate between the last lessee and the original lessor.** Authorities cited. *Id.* 121

29. Where the **original lessee transfers for the identical term of his own lease, but the transferee covenants to surrender to him, a reversion is implied.** Authorities cited. *Dis. Op. Id.* 122

30. A **reservation of a right of re-entry for breach of condition, and even the reservation of a new rent, makes the instrument a sublease.** Authorities cited. *Dis. Op. Id.*

31. Where the **same person has the inheritance and the term in himself, though he has in one the equitable interest, and the legal estate in the other, the inheritance draws to itself the term, and makes that dependent upon it.** Authorities cited. *Dis. Op. Id.* 124

32. Where one takes a lease for a number of years, and during the term enters into a contract of **purchase, with his landlord, of the same property, his possession, which was taken as tenant, operates as notice to one dealing with the landlord in respect to the land, not merely of his right as tenant, but of his right to the inheritance. The possession, although taken as tenant, becomes also a possession as purchaser, protecting him as such to the extent of his entire right.** Authorities cited. *Dis. Op. Id.*

33. A **lease of an iron furnace and land, to continue as long as a royalty of \$1,000 a year was paid, and which gave the lessor the option to terminate the lease upon the nonpayment of the royalty, and further contained a provision for expending 25 per cent more than the first year's royalty in putting the furnace in working order, is a lease from year to year, and not a lease at will. And such lessee, after assignment, will be liable for breach of covenant requiring him to make insurance.**

Hack v. Borda (Pa.)

908

VI. ACTION FOR POSSESSION; MALICIOUS PROSECUTION.

34. Where the **occupant of land was dispossessed by proceedings under the Landlord and Tenant Act, before a justice, and the proceedings were reversed on certiorari for want of jurisdiction,—Held, in an action on the case for malicious prosecution, that**

the judgment of the justice established the existence of probable cause.

Grater v. Fehr (Pa.)

493

LAPSED LEGACIES. See DEVISE AND LEGACY, IX.

LEASE. See LANDLORD AND TENANT; RAILROAD COMPANIES, 11-15.

LEGACY. See DEVISE AND LEGACY.

LEX REI SITÆ. See CONFLICT OF LAWS.

LIBEL AND SLANDER.

1. The superior courts of this State, modeled after the English courts of common law, have authority to **punish summarily, by proceedings for contempt, for any words uttered, by speech, by writing or by printing, outside of the regular course of litigation, which are designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert, in a pending cause, the due administration of justice.**

Re Contempt of Cheesman (N. J.)

576

2. Words impliedly **charging a single woman with degradation of character, and justifying a jury in finding that the intent was to impute to her an act of fornication, are clearly actionable.**

Stokes v. Miller (Pa.)

24

3. Evidence as to common **understanding as to words used was held irrelevant.** *Id.*

LICENSE. See INTOXICATING LIQUORS; PATENTS, 7.

1. **P. L. 1880, p. 190, to establish an excise department in cities of over 15,000 inhabitants, where the power to grant licenses is not vested in a board of excise or court of common pleas, is local and special and therefore unconstitutional.**

State v. Trenton Board of License (N. J.)

83

2. **Legislation dealing with the method of granting licenses must apply to all cities, or reduce all cities to a uniform system.** Authorities cited. *Id.*

85

3. In an action to enforce a contract **granting a license to manufacture a patented article, it is no defense to allege that plaintiff had no right to the patent or to grant the license to others.**

Bosaird v. Dick (Pa.)

40

4. A contract for the manufacture of a **licensed article, giving licensors the option to terminate it and declare the license forfeited at any time when licensees shall make default in making the statements and payments required of them by the contract, cannot be rescinded by licensees' refusing the statement.** The licensees are liable as long as they manufacture during the continuance of the patent. *Id.*

LIEN. See JUDGMENT, III.; LIMITATION OF ACTIONS, 5; MORTGAGE, IV.; VENDOR AND PURCHASER, 1-4.

1. By the common law the **priority of liens, whether by mortgage or judgment, is gov-**

erned exclusively by the date of their acquisition, the first in order of time standing first in order of rank.

Westervelt v. Voorhis (N. J.) 874

2. The lien of contractors and laborers for work done in the construction of a railroad, although of indefinite duration, is subject to the common-law presumption of payment arising from the lapse of twenty years.

Hayes v. Bald Eagle V. R. R. Co. (Pa.) 457

3. A bill in equity for the enforcement of a lien, so framed that it disclosed the presumption of payment, and containing no allegation of facts in rebuttal of the presumption, will be dismissed on demurrer. *Id.*

4. Where aged parents, by deed absolute, conveyed land to one of their children,—*Held*, from the fact that several mortgages were drawn by the same scrivener, intended to be executed by the grantee, but which remained unexecuted and unrecorded, and also certain verbal declarations of the grantee that the consideration of the conveyance was that the grantee should support the parents, and on their decease pay a certain sum of money to their next of kin, that this obligation was a lien upon the land, but could not be enforced against a bona fide assignee, without notice, of a mortgage which had subsequently been made by the grantee, although the original mortgagee had notice of such lien.

Sprague v. Drew (N. J.) 899

5. A provision in a lease of shore front with right to build a pier thereon, that the lease should cease and determine "in case of the destruction of such pier, or failure in operation, or an abandoning of it," will not entitle the lessee to surrender the pier to the lessor so as to cut off a mechanics' lien upon the pier built by the lessee.

Hogan v. Gaskill (N. J.) 849

6. The filing of a mechanics' lien secures to the lien claimant the rights of the owner of the property existing at the time of filing, and the owner cannot abridge or abandon such rights to the injury of the lien claimant. *Id.*

7. Where one having a lien on goods sets up a claim hostile to the owner's title, and wrongfully sells the goods, he can not set up the lien as a bar to the owner's recovery, in an action of trover, for his illegal act.

Andrews v. Wade (Pa.) 689

LIFE ESTATE. See DEVISE AND LEGACY, IV.

LIFE INSURANCE. See INSURANCE, II.

LIMITATION OF ACTIONS.

I. OPERATION; FRAUD; TRUSTS; PAYMENT; ADVERSE POSSESSION.

II. EXCEPTIONS.

See LACHES; MILLS AND DAMS, 7.

I. OPERATION; FRAUD; TRUSTS; PAYMENT; ADVERSE POSSESSION.

1. The plea of the Statute of Limitations is good in equity as well as at law.

Somerset Co. Bank v. Veghte (N. J.) 408

G. R., v. IV.

2. Where complainant's claim is based upon a fraud which defendant has concealed, the statutory period will not, in equity, be considered to have commenced until the fraud is discovered, or until it would have been discovered had reasonable diligence been exercised. *Id.*

3. On a bill for an account by a bank, alleging an embezzlement made by the defendant a number of years ago, and concealed by him while cashier and president, an answer setting up the Statute of Limitations, and that the embezzlement, if any, must have been known to the officers of the bank and to the cashiers who succeeded defendant,—*Held*, sufficient. *Id.*

4. Direct trusts, as between trustee and cestui que trust, are not reached by the Statute of Limitations. Authorities cited. *Id.* 407

5. The lien of contractors and laborers for work done in the construction of a railroad, although of indefinite duration, is subject to the common-law presumption of payment arising from the lapse of twenty years.

Hayes v. Bald Eagle V. R. R. Co. (Pa.) 457

6. The presumption of payment after the lapse of twenty years is in the nature of the Statute of Limitations, furnishing, indeed, not a legal bar, but a presumption of fact, not subject to the discretion of the jury; they are bound to adopt it as satisfactory proof until the contrary appears. Authorities cited. *Id.* 458

7. After the lapse of twenty years, all evidences of debt excepted out of the Statute of Limitations are presumed to be paid, and this is a rule of convenience and policy, the result of a necessary regard for the peace and security of society. Authorities cited. *Id.*

8. After the lapse of more than twenty years there is a presumption that the apparent title of the assignee of corporate stock is the real title; and where all parties interested on the part of the assignor acquiesced in the assignee's title, and neglected to assert the contrary for that length of time, they should not be permitted, after the assignee's death, to maintain the claim that the stock was assigned as collateral only, without the fullest measure of proof.

Lockwood v. Brantly (N. Y.) 798

9. When a creditor has received more than was due him from his debtor, the excess is deemed so much money of the debtor in the hands of the creditor for the use of the debtor; and when, on a subsequent transaction between the parties, the debtor becomes again indebted, such excess will be presumed to have been applied by the creditor upon the subsequent indebtedness when it accrued, and the debtor will not be deprived of the benefit of such application by force of the Statute of Limitations, in an action by the creditor for the entire indebtedness. *Andrews, J.*, dissenting.

Belden v. State (N. Y.) 180

10. Under Rev. 597, § 10, twenty years' possession of premises by mortgagee, after default of payment, bars the equity

of redemption; and such bar is not subject to be waived by an incautious admission of mortgagee.

Chapin v. Wright (N. J.)

59

11. If a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor revived. Authorities cited. *Id.*

60

12. And an admission having this effect will be considered to have been made if the mortgagee institutes proceedings, either by suit or otherwise, to foreclose his mortgage. *Id.*

18. An admission may be made by mortgagee's offering to purchase the equity of redemption. *Id.*

14. The laches and nonclaim of the rightful owner of an equitable estate who is under no disability, and in case free from fraud, for a period of twenty years, will, where the person in possession has held adversely to such owner, constitute a conclusive bar to all equitable relief. Authorities cited. *Id.*

15. In an action to recover a certain award to "unknown owners," for land taken for public purposes, paid to defendants' testator, plaintiff claimed to be entitled thereto by force of adverse possession under a written instrument. *Held*, under the circumstances of the case, that, there having been some evidence that the land was "usually cultivated or improved," and "protected by a substantial enclosure," within the meaning of Code Civ. Proc. § 870, for more than twenty years preceding the date of the award, and the jury having found a verdict in favor of plaintiff, his claim to adverse possession was well founded.

Paige v. Waring (N. Y.)

231

16. One claiming an easement over the land of another, by the uninterrupted adverse enjoyment thereof for over twenty years, must show that such enjoyment has been in the same place for the period of time required.

South Branch R. R. Co. v. Parker (N. J.)

63

II. EXCEPTIONS.

17. The statute limiting the time within which a writ of error must be sued out does not apply to a married woman.

Fenn v. Karyl (Pa.)

288

18. A demand by an attorney at law, for professional services, will not toll the statute on a claim by the client based on a demand for farm produce furnished.

Mattern v. McDivitt (Pa.)

896

19. Mutual accounts, to prevent the operation of the Statute of Limitations, must be such as concern the trade of merchandise, and upon which an action would lie. Authorities cited. *Id.*

897

20. Where there is a book account on one side and a demand on the other, to toll the statute, the demand must also be a book account. *Id.*

U. R., V. IV.

21. Where there are mutual demands, if any item of such account be within six years of the commencement of the suit, such item is equivalent to a subsequent promise reviving the debt. Authorities cited. *Id.*

898

22. The objections which, under the Code of Civil Procedure, § 1935, a defendant not served in the original action may oppose to the judgment therein, when sought to be enforced against him, are limited to legal valid objections which a party to the judgment might make, and must go to the validity and efficiency of the judgment; the objection that the original cause of action has become barred by the Statute of Limitations since the original judgment is not available.

Long v. Stafford (N. Y.)

394

LIS PENDENS.

A bona fide purchaser of land from a married woman, with knowledge that it was acquired by her from her husband, and that a suit is pending against the husband as surety on a guardian's bond, is sufficiently affected with notice to render the property in his hands liable for the amount of the judgment subsequently recovered in such suit, after the exhaustion of other property improperly acquired from her husband remaining in the hands of the wife.

Flynn v. Walsh (Md.)

155

LOCAL IMPROVEMENTS. See MUNICIPAL CORPORATIONS, IV.

LOCAL LEGISLATION. See CONSTITUTIONAL LAW, II.

LOGS AND LOGGING.

1. In a deed of land, a reservation of "all the pine and hemlock timber growing on said land" applies only to living trees of suitable size for use at the date of the deed.

Andrews v. Wade (Pa.)

689

2. A right to cut and remove timber growing on the land of another must be exercised within a reasonable time, or it will be presumed to have been forfeited. *Id.*

3. The owners of a tract of standing hemlock entered into a contract by which they sold all the hemlock bark growing thereon, the bark to be cut and removed by vendees in quantities not exceeding a certain amount per year, the period being unlimited; the contract, after a description of the premises read as follows: "Said lots being in the vicinity of Moose River Tannery; said bark to be used in carrying said tannery on;" subsequently the tannery was conveyed by the vendors to the vendees of the bark, and thereafter was accidentally destroyed. *Held*, the clause, "said bark to be used in carrying said tannery on," was neither an exception, reservation, condition, nor limitation, and that the destruction of the tannery did not, as matter of law, annul the contract so as to entitle the vendors to retain the bark then uncut, or to recover possession of that cut by the vendees under the contract but not removed.

Lyon v. Hersey (N. Y.)

834

4. A contract for the sale of growing

timber to be taken off by the purchaser, without specification as to time, is an interest in land, within the meaning of the Statute of Frauds. Authorities cited.

Miller v. Zufall (Pa.) 491

LOST INSTRUMENTS. See DEED, 8.

In trespass *quare clausum fregit*, plaintiff claimed title under a deed which had been lost, and in evidence thereof submitted a recital in a subsequent deed from the same grantor for other land, that one of the lines ran "thence by lands of" plaintiff. *Held*, that such recital was insufficient, and did not indicate that the whole of the line was along such lands.

Riegelsville Del. Bridge Co. v. Bloom (N. J.) 820

LOTTERIES.

1. On the trial of an indictment for selling lottery policies, the first count of which charged a sale to A, and a second count charged a sale to a person to the grand inquest unknown, the State may ask of A, when on the witness stand, whether she had seen other persons than herself buy of the defendant, and the names of those persons.

Clark v. State (N. J.) 806

2. Where the witness for the State has spoken of one transaction, the State is not precluded from proving, by the same or other witnesses, that the offense charged was a different transaction. *Id.*

3. On the trial of an indictment for selling lottery policies, a dream book found upon the premises of defendant, and a checkered paper, both containing numbers, which were used by the defendant, are admissible in evidence. *Id.*

4. On the trial of an indictment for selling lottery policies, — *Held*, it was not error to refuse to charge that, in order to convict, the jury must find that defendant expressly promised to pay or insure to the purchaser of numbers some money or thing in the event of the number chosen being successful; such promise might be inferred from the general character of the business and well-known course of dealing. *Id.*

LUMBER. See LOGS AND LOGGING.

LUNATICS. See INSANE PERSONS.

MAGISTRATES. See JUSTICES OF THE PEACE.

MALICIOUS PROSECUTION.

1. There must be proof of malice and a want of probable cause. Malice is a question for the jury; but the question of probable cause is one of mixed law and fact, and the proper practice is for the judge to assemble such facts as, in his judgment, would, if proved, establish probable cause; and to say to the jury, if they find these facts, then probable cause existed.

Porter v. White (D. C.) 151

2. Where prosecutor acted upon probable cause, although from motives of malice, he is not liable for damages. *Id.*

O. R., V. IV.

3. The fact that one swears falsely does not, alone, amount to probable cause on which to base a prosecution for perjury; but that fact, taken with the fact that prosecutor acted upon advice of counsel that perjury had been committed, will amount to probable cause. *Id.*

4. Where the occupant of land was dispossessed by proceedings under the Landlord and Tenant Act, before a justice, and the proceedings were reversed on *certiorari* for want of jurisdiction, — *Held*, in an action on the case for malicious prosecution, that the judgment of the justice established the existence of probable cause.

Graver v. Fehr (Pa.) 492

MANDAMUS. See RAILROAD COMPANIES, 42.

1. To maintain a peremptory writ of mandamus issued on the application of the attorney-general in the name of the people of the State, it must appear from the undisputed facts alleged that it was issued to protect some public right or to secure some public interest.

People v. Rome, W. & O. R. R. Co. (N. Y.) 197

2. Assuming that, when a town has been bonded for the construction of a railroad, upon condition that a permanent depot should be erected and maintained at a specified point within the town, a contract is created between the town and the railroad company, such contract can only be enforced by some proceeding on behalf of the town; it is not a matter of public interest in such sense that it can be enforced by mandamus on the application of the attorney-general on behalf of the people of the State. *Id.*

3. The decisions of the State board of railroad commissioners are advisory merely; and no legal right can be based thereon in a proceeding for a mandamus to compel a railroad company to comply with the recommendation of the board. *Id.*

4. The court may, in a proper case, correct an error in judgment on part of the controller of Philadelphia, but it will not by mandamus interfere, in advance, with that discretion which it is his right and duty freely to exercise, or dictate the decision which, in a given case, he must reach.

Dechert v. Commonwealth (Pa.) 754

5. Where a contractor, having agreed with the city of Philadelphia to build a sewer, to receive payment in assessment bills against fronting properties, to make no claim on the city for payment, and that the city shall not "in anywise guaranty any of said bills to be good and collectible," builds the sewer, receives the assessment bills, and brings suits against property-owners, who resist the liens, and afterward the city councils, by ordinance, direct the chief engineer to draw, and the city controller to countersign, in payment for the work, a warrant for \$600, against a survey department appropriation, the court will not, upon the controller's refusal, compel him by mandamus to countersign the warrant. *Id.*

6. *Mandamus* will not lie to compel the performance, by public officers, of acts and duties necessarily calling for the exercise of judgment and discretion on their part. Authorities cited. *Id.* 760

7. The state comptroller, having refused to cancel a tax sale and conveyance thereunder, cannot be compelled by *mandamus* to reach a different conclusion.

People v. Chapin (N. Y.) 183

8. It seems that the general principle, that where an officer is required by law to perform a duty involving the disbursement of money out of pocket he must be reimbursed, should be applied to the case of the mayor of a city seeking reimbursement from the city for his expenditures in resisting successfully an application for a *mandamus* against him, made on behalf of the city, to compel his official action in aid of an illegal corporate enterprise.

Barnet v. City of Paterson (N. J.) 248

MARGINS. See GAMING.

MARRIAGE. See HUSBAND AND WIFE, I.

MARRIED WOMAN. See HUSBAND AND WIFE; TRUSTS, 3, 4.

MASTER AND SERVANT.

I. CONTRACTS OF HIRING; WAGES.

II. NEGLIGENCE; LIABILITY.

I. CONTRACTS OF HIRING; WAGES.

1. When the duty to be done requires a high degree of judgment, skill, and ability, and is largely of a confidential character, and not such as has a common or general market value, the character and ability of the person who performed the duty are properly considered in arriving at the value of his services.

Johnson v. Myers (N. Y.) 778

2. The secretary, treasurer, and business manager of an iron manufacturing company, defendant, were jointly engaged in the management of a store not connected with the iron company. *Held*, that assignments of wages claims, by the employees of the iron company, in consideration of store bills and cash, were valid assignments, and did not extinguish the claims.

Huntingdon & B. T. R. R. Co.'s Appeal (Pa.) 706

3. A claim of wages for labor, under the Acts of April 9, 1873, and June 12, 1878, is preferred, in distribution of the proceeds of the lessee's property, to the landlord's claim for rent.

Riddlesburg Coal & Iron Co.'s Appeal (Pa.) 702

4. Where the property is levied on and sold by the sheriff on an execution issuing out of the court of common pleas, notice of the wages claim, under the Act of June 12, 1878, need not be given to the landlord, but if given to the sheriff it is sufficient. *Id.*

5. A statute (Act of June 29, 1881) providing that all persons, firms, etc., shall settle with their employees at least once a month, and pay them in legal money or cash orders, is unconstitutional and void. The Act is

C. R., V. IV.

an infringement of the rights of the employer and the employee; a laborer may sell his labor for what he thinks best. The Act is an insulting attempt to put the laborer under a legislative tutelage.

Godcharles & Co. v. Wigeman (Pa.) 887

6. Rules posted up on an employer's premises, to the effect that a ton of coal shall be 2,240 pounds, such a custom being opposed to a statute (Act April 15, 1834), making 2,000 a legal ton, are not binding upon the employees, unless by special contract or knowledge which will raise a presumption of contract. *R.*

II. NEGLIGENCE; LIABILITY.

7. After two months' service a freight-brakeman on a railroad will be presumed to have become acquainted with the level bridges over the track, and no action can be maintained against the railroad company if, during the discharge of his duties in the night, he is struck by a bridge and killed. It is immaterial that the road on which he is employed does not use the danger signals common upon other roads, for the absence of signals did not deceive him as to the degree of danger incurred.

Brossman v. Lehigh Valley R. R. Co. (Pa.) 911

8. If a servant accepts service, with knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injuries. Authorities cited. *Id.* 915

9. By continuing in the master's service after learning its dangerous character, the servant takes upon himself all risks incident to the service. Authorities cited. *R.*

10. A servant who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from open and obvious causes, which he has had an opportunity to understand. Authorities cited. *R.*

11. Where a yard master, for the purpose of uncoupling cars, stepped between cars which were in motion on a down grade, and his foot caught under a brake beam, and part of the train passed over his leg, in an action for damages,—*Held*, that the evidence did not sustain the contention that the engineer saw the signal of plaintiff to stop, and that the injury was due to the defective condition of the engine. Danforth, J., dissenting, on the ground that the question was properly left to the jury to determine whether the injury was not due to the defective condition of the engine, and that from the evidence it appeared that the steam chest and the throttle were leaked, and therefore the judgment should be sustained.

Bajus v. Syracuse, B. & N. Y. R. R. Co. (N. Y.)

12. There is not a performance of a duty of the master until there has been placed at the servant's use perfect and adequate physical means, or due care used to that end. Authorities cited. *Id.*

13. In an action for damages for death

caused by the explosion of a boiler owned by defendant, which was at the time in the charge of the vendor thereof, for the purpose of being repaired by it on its own account, it being claimed by plaintiff that the explosion resulted from the negligence of a servant of defendant assisting vendor's servants (of whom deceased was one) in testing the repairs.—*Held*, on the facts:

(a) That, in the absence of proof on the part of plaintiff, it must be presumed that defendant's servant either volunteered to aid vendor's servants, or was requested by them to do so; in either event he was not the servant of defendant in what he did, and defendant was not responsible for his acts.

(b) That defendant's servant was not guilty of negligence.

(c) That no responsibility was cast upon defendant if the accident occurred from any defect in the boiler which the employer of deceased was bound to repair.

Olive v. Whitney Marble Co. (N. Y.) 890

14. Where a railroad employee, after repeated warning of the danger, instead of riding in the gondola prepared for carrying the workmen, seated himself on the rear end of the tender, with his feet dangling over the side, and thereby was injured.—*Held*, he was guilty of contributory negligence and could not recover.

Lehigh Valley R. R. Co. v. Greiner (Pa.) 898

15. Where an employee of a mining company, while engaged in the performance of his duties, fell into a hole in the ground caused by steam escaping from an underground waste pipe.—*Held*, that if he saw the steam issuing from the ground, and deliberately walked into it, and was thus precipitated into the excavation, he was guilty of contributory negligence. Authorities cited. *Id.* 902

16. Where an employee, engaged in constructing and repairing a roadway, although forbidden and warned of the danger, did not ride in the box car prepared for carrying employees, but rode on the pilot or bumper of the locomotive, and the train in passing through a tunnel collided with cars standing on the track, and he was injured.—*Held*, he was guilty of contributory negligence. Authorities cited. *Id.* 903

17. Where plaintiff's deceased husband was injured by the falling of a sliding door in the store of the defendant.—*Held*, a verdict for the plaintiff should be set aside, it appearing that defendant had exercised reasonable care and skill in the selection of its servants, that the door was constructed with ordinary skill, and if the deceased was lawfully in the vicinity of the building in the course of his employment, he was a fellow-servant with the men whose negligence inflicted the injury, or if he was a trespasser or present by sufferance, the defendant owed no duty except to refrain from acts willfully injurious.

Collyer v. Pa. R. R. Co. (N. J.) 568

MAYOR. See MANDAMUS, 8; MUNICIPAL CORPORATIONS, 8.

C. R., V. IV.

MAXIMS.

1. He who asks *Orandall v. Gr*
2. Ignorance of supposed to know *Lake S. & M. S.*
3. When the rule itself ceases *Borough of Cur*
4. Delegatus non *Hicks v. Willis*
5. Interest reip *Chapin v. Wrig*
6. Sic utere tu *Pa. Coal Co. v.*

MECHANICS

MILLS AND

1. Land conveyed had acquired the described thereby by a certain creek along the deeded ciptious; the water for a long time b mill property o deeded property water power had pants of the de time before the e became available tion of the milld in view of the lo of the deeded pr ly to a strip of l rights in the la water power. (mill property l strained from

Hall v. White

2. When one proper model, stantially done, although it bre which his neigh destroyed. Aut *Pa. Coal Co. v*

3. If one built fees, and thus ho water for his ber on his premises dam or the ban and the lands of he is not liable of some fault. Authorities cited

4. In an actioning nuisance (b the natural flo nance of a dam) of May 2, 1878 (covery of dama in evidence the c to the day of the changes, and re *Humphrey v.*

5. If the dam

defendants caused back water on plaintiff's land in any degree, in the ordinary stages of water, or freshets which are to be anticipated, then such dam or obstructions would be illegal, and plaintiff would also be entitled to recover such damages as arose from such dam or obstructions in extraordinary freshets. *Id.*

6. A dam can only produce its full effect on the stream above when the pond is full; and in a flowage suit, evidence of witnesses, attempting to give the usual state of the water in the pond or in the stream above, from observation, without knowing at time of observation whether the pond was full or not, is entitled to very little consideration.

McConnell v. Am. B. P. Mfg. Co. (N. J.) 72

7. After a mill owner has acquired by prescription an easement of flowage, only continuous, uninterrupted cessation in its use for the full period of twenty years, or such cessation commenced or continued under such circumstances as to evince an intention of abandonment, and as shall also render a subsequent resumption of it clearly inequitable to the owner of the servient tenement, will extinguish it. Authorities cited. *Id.*

78

MINES AND MINING.

1. A statute (Act of June 29, 1881) providing that all persons, firms, etc., engaged in mining coal, ore, etc., shall settle with their employees at least once a month, and pay them in legal money or cash orders, is unconstitutional and void. The Act is an infringement of the rights of the employer and employee; a laborer may sell his labor for what he thinks best. The Act is an insulting attempt to put the laborer under a legislative tutelage.

Godcharles & Co. v. Wigeman (Pa.) 887

2. A custom making 2,240 pounds a ton of coal is not good when opposed to a statute (Act of April 15, 1884) making 2,000 pounds a legal ton. *Id.*

3. Where an employee of a mining company, while engaged in the performance of his duties, fell into a hole in the ground caused by steam escaping from an underground waste-pipe,—*Held*, that if he saw the steam issuing from the ground, and deliberately walked into it, and was thus precipitated into the excavation, he was guilty of contributory negligence. Authorities cited.

Lehigh Valley R. R. Co. v. Greiner (Pa.) 902

4. The owner of a trestle, who negligently leaves great masses of ore piled against one side of it in such a manner as to make it unable to bear the weight of a locomotive run upon it by the employees of a railroad company, in accordance with a contract between him and the railroad company for delivering to him ore cars, is liable in damages for the death of a member of the crew of the locomotive, resulting from the fall of the trestle and locomotive.

Pottstown Iron Co. v. Fanning (Pa.) 647

5. Attachment will not lie for unliquidated damages, and hence will not lie for damages for breach of covenant in a mine lease to C. R., v. IV.

pay royalty for ore mined, and to remove a stipulated quantity per annum.

Heckscher v. Trotter (N. J.)

77

6. Where the cause of action is the pollution of a watercourse by water from a coal mine, and where the injury was caused by a combination of mine water which flowed naturally from the mines, which was *damnum absque injuria*, and water pumped from the mines, if as to the latter there would be a liability for injury inflicted, where the injury is estimated without distinguishing between these sources, the judgment will be reversed. *Pa. Coal Co. v. Sanderson*, 86 Pa. 401, overruled. *Mercur, Ch. J., Gordon and Trunkey, JJ., dissenting.*

Pa. Coal Co. v. Sanderson (Pa.)

475

7. The right to mine coal is a right incident to the ownership of coal property, and when exercised in the ordinary manner and with due care, the owner can not be held liable in damages to a riparian owner for permitting the natural flow of mine water over his own land, into the watercourse, by means of which the water supply of a riparian owner is affected in quality or quantity, the mine owner introducing nothing into the water to corrupt it, the impurities being from natural and not artificial causes, and the result being a mere personal injury, and not affecting the general health and well being of the community. *Pa. Coal Co. v. Sanderson*, 86 Pa. 401, overruled. *Mercur, Ch. J., Gordon and Trunkey JJ., dissenting.* *Id.*

8. The working of lower strata of coal by shaft, according to the present practice of mining, and the discharge of water in the shaft by the artificial means of pumping, would seem to be necessary for the natural use of the coal lands. *Id.*

9. One mine owner may permit water naturally flowing into his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. Authorities cited. *Id.*

480

10. Each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequences may be that some prejudice will occur to the owner of the adjoining mine. Authorities cited. *Id.*

11. Taking out minerals is a natural use of mining property, and no adjoining proprietor can complain of the result of careful and proper mining operations. Authorities cited. *Id.*

481

12. The superior owner may improve his lands by throwing increased waters upon his inferior, through the natural and accustomed channels, which is a most important principle, in respect not only to agriculture but to mining operations also. Authorities cited. *Id.*

13. Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally.

Lords v. Carbon Iron Mfg. Co. (N. J.)

853

14. For damages resulting from **natural causes**, or from lawful acts done in a proper manner, the law gives no redress, such losses being regarded as *damnum absque injuria*; but where one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to go there at different times and in greater quantities than it would go there naturally, he commits a legal wrong. *Id.*

15. The owner of mineral land has a right to take away the whole of the minerals in his land, for such is the natural course of user of such land; and if, in the course of such user, water accumulates on his land, either on the surface or underground, and then passes off by the operation of the laws of nature into the land of his neighbor, his neighbor has no legal cause of complaint. *Id.*

16. If an upper mine owner breaks through a barrier, which was left by the lower mine owner for the purpose of protecting his mine against the water which otherwise would flow from the upper into the lower mine, the trespasser is answerable for the damages, including the costs of restoring the barrier; but the trespass in such case imposes no legal duty upon the trespasser to either close the opening, or to prevent the water in his mine from flowing through the opening into the lower mine. *Id.*

17. Where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, shall leave or provide sufficient support for the surface to prevent its subsidence. *Id.*

18. In a lease which declares that the land shall be occupied and worked for petroleum, rock, or carbon oil, and shall not be occupied or used for any other purpose whatsoever; and that if no oil is found in paying quantities within four years the lease be null and void, "oil" is not synonymous with "gas," and, accordingly, the production of gas alone will not satisfy the conditions of the lease. *Truby v. Palmer* (Pa.) 925

19. In an oil lease on royalty, a covenant to use due diligence in operating the premises runs with the land. *Bradford Oil Co. v. Blair* (Pa.) 101

20. A covenant in an oil lease to "continue, with due diligence and without delay, to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption for the common benefit of the parties," construed to mean that, in the event of success, exploring and drilling for oil should be continued without interruption, for the common benefit of the parties, as well as gathering and collecting the same. *Id.*

21. The liability of the defendant under this covenant depends on the question whether or not the defendant violated the covenants to use due diligence, under the circumstances of the case. *Id.*

22. The measure of damages for the breach of such a covenant is the value of the C. R., V. IV.

oil which the lessor should have received, less the cost of producing it and the value of the oil actually received. *Id.*

23. A memorandum indorsed on a lease, signed by the parties but not dated or under seal, that "it is agreed that the said second parties are not to drill any wells in the barnyard, orchard, or garden without consent of first parties, but nobody else to have the right,"—*Held*, inadmissible in an action of covenant on an oil lease. *Id.*

MISNOMER. See DEED, 1.

MORTGAGE.

I. VALIDITY.

II. DEEDS ABSOLUTE IN FORM.

III. RECORDING.

IV. LIEN.

V. PAYMENT; SATISFACTION.

VI. FORECLOSURE.

VII. REDEMPTION.

See INSURANCE, 5, 7, 8, 10-18; JOINT TENANTS AND TENANTS IN COMMON, 8; PARTITION, 9, 10.

I. VALIDITY.

1. The validity of a mortgage as a lien on land is to be determined by the law of the place where the land is situate, although both parties reside in another State. Authorities cited.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 110

2. A mortgage given by the grantee of land and accepted by the grantor, in furtherance of the specific purpose of putting the land out of the reach of the grantor's creditors, will not be enforced. *Rowland v. Martin* (Pa.) 760

3. Although the maker of a chattel mortgage may, as between himself and the mortgagee, be estopped from denying the indebtedness purporting to be secured thereby, yet on proof that the consideration expressed in the mortgage was greater than the real indebtedness, and that the mortgage was taken to protect the maker's property from his creditors, it may be held fraudulent as to creditors. *Taylor v. Wood* (N. J.) 133

4. A mortgage of the property of a corporation is an increase of its indebtedness, and can be effected only in compliance with art. 16, § 7, of the Constitution, and the Act of April 17, 1874. Otherwise a mortgage is void. *Pittsb. & S. L. R. R. Co. v. Rothschild* (Pa.) 107

5. Where tenants in common join in a mortgage of the premises held in common, to secure a debt incurred by one of them only, the interests of the others are bound thereby; and this effect of the instrument cannot be overcome by parol. The court can, however, order a sale of the interest of the debtor tenant in common first. *Lorée v. Lewis* (N. J.) 244

II. DEEDS ABSOLUTE IN FORM.

6. Where aged parents, by deed absolute, conveyed land to one of their children,—*Held*, from the fact that several mortgages were drawn by the same scrivener, intended to be executed by the grantee, but which remained unexecuted and unrecorded, and also certain verbal declarations of the grantee, that the consideration of the conveyance was that the grantee should support the parents and on their decease pay a certain sum of money to their next of kin; that this obligation was a lien upon the land, but could not be enforced against a *bona fide* assignee, without notice, of a mortgage which had subsequently been made by the grantee, although the original mortgagee had notice of such lien.

Sprague v. Drew (N. J.)

899

7. An instrument transferring machinery, and providing, in case of default, "this conveyance to be void and of no effect, and the possession of the goods herein described shall revert to the party of the first part," which was acknowledged and recorded, the transferee making an affidavit wherein he described himself as "the mortgagee," construed as a chattel mortgage.

Roddy v. Brick (N. J.)

850

8. Courts of equity lean against construing contracts to be conditional sales; and unless the construction be clearly made out to be of that nature, it is always construed to be a mortgage. Authorities cited. *Id.*

851

9. The true test whether a conveyance is a mortgage or not is to ascertain whether it is a security for the payment of any money or not; whether it is a security for the performance or nonperformance of any act or thing. If the transaction resolves itself into a security, whatever be its form, it is in equity a mortgage. If it be not a security, then it may be an absolute sale or a conditional purchase. Authorities cited. *Id.*

III. RECORDING.

10. An unregistered mortgage executed by an ancestor, although prior in date to a judgment recovered against his heir in the ancestor's lifetime, does not, on the ancestor's death, become void under the 22d section of the statute concerning mortgages.

Westervelt v. Voorhis (N. J.)

874

11. A conveyance by a husband to his wife, which was not recorded until after a mortgage was executed on the same land, is, under the Act of March 18, 1775, void as to the mortgagees without notice; hence, the children of the mortgagor, who claim title through the wife by deeds subsequent to the mortgage, are *prima facie* terretenants in a *scire facias* upon the mortgage, and are properly made parties to it.

Hulett v. Mut. L. Ins. Co. (Pa.)

767

IV. LIEN.

12. A mortgage and judgment, in order to stand in the relation of being prior C. R., V. IV.

and subsequent to each other, must embrace or cover the same land.

Westervelt v. Voorhis (N. J.)

874

13. Jersey City. Under the charter of Jersey City (P. L. of 1871, p. 1155, § 151) the lien of an assessment for a street improvement, upon mortgaged premises, is paramount to that of the mortgage.

Hand v. Jersey City (N. J.)

882

14. A prior mortgagee who has had possession of the mortgaged premises must account for rents and profits to the subsequent incumbrancer; but a subsequent incumbrancer in possession is not bound to account to the prior incumbrancer.

Leeds v. Gifford (N. J.)

148

15. A mortgage which does not by its terms pledge the rents and profits of the mortgaged premises for the payment of the mortgage debt gives the mortgagee no lien on them; and the mortgagor may take or assign them, without liability to account to the mortgagee for them. *Id.*

16. A purchaser of an equity of redemption at judicial sale takes the land burdened with the mortgage, and he has no right, therefore, to ask that some other fund be applied in discharge of the mortgage debt in relief of his estate.

Krueger v. Ferry (N. J.)

57

V. PAYMENT; SATISFACTION.

17. On the death of a purchaser who has assumed the payment of an outstanding mortgage, the land, and not the personal estate of the decedent, is primarily liable.

Coudert v. Coudert (N. J.)

132

18. Evidence on the question whether a mortgage, given to secure a usurious premium in addition to the debt, had been paid off, or whether the indebtedness secured thereby was included in a later mortgage, examined. *Held*, that the first mortgage had been fully paid before the second was executed, and that recovery of the usurious premium paid was barred by limitation.

Adams v. Mahnken (N. J.)

334

19. Where more interest than was actually called for has been paid on a mortgage, the tender of such a sum as, together with the excess of interest paid, will equal the amount due on the mortgage, is a good tender in satisfaction of the mortgage.

Perceval v. Gale (N. J.)

334

20. Statements by the owner of a mortgage as to a third person's being authorized to receive payments thereon for him, not made to the party liable on the mortgage, and not made to be communicated to him or to influence his conduct, will not estop the owner of the mortgage from afterwards denying the authority of such third person to receive payments.

Maguire v. Selden (N. Y.)

379

21. A parol agreement to extend the time of payment of a mortgage for one year is good.

Measurall v. Pearce (N. J.)

144

VI. FORECLOSURE.

23. Foreclosure proceedings in New York are ineffectual to pass title to property in Pennsylvania.

Pittab. & S. L. R. R. Co. v. Rothschild (Pa.) 107

28. Upon foreclosure, where defendant filed a cross bill alleging an agreement that if defendant would procure certain collateral securities to be executed and delivered to complainant, complainant would execute and deliver to defendant a writing extending the time for payment of a mortgage, and binding himself to accept the principal sum when tendered, and upon such payment to assign the bond and mortgage, etc., it is not necessary, in order to compel the delivery of the writing, to allege a tender of the amount due on the mortgage.

Eastwood v. Worrall (N. J.) 91

24. The execution of the written agreement did not depend upon the tender of the money, but upon the tender of the collaterals. *Id.*

25. A prior incumbrancer has a right, as against the mortgagor and subsequent incumbrancers, in case his security is precarious, to have the rents of the mortgaged premises (accruing subsequent to the appointment of a receiver) sequestered for his benefit.

Leeds v. Gifford (N. J.) 148

26. Mortgagee may take possession of premises, to obtain payment of his debt; and a payment so obtained is subject, in respect to its appropriation, to the legal rules governing the appropriation of other payments. *Id.*

27. There must be something of contrivance in mortgagee's conduct, or some positive misconduct on his part, to justify the court in depriving him of interest. Authorities cited. *Id.* 149

28. Application of a purchaser of real estate in Long Island City on the foreclosure of a mortgage, to be allowed on his purchase money the amount of taxes on the property for the years 1877 to 1885, remaining unpaid, opposed on the ground that said taxes were illegally assessed and therefore not valid liens—refused, with liberty to the purchaser to be relieved from his purchase.

Re Byrnes v. Stevens (N. Y.) 118

29. In a suit to foreclose a mortgage, payment after bill filed is properly set up by answer, and not by cross bill.

Kaable v. Goebbel (N. J.) 242

30. The right of a mortgagor to compel a mortgagee in possession to account for the rental value of premises is, in a suit to foreclose, a pure matter of defense, which the mortgagor may avail himself of by answer.

Krueger v. Perry (N. J.) 57

31. The mortgagee of an heir, devisee, or widow has no right to have the personal estate of decedent applied in relief of the land which such heir, etc., may take. Authorities cited. *Id.* 59

32. The holder of a lien subsequent to a junior mortgage has no standing to move to dismiss a bill to foreclose the junior

mortgage, because the bill seeks to have the junior mortgage given a preference in payment over the prior mortgage.

Sergeant v. Mettler (N. J.) 861

33. A mortgage executed before the statute of 1880 (P. L. p. 255), declaring that no decree for deficiency shall be made in a foreclosure suit, is subject thereto. The Act merely affects the mode of remedy.

Toffey v. Atcheson (N. J.) 863

34. Upon a suit to foreclose a mortgage made by decedent in his lifetime, instituted after his death, where the mortgagee has obtained a judgment for deficiency against decedent's executors, in their representative capacity, he cannot maintain an action to set aside a fraudulent conveyance of real estate made by decedent in his lifetime, and to subject such real estate to his judgment for deficiency. The reclamation of real estate fraudulently conveyed by a decedent must be enforced by the executors, under Laws 1858, chap. 814.

Lichtenberg v. Herdtfelder (N. Y.) 887

35. In a scire facias on a mortgage or judgment, a terretenant is one who became seised or possessed of the debtor's land, subject to the lien thereof.

Hulatt v. Mut. L. Ins. Co. (Pa.) 767

VII. REDEMPTION.

36. Under Rev. 597, § 10, twenty years' possession of premises by mortgagee, after default of payment, bars the equity of redemption, and such bar is not subject to be waived by an incautious admission of mortgagee.

Chapin v. Wright (N. J.) 59

37. If a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor revived. Authorities cited. *Id.* 60

38. An admission having this effect will be considered to have been made if the mortgagee institutes proceedings, either by suit or otherwise, to foreclose his mortgage. *Id.*

39. An admission may be made by mortgagee's offering to purchase the equity of redemption. *Id.*

40. A mortgagor has a right, after condition broken, and at any time before his equity is lost by laches, to redeem the land which he has conveyed in pledge, by paying the mortgage debt. This right, however, is a pure equity, cognisable alone by courts of equity. Authorities cited. *Id.* 61

41. When mortgagor's equity is once extinguished it should remain absolutely blotted out forever. Authorities cited. *Id.*

MUNICIPAL CORPORATIONS.

I. FORMATION; ANNEXATION; DIVISION.

II. OFFICERS; MAYOR; ALDERMEN; CONTROLLER; FIREMEN.

- III. TAXATION; PUBLIC PROPERTY.
- IV. LOCAL IMPROVEMENTS; STREETS; SEWERS; ASSESSMENTS.
- V. LIABILITY FOR TORTS; DEFECTIVE WAYS.
- VI. ACTIONS BY AND AGAINST.
- VII. PARTICULAR CHARTERS CONSTRUED.

See COUNTIES; FIRE AND FIRE DEPARTMENTS; GAS COMPANIES; POLICE AND POLICE DEPARTMENTS; SCHOOLS AND SCHOOL DISTRICTS; TAXES.

I. FORMATION; ANNEXATION; DIVISION.

1. Where **township** voters have, at their regular election, fixed the amount to be raised for **highways** in the township for the ensuing year, and the township **committee** has **appropriated** the money, to be raised by taxation, to the several road overseers, and **thereafter** a part of the **township votes** to become an **incorporated borough**, the commissioners of such new borough are not entitled to the possession and control of the portion of such money, raised by taxation upon the part of the township incorporated in the borough; but the same is to be expended by the township overseer as apportioned by the township.

State v. Horner (N. J.) 145

2. The **Legislature** may, independent of any constitutional prohibition, **incorporate** towns or villages within townships, for special or **limited purposes**, without separating the territory within the prescribed limits from the rest of the township in other respects. Authorities cited. *Id.* 146

3. P. L. 1880, p. 191, to establish an **excise department** in cities of over 15,000 inhabitants, where the power to grant licenses is not vested in a board of excise or court of common pleas, is **local** and special and therefore **unconstitutional**.

State v. Trenton Board of License (N. J.) 83

4. Under Acts of March 7, 1882, and April 17, 1884, a petition for a special election for the **formation of a projected borough** must be signed by the owners of at least one tenth in value of the lands to be embraced, at the time of presenting such petition.

State v. Ocean Beach Comrs. (N. J.) 85

5. Under Act of March 7, 1882, § 2, for the formation of borough commissioners, prescribing that the chosen freeholder of any township shall call a **special election upon petition** signed by owners of at least one tenth in value of the lands to be embraced in the **projected borough**, the petitioners must be such owners at time of presenting the petition. *Id.*

6. **Legislation** dealing with the method of granting licenses must apply to all cities, or reduce all cities to a **uniform system**. Authorities cited.

State v. Trenton Board of License (N. J.) 85

II. OFFICERS; MAYOR; ALDERMEN; CONTROLLER; FIREMEN.

7. When neither the charter of a municipal C. R., V. IV.

corporation nor a general law of the State provides to the contrary, a **majority** of the board of **aldermen** of the corporation constitutes a **quorum**; and the vote of a majority of those present, there being a quorum, is all that is required for the adoption or passage of a motion, or the doing of any other act the board has power to do.

Barnet v. City of Paterson (N. J.) 248

8. It seems that the general principle, that where an **officer** is required by law to perform a duty involving the disbursement of money out of pocket he must be **reimbursed**, should be applied to the case of the **mayer** of a city seeking reimbursement from the city for his expenditures in **resisting** successfully an **application for a mandamus** against him, made on behalf of the city, to compel his official action in aid of an illegal corporate enterprise. *Id.*

9. In proceedings for **removal of policemen** in cities, under Act of March 25, 1885, the formalities prescribed for inferior criminal prosecutions are not requisite. It is sufficient if statutory directions are substantially observed.

State v. Mayor of Camden (N. J.) 82

10. The **court** may, in a proper case, correct an error in judgment on the part of the controller of Philadelphia, but it will **not by mandamus interfere**, in advance, with that **discretion** which it is his right and duty freely to exercise, or dictate the decision which, in a given case, he must reach.

Dechert v. Commonwealth (Pa.) 754

11. The **city controller** of Philadelphia possesses all the **powers of county auditors**; his **jurisdiction** in the exercise of these powers is as full and complete as that of the courts; and he is entitled to exercise them without interference. *Id.*

12. Where a **contractor**, having agreed with the city of Philadelphia to **build a sewer**, to receive payment in assessment bills against the fronting properties, to make no claim on the city for payment, and that the city shall not "in any wise guaranty any of said bills to be good and collectible," builds the sewer, receives the assessment bills, and brings suits against property owners, who resist the liens, and afterwards the city council, by ordinance, direct the chief engineer to draw, and the city controller to countersign, in payment for the work, a **warrant for \$600**, against a survey department appropriation, the court will not, upon the controller's refusal, compel him by **mandamus** to countersign the warrant. *Id.*

13. **Removal of fireman** without notice or trial, illegal.

People v. Fire Comrs. (N. Y.) 774

III. TAXATION; PUBLIC PROPERTY.

14. The Act of May 14, 1874, entitled "An Act to Exempt from Taxation Public Property Used for Public Purposes," which exempts certain property and contains a proviso that "all property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid, and from which anyia

come or revenue is derived, shall be subject to taxation; and nothing herein contained shall exempt the same," imposes taxation upon public property used for public purposes from which a revenue is derived.

Erie Co. v. City of Erie (Pa.) 800

15. **Property belonging to a municipality**, owned and used by commissioners, appointed by law, in operating and carrying on **water works** to supply the public with water, and necessary for such purpose, from which a revenue is derived, is **taxable** under the Act of May 14, 1874. *Id.*

IV. LOCAL IMPROVEMENTS; STREETS; SEWERS; ASSESSMENTS.

16. **Surveyors' fees** are a proper item of expense to be included in an **assessment** for a local improvement.

Re Johnson (N. Y.) 856

17. The expense incurred by a **gas company** in **removing and relaying** its pipes, consequent upon the construction of a **sewer**, is a proper item of expense to be included in the **assessment** for the sewer, where a city ordinance imposed the duty of such removal and relaying upon the company, and provided for the insertion of the expense thereof in the assessment. *Id.*

18. It is presumed that one who held the title to assessed property for the convenience of another acted in such other person's behalf in maintaining a proceeding to vacate an illegal assessment; and that one who pays money under the coercion of an assessment had an interest in the land assessed. **Any one aggrieved may complain**, under Laws 1858, chap. 838.

Schultze v. City of New York (N. Y.) 518

19. The action of the court in **reducing an assessment** is **conclusive** that money **overpaid** thereon was obtained by the municipality without right, and is therefore held by it for the payer's use. *Id.*

20. An **assessment for repaving** in the city of New York, although valid on its face, is **void for want of jurisdiction**, where the proceeding was not based upon a petition of a majority of the **property-owners**, as required by the charter.

Jen v. New York City (N. Y.) 781

21. Chapter 812 of Laws of 1874, amending chapter 838 of Laws of 1858, and confining the remedy for the **vacation of assessments** in New York city to "the proceedings under the Act hereby amended," only applies where there is an existing lien created by the assessment, and does not affect the right of action to **recover money unlawfully exacted** under an illegal assessment. *Id.*

22. An **assessment** imposed without jurisdiction need not be first **vacated** in order to enable one to **recover money** paid thereon. *Id.*

23. The terms of **Borough Act** of March 7, 1873, relating to **taxes for road purposes**, should be construed to extend to assessments for road purposes where no previous appropriation has been made by legal authority.

State v. Horner (N. J.) 145

C. R., V. IV.

24. In an action for breach of **covenant against incumbrances**, contained in a warranty deed in the usual form, where an original **assessment opening a street** was in existence at the time of the execution of the deed, and afterwards a reassessment was made, — **Held**, that the lien of the reassessment related back to the lien of the original assessment, and attached when the assessment was affirmed, and not when the work was completed, and that the covenant was broken as soon as made.

Cadmus v. Fagan (N. J.) 809

25. The charter of the city of Elizabeth, giving power to the city council to **grant the right to lay down railroad tracks** in the streets, as it makes **no provision for compensation** to the owners of the land, does not give authority to the city to exercise the right of eminent domain.

Chamberlain v. Elizabethport S. O. Co. (N. J.) 870

26. A **contract** made by a city, under an ordinance which has not been annulled and which is not *ultra vires*, is **obligatory at law**.

Atlantic City Water Works Co. v. Atlantic City (N. J.) 841

27. It does not necessarily follow that, because a **contract** entered into by a city calls for **payments in futuro indefinitely**, such obligation was in **excess of the limits of expenditure** imposed upon the common council. *Id.*

28. Where the **report of a board of assessors**, in a proceeding to **condemn land for a street** opening in Trenton, shows that they met at the time and place appointed, and nothing appearing to the contrary, the report must be accepted as true. Such report should show what **notice** of the meeting of the assessors was given, and what manner of **publication** was adopted.

State v. City of Trenton (N. J.) 80

29. Under the charter (Laws 1873, p. 872), the assessors could not appoint **meetings** after the expiration of thirty days from the time appointed for their first meeting. *Id.*

30. Compliance with the charter requirements that the **report be completed and filed** within thirty days after first meeting is essential to the validity of the proceeding. *Id.*

31. Everything necessary to give **validity** to the action of a special tribunal must appear in the **record**. Authorities cited. *Id.* 81

32. Municipal claims for **paving and curbing** in Philadelphia are to be estimated according to **frontage**, except in the case of rural or suburban land.

Stewart v. Phila. (Pa.) 674

33. **Rural land** is land not already so far improved, or in the midst of or in such close proximity to city improvements, that it can fairly be said that paving and curbing are requisite for the benefit of the land as a part of the city proper. *Id.*

34. *Prima facie*, all land within the city limits is subject to the **frontage rule**, and the burden of proving land rural rests upon the owner. *Id.*

35. Municipal **assessment of land** as

rural for the purpose of taxation does not estop the city from denying its rural character in a claim for paving and curbing. *Id.*

V. LIABILITY FOR TORTS; DEFECTIVE WAYS.

86. Where a municipality improving a public highway causes an obstruction to be put upon the road, it is its duty to give some appropriate warning of the fact; and if there is nothing to indicate to a stranger that the traveled route is at the side of a road, it is presumed to be in the center.

Borough of Carlisle v. Brisbane (Pa.) 508

87. In an action by a stranger against a municipality, for an injury caused by an obstruction in the center of the highway, evidence to show that the plaintiff took the center of the road, and that the traveled route had previously been there, is admissible. *Id.*

88. Where a passenger rides, without pay, with another who is driver of a team, exercising entire control over it, and who is in no sense the passenger's agent or servant, the negligence of the driver, or his knowledge of the defective condition of the road, cannot be imputed to the passenger so as to bar an action by him against the negligent third party. The passenger is answerable for his own negligence only. *Id.*

VI. ACTIONS BY AND AGAINST.

89. A municipality having the control and supervision of the public highways within its territorial limits may maintain a suit in equity to prevent any alteration of the streets or injury to them which will deprive the public of their use.

Jersey City v. Cent. R. R. Co. (N. J.) 337

40. Assuming that, when a town has been bonded for the construction of a railroad, upon condition that a permanent depot should be erected and maintained at a specified point within the town, a contract is created between the town and the railroad company, such contract can only be enforced by some proceeding on behalf of the town; it is not a matter of public interest in such sense that it can be enforced by *mandamus* on the application of the attorney-general on behalf of the people of the State.

People v. Rome, W. & O. R. R. Co. (N. Y.) 197

VII. PARTICULAR CHARTERS CONSTRUED.

41. **Atlantic City.** Under the provision of the charter authorizing the city to provide by ordinance "for a supply of water for said city," the city is empowered to contract to pay a specified sum annually, for a series of years, for the use of water for fire purposes.

Atlantic City Water Works Co. v. Atlantic City (N. J.) 341

42. **Auburn.** Violations excise law; authority of board of charities and police to sue for penalties. Laws 1879, chap. 58, title 7, § 771.

City of Auburn v. Burtis (N. Y.) 235

43. **Bayonne.** Lien of assessment for opening streets; reassessments relate back to lien of original assessment.

Cadmus v. Fagan (N. J.) 309

C. R., V. IV.

44. **Camden.** Proceedings for removal of policemen.

State v. Mayor of Camden (N. J.) 33

45. Act of March 6, 1884, providing that clerk of criminal court shall be paid salary in lieu of fees is unconstitutional as special legislation.

Halleck v. Hollingshead (N. J.) 570

46. **Elizabeth.** sales of land to, for non-payment of taxes for the term of 900 years, are unauthorized.

Baldwin v. City of Elizabeth (N. J.) 325

47. Provision in charter authorizing city councils to grant right to lay down railroad tracks in streets, without providing compensation to abutting owners, is unconstitutional.

Chamberlain v. Elizabethport S. C. Co. (N. J.) 370

48. **Erie.** Taxation of rural property; Act of Feb. 25, 1870.

City of Erie v. Reed (Pa.) 437

49. **Gloucester.** Laws 1868, p. 106, authorizing councils to pass ordinance for appointing watchmen, constables, and police; removal of police.

State v. Gloucester City (N. J.) 574

50. **Jersey City.** Tenure of office of firemen, under Laws 1885, p. 180.

State v. Jersey City Fire Comrs. (N. J.) 334

51. Lien of assessment for street improvement is paramount to that of a mortgage thereon.

Hand v. Jersey City (N. J.) 322

52. Under the charter of Jersey City (P. L. of 1871, p. 1155, § 151), the lien of an assessment for a street improvement, upon mortgaged premises, is paramount to that of the mortgage. *Id.*

53. Parties interested are not legally entitled to a hearing before the board of finance and taxation, upon the question whether that board shall concur in a resolution of the board of public works ordering a street improvement. The proceedings are regulated by P. L. 1874, p. 504, § 2.

State v. Jersey City (N. J.) 343

54. **New York city.** Bribery by member of common council, punishable under § 72 of the Penal Code.

People v. Jaehne (N. Y.) 163

55. The determination of the commissioners appointed under the Act of 1872, chap. 580, "In relation to Certain Local Improvements in the City of New York," that a contract is free from fraud, is conclusive as to the validity of the contract.

Re Johnson (N. Y.) 303

56. Prohibition against depositing in the port of New York any dredging or other material within certain limits. Laws 1881, chap. 344.

Post v. Kreischer (N. Y.) 213

57. Assessments for repaving; petition of the majority of property-holders required.

Jez v. New York City (N. Y.) 730

58. Under Laws 1858, chap. 338 (N. Y. City Consolidation Act, Laws 1853, chap. 410, § 386), conferring the right to maintain a proceeding to reduce an assessment upon any person "aggrieved thereby," legal ownership of the

seized property is not essential. One who holds title for another may maintain a proceeding to vacate an illegal assessment and for recovery of over payments.

Schulze v. City of New York (N. Y.) 518
59. Appeals from judgments of the City, late Marine, Court of New York.

Hutkoff v. Demorest (N. Y.) 773
60. **Paterson.** Right of mayor to reimbursements for expenses in resisting *mandamus*; validity of action of board of aldermen by majority of quorum present. P. L. 1871, p. 836, § 67.

Barnet v. City of Paterson (N. J.) 248
61. **Philadelphia.** City controller; discretion; *mandamus*.

Dechert v. Commonwealth (Pa.) 754
62. Claims for paving and curbing; frontage rule; rural property.

Stewart v. City of Philadelphia (Pa.) 674

63. **Trenton.** Proceedings to condemn land for street opening; meeting of assessors; report.

State v. City of Trenton (N. J.) 80

MURDER. See HOMICIDE.

MUTUAL ACCOUNTS. See ACCOUNT.

NAVY. See ARMY AND NAVY.

NEGLIGENCE.

I. WHAT IS; EVIDENCE.

II. OF RAILROAD COMPANIES

III. ACTIONS FOR DEATH.

See **ANIMALS; BRIDGES; CARRIERS, II.; MASTER AND SERVANT, II.; MILLS AND DAMS, 2-5; MUNICIPAL CORPORATIONS, V.**

I. WHAT IS; EVIDENCE.

1. The owner of a trestle who negligently leaves great masses of ore piled against one side of it in such a manner as to make it unable to bear the weight of a locomotive run upon it by the employees of a railroad company, in accordance with a contract between him and the railroad company for delivering to him ore cars, is liable in damages for the death of a member of the crew of the locomotive, resulting from the fall of the trestle and locomotive.

Pottstown Iron Co. v. Fanning (Pa.) 647

2. Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence on his part, he is not liable for damages to his neighbor occasioned by an explosion of his boiler.

Pa. Coal Co. v. Sanderson (Pa.) 484

3. A scintilla of evidence, or a mere surmise that there may have been negligence, is not sufficient to send the case to the jury. Authorities cited.

Dwight v. Germania L. Ins. Co. (N. Y.) 536

4. **Gross neglect** is defined to be the want of that care which an ordinary man of common

sense, under the circumstances, takes of his own property. Authorities cited.

Mark v. Hudson River Bridge Co. (N. Y.) 207

5. A man must use his property so as not to incommode his neighbor; but the maxim only extends to neighbors who do not interfere with or enter upon it. If it were not so, a proprietor could not sink a well, or dig a ditch, pit, or millrace, etc. Authorities cited.

Moore v. Logan Iron & S. Co. (Pa.) 506

II. OF RAILROAD COMPANIES.

6. What is or is not negligence in a particular case is generally a question for the jury. Authorities cited.

Neslie v. Second & Third Sts. Passenger R. Co. (Pa.) 700

7. Where a passenger rides, without pay, with another who is driver of a team, exercising entire control over it, and who is in no sense the passenger's agent or servant, the negligence of the driver or his knowledge of the defective condition of the road, cannot be imputed to the passenger so as to bar an action by him against a negligent third party. The passenger is answerable for his own negligence only.

Borough of Carlisle v. Brisbane (Pa.) 508

8. Where goods in the hands of a common carrier are injured by the negligent act of a third party, to which the negligence of the carrier contributed, and an action is brought by the owner against the third party, the carrier's contributory negligence is a good defense. Authorities cited. *Id.* 511

9. Where a passenger is personally injured by the joint negligence of the carrier and another party, his remedy is against his carrier alone. Authorities cited. *Id.*

10. The passenger is so far identified with the carriage in which he is traveling that want of care on the part of the driver will be a defense of the owner of the other carriage that directly causes the injury. Authorities cited. *Id.*

11. Where a lady accepted an invitation to ride in a buggy with a person who was entirely competent to manage a horse, but she was injured by collision with a steam railroad train, it was held that she was entitled to recover if the company was negligent and the plaintiff free from negligence herself, although the driver of the buggy might have been guilty of negligence which contributed to the injury. Authorities cited. *Id.* 513

12. Where a passenger in a street railway car was injured by a collision with a steam railroad train, — *Held*, in order to recover against the company operating the steam railroad train, the plaintiff must show not only that the injury resulted from defendant's negligence, but that the negligence of the carrier company did not contribute to the result. Authorities cited. *Id.* 511

13. Where the facts are disputed, where there is any doubt or inference to be drawn from them, or where the measure of duty is ordinary and reasonable care, and the degree varies according to the circumstances, the ques-

tion cannot be considered by the court; it must be submitted to the jury. Authorities cited.

Lehigh Valley R. R. Co. v. Greiner (Pa.) 901

14. Contributory negligence, to prevent recovery, must be such as co-operates in causing the injury and without which the injury would not have happened. Authorities cited. *Id.*

15. It is the plain, imperative duty of the traveler, before crossing the track of a railroad, to stop, look, and listen for approaching trains; and his failure to do so in case of injury has been declared not to be evidence of negligence merely, but negligence *per se*, and therefore a question for the court. Authorities cited. *Id.*

16. Where a passenger, owing to the crowded condition of the cars, was unable to find a seat, although there was standing room inside, stepped outside upon the pretense of finding a seat in another car, but remained upon the platform, where by a jolt of the cars he was thrown to the ground and injured, —Held, he was guilty of contributory negligence. Authorities cited. *Id.* 902

17. It is the duty of the engineer when his train is approaching a highway, if danger is to be apprehended, to give the proper warning by the whistle or otherwise, and a failure to do so is negligence *per se*. Authorities cited. *Id.*

18. Where a passenger was passing over a bridge, —Held, it was negligence on the part of the engineer of a train passing under the bridge to sound the alarm whistle. Authorities cited. *Id.*

19. Where a boy, at the request of a fireman, climbed upon a locomotive, and was thrown off by a jar, it was held that the company owed him no duty. Authorities cited.

Moore v. Logan Iron & S. Co. (Pa.) 506

20. A person crossing a railroad track by a common and well known foot path, used by the public for many years without let or hindrance on the part of the railroad company and its employees, is not a trespasser.

Taylor v. Del. & H. O. Co. (Pa.) 628

21. While user by the public, for many years, of a path across a railroad track, does not convert the company's right of way into a public highway, it implies a license from the company, and charges the company with the duty of using ordinary care toward those crossing by the path. *Id.*

22. Whether public user of a path across railroad tracks exists, and whether the company exercised ordinary care, as regards speed and signals in a given case, or was guilty of negligence, which was the proximate cause of the injury, are questions of fact for the jury. *Id.*

23. Contributory negligence is not a defense to an action for injuries to a child, eight years of age, who is crossing the track by a foot path used by the public for years. *Id.*

24. Where a mother sent her daughter, who was four years of age, to do an errand across

the street, and the child was injured by a passing horse car, while crossing the street at a crossing where people were accustomed to cross and at which there was no special hazard, —Held, in an action brought by the child by her next friend that the contributory negligence, if any, of the mother will not bar recovery by an infant, and that the question of negligence on the part of the driver was properly left to the jury, it appearing that the driver was charged not only with driving the horses, but also collecting fare, no change box being in the car; that before reaching the crossing he had given his attention to passengers; that by his own testimony he did not see the child though he was looking ahead; and other persons saw the child in danger and endeavored to get the driver to stop.

Erie City Passenger Co. v. Schuster (Pa.) 919

25. Where the defendant, discharging his duties carefully, could have avoided injuring a child, no amount of negligence by the child's parents is a defense. Authorities cited. *Id.* 921

26. While a father could not recover for the injury of his infant son, caused in part by his own imprudence, yet the infant himself may recover. Authorities cited. *Id.*

27. The contributory negligence of a parent will not bar recovery by an infant, for injuries resulting from the negligence of another. Authorities cited. *Id.*

28. Where an injury is inflicted wilfully, or with reckless indifference to the rights of others, exemplary damages may be recovered.

Lake Shore & M. S. R. Co. v. Rosenauig (Pa.) 712

29. The question of contributory negligence is for the jury, where the evidence is conflicting. *Id.*

30. Where the only result of defects in a locomotive engine is to diminish its power, the responsibility of the railroad company for such defects is no greater than it would be in the case of a new engine of the same power as the defective engine at the time of an accident claimed to have been caused thereby.

Bajus v. Syracuse, R. & N. Y. R. R. Co. (N. Y.) 518

31. A railroad company is not bound to have at a given point an engine of sufficient power to avert the consequences of an accident which it had no reason to anticipate. *Id.*

32. In an action to recover damages from a railroad company for the death of a person found mortally injured on the track, under a highway bridge built by the company, and which it was required to maintain, the negligence of the company was alleged to consist in the unsafe condition of the approach to the bridge; there was, however, no evidence that the deceased was on the bridge, or was seen going in that direction before his injury. Held, that there was nothing to connect the injury with the condition of the bridge, or with the failure of the company to perform its duty to restore the highway to

a proper state or to make the passage of the bridge safe, and hence, that a verdict against the company could not be sustained.

Gardiner v. N. Y. C. & H. R. R. Co. (N. Y.) 785

83. A conductor's written statement giving details of an accident, made immediately after it happened, is **not admissible** in evidence; but the facts must be proved by the conductor or others who witnessed the occurrence. Conductor may use such written statement to refresh his memory.

North Hudson Co. R. Co. v. May (N. J.) 81

84. The driver of a vehicle rightfully using a street railroad track as a part of the public street is entitled to notice that the company required the track for its car, before he is obliged to leave the track. Where plaintiff was driving on the main track and suddenly a car was moved on a spur track,—*Held*, the case was properly submitted to the jury to determine whether, under the facts, the safer and more prudent course for plaintiff to have pursued to avoid collision was to attempt to get off the track, or to quicken his speed and pass before the car reached the main track, and the fact that plaintiff urged on his horses, and failed to reach a point necessary to avoid a collision by about a foot did, not constitute evidence of contributory negligence. Paterson, J., dissenting, that it appeared that plaintiff had sufficient notice of the approach of the car, was an expert in driving horses, familiar with the locality, and with proper caution could have avoided a collision.

Orange & N. Horse R. R. Co. v. Ward (N. J.) 825

85. If it appears from plaintiff's evidence that his **own negligence caused the injury** of which he complains, or contributed to it in such way that but for it he would not have received harm from defendant's negligence, the court should nonsuit, and error may be assigned upon its refusal. Authorities cited. *Id.* 826

III. ACTIONS FOR DEATH.

86. An action to recover damages for causing death by negligence is not within supreme court Rule 16, requiring certain actions to be styled, in the process and pleadings, actions of tort.

Van Blarcom v. D. L. & W. R. R. Co. (N. J.) 565

NEW TRIAL. See CRIMINAL LAW, IV.

NEXT OF KIN. See DESCENT AND DISTRIBUTION, 2, 9, 10.

NONRESIDENTS. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 5, 6.

NONSUIT. See NEGLIGENCE, 6, 13, 14, 22, 24, 27, 35.

1. If the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the duty of the court to direct the verdict; it is not the rule that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a dem-

o. R., V. IV.

onstration of its incorrectness, a question is raised which must be left to the jury. Authorities cited.

Dwight v. Germania L. Ins. Co. (N. Y.) 586

2. Since the **scintilla doctrine** has been exploded both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to justify the jury that the fact sought to be proved is established. Authorities cited. *Id.*

NOTARY PUBLIC.

The validity of the execution of a commission to take testimony is not affected by the fact that the commissioner signs himself throughout as a notary public merely, except across the seal of the envelope in which he returns the testimony.

Del. & H. O. Co. v. Webster (Pa.) 638

NOTICE. See VENDOR AND PURCHASER, 5-8.

NOVATION. See RECEIVER, 3.

NUISANCE.

1. The statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury.

Cogswell v. N. Y. N. H. & H. R. R. Co. (N. Y.) 225

2. Assuming that the general power given by the Laws of 1848, chap. 143, § 6, to the New York & New Haven R. R. Co. to run its trains into New York city over the New York & Harlem Railroad includes, as incidental thereto, the power to purchase land for an engine house, it does not sanction the maintenance of the nuisance, injurious to private property, resulting from the building and use of an engine house, as by extending smokestacks so as to cause smoke, gases, etc., to enter a private dwelling, rendering it untenable. *Id.*

3. Statutory authority may justify acts which otherwise would give a cause of action. Authorities cited. *Id.* 229

5. A party who is specially injured is entitled to an injunction to restrain a nuisance, as the unlawful occupation of a street by a railroad, without proving the amount of damage.

Pa. R. R. Co. v. Mish (Pa.) 276

6. In an action for damages for a continuing nuisance (here, the interference with the natural flow of water by the maintenance of a dam), plaintiff may, under the Act of May 2, 1876 (P. L. 95), permitting the recovery of damages up to the day of trial, give in evidence the condition of the obstruction up to the day of trial, including all additions, changes, and repairs made after suit brought.

Humphrey v. Irvin (Pa.) 685

7. One man cannot with impunity in-

vade the premises of another by a nuisance, because the damages may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of plaintiff's right. Authorities cited. *Id.* 687

OBSTRUCTIONS. See WAYS, IV.

OFFICE AND OFFICER. See CONSTITUTIONAL LAW, VI.; CORONER; CORPORATIONS, IV.; FIRE AND FIRE DEPARTMENTS; MANDAMUS, 8-8; MUNICIPAL CORPORATIONS, II.; POLICE AND POLICE DEPARTMENTS; RAILROAD COMPANIES, 8; RECEIVER; SHERIFF; STATE AND STATE OFFICERS.

1. It seems that the general principle, that where an officer is required by law to perform a duty involving the disbursement of money out of pocket he must be reimbursed, should be applied to the case of the mayor of a city seeking reimbursement from the city for his expenditures in resisting successfully an application for a mandamus against him, made on behalf of the city, to compel his official action in aid of an illegal corporate enterprise.

Barnet v. City of Paterson (N. J.) 248

2. While a police officer may come within the rule that a person holding a public office has a *prima facie* right to his salary, although physically disabled from performing his duties, but where a municipal regulation provided that an officer absent from duty without leave, should forfeit all pay during his absence, except when sick and so certified by a physician, there can be no recovery during absence from sickness without the certificate of a physician.

City of Wilkesbarre v. Meyers (Pa.) 820

3. An order of court, under Act April 10, 1878, fixing compensation of incumbent sheriff, for boarding prisoners, at one sum for one year and at a less sum for another year, during his term of office, does not violate Constitution, art. 8, § 18, prohibiting the increasing or diminishing of salary or emoluments of any public officer after his election or appointment, notwithstanding a prior order made during his term, fixing the compensation for the past services of his predecessor.

Peeling v. County of York (Pa.) 87

4. The compensation ordered to be paid to the sheriff, by law, for the board of prisoners in the county jail, is an emolument of his office, within the Constitution, art. 8, § 18. Authorities cited. *Id.* 88

5. The Act of March 28, 1877, authorizing any of the prothonotaries and sheriffs of the several counties of the Commonwealth, within six years after the expiration of their official term of office, to sue any one residing out of the county, before a justice of the peace within the county, for fees for official services, before or after judgment; authorizing constables to appoint deputies (in the county where the defendant resides) to execute the writ; providing for execution in any county in the Commonwealth, and making a certificate of the prothonotary of the county where suit is brought *prima facie* evidence that such fees are lawfully due and correct, — Held, to be *spe-*

cial legislation and unconstitutional, under the Constitution, art. 8, § 7.

Strine v. Foltz (Pa.)

283

6. A power to remove an officer "for cause" can be exercised only for good cause, and after the officer has had an opportunity for defense. Authorities cited.

State v. Police Comrs. of Newark (N. J.) 573

OIL. See MINES AND MINING, 18-21.

OLEOMARGARINE. See ADULTERATION.

OPINIONS. See EVIDENCE, V.

ORPHANS' COURTS. See COURTS, 10-18.

OYSTERS. See FISH AND FISHERIES.

PARENT AND CHILD.

The Act of April 8, 1883, allowing after-born children to take against the will, applies only to those physically born after the execution of the will, and does not apply to those legitimated after the making of the will.

Appeal of McCulloch (Pa.)

466

PAROL EVIDENCE. See EVIDENCE, III.

PARTITION.

1. A bill in equity for partition of lands may be maintained by a party holding an equitable title against a party in possession holding the legal title.

Appeal of Church (Pa.)

95

2. In a bill in equity against husband and wife to establish title to real estate and to compel conveyance of the wife's title, the wife died without having executed a decree ordering conveyance. A bill for partition against the husband and surviving child was sustained, and a conveyance ordered. *Id.*

3. In an action at law for partition, possession adversely held, for however short a time, will prevent recovery; for an action of partition cannot be turned into an ejectment, nor made the medium of trying titles. Authorities cited. *Id.*

4. A suit in equity for partition may become the medium of settling a disputed equitable title. Authorities cited. *Id.*

5. Jurisdiction of partition in equity grew up to supply defects and inadequacies in proceedings for partition at common law. Authorities cited. *Id.*

6. Partition may be maintained where the plaintiff has such an equity as would entitle him to compel a conveyance. Authorities cited. *Id.* 96

7. Plea of being a purchaser for value without notice is equitable in its nature; it is simply the assertion of a superior title. Authorities cited. *Id.* 97

8. The Act of March 29, 1883, charges a widow's dower on the land, in partition proceedings; and the orphans' court cannot divest the dower, by decree or otherwise,

unless the widow's consent is procured in such manner as to pass her estate. Mere knowledge on her part will not operate as an estoppel.

Diefendorfer v. Eschleman (Pa.) 290

9. **Owerty**, decreed by the common pleas in partition proceedings in equity and charged on the land allotted, is **subject to the lien of a mortgage** of the undivided interest for which it is payment; and the cotenant to whom the land is allotted must either make application to pay the money into court, or else pay the mortgage debt.

Reed v. Fidelity Ins. T. & S. D. Co. (Pa.) 763

10. A **release of the land by the mortgagor**, in accordance with the decree, **upon payment of the owerty** to him, does not prevent the mortgagee from afterwards recovering the mortgage debt from the cotenant to whom the land was allotted. *Id.*

11. The husband of a tenant in common of coal bearing lands, in a city, built a dwelling-house and buildings for mining and selling coal. A bill in equity for partition was filed, after the wife's death, against the husband and their minor child. On the master's report, the court determined the undivided interests of the cotenants and decreed that partition should be made. Before commissioners to divide, evidence as to the **improvements** was received, and the lands containing the improvements were allotted to the husband and minor child at a valuation not including the improvements. *Held*, proper.

Kelsey v. Church (Pa.) 99

12. A bill of review, to correct a clear mistake in fact on which a decree in partition was made, will lie more than three years after the decree was made. Authorities cited.

Appeal of Johnson (Pa.) 895

PARTNERSHIP.

1. Where, in an action seeking to hold certain parties liable as copartners with the party (here, a corporation) to whom goods had been sold, it appears from the contract between defendants and the vendee that, as between themselves, they were not copartners, it is essential to a recovery to show that defendants held themselves out as copartners with the vendee, and that the vendee obtained credit on that account.

McLewes v. Hall (N. Y.) 868

2. Under a complaint seeking to hold one liable as a partner for goods sold to another, **proof of defendant's liability as purchaser and original debtor** cannot be given without an **amendment of the complaint**. *Id.*

3. **Administrators** cannot maintain a bill to have their **coadministrator account** for the "**good will**" of their intestate's business continued by their coadministrator with their consent, all the administrators being equally in the wrong for not turning such good will into cash as an asset of the estate.

Fay's Admrs. v. Fay (N. J.) 241

4. Payment for the "**good will**" of a business must be claimed at the time of the transfer of the business. *Id.*

5. To recover for the "**good will**" of a business transmitted from one person to another, C. R., V. IV.

other, it must appear affirmatively that there was a "**good will**" connected with the business, of some value in itself. Proof merely that the business is profitable is not enough. *Id.*

6. **One partner cannot sue** another partner for a partnership transaction **except by bill in equity** or action of account render. Authorities cited.

Crow v. Greene (Pa.) 276

7. If certain members of a firm make a **settlement** of a firm claim which will be binding as between the firm and the party with whom it is made, a **member of the firm** who had no part in making the settlement, and who was **defrauded** thereby, may, nevertheless, maintain an **action for damages** for the fraud; such damages being limited to the diminution of his partnership share produced by the waste of partnership assets in the fraudulent settlement.

Sweet v. Morrison (N. Y.) 812

8. The amount of such **damages** due the defrauded partner can only be **ascertained** in a proceeding for an **accounting** between him and his copartners; and thereafter the **third party** with whom the **fraudulent settlement** was collusively made can be compelled to pay him only what is required, after the exhaustion of the firm assets, to make up to him such loss as can be traced to the waste of the disputed asset by his copartners in collusion with said third party. *Id.*

9. **One partner appointed to conduct financial settlements** of the firm cannot substitute one of his copartners in his place, to the exclusion of the others; but when he surrenders control, it goes back to the firm as a whole; and a settlement made by his copartners binds the firm. *Id.*

10. An **agreement** between copartners, that **one of them shall conduct the financial settlements** of the firm, should not be construed as abrogating or dividing the general partnership authority and as giving the one partner absolute control of such branch of the business, unless such intention is clearly shown. *Id.*

11. That a deed of assignment of a **limited partnership** was at first indexed in the "Limited Partnership Docket," and not in the "Deed Book Index," does not invalidate the **recording** of the instrument.

Sheble v. Bryden (Pa.) 664

12. **Evidence as to the value of services**, and as to whether they were rendered as partner or as employee, examined, and held that, although some of the services related to partnership property, others did not, and a recovery sustained. *Rapallo and Andrews, JJ.*, dissenting.

Johnson v. Myers (N. Y.) 778

PARTY-WALL.

In an action for **damages on a bond**, in proceedings to **restrain tearing down** an alleged party-wall, preparatory to building a new building, **evidence** is admissible, to disprove damages, that the new building erected beside the old wall could have been.

erected without any detention, with the old wall standing.

Senseng v. Parry (Pa.)

48

PASSENGERS. See CARRIERS, II.

PATENTS.

1. It appearing from the bill that an application for a patent was filed in the patent office in 1874, and definitively refused by decision of the commissioner in 1875; that no appeal therefrom to the Supreme Court of the District was taken, but that various efforts for the review and reversal of said decision were made from time to time; that in 1885 another application was filed in the patent office, which was again rejected for the same cause; that from this last refusal no appeal was taken, but in 1886 a bill in equity, under section 4915, R. S., was filed in the Supreme Court of the District of Columbia, the secretary of the interior being joined with the commissioner of patents as a party defendant,—on demurrer to the bill it was *Held*:

(a) That an applicant for patent is not, in an *ex parte* case, entitled to redress by bill in equity, until he has exhausted the remedy by appeal provided in section 4911, R. S.;

(b) That this application for patent was constructively abandoned in 1877, under section 4895, R. S., because the various efforts to procure a reversal of the decision of 1875, and the application filed in 1885, were irregular and illegal proceedings, not contemplated by said section;

(c) That the secretary of the interior may not be made a party defendant to the bill.

Kirk v. Commissioner of Patents (D. C.) 625

2. Drilling jar of combined iron and steel, the object being to avoid friction and to obtain tensile strength, will not include drilling jar of steel.

Dick v. Bovaird (Pa.)

44

3. Equity has jurisdiction to compel an accounting and discovery in aid thereof, and to restrain the manufacture of other than a patent article in violation of the terms of a written contract.

Bovaird v. Dick (Pa.)

40

4. In a bill for an account of royalties on patented articles manufactured, articles made in violation of the agreement, but not under letters patent, cannot be included in the account.

Dick v. Bovaird (Pa.)

44

5. Contract to render patentee monthly statements of all articles made during the previous month and to whom sold, with an agreement to pay royalty for each article so made, will not include unmerchantable articles.

Id

6. A contract for the manufacture of a licensed article, giving licensors the option to terminate it and declare the license forfeited at any time when licensees shall make default in making the statements and payments required of them by the contract, cannot be rescinded by licensees' refusing the statement. The licensees are liable as long as they manufacture during the continuance of the patent.

Bovaird v. Dick (Pa.)

40

7. In an action to enforce a contract granting a license to manufacture a patented article, it is no defense to allege that plaintiff had no right to the patent or to grant the license to others.

Id

PAUPERS. See POOR AND POOR LAWS.

PAYMENT. See BANKRUPTCY, 1; BILLS AND NOTES, 1; CHECKS; JUDGMENT, 18; LIEN, 2, 8; LIMITATION OF ACTIONS, 5-8; MORTGAGE, V.; PRINCIPAL AND AGENT, 5-8.

1. When a creditor has received more than was due him from his debtor, the excess is deemed so much money of the debtor in the hands of the creditor for the use of the debtor; and if, on a subsequent transaction between the parties, the debtor becomes again indebted, such excess will be presumed to have been applied by the creditor upon the subsequent indebtedness when it accrued, and the debtor will not be deprived of the benefit of such application by force of the Statute of Limitations, in an action by the creditor for the entire indebtedness.

Andrews, J., dissenting.

180

2. A judgment in an action of tort, to recover money alleged to have been obtained by fraud, is not a bar to a subsequent action to recover the same money, on the ground that it had been made under a mistake of facts.

Id

8. Where a cashier's check is given by a debtor to a creditor for a pre-existing debt, the presumption of law is that it was intended only as a conditional payment. Surrender by the creditor of the note of the debtor will not overcome such presumption.

Cannonsburgh Iron Co. v. Union Nat. Bank (Pa.)

258

4. Receiving promissory notes on account of a claim will not imply an extension of the time of payment or an agreement to sever the debt, in an action on a book account.

Buck v. Wilson (Pa.)

648

5. A debtor making a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt it shall be applied; if he simply hands the money over to his creditor, without direction as to its application, his creditor may apply the money as he pleases; and if neither party has exercised his right of appropriation, and a dispute subsequently arises, the court will make the appropriation, and in so doing, will, as a rule, apply the payment to the debt which is the least secure. Authorities cited.

Leeds v. Gifford (N. J.)

150

PENALTY. See SUNDAY; USURY, 2.

1. The Amendment of 1879, to the charter of the city of Auburn (Laws 1879, chap. 53, title 7, § 771), creating a board of charities and police with the powers of overseers of poor in towns, did not give such board the powers to sue for penalties for violations of the excise law; but such penalties are to be recovered in the name of the board of commis-

sioners of excise, under the general provision of the Laws of 1878, chap. 109, that where there is no overseer of the poor such penalties shall be sued for and recovered by and in the name of the board of commissioners of excise.

City of Auburn v. Burtis (N. Y.) 285

2. An action seeking to make a trustee of a manufacturing corporation personally liable for a debt of the corporation, on the ground of failure to make the annual report required by statute, is an action for a penalty; and therefore, under Code of Civil Procedure, §§ 528, 887, the verification of the answer therein may be omitted.

Gadsden v. Woodward (N. Y.) 208

PERJURY.

1. An oath to a bill not required to be sworn to does not render party so swearing liable to penalties of perjury for false statements contained therein.

Porter v. White (D. C.) 151

2. The fact that one swears falsely does not, alone, amount to probable cause on which to base a prosecution for perjury; but that fact, taken with the fact that prosecutor acted upon advice of counsel that perjury had been committed, will amount to probable cause.

Id.

PETROLEUM. See GAS COMPANIES, 8; INSURANCE, 14; MINES AND MINING, 18-21.

PHOTOGRAPHS. See EVIDENCE, 13.

PLEADING.

I. COMPLAINT; GENERAL RULES.

II. PLEAS.

III. DEMURRER.

IV. AMENDMENT.

See AFFIDAVIT OF DEFENSE; EQUITY, III.; MORTGAGE, 28; NEGLIGENCE, 86; PARTNERSHIP, 2.

I. COMPLAINT; GENERAL RULES.

1. An action to recover damages for causing death by negligence is not within supreme court Rule 16, requiring certain actions to be styled, in the process and pleading, actions of tort.

Van Blarcom v. D. L. & W. R. R. Co. (N. J.) 565

2. An action seeking to make a trustee of a manufacturing corporation personally liable for a debt of the corporation, on the ground of failure to make the annual report required by statute, is an action for a penalty; and therefore, under Code Civil Procedure, §§ 528, 887, the verification of the answer therein may be omitted.

Gadsden v. Woodward (N. Y.) 208

3. Facts offered in evidence to prove an issue are not themselves in issue, and the judgment is no evidence in regard to them. Authorities cited.

Belden v. State (N. Y.) 183

II. PLEAS.

4. A plea bad for duplicity is properly
C. R., V. IV.

taken advantage of by motion to strike out.
Polak v. Hudson (N. J.) 565

5. The rule that upon demurrer judgment shall go against the party whose pleading is first defective does not prevail on motion to strike out a plea. *Id.*

III. DEMURRER.

6. An objection that an action in tort is not styled as required by Rule 16 of the supreme court may be raised by a general demurrer.

Van Blarcom v. D. L. & W. R. R. Co. (N. J.) 565

7. Where specifications of the grounds of objection are subjoined to a demurrer, the party demurring will, at the argument, be confined to such grounds.

State v. Ocean Beach Comrs. (N. J.) 85

IV. AMENDMENT.

8. Under a complaint seeking to hold one liable as a partner for goods sold to another, proof of defendant's liability as a purchaser and original debtor cannot be given, without an amendment of the complaint.

McLewes v. Hall (N. Y.) 868

9. The Newark District Court has power to amend during trial, by changing the action from case to trespass, and by adding a plaintiff.

State v. Winkler (N. J.) 250

PLEDGE AND COLLATERAL SECURITY.

1. After the lapse of more than twenty years there is a presumption that the apparent title of the assignee of corporate stock is the real title; and where all parties interested on the part of the assignor acquiesced in the assignee's title, and neglected to assert the contrary for that length of time, they should not be permitted, after the assignee's death, to maintain the claim that the stock was assigned as collateral only, without the fullest measure of proof.

Lookwood v. Brantly (N. Y.) 703

2. The deposit of negotiable railroad bonds, with a bank, as collateral security for a debt, passes the title, as against the bank, notwithstanding the antecedent pledge of the same stock.

Gibson v. Lenhart (Pa.) 105

3. Delivery to the bank, depositor, is delivery to the pledgee. Authorities cited. *Id.*

4. Evidence of the antecedent pledge is inadmissible, in an action of replevin against the bank for the bonds, in the absence of *mala fides* or notice of the pledge on the part of the plaintiff. *Id.*

5. Where the bonds were deposited in the bank in a package, indorsed with the pledgee's name, the bank is estopped, in an action of replevin for the bonds, from alleging that the bonds in the package are not the original bonds pledged to the plaintiff. *Id.*

6. The question being whether one who had received a promissory note, made by a

principal debtor and sureties, on paying certain judgments against the principal debtor (to the rights under which as against land of the debtor he became subrogated) took such note as additional to the claims under said judgments, with the right of applying it on other claims held by him against said debtor; or whether such note was merely collateral to the claims under said judgments.—*Held*, on the facts that the note was collateral only, and that, after the payee therein had been reimbursed for his payments on said judgments, he should be restrained from proceeding, under a judgment recovered by him on said note, against land of a surety thereon.

Burd v. Keyser (N. J.)

245

7. A draft drawn upon a fund not then in existence, and the value of which depended upon the result of a pending lawsuit,—*Held*, upon the evidence, to have been given as additional security for an existing indebtedness, and not in payment thereof.

Adams v. Mahnen (N. J.)

385

POLICE AND POLICE DEPARTMENTS.

1. A charge against a policeman for incapacity, based on the report of the examining physician and made by the direction of the commissioners, is for good cause and in proper form, within Statutes May 2, 1885 (L. p. 826), March 25, 1885 (L. p. 163), February 23, 1886 (L. p. 48).

State v. Comrs. of Newark (N. J.)

571

2. A reasonable notice of charges and a fair hearing and investigation, without formality in the procedure, are all that is required under Acts of May 2, 1885 and Feb. 23, 1886.

Id.

3. The court, on certiorari, will not weigh the evidence. It is sufficient if there is a legal and substantial basis for removal, on which the commissioners acted within their authority.

Id.

4. Police officers, serving under the appointment and authority of the board of police commissioners, are not in a position to question the constitutionality of the Act constituting the board, on certiorari in proceedings for removal.

Id.

5. While a police officer may come within the rule that a person holding a public office has a *prima facie* right to his salary, although physically disabled from performing his duties, where a municipal regulation provided that an officer absent from duty without leave should forfeit all pay during his absence, except when sick and so certified by a physician, there can be no recovery during absence from sickness without a certificate of a physician.

City of Wilkesbarre v. Meyers (Pa.)

320

6. In proceedings for removal of policemen in cities, under Act of March 25, 1885, the formalities prescribed for inferior criminal prosecutions are not requisite. It is sufficient if statutory directions are substantially observed.

State v. Mayor of Camden (N. J.)

82

7. Section 8 of the charter of Gloucester city (Laws 1868, p. 106), gives to the com. c. R., v. IV.

mon council power to pass ordinances for appointing watchmen, constables and an additional police force, and prescribing their powers and duties. They have never passed such ordinance. *Held*, that the prosecutor, who was appointed a policeman by resolution was appointed without authority, and is removable at the discretion of council, and is not entitled to notice of removal and hearing, under Act of March 25, 1885, respecting police departments of cities, and regulating the tenure and terms of office.

State v. Gloucester City (N. J.)

573

POLICE POWERS. See CONSTITUTIONAL LAW, V.

POOR AND POOR LAWS.

1. To gain a legal settlement, under the first clause of § 1 of the Poor Act (Rev. 834), the pauper must have been seised of a freehold estate, of the value of \$180, and have dwelt thereon, or in the township in which the estate was situate, for one continuous year. Mere absence for business or pleasure of a temporary character, with the intention of returning, will not break the continuity of such dwelling.

State v. Inhab. of Shrewsbury (N. J.)

424

2. The Amendment of 1879 to the charter of the city of Auburn (Laws 1879, chap. 53, title 7, § 71), creating a board of charities and police with the powers of overseers of the poor in towns, did not give such board the power to sue for penalties for violations of the excise law; but such penalties are to be recovered in the name of the board of commissioners of excise, under the general provision of the Laws of 1878, chap. 109, that where there is no overseer of the poor, such penalties shall be sued for and recovered by and in the name of the board of commissioners of excise.

City of Auburn v. Burtis (N. Y.)

235

3. Where complainant gave to a township his bond and mortgage to indemnify it for the support of his wife while she should be chargeable to the township, and the township received moneys thereon, and complainant demanded an account thereof, he is entitled to maintain a bill in equity against the township for the amount and for the payment of whatever may be due to him.

Inhab. of North Plainfield v. Colthar (N. J.)

818

POWER OF SALE. See DEVISE AND LEGACY, VIII.

PRACTICE. See APPEAL, II.; EXCEPTIONS; EXECUTION; INSOLVENCY.

PRESUMPTION. See EVIDENCE, I.; LIMITATION OF ACTIONS, I.

PRINCIPAL AND AGENT. See ATTORNEY AND CLIENT; AUCTIONEER; BAWDY AND DISORDERLY HOUSES; INSURANCE, 1-8; SPECIFIC PERFORMANCE, 6; USURY, 1.

1. A, learning B was about to advertise for bids, induced each of several dealers separately to promise him a commission on his secur-

ing a sale from such dealer to B. He did not inform any of them of the name of purchaser or of competitive bidding and submitted a bid himself. *Held*, he was not entitled to a commission from dealer obtaining contract, there being no consideration for the promise to pay him a commission; and that the agreement therefor was void by reason of the fraudulent suppression of material facts on his part and as *contra bonos mores*.

Murray v. Beard (N. Y.) 129

2. If an agent acts adversely to his employer in any part of a transaction, or omits to disclose any intent which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services. Authorities cited. *Id.* 180

3. An agent cannot take upon himself incompatible duties and characters, or act in a transaction where he has an adverse interest or employment. Authorities cited. *Id.*

4. A commission merchant is not entitled to commissions on the sale of goods consigned to him, unless he has in all things performed his duties as consignee in a proper manner.

Zurn v. Noedel (Pa.) 658

5. Where one enters into a contract for the purchase of lands, with the agent of the vendor, and makes a payment to such agent upon his promise to return the money in case his principal's title was not good, and the sale falls through because the vendor had not a good title, such agent is liable for the return of the money.

Read v. Riddle (N. J.) 819

6. Where the agent of one party receives money from another, and the transaction is not completed, so that the payee is entitled to recovery, if the agent misleads the payer by giving him to understand that he has not paid over the money, and thereby induces him to sue for its recovery, the agent will be precluded from setting up as a defense that he has paid it over to his principal. Authorities cited. *Id.* 820

7. Where payment of money, through a mistake in fact, is made to an agent, he is liable to the payer, unless without notice, he has paid it over to his principal or has given him credit for it. Authorities cited. *Id.*

8. Where an agent, being a stakeholder, receives a deposit before the conditions on which it is to be paid are fulfilled, he is liable for the deposit. Authorities cited. *Id.*

PRINCIPAL AND SURETY. See BONDS, 2, 3, 8; GUARDIAN AND WARD, 15.

1. The facts that a tax collector reappointed to office was, at the time, in default under a former appointment, and that the sureties on his new bond were not notified by the appointing authorities of his existing defalcations, will not avail as a defense to the sureties.

Myers v. State (Md.) 844

2. Sureties on an official bond are estopped. C. R., V. IV.

from denying the official capacity of their principal. *Id.*

3. The surety seeking contribution need not make demand nor give notice, before filing his bill.

Wyckoff v. Gardner (N. J.) 181

4. Where the surety seeking contribution holds a claim against the principal, he need not realize thereon in the first instance, but may proceed against his cosureties at once, and if he does realize anything on the claim he must share it with the cosureties who have contributed. *Id.*

5. Payment, by one surety on a sheriff's bond, of judgment recovered thereon, under a statutory order directing the prosecution of the bond, and enforced by execution, will entitle him to contribution from his solvent cosureties. *Id.*

6. A discharge in bankruptcy, prior to the accruing of the liability on which contribution is sought, will not avail a cosurety sued for contribution. *Id.*

7. The estate of a deceased cosurety is liable to make contribution, whether he died before the liability arose or after. Authorities cited. *Id.*

8. The obligors in a bond for the performance of a contract are released from liability by a new contract in relation to the same subject-matter, with different security, entered into by the parties after breach of the old contract and before notice or demand upon them.

Whelen v. Boyd (Pa.) 651

PRISON. See JAIL AND JAILER.

PRIVATE WAYS. See WAYS, V.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROHIBITION, WRIT OF.

The Supreme Court of the District of Columbia has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of courts-martial.

United States v. Whitney (D. C.) 154

PROMISSORY NOTES. See BILLS AND NOTES.

PROPERTY.

As a general proposition it is safe to say that the owner of land has a right to make reasonable use of his property, and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. Authorities cited.

Pa. Coal Co. v. Sanderson (Pa.) 484

PROSTITUTION. See BAWDY AND DISORDERLY HOUSES.

PROTHONOTARY. See JUDGMENT, 1.

PUBLIC OFFICER. See OFFICE AND OFFICER.

QUIETING TITLE. See CLOUD ON TITLE.

QUI TAM AND PENAL ACTIONS.

See PENALTIES.

RAILROAD COMPANIES.

- I. FRANCHISES; CONSOLIDATION; LEASES.
- II. EMINENT DOMAIN; CONSTRUCTION OF ROAD; DAMAGES.
- III. OFFICERS.
- IV. STATE COMMISSIONERS.
- See CARRIERS; MASTER AND SERVANT, II.; NEGLIGENCE, II.; RECEIVER; TAXES, 16-30.
- I. FRANCHISES; CONSOLIDATION; LEASES.

1. When two corporations of different States become a consolidated corporation, such consolidated corporation, when acting in its corporate capacity in either of the States, acts under the authority of the charter of that State, and the legislation of the other State has no operation beyond its territorial limits.

Pittsb. & S. L. R. R. Co. v. Rothschild (Pa.) 107

2. A mortgage of the property of a corporation is an increase of its indebtedness and can be effected only in compliance with article XVI, section 7, of the Constitution and the Act of April 18, 1874. Otherwise the mortgage is void. *Id.*

3. Foreclosure proceedings in New York are ineffectual to pass title to property in Pennsylvania. *Id.*

4. A shareholder of the consolidated company who has accepted and disposed of bonds thus illegally issued, although he might be precluded from questioning the validity of the bonds and mortgage, may yet assert want of title in the purchaser of the corporate property situate in Pennsylvania and sold under the foreclosure proceedings in New York. *Id.*

5. A consolidated company stands in the same relation to each State as the original company in that State. Authorities cited. *Id.* 108

6. A railroad company negotiated, through another railroad company, for the purchase of a controlling interest in the stock of a parallel or competing line, the legal title of the stock to be held by the other railroad, but the consideration coming from the competing company. A preliminary injunction to restrain the execution of the contract was granted, and a decree entered continuing the injunction until final hearing was affirmed on appeal. Pa. Const. art. 12, § 4.

Pennsylvania R. R. Co. and North. Cent. R. Co. v. Commonwealth (Pa.) 501

7. A corporation authorized to make purchases and sales of and investments in the bonds and securities of other companies contracted for the purchase of a controlling interest in the stock and securities of a projected line of railroad, the consideration coming from another railroad company. The projected railroad had a traffic contract with a connecting railroad, by which the former, when completed, would become a parallel or competing line with the railroad furnishing the consideration. Art. 17, § 4 of C. R., v. IV.

Pa. Const. prohibits any railroad from acquiring or consolidating with a parallel or competing road. The consideration was to be the guaranteed bonds of an insolvent railroad company. The corporation in whose name the contract of purchase was made did not own or control a line which would be parallel or competing with the projected railroad. A preliminary injunction was issued after the securities were purchased and delivered to a party negotiating the transfer, but before they came into the hands of the stockholders. The injunction restrained the projected road from delivering the stock or securities, the other road from issuing or delivering the guaranteed bonds, and the railroad company furnishing the consideration or guaranty, from guaranteeing the bonds or obtaining in any manner the control of the stock, franchises, and property of the projected line. On review the decree continuing the preliminary injunction was affirmed.

Pa. R. R. Co. Bedford & B. R. R. Co. and Pa. R. R. Co. v. Commonwealth (Pa.) 495

8. If a contract obligation arises between a railroad company and a town bonded for its construction, for the maintenance of a depot, such obligation does not pass by the foreclosure of a mortgage on such railroad; nor does it devolve upon the successors of such company.

People v. Rome, W. & O. R. R. Co. (N. Y.) 197

9. A railroad company owned two lines of track to a certain village; it discontinued running trains upon the more direct line, which it had acquired by consolidation with another company, but ran trains upon the other line, which required the residents of said village to travel about two miles farther than by the more direct line, and to change cars at a different point. It appeared that the company maintained service between the termini of the road acquired by consolidation, and substantially performed its duties to the public at large. Held, that the facts did not warrant the issuance of peremptory mandamus, upon the application of the attorney-general, to compel the company to run trains upon the more direct line. *Id.*

10. Where a railroad company owns, by consolidation, two lines of road, and can substantially accommodate the people of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, it should not be compelled by mandamus to operate both lines at a great sacrifice of money. *Id.*

11. Whether a provision in the charter of a railroad company authorizing it to lease or consolidate with any other railroad, and authorizing any company to take such lease and operate the same, would be sufficient to confer such authority upon any railroad of the State, yet in the present case the title of the Act incorporating the Mays Landing & Egg Harbor City Railroad Company does not indicate such subject, and such provision of its charter is therefore void.

Camden & A. R. R. Co. v. Mays Land, & H. H. C. R. R. Co. (N. J.) 801

12. In an action for rent, due from Feb. 1881, to June 1, 1893, brought by defendant in error against plaintiff in error, upon a lease of defendant's road for the term of 999 years, where it appeared by its charter plaintiff in error had been authorized to construct a road over the same route, within ten years from Aug. 1, 1853, but had not exercised such power, that defendant's charter contained a provision authorizing it to lease its road or consolidate with any other railroad, thereby authorizing any such railroad to take and operate such lease, but the provision was void because the title of the Act did not embrace such subject and the Act embraced more than one object, so that the lease was *ultra vires*, yet,—*Held*, that the defense of *ultra vires* was not available in this action, it appearing that defendant in error had constructed its road in pursuance of a contract with plaintiff in error made in Nov. 1871, providing that it would guarantee its bonds and take a lease thereof for 999 years, and had since operated the road, and the annual reports of its directors since that time had referred to the contract and the performance of its terms from time to time, and shareholders had made no objection thereto. *Id.*

13. The power granted to a railroad company to construct a particular line of railroad carries with it by implication the right to purchase such line of railroad subsequently built by another corporation, and the right to lease for 999 years will coexist with the right to purchase. Authorities cited. *Id.*

14. Where a railroad company has made a lease *ultra vires*, such lessee will be estopped from questioning its validity in an action to recover the stipulated rent. Authorities cited. *Id.* 808

15. Where an assignee of a lease of a railroad for fifty years, together with the right of purchase of the fee at the end of the term, leased the road to defendant for ninety-nine years, reserving a different rent from that in the original lease, with a provision for reentry, but without an assignment of the right of purchase, and the defendant covenanted to surrender the premises at the end of the ninety-nine years to its immediate lessor, the instrument to defendant operated, as between the defendant and the original landlord, as an assignment of the term of fifty years, and during such term there was a privity of estate between defendant and the original landlord and the legal estate in reversion was in the original landlord during the fifty years; and he or those succeeding to his estate were both legally and equitably entitled to the rents, and had a right of action therefor directly against defendant. Finch, J., dissenting.

Stewart v. Long Island R. R. Co. (N. Y.) 115

II. EMINENT DOMAIN; CONSTRUCTION OF ROAD; DAMAGES.

16. A statute which authorized a railroad company to take lands for the construction of a railroad, with no other provision as to public highways except a requirement compelling it to make and keep in repair good and sufficient passages at the crossings of the high-

way, will not authorize the occupation of a public road longitudinally.

Pa. R. R. Co. v. Miah (Pa.) 276

17. One who has his dwelling fronting on a street unlawfully occupied by a railroad company,—*Held*, to be especially injured, and entitled to an injunction restraining the occupation of the street without power expressly given or necessarily implied in the functions of the company. *Id.*

18. A railroad company cannot appropriate and use a street or public highway for the laying of the tracks of its trunk line, switches, sidings or branches, unless the power is given expressly or by necessary implication. *Id.*

19. Bill in equity to enjoin construction of a railway track on a highway, and for other relief, will support a decree requiring removal of track laid after notice of the proceedings. *Id.*

20. A party who is specially injured is entitled to an injunction to restrain a nuisance, as the unlawful occupation of the street by a railroad, without proving the amount of damage. *Id.*

21. After a railroad company has made a location and damages have been assessed, it is too late to interpose an exception that it had subsequently adopted a new line on the same land. Authorities cited.

Funk's Admrs. v. Waynesboro School Dist. (Pa.) 800

22. The lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings; and then only for crossing purposes and not for exclusive occupancy.

Pittsburg Juno. R. R. Co's Appeal (Pa.) 263

23. Where the evidence is conflicting as to the necessity of land for the uses of a railroad, the courts will make allowance for the future needs of the road. *Id.*

24. The appellant railroad company should be restrained from locating its road across the premises of another railroad company, used as yards for repairing, storing, and shifting cars, etc., and large enough for the future needs of the road, the proposed line causing inconvenience and alterations in these premises, and there being another route by which the proposed line can be built, although at greater cost. Trunkey, J., dissenting, because the master's report shows the road could be constructed through the land claimed by plaintiff company as a yard, and the injury compensated by damages. Plaintiff company ought not to be permitted to exclusively appropriate land extending from the river to a hillside not shown to be necessary for its use. *Id.*

25. The Act of June 19, 1871, regulating the crossing of lines of railroad by other railroads, does not apply to the crossing of yard-tracks and switches which are merely incident to the use of the main line. *Id.*

26. A statute conferring authority upon a railroad company to take lands, tenements, or

properly necessary to **straighten or improve** the lines of railroads leased or owned, and the construction of the needful appurtenances thereto, does **not extend the branching powers** of the original road to its leased lines, or authorize the taking of a public street for tracks from the main lines to mills and factories.

Pa. R. R. Co. v. Mish (Pa.) 276

27. The power of a railroad company to **exercise the right of eminent domain** is determined by the expiration of the term **limited by its charter** for its exercise. Authorities cited.

Camden & Atl. R. R. Co. v. Mays Land. & E. H. C. R. R. Co. (N. J.) 802

28. The charter of the city of **Elizabeth**, giving power to the city council to grant the right to lay down railroad tracks in the streets, as it makes **no provision for compensation** to the owners of the land, does not give authority to the city to exercise the right of eminent domain.

Chamberlain v. Elizabethport S. C. Co. (N. J.) 870

29. The imposition of the burden of a **railroad operated by steam**, upon land in and constituting part of a street, is a taking, for that purpose, of the property of the persons along the line of the street who own the land to its center, subject to the right of way of the public therein, and **cannot be made without compensation.** *Id.*

30. Where **possession** of land has been taken for a railroad, and the work has been constructed upon it, but **no compensation** has been made for the land, if the company in taking possession has acted in good faith, under acquiescence of the owner, or by mistake as to the property, or as to the validity of the authority given it so to occupy, and the property is in public use, **equity will not permit the company to be disturbed** in its possession, provided it makes compensation if equity shall so require.

Paterson, N. & N. Y. R. R. Co. v. Kamlah (N. J.) 417

31. The facts that a railroad company has been **permitted by the owner** of land to take possession of it for the purposes of its road, and, with the necessary expenditure, adapt it to such uses, and occupy it accordingly for a long time, are **evidence of an agreement** that the company shall have the land upon making proper compensation. *Id.*

32. A railroad corporation having **authority**, when public necessity requires, to change the **grade of the streets crossing its tracks**, will not be permitted to exercise its power in that respect, except upon the same terms that the municipality within which the streets are located may exercise like power; that is, upon the payment of damages to those injured by the change.

Jersey City v. Cent. R. R. Co. (N. J.) 327

33. In a proceeding by a railroad company to condemn certain **water front lands** and land under the water, in the city of New York, owned by the State,—*Held*, that the application of the petitioners to acquire the same for **terminal facilities in excess of its pres-**

ent local requirements, to enable it to fill a contract with the Baltimore & Ohio R. R. Co., a **foreign corporation**, to give the latter company access to the port of New York, was properly granted, it appearing that the benefit to arise from such an action rendered the object for which the appropriation was sought a public use; and it was no objection that the construction of certain structures necessary to connect the two roads was not yet begun, such construction being assumed by contract obligations, and the necessity of the appropriation of the property for the public use being clearly shown.

Re Staten Island Rapid Transit R. R. Co. (N. Y.) 514

34. The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain, not only from individuals but also from the State, for its **prospective** as well as present uses, provided its necessities for such use in the immediate future are established beyond a reasonable doubt. Authorities cited. *Id.* 517

35. If a railroad company has the right, under an Act of the Legislature, to acquire land by purchase (for the accommodation of its business), it must secure such a **location** as will enable it to conduct its operations **without violating the just rights of others.**

Coyne v. N. Y. N. H. & H. R. R. Co. (N. Y.) 225

36. Assuming that the general power given by the Laws of 1848, chap. 143, § 6, to the New York & New Haven R. R. Co. to run its trains into New York city over the New York & Harlem Railroad includes, as incidental thereto, the power to purchase land for an **engine house**, it does not **sanction the maintenance of a nuisance**, injurious to private property, resulting from the building and use of an engine house, as by extending smoke stacks so as to cause smoke, gases, etc., to enter a private dwelling, rendering it untenable. *Id.*

37. An **agreement** made, on the purchase of right of way by a railroad corporation, to pay therefor in bonds of the **purchasing corporation**, is within the powers of such corporation; and the facts that the line of the purchasing corporation was not formally located on the line proposed to be purchased, and was subsequently located on a different line, do not affect the question of corporate power.

Munson v. Syracuse, C. & G. R. Co. (N. Y.) 191

III. OFFICERS.

38. A **contract** made by an individual, in connection with others, with a **railroad corporation** in which he is a **director**, binding the corporation to purchase certain property from him and his associates, such director having participated in the action of the corporation in assuming the obligation, is within the rule which **invalidates all contracts** made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. *Id.*

89. Such contract is not rendered valid by the fact that its effect was merely to substitute the corporation for certain of its individual promoters, who had previously contracted for the purchase; nor by the fact that the property consisted of real estate, track, etc., of another railroad corporation which the present vendors had purchased under a mortgage foreclosure, the transaction in question not being an arrangement for the reorganization of an existing railroad, within the provisions of Laws 1878, chap. 710. *Id.*

IV. STATE COMMISSIONERS.

40. The decisions of the state board of railroad commissioners are advisory merely; and no legal right can be based thereon in a proceeding for a *mandamus* to compel a railroad company to comply with the recommendation of the board.

People v. Rome, W. & O. R. R. Co. (N. Y.) 197

41. Assuming that, when a town has been bonded for the construction of a railroad, upon condition that a permanent depot should be erected and maintained at a specified point within the town, a contract is created between the town and the railroad company, such contract can only be enforced by some proceeding on behalf of the town; it is not a matter of public interest in such sense that it can be enforced by *mandamus* on the application of the attorney-general on behalf of the people of the State. *Id.*

RECEIVER.

1. A deficiency in the expenses of operating the road by the receiver in foreclosure, where the necessity of the expenses does not appear, should not be given a preference over the claim of a prior mortgagee of the road, who was not a party to the application for a receiver.

Metropolitan Trust Co. v. Tonawanda, V. & C. R. R. Co. (N. Y.) 864

2. Unsecured claims of employees of a railroad corporation, for their services in operating the road, after default under a general mortgage thereon and before the appointment (in proceedings to foreclose such mortgage) of a receiver to operate the road during the pendency of such proceedings, do not have a preference over the mortgage lien; and the receiver should not be decreed to pay such claims or to issue his certificates therefor. (So held where the foreclosure proceedings were begun before the passage of the Act of 1885, chap. 878, in reference to the wages of employees of corporations for which a receiver has been appointed. *Id.*)

3. An agreement made by the receiver of a corporation with the general assignee for benefit of creditors of the corporation in another State, to pay a certain portion of the indebtedness of the corporation to the assignee, in satisfaction of the debt, in consideration of the assignee's promise to accept of such payment in compromise, and ratified by the court, is to be regarded in equity as a novation, and the obligation is thenceforward a new one between the receiver and the assignee; and the

C. R., V. IV.

claims of attaching creditors of the assignor in this State, based upon the policy of this State in respect to assignments giving preferences, and not asserted until after the receiver had become liable to the assignee on said agreement, cannot avail against that agreement.

Kimball v. Lee (N. J.)

832

RECOGNIZANCE. See BAIL AND RECOGNIZANCE.

RECORD. See APPEAL, II.; DEED, II.; EVIDENCE, II.; JUDGMENT, 6; MORTGAGE, III.

A discharge in insolvency, granted by the same court in which an issue of *nulla in re* is on trial, may be proved by the docket entries and original papers. The production of a formal record is not necessary.

Lorian v. Rohr (Md.)

255

REDEMPTION. See MORTGAGE, VII.

REFERENCE. See ARBITRATION AND REFERENCE.

RELEASE. See PRINCIPAL AND SURETY, I., VIII.

RELIGIOUS SOCIETIES.

A deed conveying property in trust "for the use of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage, and ministerial appointments of said church," is too vague and indefinite, and the trust cannot be upheld.

Isaac v. Emory (Md.)

168

REMAINDERS. See DEVISE AND LEGACY, V.

RENT. See LANDLORD AND TENANT, 4.

REPLEVIN.

1. Vendee purchased horses, paying part of purchase price, delivery to be made at a subsequent date, at which time vendee offered notes drawn by vendor in part payment, which offer was refused on the ground that the sale was for cash. Vendee got possession, and it was held vendor might bring replevin without returning the hand money.

Bush v. Bender (Pa.)

85

2. In an action of replevin against a bank for negotiable railroad bonds deposited as collateral security for a debt, evidence of the antecedent pledge of the same stock is inadmissible, in the absence of *mala fides*, where there was notice of the pledge on the part of plaintiff.

Gibson v. Lenhart (Pa.)

105

REPORT AND CASE MADE.

Facts cannot be inferred in a case stated; and what is not stated must be presumed not to exist.

Cunnonsburgh Iron Co. v. Union Nat. Bank (Pa.)

258

RESCISSIION. See CONTRACT, 27-29; LICENSE, 4.

RESERVATION. See DEED, 9.

RES JUDICATA. See JUDGMENT, II.

REVIEW. See GUARDIAN AND WARD, 15; JUDGMENT, IV.; PARTITION, 12.

A bill of review, to correct a clear mistake in fact on which a decree in partition was made, will lie more than three years after the decree was made. Authorities cited.

Appeal of Johnson (Pa.) 895

REWARDS.

A party who, at the request of another, joins in the pursuit of a criminal, and identifies him, and afterwards testifies in court, is not, without more, entitled to a reward offered by the mayor of a city for the arrest and conviction of any person setting fire to any building within the city.

Rinehart v. City of Lancaster (Pa.) 504

ROADS. See WAYS.

RULE OF COURT. See TRIAL, 9, 10.

SALARY. See OFFICE AND OFFICER, 2-4.

SALE. See EXECUTION, II.; GUARDIAN AND WARD, 8-14; INSURANCE, 5-18; INTOXICATING LIQUORS; TAXES, II.; VENDOR AND PURCHASER.

1. Attachment lies for deficiency caused by inferiority of goods warranted. Authorities cited. 79

Heckscher v. Trotter (N. J.) 79

2. Vendee purchased horses, paying part of purchase price, delivery to be made at a subsequent date, at which time vendee offered notes drawn by vendor in part payment, which offer was refused on the ground that the sale was for cash. Vendee got possession, and it was held vendor might bring replevin without returning the hand money.

Bush v. Bender (Pa.) 35

3. Knowledge of fraud which will entitle vendor to rescind a sale is essential to put him to an election of remedies. Hence the bringing of an action for the contract price of the goods sold, unless it was brought with knowledge of the fraud, is not a binding election or a waiver of the right to rescind.

Equitable Co-operative Foundry Co. v. Hersee (N. Y.) 189

SCHOOLS AND SCHOOL DISTRICTS.

1. The Act of March 18, 1875, regulating the assessment in collection of taxes in cities of the third class, which contains a proviso excluding from the operation of the Act all cities of the third class, etc., which do not accept, by ordinance, the provisions of the Act, offends against art. 8, § 7 of the Constitution of 1874, which prohibits the passage of any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.

Commonwealth v. Halstead (Pa.) 815

2. Proceedings, instituted by a board of school directors, to assess damages for taking lands for school purposes, under the Act of C. R., V. IV.

April 9, 1867, may be discontinued at any time before final confirmation of the proceedings, or the taking of actual possession of the land.

Funk's Admra. v. Waynesboro School Dist. (Pa.) 299

3. Staking off land, prior to a view for assessment of damages, is not such possession as to give title. (*Beale v. Pa. R. R. Co.* 86 Pa. 510, distinguished.) *Id.*

SCINTILLA OF EVIDENCE. See EVIDENCE, 18, 19.

SEQUESTRATION.

A prior incumbrancer has a right, as against the mortgagor and subsequent incumbrancers, in case his security is precarious, to have the rents of the mortgaged premises (accruing subsequent to the appointment of a receiver) sequestered for his benefit.

Leeds v. Gifford (N. J.) 148

SERVANT. See MASTER AND SERVANT.

SET-OFF AND COUNTERCLAIM.

1. A set-off can only be made of a debt or demand which existed at the time of the commencement of the action, and the defendant must be able to show that it was then his. Authorities cited.

Lancaster Co. Nat. Bank v. Huver (Pa.) 673

2. A bank received a cashier's check of another bank, as a conditional payment of the debt of a third party. The latter bank made an assignment in trust for creditors, and the check was not paid on presentation. At the time of the assignment, there was, on the books of the first bank, a credit to the insolvent bank of the proceeds of notes, indorsed and discounted for the latter's accommodation. In an action by the first bank against the debtor, for the debt, — *Held*, that this deposit was not a valid set-off against the debt.

Union Nat. Bank v. Cannonsburgh Iron Co. (Pa.) 263

3. A set-off, to be allowed, must be a debt due between the same parties and in the same right, and complete when the action was instituted. Authorities cited. *Id.* 263

4. A set-off is in substance a cross action, and a cross demand must have been complete when the action was instituted. Authorities cited. *Id.*

SETTLEMENT. See POOR AND POOR LAWS, 1.

SEWERS. See DRAINS AND SEWERS.

SHERIFF.

1. Order of court, under Act April 10, 1873, fixing compensation of incumbent sheriff, for boarding prisoners, at one sum for one year and at a less sum for another year, during his term of office, does not violate Constitution, art. 8, § 18, prohibiting the increasing or diminishing of salary or emoluments of any public officer after his election or appointment, notwithstanding a prior order made during his

term, fixing the compensation for the past services of his predecessor.

Peeling v. County of York (Pa.) 87

8. The compensation ordered to be paid to the sheriff, by law, for the board of prisoners in the county jail, is an **emolument** of his office, within art. 8, § 18, of the Constitution. Authorities cited. *Id.* 88

8. A sheriff who, in answer to a rule to bring in the body of a defendant, returns that he **discharged** the defendant from custody upon his giving **bond** and complying with the requirements of the Insolvent Debtors' Act, will not be amerced.

Lewis v. Haskell (N. J.) 885

4. A sheriff cannot appoint a special **deputy pro hac vice by parol**, and if a sale in a foreclosure suit in chancery be made by a bailiff thus informally appointed, it will be set aside on a direct application to the chancellor in a subsequent proceeding. Authorities cited.

Hicks v. Willis (N. J.) 885

SHIPS AND SHIPPING.

1. **Attachment** will not lie for damages arising out of **breach of covenant in a charter-party** to employ a vessel at a certain sum per month for a designated voyage, the length of the voyage being conjectural, and hence the damages being uncertain. Authorities cited.

Heckscher v. Trotter (N. J.) 79

2. In an action against a **bridge owner for negligence in removing a boat** which had become **entangled with the bridge**, an instruction that the burden of proof was upon the plaintiff to show what damages resulted from the alleged negligent acts of the defendant, and to distinguish them from damages for which defendant was not responsible, —*Held*, properly refused, where the evidence clearly showed some substantial damages, and it is apparent that the verdict did not proceed upon the theory of charging the defendant in the first instance with the total loss and then deducting the items for which defendant was shown not to be responsible, thus shifting the burden of proof.

Mark v. Hudson River Bridge Co. (N. Y.) 208

8. When a **boat becomes entangled with a bridge**, without fault on the part of the bridge owner, becomes a **nuisance** which the bridge owner has a **right to remove**, in exercising that right the bridge owner must use ordinary care to do no unnecessary injury to the boat, and will be liable for injury unnecessarily inflicted. *Id.*

4. If, as matter of fact, the boat owner could, with the **exercise of ordinary care** and diligence, have removed the **debris** which fell upon the boat in its being extricated from the bridge, and saved the boat from subsequent injuries, the bridge owner was not liable for such injuries. *Id.*

5. In such a case the bridge owner is **not liable for want of skill** in the persons engaged in the removal of the boat, but only for the omission or commission of some act which an ordinarily prudent man would not have committed or omitted, and for reckless conduct on their part. *Id.*

C. R., V. IV.

SLANDER. See LIBEL AND SLANDER.

SOCIETIES. See RELIGIOUS SOCIETIES.

SPECIAL AND LOCAL LEGISLATION. See CONSTITUTIONAL LAW, II.

SPECIFIC PERFORMANCE.

1. A decree for a specific performance will **not be granted upon uncorroborated evidence** of the complainant, where a defendant denies the making of the agreement sought to be enforced.

McMonigle v. McMonigle (N. J.) 408

2. An unexplained **neglect** for twenty-nine years, to **pay the balance of purchase money** of land sold by contract in writing, **laches** on the part of the vendee, and fatal, in a court of equity, to all his original rights under the contract.

McGraw v. Foster (Pa.) 915

8. A **purchaser of lands**, who seeks redress under his articles, **must bring his money into court**, in order to show his readiness to perform his contract. Authorities cited. *Id.* 918

4. **Lapse of time**, change of circumstances, and indifference on the part of a vendee of land, are circumstances to induce a chancellor to refuse a decree of specific performance. Authorities cited. *Id.*

5. A **vendee** cannot experiment with his purchase, he will **not be allowed** to pursue a course of conduct calculated to **mislead the vendor** into the belief that the contract is **abandoned**, and when the development of the country makes it to his interest demand its performance. Authorities cited. *Id.* 919

6. Where complainant purchased, by **verbal contract**, of an agent who had parol authority to solicit purchasers, the **principal retaining the right to reject** any sale made by him, a piece of land and paid the agent \$10, and by the agent's authority entered upon the land and dug a trench and deposited some timber for a building, and the principal subsequently rejected the contract and tender of performance, specific performance was refused.

Chamberlain v. Manning (N. J.) 821

STATE AND STATE OFFICERS.

See RAILROAD COMPANIES, IV.

1. The statute authorizing the formation of **railroad corporations** confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of **eminent domain**, not only from individuals but also from the **State**, for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond a reasonable doubt. Authorities cited.

Re Staten Island Rapid Transit R. R. Co. (N. Y.) 517

2. **No State** is bound to recognize and enforce a **contract injurious** to its own interests or those of its subjects, although valid by the law of the place where made. Authorities cited.

Pitts. & S. L. R. R. Co. v. Rothschild (Pa.) 109

8. The **state comptroller** having refused

to cancel a tax sale and conveyance thereunder, cannot be compelled by *mandamus* to reach a different conclusion.

People v. Chapin (N. Y.) 183

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES. See CONSTITUTIONAL LAW; FRAUDS, STATUTE OF; INTOXICATING LIQUORS, 1, 8-7; JUSTICES OF THE PEACE, 1; LIMITATION OF ACTIONS.

1. **Penal Code, § 72, relating to bribery**, being a later statute covering the same subject-matter as § 58 of the Consolidation Act, and embracing new provisions, **operated to repeal the prior Act**, although the two are not in express terms repugnant.

People v. Jaehns (N. Y.) 163

2. By section 2148 of the Consolidation Act, the **Penal Code** (although enacted before **New York City Consolidation Act, Laws 1882**), is to have the same effect upon that Act as if it had been passed after it. This provision does not transcend the legislative power; and it subordinates the Consolidation Act to the Penal Code wherever the two are in conflict. *Rapallo and Earle, JJ.*, dissenting. *Id.*

3. Section 725 of the **Penal Code**, providing that that Code shall not affect "Acts incorporating municipal corporations, or Acts amending Acts of incorporation, or charters of such corporations," is to be construed as saving only those penal provisions of **charter Acts** which are not covered by the provisions of the Penal Code. *Rapallo and Earle, JJ.*, dissenting. *Id.*

4. A **later statute** covering the same subject-matter and embracing new provisions **operates to repeal the prior Act**, although the two Acts are not in express terms repugnant. Authorities cited. *Id.* 171

5. **General legislation** on a particular subject must **give way to special legislation** on the same subject, and laws special and local in their application are not deemed repealed or modified by general legislation on the same subject, although the terms of the general Act are broad enough to include the cases embraced in the special law, unless the intent to change the local law is clearly manifested. Authorities cited. *Dis. Op. Id.* 174

6. A **general repealing clause** in a general law is not sufficient to repeal a special local law not referred to in terms, and which is capable of coexisting with the general law. Authorities cited. *Dis. Op. Id.*

7. The amendment of 1879 to the charter of the city of **Auburn** (Laws 1879, chap. 53, title 7, § 71), creating a **board of charities** and police with the powers of overseers of poor in towns did not give such board the power to sue for **penalties for violation of the excise law**; but such penalties are to be recovered in the name of the board of commissioners in excise, under the general provision of the Laws of 1878, chap. 109, that where there is no overseer of the poor such penalties shall

O. R., V. IV.

be sued for and recovered by and in the name of the board of commissioners of excise.

City of Auburn v. Burtis (N. Y.) 235

8. A grant under which it is claimed that authority is given to destroy a public right should be **strictly construed**.

Jersey City v. Cent. R. R. Co. (N. J.) 327

9. In construing a statute a **purpose to disregard sound public policy** must not be attributed to the law-making power, except upon the most cogent evidence.

Jersey City Gaslight Co. v. Consumers Gas Co. of N. J. (N. J.) 330

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.

21 James I. c. 16. Statute of Limitations; personal actions 397

29 Car. II. c. 7. Sunday 272

United States.

Constitution.

Amend. 14. Due process of law; equal protection 432

Revised Statutes.

§§ 4911, 4015. Patents; appeal to Supreme Court, D. C. 625

Statutes at Large.

1801, Feb. 27. District of Columbia 597

1848, March 3. District of Columbia; infants; sale of realty 602

District of Columbia.

Revised Statutes.

§ 753. Courts; appeals 621

772. Appeal; practice 620

Illinois.

Constitution.

Art. 9, § 1. Taxes 453

Maryland.

Laws.

1715, c. 39. Apprentices 599

1735, c. 72. Decedents' estates; sale of property; debts 161, 597

1735, c. 80. Guardian and ward; education 599

1736, c. 45. Descents 594

1798, c. 101, § 10. Guardian; account 599

1798, c. 101, subd. 12, § 10. Guardian's sale 597

1872, c. 232. Carroll Co., treasurer 344

1874, c. 411. Counties; commissioners 345

1874, c. 433, § 31. Tax collectors; bonds 345

New Jersey.

Constitution.

Art. 4, § 7, p. 3. Laws impairing obligation of contracts 863

4, § 7, ¶ 4. Enactment of statutes 143

Laws.

1799 (Pat. Laws, 354). Limitation of actions; mortgage; redemption 61

1847, p. 133. Railroads; bridges 327

STATUTES AND CONSTITUTIONS CITED, C

1849, p. 379. Jersey City Gaalight Co.	381	Page 320, § 1
1852, p. 271. Camden & Atlantic Railroad	803	458. G
1853, p. 33, § 2. Small Causes Act; amend- ments	251	460. G
1861, p. 156. Highway overseers; time of election	882	462, § 1
1862, p. 271. Married woman; separate es- tate	557	497, § 2
1863, p. 119. Elizabeth; control of streets	871	597, § 1
1868, pp. 43, 106. Police departments	572, 574	652. D
1868, p. 106. Gloucester; police	574	691, § 7
1869, p. 371, § 58. Bayonne; local assess- ments, lien of	810	696, § 1
1870, p. 8. Hackensack; roads	573	706, § 2
1870, p. 181. Road Board Act; damages	829	763, § 5
1871, p. 336, § 67. Paterson; payment of claims	250	764, § 5
1871, p. 1122, § 58. Jersey City; streets; change of grade	327	785, § 1
1871, p. 1507. Hackensack; roads	573	834, § 1
1873, p. 245, § 6. Newark district courts; amendments	251	861, § 7
1874, p. 372. Trenton	80	925. R
1874, p. 504, § 9. Jersey City; board of public works	342	936. R
1874, p. 579. Hackensack; roads	573	995. R
1875, pp. 396, 609. South Orange; assess- ments	426	1002, § 3
1877, p. 54. Legislative commissions	342	1003, § 3
1878, p. 28. Legislative commissions	342	1045, § 1
1879, p. 178. Highway overseers; time of election	882	1051, § 3
1880, p. 56. Highway overseers; time of election	882	1150. T
1880, p. 191. Unconstitutional; excise de- partments	83	1166. T
1880, p. 247. County clerk; salary; uncon- stitutional	571	1168. T
1880, p. 255. Mortgage; foreclosure; defi- ciency	863	1189. Q
1881, p. 38. Taxes; delinquent	327	1196, § 1
1881, p. 184. Mortgage; foreclosure; defi- ciency	864	1196, § 1
1881, p. 194. Taxes; water rates	247, 326	1202, § 5
1882, p. 48. Borough commissioners	86, 145	1841, § 1
1882, p. 230. Executors, etc., account; com- missions	833	Supreme Cou
1882, p. 256. Taxes; roads; arbitration	561	Equity, 125.
1884, p. 58. County clerk; salary; uncon- stitutional	571	Art. 6, § 2. f
1884, p. 142. Taxes; railroad and canal property	428	Vol. 2, tit. 2,
1884, p. 265. Taxes; exemption; firemen	147	2, p. 65,
1884, April 17. Borough commissioners	86	2, p. 88,
1884, April 18. Taxes; corporations; ex- emptions	141-144	2, p. 88,
1885, p. 12. Highways; assignment of dis- tricts	882	2, p. 29,
1885, p. 130. Jersey City; fire commission- ers; transfer of employee	885	2, p. 44,
1885, p. 163. Police departments	572, 574	2, p. 76,
1885, p. 326. Police departments	83, 572	3, p. 175,
		3, p. 28'
<i>Revised Statutes.</i>		Co
Page 346, § 2. Decedents' estates; preferred claims	844	§§ 188, 196,
<i>Revision.</i>		283. Indi
Page 129. Corporations; frauds	825	395. Con
107, § 78. Estate in joint tenancy	67	411. Trfa
294. Negligence; death; damages	565	542. App
320. Dower	67	777. Cor
C. R., V. IV.		

Penal Code.

§ 71. Bribery; judicial officer	169
72. Bribery; officer accepting bribe	168
193. Manslaughter; second degree	787
195. Manslaughter; negligent use of machinery	787
395. Public health; violating quarantine regulations	360
719. Application of Code	173
725. Statutes continued in force	171
726. General repeal	173

Code of Civil Procedure.

§ 190. Court of Appeals; jurisdiction	774
263, subd. 5. Superior City Courts; jurisdiction	774
285. N. Y. Common Pleas; jurisdiction	791
331. N. Y. Marine Court; fees	791
370. Adverse possession; what constitutes	231
371. Adverse possession; claim of title not written	542
467. Poor persons; actions; costs	791
523. Pleadings; verification	208
763. Death; after verdict	396
829. Witness; party, etc.	770
837. Witness; when not excused from testifying	208
888. Deposition; when commission to issue, etc.	128
994. Exceptions; practice	773
997. Case made	773
1210. Judgment; decedent	396
1337. Appeal; questions for review	212
1405. Execution; personalty	189
1626. Mortgage; foreclosure; final judgment	109
1628. Mortgage; foreclosure; other actions	389
1631. Mortgage; foreclosure; notice	109
1632. Mortgage; foreclosure; effect of conveyance upon sale	109
1769. Alimony	538
1825, 1826. Decedents' estates; execution	389
1933. Action against joint debtors; judgment	396
1939. Action against joint debtors; answer	396
2070. Mandamus; peremptory	201
2545. Surrogates' Courts; exceptions	796
2555. Decrees; contempt	211
2589. Surrogates' Courts; appeal; costs	770

Laws.

1806, c. 131. Bribery	169
1833, c. 279. Chattel mortgages; record	234
1833, c. 294. Utica & S. R. R. Co.	229
1846, c. 195. New York & N. H. R. R. Co.	228
1846, c. 274. Distress for rent abolished	234
1848, c. 106. Auburn	237
1848, c. 143. New York & H. R. R. Co.	228
1849, c. 438, § 471. Pleading; practice (repealed 1880, c. 245)	353
1850, c. 140, § 10. Railroad companies; stockholders' liability	196, 367
1853, c. 217, § 14. New York; bribery; officers, etc.	174
1853, c. 539. Bribery	169
1854, c. 232, § 16. Railroad companies	367
1857, c. 446. New York	175
1857, c. 628. Intoxicating liquors; regulations	23, 73, 55

1858, c. 314. Frauds; protection of creditors	189, 339
1858, c. 338. New York; local assessments; frauds	513
1859, c. 431. Auburn	237
1866, c. 404. N. Y. Union Dime Savings Institution	221
1866, c. 753. Oysters; regulations	221
1869, c. 273. Auburn	237
1869, c. 742. Bribery	169, 174
1870, c. 137, § 114. New York; bribery	174
1871, c. 760. Saratoga Springs	171
1873, c. 335. New York; local government	174, 782

1873, c. 535. New York; courts; city prison	171
1873, c. 820. Intoxicating liquors; regulations	237
1873, c. 863. Brooklyn	171
1873, c. 863, tit. 13, § 14. Brooklyn; fire department	775
1874, c. 313. New York; taxes; collection	782
1876, c. 444, § 2. State board of audit	183
1876, c. 448, § 191. Court of appeals; exceptions	774
1877, c. 415. Deception in sale of butter	545
1878, c. 245. Highways; encroachments	210
1879, c. 53. Auburn	237
1879, c. 418. Chattel mortgages; record	234
1880, c. 245, § 1. Repeal of parts of Revised Statutes	353
1880, c. 439. Deception in sales of butter	546
1881, c. 211. State board of audit	183
1881, c. 346. New York; port and harbor	231
1881, c. 631. Amendment, Code of Civil Procedure	353
1882, c. 214, 215, 238, 246. Oleomargarine; adulteration	546
1882, c. 410, § 58. New York Consolidation Act; bribery	168
1882, c. 410, § 2143. New York; effect of Act	168, 173
1883, c. 26. New York; marine court	774
1883, c. 229. Amendment; Code of Civil Procedure	353
1883, c. 298, tit. 18, § 6. Albany; bribery	175
1884, c. 202. Adulteration; dairy products	546
1885, c. 138. Adulteration; dairy products	542
1885, c. 376. Corporations; wages of employees	367
1885, c. 458. Adulteration; dairy products	542

Court Rules.

Supreme Court, 32. Case made; time	773
------------------------------------	-----

*Pennsylvania.**Constitution.*

Art. 3, § 3. Title of Act	303, 315
3, § 7. Special laws	236, 313, 320, 321
3, § 13. Public officer; compensation	33
5, § 2. Justices of the peace	321
5, § 12. Philadelphia; magistrates	321
9, § 1. Taxes; uniformity	306
16, § 7. Corporations; indebtedness	103
17, § 4. Railroads; competing lines	496, 502

Laws.

1705, § 9 (Purd. 597, pl. 152). Execution; restitution	903
1713, March 27. Statute of Limitations; personal actions	397
1791, Sep. 23. Justices of the peace; costs; criminal prosecutions	746
1794, April 19. Dower; assignment	293

1794, April 23. "Sunday Act"	272
1832, March 15 (Purd. 410, par. 23). Administrator <i>pendente lite</i>	908
1832, March 29 (Purd. 542). Dower; partition	298
1832, June 9, § 77. Portsmouth, etc. railroad	279
1833, April 8 (Purd. 1477, <i>pl.</i> 18). Will; after-born child	470
1833, April 8, § 9. Devise; realty; intention	84
1833, p. 818. Distribution; next of kin	46
1834, p. 68. Evidence; documentary	463
1834, p. 77, § 34. Executors and administrators; actions; parties	907
1843, p. 273. Assignment for creditors	669
1846, April 13. Pennsylvania railroad; intersections	279
1848, April 11. Married woman; contracts	290
1854, p. 80. Phila.; controller; duties	758
1855, p. 269. Phila.; controller; misdemeanor	758
1855, p. 415. Assignment for creditors; non-resident; record	661
1856, p. 572. Phila.; controller; oath to one presenting bill	578
1859, March 29. Decree; lien	258
1860, March 31, § 36. Adultery	712
1867, p. 190. Lancaster County; quarter sessions; licenses	911
1867, p. 998. Pennsylvania railroad; depots, etc.	279
1869, March 17, § 8. Attachment; bond	749
1870, p. 242. Erie; boundary	488
1871, May 10. Erie County; quarter sessions	910
1871, June 19. Railroads; crossings	267
1871, June 19. Condemnation proceedings; injunction	280
1871, p. 639. Montgomery Co.; boroughs; streets	305
1872, April 3. Married woman; separate earnings	656
1872, April 9. Wages; exemption	708, 705
1873, p. 666. Sheriff; compensation	88
1874, April 18. Corporations; indebtedness	108
1874, May 14. Taxes; public property	303
1874, p. 158. Taxes; public property	307
1875, April 12. Intoxicating liquors; unlicensed druggist	727
1875, p. 15. Taxes; cities of third class; unconstitutional	814, 815
1876, p. 95. Nuisance; continuing; damages	687
1877, p. 25. Unconstitutional sheriffs, etc.; suit after term for fees, etc.	286
1878, May 24. Taxes; assessments; appeal	319
1878, p. 207. Wages; priority	704, 705
1879, p. 130. Phila.; controller; countersigning warrants	758
1879, p. 194. Justices of the peace	321
1881, June 29. Mines and mining; payment of employees; unconstitutional	887
1885, p. 11. Cities; ordinances; taxes	490

Virginia.

Revised Code.

Vol. 2, p. 212, § 1. Joint-stock companies; subscriptions	611
---	-----

STOCK TRANSACTIONS. See BANKRUPTCY, 8; CORPORATIONS, III.

After the lapse of more than twenty years there is a presumption that the apparent C. R., v. IV.

title of the assignee of corporate stock is the real title; and where all parties interested on the part of the assignor acquiesced in the assignee's title, and neglected to assert the contrary for that length of time, they should not be permitted, after the assignee's death, to maintain the claim that the stock was assigned as collateral only, without the fullest measure of proof.

Lockwood v. Brantly (N. Y.)

793

STREET RAILWAYS.

1. Where a passenger in a street railway car was injured by a collision with a steam railroad train,—*Held*, in order to recover against the company operating the steam railroad train, the plaintiff must show not only that the injury resulted from defendant's negligence, but that the negligence of the carrier company did not contribute to the result. Authorities cited.

Borough of Carlisle v. Brisbane (Pa.)

511

2. In an action against a street railway company for personal injuries, evidence on the part of the plaintiff that she, while alighting from one of the defendant's cars and carrying a child on her left arm, tried to reach with her right hand the handle of the rear dasher, but that, as another passenger, though there were empty seats in the car, was standing in the way, she missed the handle and, slipping on ice which remained on the step from the previous day, fell, receiving severe injuries, makes out a case for a jury; and a nonsuit is error, although it appears that the plaintiff knew there was ice on the step and might, by changing the child to the other arm, have grasped with her left hand the handle on the end of the car.

Neslie v. Second & Third Sts. Passenger R. Co. (Pa.)

699

3. The driver of a vehicle, rightfully using a street railroad track as a part of the public street, is entitled to notice that the company required the track for its car, before he is obliged to leave the track. Where plaintiff was driving on the main track and suddenly a car was moved on a spur track,—*Held*, the case was properly submitted to the jury to determine whether, under the facts, the safer and more prudent course for plaintiff to have pursued to avoid collision was to attempt to get off the track, or to quicken his speed and pass before the car reached the main track; and the fact that plaintiff urged on his horses and failed to reach a point necessary to avoid a collision by about a foot did not constitute evidence of contributory negligence. *Paterson, J.*, dissenting, that it appeared that plaintiff had sufficient notice of the approach of the car, was an expert in driving horses, familiar with the locality, and with proper caution could have avoided a collision.

Orange & N. Horse R. Co. v. Ward (N. J.)

825

4. Conductor's written statement giving details of accident immediately after it happened, is not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence. Conductor may use such written statement to refresh his memory.

North Hudson Co. R. Co. v. May (N. J.)

81

STREETS. See DEED, 11-18; MUNICIPAL CORPORATIONS, IV., V.; RAILROAD COMPANIES, 16, 17, 18, 28, 29, 32; WAYS.

SUBROGATION. See EXECUTORS AND ADMINISTRATORS, 45.

1. An administrator who has paid the debts of the estate, to an amount exceeding the personal estate, is entitled to be subrogated to the rights of the creditors against the lands of the deceased, and to subject them in the hands of the heirs and devisees to the payment of the money necessary to his reimbursement.

Woolley v. Pemberton (N. J.) 89

2. The bill for such purpose is not multifarious because it also seeks a settlement and account for rents applied by the administrator to the payment of debts primarily chargeable upon the personal estate, and to establish the equitable rights of the parties entitled to the lands with regard to such application of the rents, where all such parties are before the court. *Id.*

3. Where a policy is obtained by the owner of the equity of redemption, with an agreement with the first mortgagee, that the money collected by him should go in satisfaction of his mortgage, the money paid by the insurance company on taking an assignment of the first mortgage must be regarded as paid on account of the insurance; and the company is not entitled to subrogation to the rights of the first mortgagee.

Pearman v. Gould (N. J.) 185

4. Where mortgagee insures for his own benefit his interest as mortgagee, the insurance company on paying the loss is entitled to subrogation to his rights as mortgagee. Authorities cited. *Id.* 187

5. Where a building was insured in the name of the mortgagee for his own security and that of mortgagor, the latter paying the premium, the insurance company is not on payment entitled to subrogation through mortgagee's rights. Authorities cited. *Id.*

6. Where mortgagor had obtained a policy and assigned it to mortgagee, but, before loss, had sold the property subject to the mortgage, which purchaser had assumed to pay, and the purchaser had taken no assignment of his grantor's interest in the policy, subrogation was decreed. Authorities cited. *Id.*

7. A vendor held a policy of insurance on the dwelling-house standing on the premises sold; she took a mortgage for a part of the purchase money, which was in excess of the amount due on the policy; she did not assign the policy at the time of the conveyance nor until after the house was burned; the company tendered the amount due on the mortgage and demanded an assignment of it, which was refused. *Held*, that the company was entitled to the mortgage, and that in order to carry costs it was not necessary that the company should tender the whole amount of the unpaid purchase money.

Boundbrook Mut. F. Ins. Co. v. Nelson (N. J.) 187

SUBSCRIPTIONS. See BANKRUPTCY, 3; CORPORATIONS, III.

SUNDAY.

Under the Act of 1794, prohibiting the performance of "any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday," there can be only one penalty for violation of the statute, on one day, whether the act or acts which constitute such employment are one or many. *So held*, where defendant on the same day sold cigars, tobacco, cider, etc., to several persons in violation of the Act, and was therefor convicted and fined for six several violations.

Friedeborn v. Commonwealth (Pa.) 271

SURETIES. See PRINCIPAL AND SURETY.

SURROGATE. See COURTS, XIV.

TAXES.

I. PROPERTY TAXABLE; PUBLIC PROPERTY; EXEMPTIONS; RAILROADS.

II. COLLECTION; COLLECTORS; SALES.

III. REMEDIES AGAINST ILLEGAL.

See BONDS, 1-5; MUNICIPAL CORPORATIONS, III., IV.

I. PROPERTY TAXABLE; PUBLIC PROPERTY; EXEMPTIONS; RAILROADS.

1. The Society for Establishing Useful Manufactures is exempt from the tax imposed by the Act of April 18, 1884, upon the capital stock of corporations.

State v. Society for Establishing Useful Manufactures (N. J.) 139

2. The exemption from taxation conferred by the charter of said society extends to property of the society, acquired under a subsequent Act of the Legislature empowering it to extend its operations by condemning additional lands for the same purposes as those provided for in its charter. *Id.*

3. The exemption from taxation, under the Act of April 18, 1884, of manufacturing companies "carrying on business in this State," does not apply to a manufacturing company which has all its factories in other States, but maintains an office, sells its products, and holds its business meetings in this State.

State v. American Glucose Co. (N. J.) 142

4. Act of April 25, 1884 (P. L. 1884, p. 265), providing that certain firemen "shall be entitled to have and receive the same advantages in respect to taxes and jury duty as now are or hereafter may be allowed to the National Guard of this State," without settling out the acts in relation to the exemption of members of the National Guard, is within the constitutional inhibition that a statute, to make the Acts of a former statute part thereof, must insert those sections of a former Act in the new law.

State v. McNeal (N. J.) 147

5. Article 9, § 1 of the Constitution, providing that all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and that

public property used for public purposes may, by general laws, be exempt from taxation, does **not render public property taxable.**

Erie Co. v. City of Erie (Pa.) 805

6. The Act of May 14, 1874, entitled "An Act to Exempt from Taxation Public Property Used for Public Purposes," which exempts certain property and contains a proviso that "all property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation, and nothing herein contained shall exempt the same," imposes taxation upon public property used for public purposes from which a revenue is derived. *Id.* 800

7. Property belonging to a municipality, owned and used by commissioners, appointed by law, in operating and carrying on water works to supply the public with water, and necessary for such purpose, from which a revenue is derived, is taxable under the Act of May 14, 1874. *Id.* 800

8. A house and lot and horses owned by a city, and used in operating the fire department of the city, are not liable to taxation. *Id.* 805

9. Public property used for public purposes is not subject to taxation, and cannot be without express statute. Authorities cited. *Id.* 807

10. The terms of Borough Act of March 7, 1872, relating to taxes for road purposes, should be construed to extend to assessments for road purposes where no previous appropriation has been made by legal authority.

State v. Horner (N. J.) 145

11. Where township voters have, at their regular election, fixed the amount to be raised for highways in the township for the ensuing year, and the township committee has appropriated the money, to be raised by taxation, to the several road overseers, and thereafter a part of the township votes to become an incorporated borough, the commissioners of such new borough are not entitled to the possession and control of the portion of such money raised by taxation upon the part of the township incorporated in the borough; but the same is to be expended by the township overseer as apportioned by the township. *Id.*

12. Without offending the rule of uniformity upon the same class of subjects, the Legislature may select the subjects of its taxation, but the tax, upon whatever laid, must be uniform, and in the taxation of property there can be no distinction between natural persons and corporations. Authorities cited. *Dis. Op.*

State Board of Assessors v. Cent. R. R. Co. (N. J.) 455

13. The Act of March 18, 1875, regulating the assessment and collection of taxes in cities of the third class, which contains a proviso excluding from the operation of the Act all cities of the third class, etc., which do not accept, by ordinance, the provisions of the Act, offends against article 8, § 7 of the Constitution of 1874, which prohibits the passage of any local or special law regulating

the affairs of counties, cities, townships, wards, boroughs, or school districts.

Seranton School Dist. v. Lackawanna I. & O. Co. (Pa.) 811

Commonwealth v. Halstead (Pa.) 818

14. The Act of May 24, 1878, giving the right of appeal from assessments for the purposes of taxation, to owners of real estate in counties of less than 5,000 inhabitants is unconstitutional, under art. 8, § 7, of the Constitution.

City of Seranton v. Stillman (Pa.) 817

15. Under Act Feb. 25, 1870, providing that city councils shall discriminate, in laying city taxes, between rural portions and property in the improved or built up portions of the city.—*Held*, the action of councils in determining certain property to be taxable at the rates applicable to the whole class is not subject to review, where it appeared that the discretion conferred upon the councils was not abused, and that there was some evidence that the property was benefited by the various city improvements included in the assessment; and if this were not so, yet the levy was validated by the Act of April 30, 1885, providing that all ordinances levying taxes in cities of the third, fourth, and fifth classes, in amount not exceeding twenty mills in any one year, are hereby made valid.

City of Erie v. Reed (Pa.) 487

16. The "Act for the Taxation of Railroad and Canal Property," approved April 10, 1884 (P. L. 1884, p. 142), providing for the separate taxation, through a "state board of assessors," of property used for railroad and canal purposes, at the rate of one half of one per cent on the valuation, for state purposes, and at the local rate (but not exceeding one per cent) on the valuation of the real estate, exclusive of the main-stem and waterway, for local purposes, and providing that the companies shall not be required to pay a greater tax for all purposes under the Act than they would be required to pay at full local rates, does not contravene the provision of the State Constitution (Amendment of 1875), that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value," or the 14th Amend. of the Federal Constitution, providing that no State shall deny to any person the equal protection of its laws. Railroad and canal property may be distinguished as a class, and a statute operating equally upon all such property is not a local or special law. Such law is enforceable against all corporations having repealable charters and therefore subject to additional taxation. Depue, Dixon, and Reed, *JJ.*, dissenting.

(*S. C.* in Supreme Court, 2 Cent. Rep. 715, reversed.)

State Board of Assessors v. Cent. R. R. Co. of N. J. (N. J.) 428

17. By the reservation of the power to alter a charter, the Legislature retains the power to impose additional taxation. *Id.*

18. All taxes, whether levied for state, county or municipal purposes, are state taxes; they can be imposed by no other authority than that of the State. The State appropriates the proceeds to what purposes it

sees fit; but however the proceeds may be appropriated, **every tax is a state tax.** Authorities cited. *Id.* 431

19. The true value, for the purposes of taxation, of railroad cuts and embankments and canal locks is **not the cost, but what they are worth** in connection with the works of which they form a part. Authorities cited. *Id.*

20. **Perfect equality** and perfect uniformity of taxation, as regard individuals or corporations, or the different classes of property subject to taxation, is **a dream unrealized.** It may be admitted that the system which most nearly attains this is the best, but the most complete system which can be devised, when we consider the immense variety of space which it necessarily embraces, must be imperfect. Authorities cited. *Id.* 432

21. **Franchises** are undoubtedly property, and, as such, are taxable. Authorities cited. *Id.*

22. Whenever a tax or burden is imposed upon property for the public use, and **provision** is made for a mode of confirming or **contesting** the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding with regard to the property, as is appropriate to the nature of the case, the judgment in such case cannot be said to deprive the owner of his property without **due process of law.** Authorities cited. *Id.* 433

23. The true value of property used for **railroad or canal** purposes cannot be arrived at except in treating it as a **class** by itself. Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property. Authorities cited. *Id.* 436

24. Where a particular tax **bears heavily** upon a corporation or class of corporations it cannot, for that reason only, be pronounced contrary to the Constitution. Authorities cited. *Id.* 438

25. A tax is **uniform** when it operates with the **same force and effect** in every place where the subject is found, but **perfect uniformity** and perfect equality of taxation, in all aspects in which the human mind can view it, is a **baseless dream.** Authorities cited. *Id.* 439

26. With the selection of property to be taxed the power of the Legislature to discriminate ends. The rule of **uniformity** prescribed for taxation prevents property from being classified and taxed as classed by **different rules.** Authorities cited. *Dis. Op.* *Id.* 450

27. **Where the power of the Legislature is not restrained** by express constitutional limitations, the **designation** of the property to be taxed and the manner of taxation are matters **within the discretion** of the Legislature. Authorities cited. *Dis. Op.* *Id.* 453

28. In **property** there is always present the element of **value** as the basis on which

equality in taxation can be attained by the application of a uniform rate on such values, but in **franchises, trades, or occupations** there is **no element of value** in common, and hence the rule of equality is not violated by a taxation of these subjects by a rule which is uniform as to each class. Authorities cited. *Dis. Op.* *Id.*

29. To impose certain taxes exclusively upon **one class** of taxable property is as much a **discrimination** as to **vary** the rates of the same or other taxes upon **different classes** of property. Authorities cited. *Dis. Op.* *Id.* 454

30. The Legislature may exempt certain specific property or classes of property from taxation, but such exemption must be absolute and total. The Legislature has **no power to exempt** property from one tax or from taxation for **one purpose** and hold it liable to taxation for **other purposes**, without violating the rule of uniformity. Authorities cited. *Dis. Op.* *Id.*

II. COLLECTION; COLLECTORS; SALES.

31. The constitutional amendment requiring that "property shall be assessed for taxes under **general rules**" does not **affect** the mere machinery for the collection of taxes; hence, it does not affect the **time** within which a **sale** for taxes should take place.

Baldwin v. City of Elizabeth (Pa.) 335

32. When a tax has been **lawfully laid**, but the **sale** to enforce it is a **nullity**, the Act of 1881 (P. L. 1881, p. 194), providing that no tax, etc., shall be set aside for **irregularity**, if the person against whom it is assessed is liable to taxation, but that the court shall make a new assessment, has no applicability. *Id.*

33. If land is seated when **assessed**, after the collector's return it is the commissioner's duty to cause it to be **sold as seated.**

Skinner v. McAllister (Pa.) 750

34. If land is **seated** when assessed, and **sold** for taxes as **unseated** land, the **sale** is **void.** *Id.*

35. As a general rule a **tax deed** is not even **prima facie evidence of title.** It is incumbent upon whoever asserts title under it to prove affirmatively that all the preliminaries to the sale which the law prescribes were complied with.

Brewer v. District of Columbia (D. C.) 621

36. A tax deed, made in pursuance of a sale for the unpaid taxes of a certain year, passes the property to the purchaser, **discharged** of the liens of all taxes remaining **due** and unpaid at the time of the sale. *Id.*

37. Where the proceedings have been lawful and regular, the title passed by the deed **expunges all previous titles** and puts in the grantee an absolute, complete, and perfect title in fee simple to the property, discharged of all pre-existing equities and liens whatsoever and by whomsoever owned, saving only such limited rights of redemption as may be specially provided for by statute. Authorities cited. *Id.* 633

38. **Sales of land to the city of Eliza-**

both for nonpayment of taxes, for a term of 900 years, are unauthorized by law; and such sales and the certificates thereof convey no estate or interest in the property sold.

Baldwin v. City of Elizabeth (N. J.) 825

39. A tax collector will not be relieved from liability to account for taxes collected by him, by the omission of other officials to observe the statutory requirements that the assessment account shall be kept in a separate book, and that moneys for educational purposes shall be levied separately.

Myers v. State (Md.) 844

40. The provision in the bond of a tax collector for Carroll County, that he shall "pay to the county commissioners or their order" money which he shall receive, is not impaired by the Act of 1873, chap. 233, making it the duty of the treasurer of Carroll County to "receive the proceeds of all taxes levied in the county." Payment to the treasurer is, in law, payment to the commissioners. *Id.*

41. The state comptroller having refused to cancel a tax sale and conveyance thereunder, cannot be compelled by mandamus to reach a different conclusion.

People v. Chapin (N. Y.) 188

42. A payment by a tax collector, of money collected by him on the taxes for one year, in discharge of the taxes for previous years with which he is chargeable, is a breach of his bond.

Myers v. State (Md.) 844

43. The facts that a tax collector reappointed to office was, at the time, in default under a former appointment, and that the sureties on his new bond were not notified, by the appointing authorities, of his existing defaultations, will not avail as a defense to the sureties. *Id.*

44. Application of a purchaser of real estate in Long Island City on the foreclosure of a mortgage, to be allowed on his purchase money the amount of taxes on the property for the years 1877 to 1885, remaining unpaid, opposed on the ground that said taxes were illegally assessed and therefore not valid liens, refused with liberty to the purchaser to be relieved from his purchase.

Re Byrnes v. Stevens (N. Y.) 118

45. Under the corporation tax law, the court of chancery has only authority to grant or refuse an injunction against a corporation's continuing business after failure to pay the tax assessed against it; and a proper case for such injunction appears when the court is satisfied that the State is not wholly in the wrong.

State v. American Glucose Co. (N. J.) 142

46. An injunction will not be granted under the Act of April 18, 1884, to restrain a corporation from exercising franchises in case of nonpayment of tax, where the corporation has only kept up a formal organization without transacting any business.

Re Faure Electric Light & Force Co. (N. J.) 148

Re New York File & Sharpening Co. (N. J.) 144

III. REMEDIES AGAINST ILLEGAL.

47. The "Act Concerning Past Due Assessments" (P. L. 1881, p. 38) affords a complete remedy to the owner of land assessed under unconstitutional laws for benefits for municipal improvements; and he therefore has no standing to seek relief in equity.

Baldwin v. City of Elizabeth (N. J.) 825

48. When a landowner seeks the aid of a court of equity to relieve him from a tax sale and the tax is lawful, the court should (on the principle that he who would have equity must do equity) require, as terms of setting aside the sale and certificate, that he pay the tax and interest thereon. *Id.*

49. The right to maintain a suit, under the statute, to quiet title by removing the cloud caused by a sale for alleged illegal taxes, may be lost through laches in failing to question the validity of the tax by *certiorari*. *Id.*

50. If a party assessed has opportunity to appeal to the board of commissioners, and fails to do so, he cannot have relief on *certiorari* on the question of valuation.

State v. Posenell (N. J.) 564

51. In an action to recover the excess of a payment, made on an assessment afterwards vacated, over the amount of a reassessment, it was held that the amount of the reassessment was to be charged against the payment as of the date of the first assessment, and interest could be recovered only on the balance. Authorities cited.

Cadmus v. Fagan (N. J.) 811

TENANTS IN COMMON. See JOINT TENANTS AND TENANTS IN COMMON.

TENDER. See EJECTMENT, 1, 8.

Vendee purchased horses, paying part of purchase price, delivery to be made at a subsequent date, at which time vendee offered notes drawn by vendor in part payment, which offer was refused on the ground that the sale was for cash. Vendee got possession, and it was held vendor might bring replevin without returning the hand money.

Bush v. Bender (Pa.) 85

TESTAMENTARY CAPACITY. See WILL, 2-4.

TICKETS. See CARRIERS, II.

TOWNS. See MUNICIPAL CORPORATIONS.

TRADEMARKS.

The use of words (here, "patent roofing") merely designating the kind of business one is engaged in cannot be protected as a trade-mark.

Fay's Admrs. v. Fay (N. J.) 241

TRESPASS. See ANIMALS; LOGS AND LOGGING.

1. An agreement in writing for the sale of unseated land, and an offer of immediate possession, and an acceptance of the same by the vendee, and part payment of the purchase money, gives the vendee the equitable title, and, in contemplation of law, the actual possession, which will support an action for trespass for injury done thereon.

Müller v. Zufall (Pa.) 496

2. The owner of wild and uncultivated land is to be deemed in possession, so as to maintain trespass, until an adverse possession is clearly made out. Authorities cited. *Id.* 493

8. It lies not in the mouth of a trespasser to defend by reason of the plaintiff owning only an equitable interest. Authorities cited. *Id.*

4. The vendee of land, under an unrecorded written contract, who has never been in possession, and who has paid only part of the purchase money, cannot, without first paying or tendering the balance of the purchase money, maintain against the legal owner trespass for cutting timber.

McGrew v. Foster (Pa.) 915

5. A part owner of goods in possession of them may recover all the damages resulting from a trespass upon the goods, committed by a stranger.

State v. Winkler (N. J.) 250

6. In trespass *quare clausum fregit*, plaintiff claimed title under a deed which had been lost, and in evidence thereof submitted a recital in a subsequent deed from the same grantor for other land, that one of the lines ran "thence by lands of" plaintiff. Held, that such recital was insufficient and did not indicate that the whole of the line was along such lands.

Riegelsville Del. Bridge Co. v. Bloom (N. J.) 820

7. If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to another. Authorities cited.

Pa. Coal Co. v. Sanderson (Pa.) 483

8. A landowner may lawfully leave an excavation unprotected, so distant from the highway that no one can reach it without becoming a trespasser. Authorities cited.

Moore v. Logan Iron & S. Co. (Pa.) 506

9. One may not excusably place a dangerous pitfall or wolf trap or a spring gun purposely to catch even willful trespassers poaching on his grounds. Authorities cited. *Id.*

10. As a general rule, the only legal duty which a trespasser incurs by his wrongful act, where his trespass is complete when judicial aid is invoked, is a liability to reimburse the person injured, in money, for the loss which his trespass has caused.

Lords v. Carbon Iron Mfg. Co. (N. J.) 853

11. For a simple trespass, which is complete when the force by which it is committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his damages once for all. *Id.*

12. If the damages resulting from a trespass are aggravated or increased by the folly, willful obstinacy, or gross carelessness of the injured person, such part of his loss as is directly attributable to his own fault cannot be recovered. *Id.*

13. The jurisdiction of courts of equity

C. R., V. IV.

in cases of trespass is purely preventive; they may restrain a threatened trespass, if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass; but for a completed trespass, which, as a legal wrong, is complete when protection is sought, they can give no redress whatever. *Id.*

14. A court of equity cannot award pecuniary damages in redress of a trespass. A court of equity has no authority to impose an easement on the land of a trespasser, in redress of the wrong done by the trespass. *Id.*

TRIAL. See CRIMINAL LAW, III.; JURY; WITNESS.

1. The exclusion of evidence is no cause for reversal where it is admitted at a later stage of the trial.

Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.) 713

2. A point presented to the court for consideration should be so answered that the jury will clearly understand whether it is affirmed or denied.

Swank v. Phillips (Pa.) 461

3. An erroneous instruction upon a material point, expressing the opinion of the court that the evidence did not warrant a certain conclusion, is not cured, in the absence of an explicit withdrawal, by a subsequent submission of the question to the jury.

Driggs v. Phillips (N. Y.) 237

4. It is not error for the court to refuse to instruct the jury on facts that are not in evidence.

Erie City Passenger R. Co. v. Schuster (Pa.) 919

5. When a jury is misled by the charge of the court, the verdict will be reversed.

Skinner v. McAllister (Pa.) 750

6. Where the jury renders a verdict for plaintiff, by direction of court, subject to a reserved point of law which does not state the facts, and no exceptions are taken to the findings of fact contained in the verdict of the jury, the entry of judgment for the plaintiff, by the court, on the reserved point, will be presumed right, and will be affirmed.

Cent. Bank of Pittsburgh v. Earley (Pa.) 270

7. A reserved point of law must state the facts out of which it arises. Authorities cited. *Id.* 271

8. If plaintiff's case, as exhibited by the testimony and the rejected offers of evidence, is fatally deficient in the requisite kind or degree of proof, there is no error in the court's directing a verdict for defendant.

Shank v. Simpson (Pa.) 743

9. A rule of court, providing that a copy of a book account sued on, duly filed and verified by affidavit, shall be admitted in evidence without further proof, unless the defendant file an affidavit that he believes justice will be done if the plaintiff be not held to strict proof of his claim, construed, and held to apply to a case where the suit is by an administrator on a decedent's book account.

Mattern v. McDivitt (Pa.) 396

10. The refusal by a party to a suit to produce at the trial thereof papers then admitted to be in his possession, having been duly notified so to do, but no order to produce them under the rule of court having been asked for—does not justify denunciation by the court in its charge. *Id.*

TROVER AND CONVERSION.

1. Where one having a lien on goods sets up a claim hostile to the owner's title and wrongfully sells the goods, he cannot set up the lien as a bar to the owner's recovery, in an action of trover, for his illegal act.

Andrews v. Wade (Pa.) 689

2. Justification is not admissible under a general denial in trover.

Whedder v. Lawson (N. Y.) 186

3. Actual possession of personal property by plaintiff at the time of taking is enough, without other evidence of title, to maintain an action in trover for the conversion thereof, except against the true owner or one connecting himself with the true owner. *Finch, J., dissents.* *Id.*

TRUSTS. See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; LIMITATION OF ACTIONS, 4; RELIGIOUS SOCIETIES; VENDOR AND PURCHASER, 13.

1. A deed conveying property in trust "for the use of the ministry and membership of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage, and ministerial appointments of said Church," is too vague and indefinite, and the trust cannot be upheld.

Isaac v. Emory (Md.) 163

2. A trust cannot be upheld unless it be of such a nature that the *cestuis que trust* are defined and capable of enforcing its execution by proceedings in a court of chancery. Authorities cited. *Id.* 164

3. Where the evidence shows a wrongful conversion of trust funds by a married woman, her estate is liable in damages, although the trust funds be not identified as a part of her estate. There was no evidence of coercion by the husband.

Appeal of Franklin (Pa.) 322

4. Real estate acquired before the Code, by the husband, with money furnished by the wife, with her consent, and held in his name for many years, will be considered his, and not as held by him in trust for the wife.

Flynn v. Walsh (Md.) 155

5. A, the owner of certain real estate, executed a deed thereof to B, in trust to execute a conveyance of the premises to such person as C might appoint by a writing under seal, in her lifetime, or by will, and to permit C to occupy the same and receive the rents and profits thereof during her life. This deed was made upon a valuable consideration moving from C, the *cestui que trust*. A and B both died without C's having made any appointment under the trust deed. A leaving a will bequeathing all his estate to C. Thereafter C orally requested the principal heir at law of B to convey the C. R., V. IV.

premises to her, which was done by deed executed by the principal and certain other, but not all, the heirs at law of B. *Held*, that the power given to B to convey to C's appointee was a power coupled with a trust; that C's appointment of herself was valid; that the fact that her request for a conveyance was oral, instead of in writing, was such a defect in the execution of the power as equity will correct; that the conveyance of the legal title to C by heirs at law of B was valid, and that a title to the premises acquired through C thereunder is good.

Mut. L. Ins. Co. v. Everett (N. J.) 828

6. Where a son was trustee, to some extent, or agent of his aged mother, and had the care or custody of her estate, and the possession of securities claimed to belong to such estate, he is held to a strict account; and the burden is on him to make clear and plain, and to remove every reasonable doubt as to the ownership of such security.

Parker's Admr. v. Parker (N. J.) 67

7. A note of hand, made by one having a contingent interest in remainder in a trust fund, secured only by an agreement between the maker and the person who has a life estate in the income of the fund, pledging all their interest in the fund to the payment of the note, is a doubtful security such as a new trustee will not be compelled to accept from his predecessor.

Re Craven (N. J.) 144

8. A preliminary injunction will issue at the instance of a trustee, restraining a *cestui que trust* from issuing execution on a judgment in his own name, where there is a dispute as to whether or not the judgment is included in the trust.

Reeser v. Reeser (Pa.) 51

TURNPIKE COMPANIES.

1. The change of a turnpike to a common, free, public road confers no special benefit upon the landowner, and assessments made therefor are void.

State v. Essex Pub. Road Board (N. J.) 830

2. No damage is done the owners of the soil of a public highway by changing such highway from a common, free, public road to a turnpike, or by transferring the easement from the public to a private corporation which by law is authorized to require of the public payment of tolls for traveling upon the road. Authorities cited. *Id.* 831

ULTRA VIRES. See CORPORATIONS, 5, 6, 8, 10, 18-23.

UNDUE INFLUENCE. See FRAUD AND FRAUDULENT CONVEYANCE, I.

UNLIQUIDATED DAMAGES. See DAMAGES, 12.

USAGE. See CUSTOM AND USAGE.

USURY.

1. If a bonus for the loan of money, which, if paid to the lender directly, would render the loan usurious, is paid to the agent of the lender without the knowledge and against

the will of the lender, he is not affected by the illegality of the transaction, and may enforce a mortgage given him to secure such loan; but if the bonus is taken by the agent with the knowledge of the lender, then his mortgage must be declared usurious.

Borchertling's Est. v. Trefts (N. J.) 837

2. If the lender under a usurious contract comes into court, the borrower can safely insist upon the enforcement of the penalty; but if the borrower comes in he will be required to pay what is really and bona fide due. Authorities cited.

Orandall v. Grow (N. J.) 71

VENDOR AND PURCHASER. See SALE.

1. A vendor's lien, or lien by way of equitable mortgage, because of a promise to give a mortgage to secure purchase money, held superior to the claim of an assignee representing judgment creditors of a firm of which the vendee was a member.

Hubbard's Admr. v. Clark (N. J.) 593

2. A vendor's lien for purchase money extends, on his death, to his personal representatives. *Id.*

3. A bill to enforce a vendor's lien for the purchase money of land conveyed by one since deceased is properly brought by the vendor's administrator, and the widow and the heirs at law need not be joined; and this, although the heirs had dealt with the vendee directly in reference to the purchase money. *Id.*

4. The establishment of a vendor's lien for purchase money is an equitable and not a legal remedy. Authorities cited. *Id.* 594

5. A bona fide purchaser of land from a married woman, with knowledge that it was acquired by her from her husband, and that a suit is pending against the husband as surety on a guardian's bond, is sufficiently affected with notice to render the property in his hands liable for the amount of the judgment subsequently recovered in such suit, after the exhaustion of other property improperly acquired from her husband remaining in the hands of the wife.

Flynn v. Walsh (Md.) 155

6. Where a purchaser has enough knowledge to put him on inquiry, it is equivalent to notice. Authorities cited. *Id.* 158

7. A vendee with notice of a former conveyance, or who, with such notice as should have put him on inquiry whether his grantor's title was disputed, neglected to inquire concerning it, is not an innocent purchaser and takes no title.

Swank v. Phillips (Pa.) 461

8. Where one takes a lease for a number of years, and during the term enters into a contract of purchase, with his landlord, of the same property, his possession, which was taken as tenant, operates as notice to one dealing with the landlord in respect to the land, not merely of his right as tenant but of his right to the inheritance. The possession, although taken as tenant, becomes also a possession as purchaser, protecting him as such to the extent

C. R., V. IV.

of his entire right. Authorities cited. *Dia. Op. Stewart v. Long Island R. R. Co.* (N. Y.) 154

9. Where complainant purchased, by verbal contract, of an agent who had parol authority to solicit purchasers, the principal retaining the right to reject any sale made by him, a piece of land and paid the agent \$10, and by the agent's authority entered upon the land and dug a trench and deposited some timber for a building, and the principal subsequently rejected the contract and tender of performance, specific performance was refused.

Chamberlain v. Manning (N. J.) 821

10. In a contract in writing for the sale of land there is no implied covenant to give the vendee possession before the conveyance is executed.

McGrew v. Foster (Pa.) 915

11. A mere temporary occupancy for the purpose of making a survey or taking off timber, by one having no right of possession, is not such an actual occupancy as defeats the constructive possession of the owner. *Id.*

12. When an agreement for sale of land is fully executed in writing, the vendor thereby assumes the character of a trustee, and holds the legal title in trust for the vendee, under the terms and conditions of the contract. The trust thus implied is of the same character as if it had been expressed in the agreement.

Orne v. Kittanning Coal Co. (Pa.) 751

13. The vendee of land under an unrecorded written contract, who has never been in possession, and has paid only part of the purchase money, cannot, without first paying or tendering the balance of the purchase money, maintain against the legal owner trespass for cutting timber.

McGrew v. Foster (Pa.) 915

VERDICT. See CRIMINAL LAW, 18; TRIAL, 6-8.

VESSELS. See SHIPS AND SHIPPING.

VESTED REMAINDERS. See DEVISE AND LEGACY, V.

WAGERS. See GAMING; INSURANCE; 23.

WAGES. See MASTER AND SERVANT I; RECEIVER, II.

WARD. See GUARDIAN AND WARD.

WATER COMPANIES.

1. Property belonging to a municipality, owned and used by commissioners, appointed by law, in operating and carrying on water works to supply the public with water, and necessary for such purpose, from which a revenue is derived, is taxable under the Act of May 14, 1874.

Erie Co. v. City of Erie (Pa.) 300

2. The Act of May 14, 1874, entitled "An Act to Exempt from Taxation Public Property Used for Public Purposes," which exempts certain property and contains a proviso that "all property, real or personal other than that which is in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived

shall be subject to taxation; and nothing herein contained shall exempt the same," imposes taxation upon public property used for public purposes from which a revenue is derived.

Id.

WATERS AND WATERCOURSES.

See DRAINS AND SEWERS; FISH AND FISHERIES; MILLS AND DAMS; MINES AND MINING, 6-17.

1. The description in a deed, "high water line" or its equivalent (here, "the beach"), is a fixed and permanent one, bounding the land conveyed by the high water line existing at the date of the deed; if the high water line subsequently recedes by natural causes, the land submerged is lost to the grantee in the deed.

Nixon v. Walter (N. J.) 875

2. The grantee of the shore of navigable waters does not take a fixed freehold, but one that shifts and recedes as the shore advances. Authorities cited. *Id.* 877

3. Where a boundary line was "along the high water mark of a pond," it was held that the line thus given was a fixed and permanent one, the line of high water mark at the date of the deed did not follow changes of the high water mark of the pond. Authorities cited. *Id.*

4. Under a grant from the commissioners of the land office of the State, to the owner of the adjacent upland, of lands under water in an arm of the sea, which is a common fishery, not a natural oyster bed, and within the limits of the port of New York, within which the dumping of dredging material is prohibited except in the construction of piers, etc., reserving to the people of the State the right of entering upon and using the granted premises until appropriated by the grantee by the erection of a dock, etc., the grantee has no right to dump dredging material upon an oyster bed planted by another within said granted premises, unless that constitutes an actual appropriation within the provisions of the grant.

Post v. Kreischer (N. Y.) 219

5. Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally.

Lords v. Carbon Iron Mfg. Co. (N. J.) 853

6. Where the cause of action is a pollution of a watercourse by water from a coal mine, and where the injury was caused by a combination of mine water which flowed naturally from the mines, which was *damnum absque injuria*, and water pumped from the mines, if as to the latter there would be liability for injury inflicted, where the injury is estimated without distinguishing between these sources, the judgment will be reversed. *Pa. Coal Co. v. Sanderson*, 86 Pa. 401, overruled. *Mercur, Oh. J., Gordon and Trunkley, JJ.*, dissenting.

Pa. Coal Co. v. Sanderson (Pa.) 475

7. The right to mine coal is a right incident to the ownership of coal property, and when exercised in the ordinary manner and with due care, the owner cannot be held liable in damages to a riparian owner for permitting the natural flow of mine water over

his own land into the watercourse, by means of which the water supply of a riparian owner is affected in quality or quantity, the mine introducing nothing into the water to corrupt it, the impurities being from natural and not artificial causes, and the result being a mere personal injury and not affecting the general health and well-being of the community. (*Pa. Coal Co. v. Sanderson*, 86 Pa. 401, overruled.) *Mercur, Oh. J., Gordon and Trunkley, JJ.*, dissenting. *Id.*

8. Land on a lower level owes a natural servitude to that on a higher level in respect of receiving, without claim for compensation by the owner, the water naturally flowing down to it. Authorities cited. *Id.* 480

9. If a well of one landowner is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land, to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is on his own property, and thereby letting out the water. Authorities cited. *Id.*

10. The superior owner may improve his lands by throwing increased waters upon his inferior, through the natural and accustomed channels, which is a most important principle, in respect not only to agriculture but to mining operations also. Authorities cited. *Id.* 481

11. If one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for damages without proof of some fault or negligence on his part. Authorities cited. *Id.* 483

12. The owner of an artificial pool, formed by damming a natural stream, was held not liable for injury resulting from an extremely violent storm. Authorities cited. *Id.*

13. The law has never gone so far as to recognize in one man the right to convert another's farm to his own use for the purpose of a filter. Authorities cited. *Id.* 484

WAYS.

I. DEDICATION.

II. LAYING OUT; ASSESSMENTS · PROCEEDINGS.

III. RAILROAD COMPANIES.

IV. OBSTRUCTIONS.

V. PRIVATE WAYS; ALLEYS.

See MUNICIPAL CORPORATIONS, IV., V.; TURNPIKE COMPANIES.

I. DEDICATION.

1. A dedication of land to the public cannot be inferred from the mere removal of a fence, by the owner; but if such inference obtained, the dedication would not be effectual without acceptance.

Rozell v. Andrews (N. Y.) 209

2. Where the owner of land lays it out into blocks and lots upon a map, and

designates certain portions thereof to be used as streets, parks, and squares, an implied covenant arises as appurtenant to lots granted with reference to such plan, not to use the portions so devoted to the common advantage, although not of such a nature as to give rise to public rights by dedication, otherwise than in the manner indicated by such map.

Lennig v. Ocean City Asso. (N. J.) 808

8. The mere laying out or location of streets is not a dedication of the land upon which they are laid to the use of the public, but only an indication of what may thereafter be so dedicated, and until they are so opened the landowner is entitled to no damages.

Funk's Admrs. v. Waynesboro' School Dist. (Pa.) 800

II. LAYING OUT; ASSESSMENTS; PROCEEDINGS.

4. A city is not liable for consequential damages suffered by a land owner from the sliding down of his land, caused by the cutting down of the street and the removal of the lateral support, where such action of the city was authorized by its charter. Authorities cited.

Cogswell v. N. Y. N. II. & H. R. R. Co. (N. Y.) 329

5. The Act of May 9, 1871, entitled "An Act Relating to Streets in Several Boroughs of Montgomery County," which provides that the damages for locating streets shall be assessed under the general road laws, does not impose the payment of the damages upon the county under the general road laws, and the statute is therefore not unconstitutional as containing in its title no notice that it embraced matters relating to the county. Paxson and Green, JJ., concurring in the judgment on the ground that, while the Act does impose the payment of damages upon the county, the title of the Act sufficiently gives notice to the taxpayers.

Montgomery Co.'s Appeal (Pa.) 808

6. Upon certiorari of road proceedings the presumption is that the road was laid at a proper grade whenever practicable.

Re Road in Dunmore Township (Pa.) 88

7. In the absence of any rule of court prohibiting the viewers from being entertained by the petitioner, and upon finding of the court that it was done under circumstances evincing no sinister purpose or effort to unduly influence the viewers, the proceedings were not set aside. *Id.*

8. A contract entered into by the supervisors of a township, with a canal company, for the use of the tow path of the canal as a public road, in consideration of the payment of an annual sum of money, the contract being made by decree of quarter sessions court, is ultra vires, against public policy, and not authorized by statute; the canal company cannot enforce payment thereon.

Pa. Coal Co. v. Townships of Shirley and Union (Pa.) 927

9. The only parties to a proceeding under Act of 1882, to authorize the compromising or settlement by arbitration of a tax or assessment laid by any public road board, are C. R., v. IV.

the road board and the applicant; and to bring himself within the Act he must show an excess in the assessment over the accruing benefits.

State v. Skinkle (N. J.) 560

10. A return of the laying out of a public road by surveyors of the highways was amended by striking out an award of damages for lands taken, to "the heirs of A. B.," and inserting in lieu thereof a specific award to each individual owner. Held, that such owners had a right to caveat and procure a review of the necessity and utility of the road, by chosen freeholders, after the original return was received by the county clerk, by taking the steps required by Rev. 996, § 8, within the time prescribed; and that such right was not revived or renewed by such an amendment to the return.

State v. Craig (N. J.) 563

11. Section 8, concerning roads in the Township of Hackensack (Laws 1870, p. 8), applicable to Ridgefield, requires that the road board shall decide and determine upon the necessity of a proposed improvement in roads. Their decision must show that they did so decide and determine in exercising their special statutory authority.

State v. Ridgefield Pub. Road Board (N. J.) 573

12. The lack of notice will not be presumed from the silence of the return; and if damages have not been paid, the remedy will be, not to set aside the ordinance, but to compel the city to take the requisite steps to make compensation.

State v. City of Lambertville (N. J.) 574

13. After the lapse of sixteen years, proceedings to open a street will not be reviewed on certiorari, for failure of the return to show notice of the ordinance and an award of damages. *Id.*

14. The terms of Borough Act of March 7, 1882, relating to taxes for road purposes, should be construed to extend to assessments for road purposes, where no previous appropriation has been made by legal authority.

State v. Horner (N. J.) 145

15. Where township voters have, at their regular election, fixed the amount to be raised for highways in the township for the ensuing year, and the township committee has appropriated the money, to be raised by taxation, to the several road overseers, and thereafter a part of the township votes to become an incorporated borough, the commissioners of such new borough are not entitled to the possession and control of the portion of such money raised by taxation upon the part of the township incorporated in the borough; but the same is to be expended by the township overseer as apportioned by the township. *Id.*

16. The report of a reassessment, made after a partial vacation of an assessment for a street improvement, will not be vacated merely because on its face it seems to give awards to all owners of land taken or damaged, and to levy assessments upon all lands benefited, instead of being confined to the lands concerning which the original assessment had been vacated, it appearing that, as to other lands, the as-

assessments in the second and first reports are identical.

State v. Village of South Orange (N. J.) 425

17. Where the report of a board of assessors, in a proceeding to condemn land for a street opening in Trenton, shows that they met at the time and place appointed, and nothing appearing to the contrary, the report must be accepted as true. Such report should show what notice of the meeting of the assessors was given and what manner of publication was adopted.

State v. City of Trenton (N. J.) 80

18. Under the charter (Laws 1878, p. 872), the assessors could not appoint meetings after the expiration of thirty days from the time appointed for their first meeting. *Id.*

19. Compliance with the charter requirements, that the report be completed and filed within 80 days after the first meeting, is essential to the validity of the proceeding. *Id.*

20. Everything necessary to give validity to the action of a special tribunal must appear in the record. Authorities cited. *Id.* 81

21. The change of a turnpike to a common, free, public road confers no special benefit upon the landowner, and assessments made therefor are void.

State v. Essex Pub. Road Board (N. J.) 880

22. No damage is done the owners of the soil of a public highway by changing such highway from a common, free, public road to a turnpike, or by transferring the easement from the public to a private corporation which by law is authorized to require of the public payment of tolls for travelling upon the road. Authorities cited. *Id.* 881

23. The power of a township committee to assign limits and divisions of the highways, under section 87 of the Road Act, cannot be exercised in any township where an overseer was elected by the inhabitants of the road district, after such an election during that year.

State v. Smith (N. J.) 881

24. It is proper for a township committee to refuse to recognize a claim for work done by a road overseer in the absence of or in excess of an appropriation to his district. *Id.*

25. The legislative grant in § 16 of the supplement of 1870 to the Road Board Act (P. L. p. 181), of the right to assess damages upon lands benefited, for the transfer of the franchise of a turnpike company to the Essex public road board, is an authority to lay a burden where no possible benefit can accrue, and is unconstitutional and void. It sanctions the taking of private property for public use without compensation. The prescribed limitation of time within which a writ of certiorari must be sued out to review an assessment is inoperative.

Essex Pub. Road Board v. State (N. J.) 829

State v. Essex Pub. Road Board (N. J.) 880

III. RAILROAD COMPANIES.

26. A railroad corporation having authority, when public necessity requires, to change

the grade of will not be p that respect, the municipi located may payment of change.

Jersey City

27. Public destroyed, ev legislative ferred either implication. struction oug right of high cited. *Id.*

28. The in railroad of constituting that purpose, along the line to its center, public thereh out compen Chamberlasi.

29. A statu company to t a railroad, wit highways ex to make and l passages at th will not au public road l Pa. R. R. C

30. A railr priate and u the laying of switches, sid power is giv implication.

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31. A muni and supervis its territorial l equity to pre streets or inju public of thei Jersey City v

32. Commis to the proceed the removal of and cannot m the removal o join future ob

Rozell v. Anc

33. Where t ject to the eas obstruction public officials acquiescence c can deprive th whole highway obstructions.

Driggs v. Ph

34. The pla against public performance c an obstruct

cannot recover if the act complained of was done upon premises which at any time had been set apart as a highway and by dedication had become such, although plaintiff had occupied a portion of it for twenty years.

Id.

85. Where, after a street was opened and dedicated to public use, complainant railroad purchased a portion of land over which the street extended, taking a deed with full covenants of warranty, and completely obstructed the street by making a deep excavation for its road and laying its tracks, it is estopped from claiming that any portion of said street was dedicated, as against one erecting a dwelling-house on a portion of said street.

South Branch R. R. Co. v. Parker (N. Y.) 63

86. Afterwards complainant filed a caveat against recording of surveyors' return of public road over same land, crossing the railroad, and prevailed; and then built a water tank in the center of said proposed highway. Held that this too works an estoppel.

Id.

87. One who has his dwelling fronting on a street unlawfully occupied by a railroad company,—Held, to be specially injured, and entitled to an injunction restraining the occupation of the street without power expressly given or necessarily implied in the franchises of the company.

Pa. R. R. Co. v. Mish (Pa.)

276

V. PRIVATE WAYS; ALLEYS.

88. To establish a by-road from twenty years' uninterrupted enjoyment, there must be a certain, well-defined line of travel in the same place over the entire route.

South Branch R. R. Co. v. Parker (N. Y.) 63

89. The court will not declare the existence of an alleged way over a private alley way owned by two in common, unless both owners of the private way are in court.

Id.

40. In such case the court would rather presume a license by the absent owner than to declare the use adverse, without his being heard.

Id.

41. The owner of the fee in an alley way over which is a right of way may erect a building over said way, if in so doing he does not interfere with the right of way.

Sutton v. Groll (N. J.)

251

WIDOW. See DESCENT AND DISTRIBUTION, 11-15; DOWER.

WILL. See DESCENT AND DISTRIBUTION, 6; DEVISE AND LEGACY.

1. Declarations of the maker of a holographic will, made previous to the time of its execution and publication, in conversations with the persons who subsequently witnessed the will, may be admitted to aid in showing a publication within the statutory requirements, where such previous declarations are closely connected with the act of publication by words used by the testator at the time of publication.

Re Will of Beckett (N. Y.)

381

2. Where testator made a will in 1870, when C. R., V. IV.

he had undoubted testamentary capacity, and subsequently made another will in 1880, some of the provisions of which were hostile to the former, and there was some evidence that at the latter date the health and mental capacity of testator had been much impaired by intemperance, yet it appeared from the facts that the entire will was in testator's own handwriting and that he had attended to business, making and paying a number of checks and transacting a variety of matters, and there was a conflict of testimony as to whether the testator was physically capable of writing on the day of the date of the will; but the preponderance was that he had written the will and a number of other instruments, and the provisions of the will did not indicate any incapacity,—the decree of the orphans' court admitting the will of 1870 and rejecting that of 1880 was reversed.

Re Diets (N. J.)

387

3. A will cannot be rejected because the court sees no good reasons for its provisions.

Id.

4. When it is sought to establish a posterior will, to overthrow a prior one made by the testator in health and under circumstances of deliberation and care, where the subsequent will was made when the testator was in enfeebled health and in hostility to the provisions of the first one, the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. Authorities cited.

Id.

5. Lapse of time and laches (in this case a delay of fourteen months) are not a bar to the filing of a caveat to test the validity of a will.

Re Estate of McIntire (D. C.)

605

6. An executor is not, as such, incompetent, under section 829, Code Civ. Proc., to testify, on the probate of the will, as to personal conversations and transactions with the testator, on the ground that he is a party to the proceeding or interested by way of commissions. Authorities cited.

Id.

7. A legatee may, by releasing his interest in the will, remove his incompetency, under § 829, Code Civ. Proc., to testify, on the probate of the will, in relation to personal conversations and transactions with the testator.

Re Will of Wilson (N. Y.)

769

8. A divorced wife, however innocent, has no right to a distributive share in the personal estate of her divorced husband, upon his death intestate. Hence a divorced wife, who had been divorced on her own application (for the adultery of her husband), and who had released all interest in her former husband's real estate, is not entitled to notice of proceedings to probate his will.

Re Estate of Ensign (N. Y.)

376

9. In a suit by an executor to compel production of a will held by the daughter of testatrix and her husband, defendants having been in the wrong originally,—Held, liable for costs.

Beckett v. Zane (N. J.)

54

10. Under section 2589, Code Civ. Proc., the

general term has no power, on appeal from a surrogate's court, to award costs to an unsuccessful contestant of the probate of a will.

Re Will of Wilson (N. Y.) 769

11. Every last will made when testator had no issue living, wherein any issue he might have is not provided for or mentioned, shall be void if, at the time of his death, he leave a child or children or issue, or leave his wife en-ciente of a child, and such testator shall be deemed to die intestate. Rev. 1246, § 20.

Coudert v. Coudert (N. J.) 182

WITNESS.

I. COMPETENCY.

II. CREDIBILITY.

III. EXAMINATION.

See EVIDENCE, 9-11, 14; HUSBAND AND WIFE, 83; PERJURY; WILL, 6, 7.

I. COMPETENCY.

1. A legatee may, by releasing his interest in the will, remove his incompetency, under section 829, Code Civ. Proc., to testify, on the probate of the will, in relation to personal conversations and transactions with the testator.

Re Will of Wilson (N. Y.) 769

2. An executor is not, as such, incompetent, under § 829, Code Civ. Proc., to testify, on the probate of the will, as to personal conversations and transactions with the testator, on the ground that he is a party to the proceeding or interested by way of commissions. Authorities cited. *Id.* 770

3. If, at the time of examination of a person before a coroner's inquest, it appears that a crime has been committed and that he is in custody as the supposed criminal, he is not to be regarded as a witness, but as a person accused, and he is to be treated in the same manner as if brought before a committing magistrate; and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense. Authorities cited.

People v. Mondon (N. Y.) 859

4. Where a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn, his testimony (should he afterwards be charged with the crime) may be used against him on his trial, and the mere fact that at the time of his examination he was aware that a crime was suspected and that he was suspected of being the criminal will not prevent his being regarded as a mere witness, whose testimony may afterwards be given in evidence against himself. Authorities cited. *Id.*

5. A corporation, acting through officers and agents who are admitted to testify in cases where the corporation is a party, cannot be C. R., V. IV.

said to be under legal disability; and the opposing party in a suit can be examined as a witness.

North Hudson Co. R. Co. v. May (N. J.) 81

6. That the plaintiff in an action of ejectment has been permitted to testify to matters occurring in the lifetime of the deceased ancestor of defendants, either with or without objection, does not render the widow and son of the ancestor competent to testify to such matters for the purpose of sustaining defendant's title.

Swank v. Phillips (Pa.) 461

7. In a suit by a married woman through her husband as her next friend, the latter, being a nominal party to the suit only, is a competent witness for the plaintiff.

Neale v. Hermann (Md.) 161

8. Conductor's written statement giving details of accident immediately after it happened, is not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence. Conductor may use such written statement to refresh his memory.

North Hudson Co. R. Co. v. May (N. J.) 81

II. CREDIBILITY.

9. Evidence testing the recollection and credibility, or showing the bias of a witness, is admissible as cross examination.

Lake Shore & M. S. R. Co. v. Rosenzweig (Pa.) 712

10. A judge is not bound to believe a thing merely because the witness swears to it, but he should test the evidence as other men of discernment would test it, believing what he is convinced is true, and discarding what he is convinced is false.

Fuller v. Fuller (N. J.) 88

III. EXAMINATION.

11. Cross examination is never limited or controlled by the mere words and phrases used in direct examination. Where a party to a suit denies the principal allegation or charge against him, in his direct examination, he thereby lays himself liable to cross examination upon every circumstance and transaction with which he was connected, which may tend to establish the allegation or charge.

Pullen v. Pullen (N. J.) 71

WORDS. See DEFINITIONS.

WRIT AND PROCESS. See EXECUTION.

A sheriff's return, that he served the summons in a case on the guardian of a minor, cannot be contradicted in a collateral action.

Levan v. Mitholland (Pa.) 966

WRIT OF ERROR. See ERROR.

SUPPLEMENTAL INDEX.

EDITORIAL NOTES AND BRIEFS.

ABANDONMENT. See WATS.

ABATEMENT. See NUISANCE.

ACCOUNT. See EQUITY; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; LIMITATION OF ACTIONS.

Equity jurisdiction of common pleas. (Pa.) 43

Bill for account must aver an indebtedness at time of filing. (Pa.) 43

Limitation of actions; mutual accounts. (Pa.) 897

ACTION OR SUIT. See ACCOUNT; AFFIDAVIT OF DEFENSE; APPEAL; ARBITRATION AND REFERENCE; ASSUMPSIT; ATTACHMENT; BANKS AND BANKING; CERTIORARI; CLOUD ON TITLE; CONTEMPT; CONTRACT; CORPORATIONS; COSTS; COVENANT; CRIMINAL LAW; DAMAGES; DEBT; DEPOSITIONS; EJECTMENT; EQUITY; ERROR; ESTOPPEL; EVIDENCE; EXCEPTIONS; EXECUTION; EXECUTORS AND ADMINISTRATORS; FRAUD AND FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; INSURANCE; JUDGMENT; JURY; LACHES; LIBEL AND SLANDER; LIMITATION OF ACTIONS; LIS PENDENS; MALICIOUS PROSECUTION; MANDAMUS; MASTER AND SERVANT; MORTGAGE; MUNICIPAL CORPORATIONS; NEGLIGENCE; NEW TRIAL; NONSUIT; NUISANCE; PARTITION; PERJURY; PLEADING; QUO WARRANTO; REPLEVIN; REPORT AND CASE MADE; SALE; SET-OFF AND COUNTERCLAIM; TAXES; TENDER; TRIAL; TROVER AND CONVERSION; WILL; WITNESS; WRIT AND PROCESS.

Definition. (N. Y.) 127

An action is an ordinary proceeding in a court of justice; every other remedy or proceeding is a special proceeding. (N. Y.) 127

When lies. If claims may be counted on separately, they are separate causes of action, for one cause is no bar to another. (Pa.) 645

If parties agree that a debt shall be payable in installments, they have severed it, and a recovery of one installment under a declaration which counts for the whole debt does not bar a subsequent suit for an installment not due when the first suit was brought. (Pa.) 645

If a person makes a promise to another, upon a lawful consideration, for the benefit of a third person, such third person may maintain an action, even at law, upon it. (N. J.) 899

Where there is a legal right there is also a C. R., V. IV.

legal remedy by suit or action at law whenever that right is invaded. (N. Y.) 220

The court looks behind the nominal party, and treats as the real party him whose interests are involved in the issue and who conducts and controls the action. (Pa.) 765

State can no more be sued in equity than at law. (N. Y.) 184

Waiver of right to *discontinue* action of tort and bring new action *ex contractu*. (N. Y.) 181

ADJOURNMENT. See CONTINUANCE AND ADJOURNMENT.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADULTERY.

Sufficiency of indictment. (Pa.) 712

Indictment; omission of name of wife. (Pa.) 711

ADVERSE POSSESSION. See LIMITATION OF ACTIONS; WAYS.

AFFIDAVIT. See ATTACHMENT.

AFFIDAVIT OF DEFENSE.

An affidavit by a mere stranger, without showing a disability on the part of the defendant to make his affidavit, is insufficient. (Pa.) 508

An affidavit by defendant's attorney upon information of his client is not sufficient. (Pa.) 508

When an affidavit is made by the clerk of defendant, it must set out why it could not be made by the principal. (Pa.) 508

A general affidavit that the plaintiff's charges are excessive is insufficient. (Pa.) 508

An affidavit setting forth partial failure of consideration should state the exact amount. (Pa.) 508

If an affidavit be evasive, the plaintiff is entitled to judgment. (Pa.) 508

An item of commission for collecting a sum of money is not a proper subject for a book charge. (Pa.) 289

Judgment cannot be taken against a married woman for want of an affidavit of defense. (Pa.) 289

AGENT. See PRINCIPAL AND AGENT.

ALIMONY. See HUSBAND AND WIFE.

AMENDMENT. See JUDGMENT.

APOTHECARY. See INTOXICATING LIQUORS.

APPEAL. See CRIMINAL LAW; EXCEPTIONS; REPORT AND CASE MADE.

No appeal will lie from an order that was discretionary. (N. J.) 837

Any order, judgment or decree is appealable which, if not set aside or reversed, will put an end to the suit in controversy. (D. C.) 617

A decree is final which leaves "nothing to be litigated between the parties." (D. C.) 617

An exception to "each and every part" of a surrogate's decree is unavailing. (N. Y.) 795

Practice. Findings on questions of fact upon conflicting evidence will not be disturbed. (N. Y.) 226

Finding of fact by master only set aside for plain error. (Pa.) 46

Conclusiveness of findings of fact upon conflicting evidence. (N. Y.) 185

Power of court of appeals to review questions of fact in actions originating in surrogates' courts. (N. Y.) 851

Upon failure to find upon issues of fact, **presumption** is that court below found against parties attempting affirmation of issue. (N. Y.) 181

Error in the admission of illegal evidence cannot be disregarded. (N. Y.) 790

ARBITRATION AND REFERENCE.

A referee's findings of fact are construed as a special verdict. (Pa.) 700

ARREST. See FALSE IMPRISONMENT.

The promoters of an imprisonment, in proceedings without the jurisdiction of the court, will not be protected for acts done under the void process. (N. Y.) 216

ARSON.

To constitute a dwelling-house in the statute against arson, it must be a habitation for man and usually occupied by some one lodging in it at night. (N. J.) 424

ASSESSMENT. See DRAINS AND SEWERS; MUNICIPAL CORPORATIONS; TAXES.**ASSIGNMENT.** See MORTGAGE.

A valuable consideration is necessary to support an equitable assignment. (N. Y.) 878

Right of **assignee** to sue in his own name. (D. C.) 609

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Validity and recognition of foreign assignments for benefit of creditors. (Pa.) 660

A foreign attachment against a nonresident debtor is valid, notwithstanding a previous assignment for benefit of creditors made by the defendant, where the assignment has not been recorded within the county in which the debt was attached, and no notice thereof was given to the attaching creditor. (Pa.) 660

Validity of provision in lease that landlord should have title as mortgagee upon property on the premises to secure rent, and that the tenant should have the right to use the property and make sales thereof, as against assignee for benefit of creditors of the tenant. (N. Y.) 288

Recording. (Pa.) 666

C. R., V. IV.

Statutory right of assignee to property conveyed in fraud of creditors. (N. Y.) 187

Liability of assignee for permitting removal of property from possession. (N. Y.) 187

ASSUMPSIT.

Where contract was executed by agent in behalf of principal, and latter has ratified it by accepting its benefits, seal may be rejected as surplusage, and recovery had against principal in assumpsit, as if it were a simple contract. (N. Y.) 181

Bill for discovery will not lie where there is a remedy by assumpsit. (Pa.) 43

Whenever an account will lie, *indebitatus assumpsit* will lie. (Pa.) 474

ASSUMPTION OF RISK. See MASTER AND SERVANT.**ATTACHMENT.**

Will lie for assumpsit on a *quantum meruit*, goods sold and delivered, work and labor done, and the like, where no price was agreed upon. (N. J.) 78

Devisee of income of fund during life has no interest in the *corpus*, subject to gift, sale, or attachment. (Pa.) 84

Sufficiency of **affidavit** must be attacked before appearance. (N. J.) 77

Waiver of irregularity in **issuance of writ**, by appearance. (N. J.) 77

The **bond** should be in double the amount which may be recovered. (N. J.) 78

Practice under Act of March 17, 1869; liability on bond. (Pa.) 749

There is no rule which compels the real owner of property, on notice of a suit, to *intervene* and defend *pro interesse suo*, on pain of forfeiting his rights of property or of action. (Pa.) 766

Foreign attachment cannot be maintained for a debt not due. (Pa.) 660

Validity of foreign attachment against foreign assignment for benefit of creditors. (Pa.) 660

A foreign attachment against nonresident debtor is valid, notwithstanding a previous assignment for benefit of creditors made by the defendant, where the assignment has not been recorded within the county in which the debt was attached, and no notice thereof was given to the attaching creditor. (Pa.) 660

A foreign attachment will not be quashed on allegation of defendant of agreement with plaintiff to extend the time of payment of the debt; such agreement is matter of defense, to be pleaded and tried in the regular way, and not on a motion to dismiss the suit. (Pa.) 660

Foreign attachment will be quashed on motion when it appears on the face of the record that the proceedings are irregular and void. (Pa.) 660

Right of defendant in foreign attachment to require plaintiff to show cause of action. (Pa.) 660

When the defendant in foreign attachment enters security for the debt, it dissolves the attachment, and the action becomes merely a common-law remedy. (Pa.) 660

ATTORNEY AND CLIENT.

An order cannot be taken by default against a party, after his death, by service upon the person who had been his attorney during his lifetime. (N. Y.) 394

After verdict, attorneys who represented parties at the time of trial may continue to do so until judgment is entered, and notice upon such attorney after the death of one of the defendants is sufficient. (N. Y.) 395

An affidavit of defense by defendant's attorney upon information of his client is not sufficient. (Pa.) 508

Liability of attorney for the issuance of void or irregular process. (N. Y.) 217

ATTORNEY-GENERAL.

Has right to present *quo warranto* information without leave asked of any one. (N. J.) 85

When equity intervenes to restrain acts prejudicial to the community, it must be by bill by the attorney-general. (Pa.) 277

AUCTION AND AUCTIONEER.

Agreements not to bid at public auction; public policy. (N. Y.) 191, 194

A bidder at an auction may retract his bid at any time before the hammer is down. (Pa.) 890

A sale of lands by public auction is within the Statute of Frauds. (Pa.) 891

When the name of a bidder on real estate is entered by the auctioneer, on the spot, and such entry is so connected with the subject and promise of sale as to make part of the memorandum, it is a contract in writing so as to take the case out of the Statute of Frauds. (Pa.) 891

BAIL AND RECOGNIZANCE.

Recognizance is subject to the legal presumption of payment after twenty years. (Pa.) 458

BAILMENT. See PLEDGE AND COLLATERAL SECURITY.

If one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence. (N. Y.) 205

The continued holding of a pledge prevents the operation of the Statute of Limitations. (Pa.) 458

BANKRUPTCY.

Evidence of acknowledgment or promise to pay a debt, in order to revive after discharge in bankruptcy, is more strictly construed than in cases to avoid the Statute of Limitations. (Pa.) 659

A mere recognition of a debt after discharge in bankruptcy will not revive; there must be an express promise to pay, unconditional and absolute. (Pa.) 659

BANKS AND BANKING.

A bank has no lien on money standing to the credit of one of its depositors, for the amount of the note of such depositor, discounted by the bank, but which is not matured. (Pa.) 262, 673

Deposit of negotiable bonds with bank, as collateral security; right of action. (Pa.) 106

C. R., V. IV.

BASTARDY.

Discharge under insolvent laws. (Pa.) 711
Sentence; costs. (Pa.) 711
Right of after-born child to take against will; Act April 8, 1833; child legitimated after the making of the will. (Pa.) 470

BAWDY AND DISORDERLY HOUSES.

Agent renting, liable. (N. J.) 880
Indictable at common law. (N. J.) 880
Evidence of reputation. (N. J.) 880

BILLS AND NOTES.

There is no implication that a creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note at a future day on account of it. (Pa.) 645

The receipt of the debtor's note does not discharge the debt, unless it is so agreed. It is a mere concurrent security. (Pa.) 645

BONA FIDE PURCHASER. See VENDOR AND PURCHASER.

BONDS. See ATTACHMENT; BAIL AND RECOGNIZANCE; PRINCIPAL AND SURETY; RAILROAD COMPANIES; REPLEVIN.

BOOK ACCOUNTS. See EVIDENCE.

BOROUGHES. See MUNICIPAL CORPORATIONS.

BRIBERY.

By member of common council of New York city, punishable under Penal Code. (N. Y.) 165-168

BRIDGES.

The approaches of a bridge are a part thereof, and a duty to repair applies to them. (N. Y.) 786

BROKER. See PRINCIPAL AND AGENT.

BURDEN OF PROOF. See EVIDENCE; FRAUD AND FRAUDULENT CONVEYANCE; NEGLIGENCE.

BURGLARY.

Dwelling-house must be a house in which occupier and his family usually reside, or, in other words, dwell and lie in. (N. J.) 424

CANALS.

Seal of canal commissioners is not seal of State. (N. Y.) 181

CARRIERS. See NEGLIGENCE; RAILROAD COMPANIES; STREET RAILWAYS.

Of goods. In an action on the case by consignor, carrier may show that title to goods really belonged to third person who had taken possession thereof. (Pa.) 106

Of passengers; who. A person traveling as an employee is not a passenger. (Pa.) 900

One entering wrong train by mistake is a passenger. (Pa.) 719

A passenger is a person who rides upon the company's trains with its assent, not at the time being in its employ; and evidence which

shows such assent is sufficient to create the relation. (Pa.) 900

Liability. The duty of a carrier of passengers is to exercise the highest degree of care, diligence, and foresight. (Pa.) 699

The lessee of a grand stand at the races, receiving a compensation for admission to the stand, was held liable to the same extent as a carrier of passengers. (Pa.) 649

It is the general American rule that there is no privity in negligence between a passenger and his carrier; the contributory negligence of the carrier is not to be imputed to the passenger. (Pa.) 510

The carrier's liability for injury to passengers is only *prima facie*, and can be removed when the injury complained of resulted from inevitable accident or from something against which no human prudence or foresight could provide. (Pa.) 648

Contributory negligence. Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence. (Pa.) 510

Where a passenger on a carrying vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and of another party, the carrier alone is liable for the injury. (Pa.) 510

Where a passenger upon a railway car was guilty of a want of care which did not contribute to the accident, or only remotely contributed to it, he will not thereby be prevented from recovering. (Pa.) 901

Where a passenger on a ferryboat approaching the landing bridge stood outside the chain, and the boat collided with the wharf or bridge, and the passenger was injured,—*Held*, not guilty of contributory negligence, and for the jury. (Pa.) 901

Where a passenger standing on a platform of a car going slowly over a bridge was injured by a collision resulting from a defect in the car,—*Held*, the question of contributory negligence should be left to the jury. (Pa.) 901

Where the shipper of a load of cattle was directed by the station agent to ride on the top of the car where his cattle were,—*Held*, he was guilty of contributory negligence. (Pa.) 899

It is contributory negligence on the part of the passenger to allow his elbow to project from the car window. (Pa.) 641

It is not contributory negligence *per se* for a passenger to ride on the front platform of a crowded street car. (Pa.) 901

It is negligence for a passenger to ride in the baggage car even with the consent of the conductor. (Pa.) 900

Contributory negligence; passenger alighting from moving train. (Pa.) 640

It is not negligence *per se* for a passenger to get off a car that is moving slowly. (Pa.) 642

Contributory negligence not imputable to passenger who alights from train, on the instruction of the conductor, at an unsafe place. (Md.) 254

A railroad company has the right forcibly to eject those who refuse to comply with reasonable regulations. (Pa.) 718

It is the duty of one purchasing a ticket to know on what train it can be used; a ticket is but a part of the contract for the passage, the C. R., V. IV.

rules and regulations being the other part. (Pa.) 717

A railroad company has a right to make and enforce all needful rules and regulations for the management of its road and trains. (Pa.) 717

Right to exemplary damages for ejectment by conductor, wanton, reckless, and oppressive. (Pa.) 719

Where a passenger is injured, the burden is upon the carrier to show facts relieving it from liability. (Pa.) 699

CASE MADE. See REPORT AND CASE MADE.

CAVEAT. See WILL.

CERTIORARI.

A *certiorari* only brings up the record for review. (Pa.) 918

Proper remedy to review comptroller's decision for refusing to cancel tax sale. (N. Y.) 185

CESTUI QUE TRUST. See TRUST.

CHALLENGE. See JURY.

CHARGE OF COURT. See TRIAL.

CHARGE ON LAND. See DEVISE AND LEGACY.

CHARTERS. See CONSTITUTIONAL LAW; CORPORATIONS; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

CHATTEL MORTGAGE. See MORTGAGE.

CHURCHES. See RELIGIOUS SOCIETIES.

CITIES. See MUNICIPAL CORPORATIONS.

CLASSIFICATION. See CONSTITUTIONAL LAW.

CLIENT. See ATTORNEY AND CLIENT.

CLOUD ON TITLE.

Action will lie to remove lien created by illegal tax sale. (N. Y.) 185

COAL MINES. See MINES AND MINING.

COLLATERAL SECURITY. See PLEDGE AND COLLATERAL SECURITY.

COMMERCE. See CONSTITUTIONAL LAW.

COMMITMENT. See CONTEMPT.

COMMON PLEAS. See COURTS.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN; RAILROAD COMPANIES; WAYS.

CONFESSION. See CRIMINAL LAW; JUDGMENT.

CONFLICT OF LAWS.

Validity and recognition of foreign assignments for benefit of creditors. (Pa.) 660

CONSIDERATION. See CONTRACT;
DEED; VENDOR AND PURCHASER.

CONSOLIDATION. See RAILROAD COMPANIES.

CONSTITUTIONAL LAW. See EMINENT DOMAIN; INTOXICATING LIQUORS; RAILROAD COMPANIES; STATUTES; SUNDAY; TAXES.

Effect will be given to that part of a statute which is not obnoxious to the Constitution. (N. J.) 863

Sufficiency of expression of subject in title. (Pa.) 304, 307

Local and special legislation; classification of cities. (N. J.) 84, 86; (Pa.) 284, 285, 314, 319

No classification of school districts has as yet been attempted, and until they are classified any Act affecting them must affect all or none. (Pa.) 311

Act of June 20, 1881, regulating payment of persons engaged in mining coal, ore, etc., is void. (Pa.) 888

Act 1880, p. 191, creating excise departments in cities of over 15,000 inhabitants, is special and unconstitutional. (N. J.) 84

The Constitution of the United States and the Constitution of a State are the only restriction or limitation upon legislative power. (N. Y.) 544

A charter right to consolidate with other corporations cannot be taken away by subsequent statute or Constitution. (Pa.) 499

The right to cumulative voting cannot be given by a statute or Constitution, subsequent to the charter, without the consent of the stockholders. (Pa.) 499

Power of Legislature to alter, suspend, or repeal charter. (N. J.) 140

Consolidation of competing lines of railroad. Constitution of 1874, art. 17. (Pa.) 499, 500, 501, 508, 504

Effect of Constitution of 1874, prohibiting any railroad from consolidating with or acquiring a parallel or competing line, upon companies having charters before the adoption of the Constitution. (Pa.) 499

Application of Art. 17 of the Constitution, prohibiting acquisition or control of parallel or competing roads, to passenger railways. (Pa.) 501

Commerce. Police power of State Legislatures. (N. Y.) 543

Police laws are not unconstitutional because they impair property or interfere with its full enjoyment or individual rights. (N. Y.) 544

The police power of the Legislature is so essential to the welfare of the State that the Legislature cannot dispossess itself thereof. (N. Y.) 544

The Legislature may pass police laws which incidentally regulate interstate commerce. (N. Y.) 544

The Legislature has authority, as an exercise of police power, to suppress any trade which is injurious to the public health, welfare, or morals. (N. Y.) 544

The power of the Legislature to prohibit the sale of impure and unwholesome articles of food, and to provide for the confiscation and destruction of such articles on their being of C. R., V. IV.

ferred for sale in open market, cannot be questioned. (N. Y.) 544

The Legislature may regulate the weight and price of bread. (N. Y.) 544

It is within the police power of the Legislature to regulate and exclude slaughter houses in villages and cities. (N. Y.) 544

It is within the police power of the Legislature to control and forbid work in laundries in certain hours. (N. Y.) 544

Statutes prohibiting the killing or possession of game during certain seasons are constitutional. (N. Y.) 544

It is within the power of the Legislature to regulate public warehouses. (N. Y.) 544

The police power is superior to all charters, in one sense, but never in the sense of permitting the State, under it, to take for nothing the property rights of citizens or corporations. (Pa.) 500

Eminent domain. An Act entitled "An Act to open and straighten certain streets (naming them) in the city of Philadelphia," which provided, in the body of the Act, for the assessment of damages, was held constitutional. (Pa.) 804

A tax which is not uniform is in conflict with the Fourteenth Amendment of the Federal Constitution, which requires that no statute shall deny to any person within its jurisdiction the equal protection of the laws. (N. J.) 427

The Legislature may prohibit the intermarriage of white and colored people. (N. Y.) 544

While the Legislature may establish the effect of certain evidence, and shift the burden of proof from one party to another, yet it has not the power to make the lawful act of one person presumptive evidence of the unlawful act of another. (N. Y.) 855

CONTEMPT.

Constructive contempts must be brought before the court by affidavits of persons who witnessed them, and thereupon a rule is made upon the offender to show cause why attachment should not issue against him. (N. J.) 585

The power of a court to commit for contempt is not to be upheld, except under the circumstances and in the manner prescribed by law. (N. J.) 585

Power of court to punish for libelous publication, out of court, concerning pending case. (N. J.) 579-580

Statutory provisions of the several States. (N. J.) 579-581

Liability for contempt on refusal to obey a surrogate's decree. Code, § 2555. (N. Y.) 210, 211

Practice and appeal, under Act April 17, 1884. (N. J.) 577

The power to commit for contempt is not the necessary incident of a court of justice, and therefore is not granted by implication; it can only be derived from the common law or by the legislative grant of such power. (N. J.) 581

Form of commitment for contempt. (N. Y.) 216

CONTINGENT REMAINDER. See DEVISE AND LEGACY.

CONTINUANCE AND ADJOURNMENT.

Where a party is present and makes no objection to the adjournment, he cannot afterwards be heard to except to it because irregular. (N. J.) 884

CONTRACT. See ASSUMPSIT; CONSTITUTIONAL LAW; CORPORATIONS; COVENANT; DEED; FRAUDS, STATUTE OF; HUSBAND AND WIFE; LIMITATION OF ACTIONS; VENDOR AND PURCHASER.

What constitutes. Conversations and negotiations leading to a written contract are admissible to prove a fraud or trust; but there should be clear evidence that the arrangement continued up to the time of executing the writing. (Pa.) 922

Where a parol agreement is in accordance with and not in opposition to a written contract, the parol agreement being collateral, it does not infringe the rule that a contract cannot be partly in parol and partly in writing. (Pa.) 652

Incapacity; drunkenness. (Pa.) 890
Where the only question is the construction of a written contract, a submission to the jury is error. (N. Y.) 531

Part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue. (N. J.) 144

A moral obligation alone, as an executed consideration, is not sufficient to support either an express or implied promise. (N. J.) 557

No implied contract on part of State to pay for work voluntarily done. (N. Y.) 182

When there is an express contract, a party cannot be bound by an implied promise. (Pa.) 104

Executory contract. (Pa.) 86
No inference that a transaction is illegal will be allowed, unless absolutely necessary. (N. Y.) 192

Where a promise is void *ab initio*, it is not capable of ratification. (N. J.) 557

A lawful contract cannot be avoided by a void agreement. (N. Y.) 894

Contract will not be presumed illegal or against **public policy**, when it is capable of a construction which will make it consistent with the law. (N. Y.) 191

Agreements not to bid at public auction; public policy. (N. Y.) 191, 194

Not presumed void or illegal or against public policy, when capable of construction which will make it valid. (N. Y.) 129

Agreements in restraint of free competition at public sales are void. (N. Y.) 129

Equity will not enforce contract in **restraint of trade.** (Pa.) 46

Construed most strictly against makers. (Pa.) 46

Reformation; evidence of fraud or mistake must be clear, precise, and indubitable. (Pa.) 45

Limitations, conditions, forfeitures. (N. Y.) 884

Where no time is fixed for **performance**, the party from whom performance is due is not in default until he has been notified or required to perform by the other party; until

some act or notice on the part of the latter, he must be regarded as consenting to the delay. (N. Y.) 198

Rescission for nonperformance. (N. Y.) 373

Rescission can only be by acts of both parties. (Pa.) 43

Rescission; restoration of consideration. (N. J.) 898

To retain any benefit under a contract is incompatible with rescission. (Pa.) 740

If a person makes a promise to another, upon a lawful consideration, for the benefit of a third person, such third person may maintain an **action**, even at law, upon it. (N. J.) 399

Where contract was executed by agent in behalf of principal, and latter has ratified it by accepting its benefits, a seal may be rejected as surplusage and recovery had against principal in assumpsit, as if it were a simple contract. (N. Y.) 181

Test for distinguishing liquidated and unliquidated damages in action on contract. (N. J.) 78

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; MASTER AND SERVANT; NEGLIGENCE.

CONVERSION. See DEVISE AND LEGACY; TROVER AND CONVERSION.

CONVEYANCE. See DEED; FRAUD AND FRAUDULENT CONVEYANCE; HUSBAND AND WIFE.

CORPORATIONS. See BANKS AND BANKING; CARRIERS; GAS COMPANIES; MINES AND MINING; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; RELIGIOUS SOCIETIES; SCHOOLS AND SCHOOL DISTRICTS; STREET RAILWAYS; WATER COMPANIES.

Definition. (N. J.) 141

Power of Legislature to alter, suspend, or repeal **charter.** (N. J.) 140

A nonuser or misuser will not forfeit a charter. (N. J.) 141

Franchise defined. (N. J.) 140, 141

Every act affecting the public is the exercise of a franchise. (N. J.) 85

Immunity from taxation is not a franchise. (N. J.) 141

Subscription for stock in advance of the formation of the corporation becomes binding as soon as it comes into existence. (N. Y.) 192

Right of assignee to sue on stock subscriptions. (D. C.) 609

Individual liability of subscribers to creditors. (D. C.) 609

Right of stockholder to compel production and inspection of books. (N. J.) 403

Taxation of. (N. J.) 189-141

Contracts preliminary to the formation of a corporation, by persons acting in behalf of the corporation to be formed, if legitimate, are binding on the corporation when formed. (N. Y.) 193

The plea of *ultra vires* will not prevail for or against a corporation when it will not advance justice but, on the contrary, will accomplish a legal wrong. (N. Y.) 193

Where a contract has been performed and

the benefit received, a plea of *ultra vires* cannot be set up. (Pa.) 928

An agreement originally *ultra vires* cannot be impeached after a considerable time. (Pa.) 928

The seal of a private corporation does not prove itself. (Pa.) 296

Right of officer of corporation to purchase and take assignment of claims against it. (Pa.) 707

A director or other officer of a corporation may lawfully become its creditor, and will be entitled to all the remedies of other creditors. (N. Y.) 191

The Statute of Limitations does not apply against a corporation which has ceased from the ordinary business for which it was created. Act of March 27, 1718. (Pa.) 458

Conveyances, by insolvent corporations, to prefer creditors. (N. J.) 828

The assets of an insolvent corporation are a fund for the payment of its debts. (Pa.) 457

A foreign corporation can only acquire and hold lands by comity. (N. Y.) 226

COSTS. See WILL.

In tort, plaintiff cannot recover compensation for his necessary expenses, together with counsel fees. (Pa.) 49

COTENANTS. See JOINT TENANTS AND TENANTS IN COMMON.

COUNSEL. See ATTORNEY AND CLIENT.

COUNTERCLAIM. See SET-OFF AND COUNTERCLAIM.

COUNTIES. See MUNICIPAL CORPORATIONS.

COURTS. See CONTEMPT; EQUITY; JUDGES OF THE PEACE; RECEIVER.

Power of court to punish by contempt for libelous publication, out of court, concerning pending case. (N. J.) 577-579

Authority, under Act April 10, 1873, P. L. 666, to increase or decrease compensation of sheriff for board of prisoners in county jail. (Pa.) 88

New York Supreme Court; jurisdiction of foreclosure proceedings of premises in Pennsylvania and New York. (Pa.) 112

Common pleas; equity jurisdiction in settling accounts. (Pa.) 43

Within the sphere of its jurisdiction, the orphans' court is a court of equity. (Pa.) 898, 928.

Power of orphans' court to relieve against mistakes. (Pa.) 898

Power of orphans' court to rescind guardian's sale, for mistake, after delivery of deed, confirmation of sale, and payment of purchase money. (Pa.) 893

A decree of the orphans' court is not conclusive in cases of fraud, gross mistake, or misapprehension, and want of jurisdiction. (Pa.) 808

Where subordinate body or officer invested with power to determine question of fact, it is a judicial duty. (N. Y.) 184

COVENANT.

Covenants, like other contracts, are to be C. R., V. IV.

construed according to the intention of the parties, of which acts and declarations under the agreement, commonly called contemporaneous construction, are evidence. (Pa.) 693

Against incumbrances; municipal assessments; lien attaches when assessment confirmed, and not when work completed. (N. J.) 810

Running with land; covenant in oil lease on royalty, to use diligence in operating premises. (Pa.) 104

Breach of covenant in oil lease on royalty to use diligence in operating premises; measure of damages. (Pa.) 104

CREDITOR. See DEBTOR AND CREDITOR.

CRIMINAL LAW. See ADULTERY; ARREST; ARSON; BAIL AND RECOGNIZANCE; BASTARDY; BRIBERY; BURGLARY; GAMING; HOMICIDE; INTOXICATING LIQUORS; JAIL AND JAILER; PERJURY.

A guilty intent is not necessary to constitute the offense, under Laws 1885, chap. 183, § 7, amended by chap. 458, of selling oleomargarine made in imitation of butter. (N. Y.) 548

When a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that the act was done with that intent. (N. Y.) 167

Former jeopardy. (D. C.) 618

When a defendant has once been tried for an offense upon an indictment, upon which he could have been legally convicted and sentenced, he cannot be tried again, at least where he has done nothing to set aside the verdict. (Pa.) 726

In criminal pleadings there can be no joinder of separate, distinct offenses in one and the same count. (N. Y.) 788

Indictment; averment of time. (N. Y.) 788

An indictment must allege the place where the offense was committed, with such distinctness, that a judgment rendered thereon may be pleaded in bar to any second indictment for same offense. (N. Y.) 788

In an indictment, nothing material shall be taken by intendment or implication. (Pa.) 712

It is not sufficient in an indictment for a statutory offense to lay it in the words of the statute, unless they expressly serve to allege the act, with all the necessary additions, and without the least uncertainty or ambiguity. (Pa.) 712

A judgment sustaining a demurrer to an indictment is not a bar to a new indictment or a trial thereon. (D. C.) 617

The prisoner shall have the benefit not only of the doubts upon the facts, but doubts also upon the law. (N. Y.) 790

Evidence. Presumption as to innocence. (N. Y.) 167

Facts consistent with innocence are not proof of guilt. (N. Y.) 167

When facts are consistent with honesty and dishonesty, court will adopt construction favoring innocence. (N. Y.) 167

Confessions; threats. (N. Y.) 166, 168

Liability for culpable negligence in construction of buildings, under Penal Code, §§ 192-

195; admissibility of photographs of building and of reports made by official inspector. (N. Y.) 789-790

When there has been an acquittal on one count, and a conviction on another, for a distinct offense, a **new trial** can only be granted on the count on which there has been conviction. (Pa.) 727

Right of **appeal**, under U. S. Rev. Stat. § 772. (D. C.) 617, 618

Right of State to appeal in criminal cases. (D. C.) 620

CROSS EXAMINATION. See WITNESS.

CROSSINGS. See RAILROAD COMPANIES.

CUSTOM AND USAGE.

Where a custom prevails in a certain trade, contracts are presumed to be made in reference to it. (Pa.) 888

Custom cannot control a statute to the contrary. (Pa.) 888

Custom cannot control a statute (April 15, 1884) making 2,000 pounds a ton of coal. (Pa.) 888

DAMAGES. See MASTER AND SERVANT; MILLS AND DAMS; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

When public or private rights are invaded, and an injunction is asked, no question of the amount of damages is raised, but merely one of the invasion of a right. When railroad companies exceed their statutory powers in dealing with other people's property, this principle may be invoked. (Pa.) 278

Test for distinguishing liquidated and unliquidated damages in an action on contract. (N. J.) 78

Right to exemplary damages for willful negligence. (Pa.) 718, 719

In tort, plaintiff cannot recover compensation for his necessary expenses, together with counsel fees. (Pa.) 49

Measure, upon breach of covenant in oil lease on royalty, to use diligence in operating premises. (Pa.) 104

Right to recover damages up to day of trial, under Act of May 2, 1876. (Pa.) 686

DAMS. See MILLS AND DAMS.

DEBT.

Gaming securities should be decreed to be delivered up, notwithstanding both parties had participated in the fraud, because public policy would be best served by such a course. (N. J.) 421

DEBTOR AND CREDITOR. See ACCOUNT; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; DEBT; FRAUD AND FRAUDULENT CONVEYANCE; SET-OFF AND COUNTERCLAIM.

In case of the insolvency of the borrower before the actual payment of the money by the lender, an equitable right, analogous to that of stoppage *in transitu*, may be exercised by the lender. (Pa.) 263

C. R., V. IV.

DECEDENTS' ESTATES. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; WILL; WITNESS.

DECLARATIONS. See ESTOPPEL; EVIDENCE.

DECREE. See EQUITY; JUDGMENT.

DEDICATION. See WAYS.

DEED. See COVENANT; EASEMENT; ESTOPPEL; FRAUD AND FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; MORTGAGE; VENDOR AND PURCHASER.

Parol evidence may be received to prove a consideration not mentioned in the deed, provided it be not inconsistent with the consideration expressed in it. (Pa.) 923

Record of deed not containing definite description is not notice to purchaser at judicial sale. (Pa.) 916

A purchaser from one whose deed is unrecorded is affected with notice of an unrecorded mortgage mentioned in the receipt for purchase money, at the foot of such unrecorded deed. (Pa.) 917

Where the statute designates the book in which an instrument must be recorded, its terms must be complied with, or the record will be worthless. (Pa.) 666

Where the statute does not require that an instrument should be recorded in a particular book, it may be properly recorded in any book kept by the recorder. (Pa.) 666

An unrecorded deed is not valid, after the death of the grantor, as against one holding a recorded deed from the grantor's heir, without notice of the former deed. (N. J.) 874

An unrecorded deed is void against a subsequent purchaser without notice. (Pa.) 463

Reformation of deed will not be made to the prejudice of a judgment creditor of the grantee. (D. C.) 616

Recitals in the deed are evidence against the grantee accepting the same. (Pa.) 917

Recitals are evidence against parties and privies to the conveyance. (Pa.) 917

Recital is *prima facie* evidence of payment of consideration. (Pa.) 916

DEFAULT. See JUDGMENT.

DEFINITIONS.

Action. (N. Y.) 197

Authorized. (D. C.) 151

Chose in action. (Pa.) 661

Cohabitation. (Pa.) 679

Corporation. (N. J.) 141

Crime. (Pa.) 746

Dwelling; residence; domicile. (N. J.) 424

Franchise. (N. J.) 140, 141

Gas not synonymous with petroleum oil. (Pa.) 927

Heirs. (N. Y.) 178

Issue. (N. Y.) 178

Petroleum oil not synonymous with gas. (Pa.) 927

Property. (N. J.) 146

Survivor. (N. Y.) 177

DEMURRER. See PLEADING.

DEPOSITION.

Issue of commission; appealability of order. (N. Y.) 127
Form of executing commission to take testimony. (Pa.) 642

DEPOSITS. See BANKS AND BANKING.

DESCENT AND DISTRIBUTION.

See DOWER; WILL.

Next of kin. (Pa.) 47, 48
Brothers and sisters of half blood and their issue take to the exclusion of more remote kindred of the whole blood, and in preference to deceased uncle of whole blood. (Pa.) 47
There cannot be two perquisitors from whom to trace the blood. (Pa.) 48
Lien of debts against lands inherited by heir. (N. J.) 874

DEVISE AND LEGACY. See DESCENT AND DISTRIBUTION; DOWER; EXECUTORS AND ADMINISTRATORS; WILL.

Right of disposition. A *feme covert* may exercise any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether it was given to her when *sole* or married. The concurrence of her husband is in no case necessary. (Pa.) 466

The law favors a construction to prevent an intestacy. (Pa.) 637

Intention must be clear before the court will hold a legacy to be specific. (N. J.) 831

Intention to be ascertained from whole instrument. (N. Y.) 177

In arriving at testator's intent, words of will must be permitted to have their proper force. (Pa.) 83

A testator is presumed to have an additional purpose for each additional expression. (N. J.) 865

Effect to be given to every clause. (N. Y.) 177

Though a will must be construed as an entirety, yet the legal construction of one section cannot be controlled by guesses as to the intent of the testator, arising from the disposition of his property in the remaining sections. (N. J.) 865

A will is construed according to the ordinary sense of the words used, except where a rule of law, the context, external circumstances, or a rule of construction is inconsistent with such interpretation. (N. J.) 865

The construction of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within the four corners of the instrument. (N. J.) 866

All doubt must be resolved in favor of the testator's having said exactly what he meant, and plain, clear words, read in their ordinary sense, must always control in searching for the intention of the testator, unless repugnant to other words, equally plain and clear, in another part of the will. (N. J.) 866

To change the express and definite words of a bequest, it must be clear that the testator did not intend what he said, and this by the provisions of the will. (N. J.) 866

Construction of testamentary words must always depend in some measure upon special facts. (Pa.) 84

Punctuation may be regarded as a guide to the construction, when no other means of solving an ambiguity can be found. (N. J.) 865

Several independent devises, not grammatically connected or united by the expression of a common purpose, must be construed separately and without relation to each other, unless a design to connect them be very plain and apparent. (N. J.) 865

In the absence of an expressed contrary intent, the intention of the testator should be construed to give to his widow a fair equivalent for the portion which she would have taken under the intestate laws. (N. Y.) 866

It is a *prima facie* rule of construction that an additional legacy given by a codicil is attended by the same incidents as the original legacy. (N. Y.) 881

"Issue" in a limitation of personal property take as purchasers, the reason of the rule being that the operation of the law, whenever possible, makes real estate descendible and personal estate distributable. (Pa.) 637

Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. (N. Y.) 178

The term *class*, applied to a gift involving survivorship, and upon the question of vesting, is applicable only to the case of the plurality of persons comprised under one general description, indefinite in number and individually undistinguished by name or particular description. (Pa.) 638

The naming of some of a class of children, or others of a number of beneficiaries, will not in itself render the gift any the less a gift to a class. (Pa.) 637

A gift of aliquot shares to several as tenants in common is not to a class. (Pa.) 638

A bequest of personalty for life without limitation over will be construed as an *absolute* gift. (N. J.) 865

Devise to wife of one half of real estate, also all personal property during life, — *Held*, she had the real estate in fee. (N. J.) 865

Bequest of income will not carry an absolute estate in the principal, where the plain intent of testator is otherwise. (Pa.) 83

Life estate; gift over. (N. Y.) 176-178

Devise for life with gift over in case of death without issue. (N. Y.) 177

A devise of an estate generally or indefinitely, with the power of disposition over it, carries the fee, but where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed. (Pa.) 466

A remainder becomes vested as soon as there is any one in existence capable of taking. (Pa.) 681

Investment of trust funds: accretions; right of life tenant and remaindermen to accretions. (N. Y.) 797

The law favors the vesting of estates in remainder at the earliest possible period. (Pa.) 681

Distinction between *vested and contingent remainders*. (Pa.) 682, 683

Vested remainders. 466

Where a contingent estate is limited after a life estate, the English rule is that the contingency is death during lifetime of the life tenant. (N. J.) 595

Where there is no antecedent gift of a future legacy, independent of a direction and time of payment, the legacy is contingent. (Pa.) 636

Contingency in case of death without issue. (N. Y.) 177, 178

Executory devise. (N. Y.) 177
Words, "all the residue of my estate," may be restricted to personality. (Md.) 159

Gift of income of fund with limitation as to time. (Pa.) 83

A gift of the proceeds of a thing is the gift of the thing itself. (Pa.) 467

Devisee of income of fund during life has no interest in the *corpus* subject to gift, sale, or attachment. (Pa.) 84

Implied power of sale. (Md.) 160

Redeemable lease for ninety-nine years will take away devise of land which is converted into personality. (Md.) 160

Powers are to be strictly construed. (Pa.) 467

Ordinarily a power of a disposal annexed to the fee is merged in the estate; but where a married woman is the devisee in fee and the donee of the disposing power, the power, the execution of which may be necessary to pass her estate, should not be regarded as merged. (Pa.) 466

If a power is required to be executed by deed, nothing less will satisfy the words; and it must be sealed and delivered as a proper deed, without reference to the power of the donee to make a proper deed; therefore a married woman must seal and deliver the deed as if she were *sui juris*. (Pa.) 466

A power has no effect on a limitation over until it is executed. Until then it is as if it had no existence, but if it carries the fee, when executed, it operates as a divestiture. (Pa.) 466

A power is collateral, when conferred upon a stranger without interest; appendant, when the person, along with his interest and within its compass, has the power of revocation or appointment; in gross, when the life tenant has the power of appointment out of the compass of his estate. (Pa.) 467

Mingling of realty and personality into one fund makes legacies **payable out of** such fund. (Md.) 160

Personal liability of devisee to pay legacies. (N. Y.) 177

Words charging debts will charge legacies. (Md.) 160

Charge upon land; legacies. (Md.) 159, 160

Words, "pay out of my estate," are an express charge on realty. (Md.) 160

Equity has exclusive jurisdiction in regard to legacies charged on land. (Md.) 160

DISCONTINUANCE.

Waiver of right to discontinue action of tort and bring new action *ex contractu*. (N. Y.) 181

DISCOVERY. See EQUITY.

DISORDERLY HOUSES. See BAWDY AND DISORDERLY HOUSES.

C. R., V. IV.

DISTRESS. See LANDLORD AND TENANT.

DIVORCE. See HUSBAND AND WIFE.

DOCUMENTARY EVIDENCE. See EVIDENCE.

DOWER.

Right of widow to dower in proceedings for partition, under Act March 29, 1833. (Pa.) 293

Right of dower in land held in joint tenancy. (N. J.) 66

Right of widow, under Intestate Act of April 8, 1838, is a freehold estate. (Pa.) 293

A widow, although she dies, is entitled to dower according to her expectancy of life, and not by actual value as determined by length of life. (N. J.) 570

Widows' quarantine. (N. J.) 847

An election made in ignorance, or under mistake of the real nature or extent of the party's right, is not binding, and may be revoked, unless the rights of third parties have intervened. (N. J.) 847

Power of married woman to convey her inchoate right of dower. (N. Y.) 214

The joinder of a *feme covert* with her husband in his conveyance operates as a release of her contingent future right, by way of estoppel. (N. Y.) 214

A quitclaim or release by a married woman, to a stranger to the title, is ineffectual to divest her of an inchoate right of dower. (N. Y.) 214

DRAINS AND SEWERS.

Validity for assessments for cost of sewers at a rate per lineal foot of street frontage; special benefits; assessments according to value of property. (N. J.) 247

DURESS.

Avoidance of marriage for duress of imprisonment. (N. J.) 423

EASEMENT.

Equity will not permit disturbance, right being doubtful. (Pa.) 53

EJECTMENT. See PARTITION.

Vendee cannot maintain equitable ejectment without having tendered purchase price. (Pa.) 917

Plaintiff cannot recover upon a title acquired after suit brought. (Pa.) 463

The acts of a deceased person done against his interest are evidence in favor of those claiming under him. (Pa.) 463

EMINENT DOMAIN. See CONSTITUTIONAL LAW; RAILROAD COMPANIES; WAYS.

Right of one railroad company to take land appropriated by another. (Pa.) 265

Authorizing a corporation to do such acts upon its own land as shall destroy or seriously impair the enjoyment of adjoining land is taking such land within the meaning of the Constitution; and although such authority be given for public purposes, if provision be not made for compensation to the party injured, the authority is void. (N. Y.) 236

EQUITABLE ESTOPPEL. See **ESTOPPEL.**

EQUITY. See **CLOUD ON TITLE; EASEMENT; INJUNCTION.**

Principles. As between persons having only equitable interests, if their interests are in all other respects equal, then priority in time gives the better equity. (N. Y.) 878

Equities are equal between parties equally innocent and diligent. (Md.) 156

Equity affords relief where a fraud has been practiced by one party and the other acted by mistake. (N. Y.) 784

Equity will not interfere in dispute as to mere legal rights. (Pa.) 112

Having cognizance of litigation, will dispose of every feature of dispute. (Pa.) 43, 45

He who seeks equity must do equity. (Md.) 155

He who comes into equity must come with clean hands. (Md.) 155

The rule that he who goes into equity must do equity applies only to equities arising out of the same transaction, the same contract. (Pa.) 740

One attempting to defraud another in payment cannot ask repayment of part consideration from him. (Pa.) 87

Not relieve against *bona fide* purchaser for valuable consideration. (Md.) 156

Jurisdiction is in personam. (Pa.) 112

Jurisdiction over administration of assets of decedent. (N. J.) 89

Has exclusive jurisdiction in regard to legacies charged on land. (Md.) 160

In equity, executor is trustee of all assets. (Md.) 160

State can no more be sued in equity than at law. (N. Y.) 184

An action cannot be maintained at law by the wife against her husband's representatives, for money received by him in his lifetime, to her use. (N. J.) 862

Will not enforce contract in restraint of trade. (Pa.) 46

Fraud or mistake. To reform contract, evidence must be clear, precise, and indubitable. (Pa.) 45

Jurisdiction to cure mistake in deeds. (D. C.) 616

Parol evidence is admissible to support allegations of mistake, surprise, or fraud. (Pa.) 46

Account. Equity jurisdiction of common pleas. (Pa.) 43

Jurisdiction for account. (N. J.) 819

Bill for account must aver an indebtedness at time of filing. (Pa.) 43

Administrator allowed to account in equity, though letters taken out before surrogate. (N. J.) 89

Jurisdiction for **discovery.** (N. J.) 819

Bill for discovery will not lie where there is a remedy by assumpsit. (Pa.) 43

The power to appoint a receiver has been classed under the head of the *quia timet* jurisdiction of chancery; the remedy is a provisional or auxiliary one, exercised as an adjunct to the principal relief sought in the case. (N. Y.) 865

In the United States, the power of the court of chancery to appoint a receiver has been exercised as an inherent authority, without legislative aid. (N. Y.) 865

In England, the power to appoint receivers exists only by virtue of statute, the equity courts having declined to exercise it before authority to do so was expressly conferred. (N. Y.) 865

When equity intervenes to restrain acts prejudicial to the community, it must be by bill by the attorney-general. (Pa.) 277

Will not prevent disturbance of alleged easement where complainant's right is doubtful. (Pa.) 52

Jurisdiction to restrain breach of trade contract. (Pa.) 43

Laches. (Pa.) 53

Pleading. Oath to bill must be either required or authorized by common law, or statute, or rules of court. (D. C.) 151

Prayer for general relief entitles to any relief consistent with case made in bill. (Pa.) 49

An answer responsive to the bill must prevail, unless overcome by two witnesses, or one witness supported by circumstances equivalent to evidence. (N. J.) 879

Where a demurrer is frivolous or intended to delay it should be overruled. (N. J.) 863

Where a demurrer is too extensive it should be overruled. (N. J.) 863

The unrecorded testimony of the complainant is insufficient to overcome a responsive answer. (N. J.) 879

Decree. Conclusiveness. (Pa.) 98

A cause should not be referred to a master before there is an interlocutory decree finding a liability to account. (Pa.) 43

Findings of fact by master only set aside for plain error. (Pa.) 46

ERROR. See **APPEAL; EXCEPTIONS; REPORT AND CASE MADE.**

A case stated is like a special verdict and subject to the same rules. (Pa.) 261

ESTATES OF DECEDENTS. See **DECEDENTS' ESTATES.**

ESTOPPEL.

The doctrine of estoppel applies to corporations. (D. C.) 621

Estoppels are strictly construed. (N. Y.) 880

By deed, etc. (D. C.) 621

By deed; no other consideration can be set up. (Md.) 156

A stranger to the title cannot claim the benefit of an estoppel by deed of a *feme covert*. (N. Y.) 214

One not a party to proceedings is not estopped thereby. (Pa.) 106

By contract. (Pa.) 43

Where a party has, by his declarations and conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admissions, if consequences would be such as to work an injury to the other person. (N. Y.) 879

To create an estoppel the party must have been guilty either of fraud in willfully misleading, or of negligence in not observing that his words would mislead the other. (N. Y.) 880

Intention to mislead is immaterial, if conduct was calculated to mislead and actually did mislead. (N. Y.) 380

A statement can only create an estoppel in favor of the individual to whom it is made. (N. Y.) 380

Equitable; acquiescence and ratification. (Md.) 155

Matter of estoppel must be specially pleaded as such. (Pa.) 42

EVICTIION. See LANDLORD AND TENANT.

EVIDENCE. See CUSTOM AND USAGE; CRIMINAL LAW; DEED; DEPOSITION; DISORDERLY HOUSES; EQUITY; FRAUD AND FRAUDULENT CONVEYANCE; INTOXICATING LIQUORS; NEGLIGENCE; NON-SUIT; PERJURY; PLEADING; REPLEVIN; TRIAL; VENDOR AND PURCHASER; WILL; WITNESS.

Where a party suppresses evidence in his power, the **presumption** is that, if produced, it would make against him. (Pa.) 397

Circumstance from which inference is to be drawn is never to be presumed, but must be substantially proved. (N. Y.) 167

While the Legislature may establish the effect of certain evidence, and shift the burden of proof from one party to another, yet it has not the power to make the lawful act of one person presumptive evidence of the unlawful act of another. (N. Y.) 355

Whenever the plaintiff bases his action on a negative allegation, the **burden** is on him to prove such allegation. (Pa.) 905

Where a matter is peculiarly within the knowledge of the other party he must prove it. (Pa.) 904

Documentary. If part of contract is to be received in evidence, defendant is entitled to have whole received. (Pa.) 104

In the absence of fraud or mistake, a contract is not only the best, but the sole, evidence of agreement. (Pa.) 46

An exemplification of a record is not evidence of a secondary quality, but stands upon an equality with the original. (Pa.) 463

The seal of a private corporation does not prove itself. (Pa.) 296

An item of commission for collecting a sum of money is not a proper subject for a **book charge**. (Pa.) 289

Items susceptible of proof by books of original entry. (Pa.) 289

Photographs are **secondary** evidence. (N. Y.) 790

Photographs have never been allowed as competent evidence when the article itself could be seen in the same condition as represented by the photograph. (N. Y.) 790

On the trial of an issue involving the condition, appearance, or identity of a person, place, or thing at a previous time, a photograph at the time in question is competent, upon proper evidence of its fidelity. (N. Y.) 790

Admissibility of **parol** evidence of contemporaneous agreement. (Pa.) 747

Parol evidence is admissible to explain a latent ambiguity. (Pa.) 922

Parol evidence may be given to explain written agreement. (Pa.) 46

Parol evidence may be received to explain and define the subject-matter of a written agreement. (Pa.) 922

Admissibility of parol evidence to contradict or vary written instruments. (Pa.) 46

Generally parol evidence is inadmissible to contradict or vary the terms of a written instrument. (Pa.) 922

Conversations and negotiations leading up to a written contract are admissible to prove a fraud or trust, but there should be clear evidence that the arrangement continued up to the time of executing the writing. (Pa.) 922

Parol evidence is admissible to alter the legal operation of an instrument, where it contradicts nothing expressed in the writing. (Pa.) 922

Parol evidence must be such as would justify a chancellor in reforming a writing on the ground of fraud, accident or mistake, and must be clear, precise, and indubitable. (Pa.) 922

Parol evidence is admissible to supply deficiencies in a written agreement. (Pa.) 922

Parol evidence may be received to prove a consideration not mentioned in the deed, provided it be not inconsistent with the consideration expressed in it. (Pa.) 922

A written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. (Pa.) 747

Res gestæ. (Md.) 348

Declarations, to be part of the *res gestæ*, must have been made at the time of the act they are supposed to characterize. (Md.) 349

Admissibility of declaration in party's favor; presence of other party. (Md.) 348, 349

The existence of the marriage relation is not enough to make admissions or declarations made by either husband or wife competent against the other, but it is enough to show that the declarant was the agent of the other in the matter involved, and acted as such when the declaration was made. (N. J.) 400

Where some evidence of agency has been given, it is competent to give in evidence the acts and declarations of the alleged agent respecting the subject-matter of his authority. (Pa.) 296

The acts of a deceased person, done against his interest, are evidence in favor of those claiming under him. (Pa.) 463

Where one has sold the same land to different persons, his declarations before the second sale are evidence against his second vendee. (Pa.) 463

An **expert** was held incompetent to testify from an immediate comparison of hands made by him at the trial, without adequate knowledge previously acquired of the handwriting of party. (N. Y.) 790

If a knowledge of the witnesses is derived from specimens, although genuine, which have been selected by the party calling the witness, or by the witness himself, to enable him to qualify himself to testify as to the handwriting, his testimony cannot be received. (N. Y.) 790

When "experts" are called for purpose of

relieving obligor in injunction bond, court should instruct that such testimony should be received with great caution. (Pa.) 50

Admissibility of evidence to show genuineness of handwriting; comparisons, when allowed. (N. Y.) 789

Competency; sufficiency; weight. Plaintiff is bound to offer all the evidence pertinent to maintain the issue on his part. (Md.) 849

The admission of incompetent evidence cannot be assigned for error, if the facts were subsequently established by other conclusive evidence. (Pa.) 468

If incompetent evidence has been admitted on the one side, it may be rebutted by the same amount of evidence on the other. (Pa.) 468

A mere scintilla of evidence is not sufficient to send the case to the jury. (N. Y.) 581

Failure of proof. (N. Y.) 190

EXCEPTIONS. See **APPEAL**; **REPORT AND CASE MADE.**

Amendment of bill after signed and filed. (Md.) 162

EXECUTION.

Where the right to issue execution upon a judgment depends upon the existence of the fact of a performance of some collateral act, the existence of that fact or the performance of the act must be judicially determined before execution can issue. (Pa.) 926

Where the execution is not issued for the enforcement of the judgment, it is fraudulent as to subsequent execution creditors. (Pa.) 656

An execution is intended not to secure, but to enforce, payment of a debt. It must be used in good faith, for its legitimate purpose, or the plaintiff in whose favor it issues gains no advantage from it. (Pa.) 657

Where the plaintiff's object is to obtain security, not satisfaction, for his debt, the employment of an execution for this purpose is a perversion of its design, and a fraud against third persons. (Pa.) 657

Even where the execution plaintiff is guilty of laches, he will not be postponed, if he orders the sheriff to proceed before another writ comes into his hands. (Pa.) 656

Delay will defeat an execution, whether owing to the directions or permission of the plaintiff, or to the default of the officer. (Pa.) 657

An execution will not be postponed for an officer's default. His procrastination, even by sufferance of the creditor, is not fraudulent *per se*, and postpones only where the creditor directs him not to proceed. (Pa.) 656

It is not necessary that the notice of sale be signed by the sheriff, or master, or executor with his own hand. (N. J.) 884

A sale for less than value, if fair, is no cause for setting aside the sale. (N. J.) 884

Irregularities will not avoid a sale. (Pa.) 907

Caveat emptor applies with especial force to judicial sales. (N. Y.) 224

Upon the distribution of the proceeds of a sheriff's sale, a subsisting judgment can only be attacked by other creditors collaterally upon the ground of collusion. (Pa.) 627

Power of court to set aside sale after delivery of sheriff's deed. (Pa.) 892

C. R., V. IV.

Record of deed not containing definite description is not notice to a purchaser at a judicial sale. (Pa.) 917

A purchaser at sheriff's sale is bound to take notice of defects appearing upon the record. (Pa.) 907

A purchaser at a judicial sale is not to be deprived of his rights by reason of mere irregularities in the proceedings, of which he was ignorant. (N. J.) 834

EXECUTORS AND ADMINISTRATORS. See **DESCENT AND DISTRIBUTION**; **DEVISE AND LEGACY**; **DOWER**; **WILL**; **WITNESS.**

It is the duty of joint executors to make investments in their joint names, and to keep a joint possession of the property. (N. Y.) 525

Where one of several executors has in the first instance the actual custody of the funds of the estate, he has a right to retain possession. (N. Y.) 525

One executor or trustee will be liable for the acts of another, if he permits the latter to have the entire management of the estate, or acquiesces in his misapplication of the funds. (N. Y.) 525

In order to hold one executor liable for the acts of his coexecutor, the general rule is that there must be a conjunction of wrong. (N. Y.) 526

A *devastavit* of one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it, for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. (N. Y.) 526

Executors de son tort; who are; liability. *Note.* 94

Right of administrator *d. b. n.* to collect, under Act of 1834. (Pa.) 928

Right of nonresident to letters of administration. (Pa.) 677

Management of estate; claims. Executors, interest in estate; power of administrator. *Note.* 94

An executor must use the same care and management that a prudent man would exercise in his own affairs. (Pa.) 787

In equity, executor is trustee of all assets. (Md.) 160

Equitable jurisdiction over administration of assets. (N. J.) 89

Continuing business. *Note.* 94

Trust funds received during the year are regarded as inoperative, until the close of the year. (N. J.) 879

Executors may retain money to meet contingencies. (N. J.) 880

Reclamation of real estate fraudulently conveyed by decedent. (N. Y.) 889

Proceedings on the reference of a claim against an estate do not constitute an action. (N. Y.) 127

Allowance of funeral expenses against insolvent estate. (N. J.) 848

In the absence of statute, funeral expenses have the preference. (N. J.) 848

Where the wife and other relatives of the testator made a journey to visit the testator, who was sick at a distance from home, their expenses

were allowed against the estate, although they did not arrive until after his death. (N. J.) 843

Where an intestate committed suicide away from home,—*Held*, the expenses of a special messenger sent to his relatives, and the expenses of a person to accompany the body, should be included among the funeral expenses. (N. J.) 843

Any person providing reasonable burial for a decedent is entitled to recover therefor, and receive a preference where the estate is insolvent. (N. J.) 843

The cost of ordinary mourning apparel for the family of the deceased is an item of charge against the estate. (N. J.) 843

The expenses of a wake have been allowed as part of the funeral expenses. (N. J.) 843

The cost of erecting a suitable gravestone is a charge against the estate. (N. J.) 843

It is not necessary that the notice of sale be signed by the sheriff, or master, or executor with his own hand. (N. J.) 834

Adjournment of sale by executor for payment of debts may be made by his attorney. (N. J.) 834

A completed orphans' court sale is a judicial sale, to which the rule of *caveat emptor* applies. (Pa.) 893

A sale of decedent's real estate, even after confirmation by the court, does not divest the title of the heirs of the decedent until a deed has been executed and delivered. (Pa.) 893

The confirmation, by the orphans' court, of a sale of real estate by an executor, made in pursuance of its authority, is not complete till the purchase money be paid and a deed delivered. (Pa.) 893

If the court has jurisdiction of a sale of real estate by an executor, a mere irregularity in selling, or in the method of conducting the same, will not avoid the sale. (N. J.) 831

A sale for less than value, if fair, is no cause for setting aside the sale. (N. J.) 834

Offers to pay more for the property than it brought at public sale are not in themselves ground for setting aside the sale. (N. J.) 834

Accounting. *Note.* 94
Accounts; *prima facie* evidence of correctness. (Md.) 155

Final account filed by some of several executors; liability of executors not participating. (N. J.) 831

Administrator allowed to account in equity, though letters taken out before surrogate. (N. J.) 89

The orphans' court cannot open a final account except to correct particular items. (N. J.) 831

Executor, when charged with interest, compound and simple. (N. J.) 880

Review of an executor's or guardian's account can be had only (1) for error of law appearing in the body of the decree; (2) for new matter which has arisen after the decree, and, (3) it may be allowed *ex gratia* for new evidence as to facts subsequently discovered, which could not have been procured by due diligence; the plaintiff must show that he has been diligent and not negligent. (Pa.) 737

Commissions; determination of rate. (N. J.) 879

Commissions of accountant are due at the time at which the services for which they are allowed are performed. (N. J.) 879
O. R., V. IV.

When yearly accounts are required to be rendered, and interest charged on balance, full commissions should be allowed on each year's receipts and disbursements. (N. J.) 879

Personal liability of executor for loss resulting from delay or negligence in collecting or vesting funds. (N. J.) 831

Liability for mingling funds. *Note.* 94

Liability, upon payment of debts and legacies, for deficiency of assets. (N. J.) 89

Administrator not liable for debt he returns good, or "separate," unless collected. Code, art. 93, § 232. (Md.) 163

Liability for contempt on refusal to obey surrogate's decree. Code, § 2855. (N. Y.) 210, 211

Actions to charge real estate of decedent; notice to devisees; parties. Acts of Feb. 24, 1884, June 18, 1886. (Pa.) 906

EXECUTORY CONTRACT. See CONTRACT.

EXECUTORY DEVISE. See DEVISE AND LEGACY.

EXEMPLARY DAMAGES. See DAMAGES.

EXEMPTION. See TAXES.

EXPERT TESTIMONY. See EVIDENCE.

EXTRINSIC EVIDENCE. See EVIDENCE.

FALSE IMPRISONMENT. See MALICIOUS PROSECUTION.

The promoters of an imprisonment, in proceedings without the jurisdiction of the court, will not be protected for acts done under a void process. (N. Y.) 216

A void judgment will not protect the parties who procured it. (N. Y.) 216

Error of the court in adjudging a party entitled to process does not make the party liable for acts done under the erroneous process. (N. Y.) 217

FELLOW SERVANT. See MASTER AND SERVANT.

FEME COVERT. See HUSBAND AND WIFE.

FENCES.

The removal of a fence and substituting a row of trees will not warrant the inference of an intention to dedicate the land as a street. (N. Y.) 209

FINDINGS. See APPEAL; ARBITRATION AND REFERENCE.

FIRE INSURANCE. See INSURANCE.

FIRES AND FIRE DEPARTMENTS. See ARSON.

Tenure of office of firemen, under Laws 1885, p. 180. (N. J.) 884

FISH AND FISHERIES.

Oysters planted under tide waters of a bay

or arm of the sea; common fishery; right of proprietorship. (N. Y.) 220

FORECLOSURE. See MORTGAGE.

FOREIGN ATTACHMENT. See ATTACHMENT.

FOREIGN CORPORATIONS. See CORPORATIONS; RAILROAD COMPANIES.

FORFEITURE. See CONTRACT; INSURANCE.

FORMER JEOPARDY. See CRIMINAL LAW.

FRANCHISES. See CORPORATIONS; TAXES.

FRAUD AND FRAUDULENT CONVEYANCE. See EQUITY.

Fraud; in general. One attempting to defraud another in payment cannot ask repayment of part consideration from him. (Pa.) 87

Fraud, to vitiate a contract, must be such as occasioned the contract, not collateral to it, as in a security accompanying a debt. (Pa.) 740

Fraud, to invalidate an assignment, must be at the time of making it, so as to have attached to it, and not in a prior transaction affecting the property passing under it. (Pa.) 740

An assignee of a contract cannot insist upon fraud, used in the making of the contract, on the party under whom he claims. (Pa.) 740

An unsuccessful effort at fraud will not void a title. (Pa.) 740

If an innocent third party has acquired an interest in the property, or by delay the position even of a wrongdoer is affected, it will preclude a party from exercising his right to rescind. (Pa.) 740

Equity affords relief where a fraud has been practiced by one party and the other acted under a mistake. (N. Y.) 784

Waiver of right to rescind sale for fraud. (N. Y.) 190

Fraud upon creditors. Voluntary conveyances. (Md.) 156

Conveyances by insolvent corporations, to prefer creditors. (N. J.) 823

Conveyance void if made with intent to hinder and delay creditors. (N. Y.) 185

Where conveyance or mortgage is taken to secure debt, even with express purpose of preventing lien of judgment to be taken, it is valid. (N. Y.) 185

Chattel mortgage not filed, and without immediate and continued change of possession, is fraudulent. (N. Y.) 187, 188

In case of general assignment for creditors, fraud of assignor alone is sufficient. (N. Y.) 185

A conveyance without valuable consideration cannot stand where there are creditors, unless the grantor has sufficient ability to otherwise pay his debts and there has been no collusion. (Pa.) 665

A reservation of a portion of the property assigned is fraudulent, without inquiring as to whether there is surplus. (Pa.) 665

If a debt is a voluntary one and its effect is

to hinder or delay creditors, a vendee without consideration, whether there was fraud on his part or not, will take no title as against creditors. (Pa.) 665

Validity of transfer made by insolvent containing provision that any surplus is to be returned to the assignor. (Pa.) 666

A husband may settle property on his wife although he afterwards becomes insolvent. (Pa.) 744

When the purchaser of property pays a full consideration therefor, he cannot be deprived of it on a vague suspicion that it was sold for the purpose of defrauding the vendor's creditors. (Pa.) 766

A concurrent possession in the vendor and vendee is not sufficient as against creditors. (Pa.) 766

One cannot be prejudiced by the fraud of another of which he had no notice. (Pa.) 766

Until the creditor has obtained a judgment at law for his demand against the debtor, and the return of an execution unsatisfied, an action in equity cannot be maintained to set aside a conveyance as fraudulent and void. (N. Y.) 889

Fraud without damage or damage without fraud gives no cause of action. (Pa.) 86

Reclamation of real estate fraudulently conveyed by decedent. (N. Y.) 889

If there is evidence of fraud it should be left to the jury. (Pa.) 86

Fraud is never presumed. (N. Y.) 190

Burden of proof is on party alleging fraud. (N. Y.) 190

Actual fraud must be shown upon the part of both grantor and grantee. (N. Y.) 185

Fraud may be inferred from facts, but they must tend to prove the fraud. (Pa.) 766

FRAUDS, STATUTE OF.

A parol contract for the purchase of land may be disaffirmed; on it there is no legal liability to take and pay for the land. Damages can only be recovered on a parol agreement. (Pa.) 891

A sale of lands by public auction is within the Statute of Frauds. (Pa.) 891

When the name of a bidder on real estate is entered by the auctioneer, on the spot, and such entry is so connected with the subject and promise of sale as to make a part of the memorandum, it is a contract in writing so as to take the case out of the Statute of Frauds. (Pa.) 891

A contract for the sale of standing timber on a tract of land, to be taken off at the discretion of the purchaser as to time, is an interest in the land, within the meaning of the Statute of Frauds. (Pa.) 491

Sufficiency of evidence to take parol contract out of the statute. (Pa.) 490

FUNERAL EXPENSES. See EXECUTORS AND ADMINISTRATORS.

GAME AND GAME LAWS.

Statutes prohibiting the killing or possession of game during certain seasons are constitutional. (N. Y.) 544

GAMING.

Dealing in stocks on margins. (N. J.) 421

GAS COMPANIES.

Right to include in assessment for local improvements the expenses of removing and relaying gas pipes as a necessary incident to the work. (Pa.) 857

The Legislature may fix the price of water and gas, and grant exclusive privileges to supply the same to villages and cities. (N. Y.) 544

GIFT. See DEVISE AND LEGACY.

Delivery. (Pa.) 698

Declarations of donor, evidence of intent to make gift. (Pa.) 698

A gift is not executed so long as the donor retains any control over it. (Pa.) 696

Devisee of income of fund during life has no interest in the *corpus*, subject to gift, sale, or attachment. (Pa.) 84

GUARDIAN AND WARD.

A guardian must use the same care and management that a prudent man would exercise in his own affairs. (Pa.) 787

Power of orphans' court to rescind guardian's sale for mistake, after delivery of deed, confirmation of sale and payment of purchase money. (Pa.) 893

Account is only *prima facie* evidence of correctness. (Md.) 155

Review of an executor's or guardian's account can be had only (1) for error of law appearing in the body of the decree; (2) for new matter which has arisen after the decree, and (3) it may be allowed *ex gratia* for new evidence as to facts subsequently discovered, which could not have been procured by due diligence; the plaintiff must show that he has been diligent and not negligent. (Pa.) 787

HANDWRITING. See EVIDENCE.**HIGHWAYS. See WAYS.****HOMICIDE.**

Deliberation and premeditation. (N. Y.) 540
After mutual combat, the question is whether there has been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger. (N. Y.) 540

If the killing is not the instant effect of impulse, if there is any hesitation or doubt to overcome, and choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder. (N. Y.) 540

If a fatal blow be struck in self-defense, the homicide is not justifiable unless the prisoner had retreated as far as possible. (N. Y.) 540

HOUSES OF ILL FAME. See BAWDY AND DISORDERLY HOUSES.**HUSBAND AND WIFE. See ADULTERY; DOWER; TRUSTS.**

Marriage. The Legislature may prohibit the intermarriage of white and colored people. (N. Y.) 544

Mere words, without an intention corresponding to them, will not make a marriage or any other civil contract. (N. J.) 428

The best evidence of reputation is that it

never was discussed or questioned in the community. (Pa.) 678

Reputation consists of the speech of the people who have an opportunity to know the facts to be proved by them. (Pa.) 678

Evidence of marriage by cohabitation, reputation, and acknowledgment of parties. (Pa.) 678, 679

Meretricious relation; reputation; sufficiency of evidence to prove marriage. (Pa.) 679

Relation illicit in its origin is presumed to continue so. (Pa.) 679

A wife is a competent witness to prove a marriage contract between herself and deceased husband, in a contest where the legality of the marriage is in question. (Pa.) 679

False representations of a woman that she is pregnant, when in fact she is not, or that the husband is the father of an unborn child, when in fact another is the father, will not avoid a marriage induced thereby. (N. J.) 423

Where a husband receives money from his wife during coverture, with the understanding that he was to hold it for her, his estate must account in equity at the suit of the widow. (N. J.) 863

Reduction to possession, with the wife's consent, for the purpose of reinvestment, does not vest title in husband. (N. J.) 863

Declarations of the husband when receiving the wife's money or chose in action, or afterwards, clearly evincive of his intent at the reduction into possession, are sufficient to repel the presumption of personal acquisition, and to establish the relation of trustee for the wife. (Pa.) 696

A husband may settle property on his wife, although he afterwards becomes insolvent. (Pa.) 744

Liability of husband receiving legacy belonging to his wife; agreement to repay. *Note.* 850

Wife. Rights and liabilities as husband's creditor. (Md.) 155, 156

As to property of married woman. *Note.* 850

A *feme covert* may execute any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether it was given to her when *sole* or married. The concurrence of her husband is in no case necessary. (Pa.) 466

Right of married woman to contract under Act of March 24, 1862. (N. J.) 557

Power of married woman to contract. *Feme Sole* Trader Act of April 8, 1872. (Pa.) 655

While a *feme covert* may not be liable on a contract to sell and deliver her personal property at a future time, yet she cannot repudiate a gift or contract fairly made, under which she has delivered possession of the property. (Pa.) 655

A quitclaim, or release by a married woman, to a stranger to the title, is ineffectual to divest her of an inchoate right of dower. (N. Y.) 214

Power of married woman to convey her inchoate right of dower. (N. Y.) 214

Validity of judgment note given by married woman on purchase of land; expression of consideration on face of note. (Pa.) 709, 710

At common law the chose in action of a married woman remains hers until reduced to possession by the husband; and rendition is a matter of intention. (N. J.) 389

A married woman acting as trustee will be liable for waste committed during coverture. (Pa.) 828

Torts of wife; liabilities of husband; liability of wife; evidence of coercion; presumption from presence. *Note.* 834

Conveyances, etc. A deed of a married woman must be made with the joinder of her husband. (Pa.) 467

The mortgage of a married woman given for the purchase money of real estate will be enforced, although her husband does not join in the mortgage. (Pa.) 760

Form of acknowledgment of married women. (Pa.) 461

A substantial compliance with the form of certificate of acknowledgment by a married woman is sufficient. (Pa.) 461

An action cannot be maintained at law by the wife against her husband's representatives, for money received by him in his lifetime to to her use. (N. J.) 862

Judgment cannot be taken against a married woman for want of an affidavit of defense. (Pa.) 269

Competency as witnesses in actions by and against. (Md.) 162

The existence of the marriage relation is not enough to make declarations or admissions made by either husband or wife competent against the other, but it is enough to show that the declarant was the agent of the other in the matter involved, and acted as such when the declaration was made. (N. J.) 400

Divorce; grounds. Cruel and barbarous treatment has been defined to be actual personal violence, or the reasonable apprehension of it, or such a course of treatment as injures life and health and renders cohabitation unsafe. (Pa.) 282

Where each party has cause for divorce, neither can obtain a divorce. (Pa.) 282

Mere want of sympathy, disagreeable manner, bad temper, etc., are not cause for separation. (Pa.) 282

Alimony is in the sound discretion of the court. (Pa.) 283

Alimony; when allowed, under Code Civ. Proc. § 1769. (N. Y.) 537

Power of court to make additional allowance of alimony for past expenses. (N. Y.) 537

ILLEGITIMACY. See **BASTARDY.**

ILL FAME, HOUSES OF. See **BAWDY AND DISORDERLY HOUSES.**

IMPLIED CONTRACT. See **CONTRACT.**

INDICTMENT. See **ADULTERY; CRIMINAL LAW.**

INFANTS. See **GUARDIAN AND WARD; NEGLIGENCE.**

Negligence; contributory negligence of parents. *Note.* 919

Negligence; when negligence of parent imputed to. (Pa.) 920

INJUNCTION. See **EQUITY.**

When lies. When public or private rights are invaded and an injunction is asked, no question of the amount of damages is raised, C. R., v. IV.

but merely one of the invasion of a right. When railroad companies exceed their statutory powers in dealing with other people's property, this principle may be invoked. (Pa.) 278

Right of adjacent landowner to enjoin unlawful occupation of street by railroad. (Pa.) 277, 278

By trustee against *cestui que trust.* (Pa.) 52

Injunction will be granted in all cases of timber, coal, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed. (N. Y.) 884

Restraining breach of trade contract. (Pa.) 43

Laches will bar relief. (Pa.) 52

Under Act May 6, 1844, injunction will not issue until bond given. (Pa.) 49

When experts are called for purpose of relieving obligor in injunction bond, court should instruct that such testimony should be received with great caution. (Pa.) 50

Pleading; practice. When equity intervenes to restrain acts prejudicial to the community, it must be by bill by the attorney-general. (Pa.) 277

Preliminary injunction to preserve *statu quo*; discretion of chancellor. (Pa.) 52

Clear title must be shown to authorize preliminary injunction. (Pa.) 52

Where answer denies all equity, injunction will not issue. (Pa.) 52

Action on bond; **damages**; counsel fees. (Pa.) 49, 50

INSOLVENCY. See **ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; CORPORATIONS; RECEIVER.**

A party whose debt is not due has no equitable claim to have it set off against a debt of his own, already due, in the hands of a party who is insolvent. (Pa.) 262

In case of the insolvency of the borrower before actual payment of the money by the lender, an equitable right, analogous to that of stoppage *in transitu*, may be exercised by the lender. (Pa.) 262

Discharge from sentence under fornication and bastardy laws. (Pa.) 711

Form of order in discharge. (Md.) 255

INSTRUCTIONS. See **TRIAL.**

INSURANCE.

Fire. Authority of agents to waive conditions in policy. (Pa.) 761, 762

Evidence of authority of agents. (Pa.) 296, 297

A policy, together with the application, constitutes the contract. (N. Y.) 580

Distinction between warranties and mere representations in application for insurance. (N. Y.) 581

Where there was a warranty of no building within a certain distance of the property, it was held the reasonable intent was to make the warranty applicable to such a building only as increased the risk. (N. Y.) 581

The effect of a breach of warranty is to annul the policy, without regard to the materiality of the warranty or whether the breach had

anything to do in producing the loss. (N. Y.) 530

Alteration of premises; increase of risk; duty of insured to give notice. (Pa.) 688

An insurance company which has insured the mortgagee's interest is liable for an injury to the property, although the remaining land is ample security. (Pa.) 652

Life. Insurable interest in life policies. (Pa.) 808

An insurable interest arising from the ties of blood or marriage is such as will justify a reasonable expectation of advantage or benefit from the continuance of life. (Pa.) 809

A man has no insurable interest in the life of his brother *per se*. (Pa.) 808

A man may effect an insurance on his own life for the benefit of a relative or friend. (Pa.) 809

If the relation of debtor and creditor subsists, and the policy is effected with the privity of the debtor, and it is agreed or can be inferred that it is intended as a security, it will belong to the debtor after the payment of the debt, although the creditor has paid over all the premiums. (Pa.) 808

All that is printed or written on the face or back of a policy are parts of it and constitute the contract. (N. Y.) 788

Wagering policies. (Pa.) 809, 694
Forfeiture for nonpayment of premiums; nonforfeiture policies. (N. Y.) 788, 784

Right of representative of insured to recover on life policy issued to one having no insurable interest. (Pa.) 649

INTERMARRIAGE. See HUSBAND AND WIFE.

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW.

INTERVENTION. See ATTACHMENT.

INTOXICATING LIQUORS.

Act 1880, p. 191, creating excise departments in cities of over 15,000 inhabitants, is special and unconstitutional. (N. J.) 84

Right to license, under Act March 22, 1867. (Pa.) 912

Licenses, under Pa. Act, March 22, 1867; question to be considered by the court; discretion of the court. *Notes.* 909

Construction of Act April 12, 1875, prohibiting druggists from selling without licenses, to be used as a beverage. (Pa.) 726, 727

Illegal sale; Sunday; druggist; modification of previous legislation imposing penalties by Pa. Act, p. 12, 1875. *Notes.* 725

Constitutionality of statute making fact that a person is seen to drink liquor in a shop *prima facie* evidence that it was sold with intent. (N. Y.) 855

Evidence that "persons went in sober and came out drunk" is competent on the question of the sale of intoxicating liquors. (N. Y.) 855

The law implies a sale where the evidence is that a person called for liquor and it was furnished him. (N. Y.) 855

Sale by the servant is *prima facie* by the master. (N. Y.) 855

INTOXICATION. See CONTRACT.

C. R., v. IV.

ISSUE. See DEVISE AND LEGACY.

JAIL AND JAILER.

If the county jail should be burned or rendered uninhabitable by infectious disease, the commissioners have power to hire prisoners kept in some other suitable place. (Pa.) 928

Compensation paid to sheriff for board of prisoners is an emolument of his office. (Pa.) 87

Authority, under Act of April 10, 1873 (P. L. 666), to increase or decrease compensation of sheriff for board of prisoners in county jail. (Pa.) 88

JEOPARDY. See CRIMINAL LAW.

JOINT EXECUTORS. See EXECUTORS AND ADMINISTRATORS.

JOINT TENANTS AND TENANTS IN COMMON.

Rights and remedies *inter se*. *Notes.* 471
Right of one joint tenant to recover for improvements. (Pa.) 474

Liability of tenant for repairs and improvements made by cotenant. (Pa.) 100, 101

Assumpsit for use and occupation will lie by one joint tenant against another. (Pa.) 474

Account, and not assumpsit, is the remedy for one joint tenant against another who has held sole possession. (Pa.) 474

Neither trespass nor assumpsit will lie for mere passive occupation by one. (Pa.) 474

Validity and effect of mortgage made by several joint tenants to secure the debt of one. (N. J.) 244

Right of dower in land held in joint tenancy. (N. J.) 66

In partition in equity, a tenant in common is entitled to improvements made by him which are reasonably necessary for the proper enjoyment of the land, and not injurious to the estate of the other cotenant. (Pa.) 90

A husband who thus improves property in which his wife has an undivided interest is not a stranger or volunteer. *Id.*

JUDGMENT. See EQUITY.

The jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in another proceeding. (N. J.) 585

An order cannot be taken by default against a party after his death by service upon the person who had been his attorney during his lifetime. (N. Y.) 394

Effect of death of one of joint defendants. (N. Y.) 394

After verdict, persons who represented parties at the time of trial may continue to do so until judgment is entered, and notice upon such attorney after the death of one of the defendants is sufficient. (N. Y.) 395

Form of warrant to confess judgment. (Pa.) 287, 288

Judgment cannot be entered on warrant of attorney, before the warrant is actually filed in the prothonotary's office. (Pa.) 287

Courts have authority to vacate or modify a judgment entered by warrant of attorney,

either for cause appearing on the record, or for such as may be established by depositions. (Pa.) 287

Res judicata. (N. Y.) 181
Conclusiveness of decree. (Pa.) 98

Where the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others. (Pa.) 488

If the evidence in a second suit would have been clearly available in the first suit, then the judgment and verdict in the first is an absolute bar to any recovery in the second. (Pa.) 645

The plea of former recovery is composed partly of law and fact, is a mixed question, and, where there is any conflicting testimony, is always for the jury. (Pa.) 645

Upon the distribution of proceeds of a sheriff's sale, a subsisting judgment can only be attacked by other creditors collaterally, upon the ground of collusion. (Pa.) 637

A judgment transferred from one county to another, under Act of April 16, 1840, has the same force and effect as the original judgment as to the lien and right to an execution. (Pa.) 257

The lapse of five years raises the presumption of payment of an unrevived judgment. (Pa.) 257

Power of court to amend after term. (Pa.) 696

Practice. When judgment at law is rendered against A and B, equity will not afford relief against it in their favor; yet when it is made the basis of proceedings in equity against X and Y, strangers to it, equity will, in their favor, relieve against it if it was rendered fraudulently, etc. (Md.) 155

Reformation of deed will not be made to the prejudice of a judgment creditor of the grantee. (D. C.) 616

JUDICIAL SALE. See EXECUTION.

JURISDICTION. See EQUITY; JUDGMENT; MORTGAGE.

JURY. See NEGLIGENCE; TRIAL.

One who has formed an opinion from the reading or report of the testimony against the prisoner on a former trial, however strong his belief and purpose to decide on the evidence and give an unbiased verdict, cannot be readily received. (N. Y.) 789

If there is any doubt concerning a juror's impartiality, he should be rejected. (N. Y.) 789

It is a ground for challenge, in an action for libel on the manager of an opera, that a juror declares himself opposed to theatrical performances. (N. Y.) 789

A juror should be rejected who has an opinion as to defendant's guilt which would require evidence to remove, but who believed he could render an impartial verdict. (N. Y.) 789

JUSTICES OF THE PEACE.

A justice has no jurisdiction in trespass *quare clausum fregit*, if the title to the land is in dispute. (N. J.) 562

LACHES.

Forfeiture of right to relief. (Pa.) 52
C. R., V. IV.

LANDLORD AND TENANT. See RAILROAD COMPANIES.

Lease construed most strongly against landlord. (Pa.) 46

When an option is given in a lease, it is that of lessee. (Pa.) 48

Where no definite term is mentioned, the grant is construed to convey the largest estate possible. (Pa.) 904

A lease for one hundred years, with provision that the lessee, his heirs, and assigns may hold the premises so long as he and they shall think proper after the expiration of the term, at the same rent, is not determinable by the lessor after the end of the term, at least not without making compensation for improvements. (Pa.) 904

Lease from year to year is assignable. (Pa.) 904

A covenant to repair is neither superseded, nor qualified, nor restricted, as to amount, by a covenant to insure for a specified amount. (Pa.) 904

Validity of provision in lease, that landlord should have title as mortgagee upon property on the premises to secure rent, and that tenant should have the right to use the property to make sales thereof, as against assignee for benefit of the creditors of the tenant. (N. Y.) 238

A reversion is essential to a lease; and when a grantor has transferred all his term and estate in the demised premises, the instrument of transfer will operate as an assignment of the lease, and not as an under-lease, notwithstanding the reservation of a rent to the grantor, or a writ of re-entry on nonpayment or on the nonperformance, by the grantee, of covenants contained in it, and although words of demise be used instead of words of assignment. (N. Y.) 117

Transfer of an entire term is an assignment, and not a sublease. (N. Y.) 116

The same instrument may be an assignment between the original lessor and the transferee, and a sublease between the parties to it. (N. Y.) 117

Where the two contracts differ, and an interest is reserved by first lessee against his tenant, the latter will be regarded as an undertenant and not an assignee. (N. Y.) 117

Measure of damages for breach of covenant for royalty to use diligence in operating premises. (Pa.) 104

A demise to one, his heirs and assigns, for such time as he pays rent, is a perpetual lease. (Pa.) 904

A tenancy at will exists only nominally, and is, in fact, a tenancy from year to year. (Pa.) 904

Tenancy at will cannot arise without express grant or contract. All general tenancies are by implication and constructively from year to year. (Pa.) 904

If any circumstances, payment of rent or otherwise, appear referable to an annual holding, the term is from year to year, and not at will. (Pa.) 904

The reservation of the yearly rent is not inconsistent with a tenancy at will. (Pa.) 905
Leases for an uncertain time are *prima facie* leases at will. (Pa.) 905

Assignment of an estate at will puts an end to it. (Pa.) 904

Among the examples of **life estates** are: "If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or so long as the grantee dwell in such house, or so long as he pays ten pounds," or for any like uncertain time. (Pa.) 904

Every indefinite estate is an estate for life, although it may terminate earlier, even though the termination is by the act or fault of the lessee. (Pa.) 904

A lease to a tenant, as long as he desires to use the house for a drug store, creates an estate for life, determinable by failure to use it. (Pa.) 904

If a man make a lease of a manor that, at the time of the lease, is worth £20 per annum, to another, until £100 be paid, in this case because the annual profits of the land are uncertain, he has an estate for life. (Pa.) 904

A lease during the time that salt works should be erected and used on the land, creates an estate for life, subject to be defeated. (Pa.) 904

Requisites of **surrender of premises** by tenant during term, to release him from liability for rent. (Pa.) 702

Request by the landlord for the keys of the premises, followed by an acceptance of them, will constitute a surrender of the term. (Pa.) 701

Eviction is any act of the landlord which deprives the tenant of that beneficial enjoyment of the premises to which he is entitled under the lease. (Pa.) 701

Eviction; defense to action for rent. (Pa.) 701

Railing off a part of demised premises is an eviction. (Pa.) 701

A landlord's refusal to allow an undertenant to enter the premises under threats of suit, whereby the lessee is deprived of underletting, amounts to an eviction. (Pa.) 701

Taking possession of premises left vacant by the tenant, repairing, advertising the house to rent, are all acts in the interest and benefit of the tenant, and do not discharge him from his covenant to pay rent. (Pa.) 701

Claims for wages under Act April 9, 1872; priority over **distress** for rent. (Pa.) 704

After suit for rent, judgment and execution, the landlord may distrain. (Pa.) 706

Taking the note of a third person, when not in satisfaction of the rent, will not estop the landlord from distraining. (Pa.) 706

Rights; liabilities of parties. An owner in possession induced to sign a lease is not estopped from denying the tenancy or setting up his own title. (Pa.) 662, 663

Tenant is estopped from denying title of landlord. (Pa.) 662

Exceptions to the rule that a tenant will not be allowed to dispute the title of his landlord. (Pa.) 663

A tenant of an upper floor of a building is not liable, in the absence of negligence, for damages caused by water escaping from the plumbing to the lower floor. (Pa.) 477

Liability of landlord making excavation on premises, for injury resulting to members of the family and visitors of the tenant. (Pa.) 506

LEASE. See **LANDLORD AND TENANT.**

C. R., V. IV.

LEGACY. See **DEVISE AND LEGACY.**

LIBEL AND SLANDER.

Words actionable. (Pa.) 85

Words are actionable whenever they impute an offense of moral turpitude, punishable in temporal courts. (Pa.) 85

If words are not actionable, special damages alleged and proven will support verdict and judgment. (Pa.) 85

Words charging or imputing act of fornication; want of chastity. (Pa.) 85

Sense in which words are received by the world is the sense to be ascribed to them on the trial. (Pa.) 85

The truth of the innuendo is for the jury. (Pa.) 85

Power of court to punish by contempt for libelous publication out of court concerning pending case. (N. Y.) 577-579

LICENSE. See **INTOXICATING LIQUORS.**

No warranty of validity of letters patent is implied in any license given thereunder, and proof of invalidity is therefore no defense to any suit for promised royalties. (Pa.) 48

LIEN. See **JUDGMENT; MORTGAGE; RAILROAD COMPANIES; VENDOR AND PURCHASER.**

Vendor's lien for purchase money. (N. Y.) 899

Lien of contractors and laborers for work done in the construction of a road. (Pa.) 457

As to third persons acquiring subsequent liens upon property, the record is their proper resort for information, and they must be permitted to rely upon it with confidence. (N. J.) 874

Manufacturer's lien. (Pa.) 688

A lien may be lost by setting up a claim hostile to the title of the owner of the goods. (Pa.) 690

LIFE ESTATE. See **DEVISE AND LEGACY; LANDLORD AND TENANT.**

LIFE INSURANCE. See **INSURANCE.**

LIMITATION OF ACTIONS. See **CORPORATIONS; LACHES; PLEDGE AND COLLATERAL SECURITY.**

In general. Courts of equity apply the Statute of Limitations by analogy. (N. J.) 863

Equity follows the law in stale claims. (Pa.) 458

The Statute of Limitations does not apply against a corporation which has ceased from the ordinary business for which it was created. Act of March 27, 1718. (Pa.) 453

Whether there has been an actual purchase or not, equity will presume one after the lapse of twenty years, a presumption based not on fact, but in the face of evidence to the contrary. (N. Y.) 794

Adverse possession; what length of time will defeat partition. (Pa.) 98

Adverse possession; interruption; abandonment. (N. Y.) 233

In the case of unseated lands, where taxes were paid for thirty years, and no taxes paid or other acts of ownership exercised by the ad-

verse claimant.—*Held*, the Statute of Limitations ran in favor of the payor. (Pa.) 758

Right to acquire title in highway by adverse possession. (N. Y.) 288

Contracts under seal. (N. Y.) 181

The continued holding of a pledge prevents the operation of the Statute of Limitations. (Pa.) 458

Mutual accounts. (Pa.) 897

An action by a *census que trust* against the trustee, under a direct trust, is not within the statute. (N. Y.) 525

The Statute of Limitations does not affect the lien of the vendor for purchase money, because the vendee or the purchaser from him, with notice, stands in the relation of a trustee or mortgagor for the unpaid purchase money. (N. J.) 899

The presumption of payment from the lapse of time is not conclusive, but casts the burden of rebutting it upon the creditor. (Pa.) 458

LIQUIDATED DAMAGES. See DAMAGES.

LIS PENDENS.

Notice. (Pa.) 119

LOCAL IMPROVEMENTS. See MUNICIPAL CORPORATIONS.

LOCAL LEGISLATION. See CONSTITUTIONAL LAW.

LOGS AND LOGGING.

One having a right to timber upon the land of another may be required to take it off after a reasonable time. (Pa.) 690

A contract for the sale of standing timber on a tract of land, to be taken off at the discretion of the purchaser as to time, is an interest in land, within the meaning of the Statute of Frauds. (Pa.) 491

LUMBER. See LOGS AND LOGGING.

MALICIOUS PROSECUTION.

Malice; probable cause; advice of counsel. (D. C.) 151, 152

Malice may be inferred from the want of probable cause. (Pa.) 494

Recovery of possession of land under legal process; probable cause. (Pa.) 494

MANDAMUS.

Mandamus is a common-law remedy, and not an equitable one. (N. Y.) 200

Mandamus will issue only for public purposes and to compel the performance of public duties. (N. Y.) 200

Not issue where another remedy. (N. Y.) 185

Will not lie to compel the performance, by public officers, of acts calling for the exercise of judgment and discretion. (Pa.) 755; (N. Y.) 184

To compel state comptroller to cancel tax sale. (N. Y.) 184

Duty of controller of Philadelphia in relation to warrants; discretion; *mandamus*. (Pa.) 755-757

Will not issue to enforce a private contract with a corporation created to supply a public want. (N. Y.) 200

Where the duty to build and operate a railroad is not made imperative by the charter or laws of the State, *mandamus* will not lie. (N. Y.) 200

MARRIAGE. See HUSBAND AND WIFE.

MARRIED WOMAN. See HUSBAND AND WIFE.

MASTER. See EQUITY.

MASTER AND SERVANT.

Claims for wages, under Act April 9, 1872; priority over distress for rent. (Pa.) 704

Act of June 29, 1881, regulating payment of persons engaged in mining coal, ore, etc., is void. (N. J.) 888

Physical disability rendering the servant unable to perform his part of the contract will excuse the master from paying the stipulated wages while the disability lasts. (Pa.) 820

Insolvent railroad; lien and priority for wages of employees. (N. Y.) 865, 866

Liability. Duty of master to furnish safe machinery. (Pa.) 650, 918; (N. J.) 569; (N. Y.) 892, 519

A master is not bound, as to his servant, to employ the latest and most improved machinery, but only such as is suitable. (Pa.) 914

There is no obligation on the part of a railroad company to build its bridges over public roads with such an elevation that one of its employees standing upright on the top of the cars will not be endangered. (Pa.) 914

An employer is not bound to make such constant examination and overhauling of his machinery and works as would interfere with the proper furtherance of the business. (Pa.) 649

A master is not bound to make use of the safest known instruments and appliances, nor is he responsible for a failure to discard one which is not such. (N. Y.) 519

A railroad company is not liable to its employee for using on its train an old mail car, lower than others composing the train, although the danger of coupling the old car with another was greater than if the cars had been of equal height. (N. Y.) 519

Where one has been placed in a perilous situation by his own negligence, yet ordinary care on defendant's part in furnishing suitable machinery would have prevented the injury, the latter is liable. (N. Y.) 519

Knowledge of master of defect in machinery. (N. Y.) 519

Knowledge of defects by master. (N. J.) 569

Liability of master for injuries resulting to servant while assisting third person engaged in repairing the property of plaintiff's master. (N. Y.) 390-392

Notice and warning should be given to minors in and about machinery or dangerous structures. (N. J.) 569

A master introducing a new explosive, without informing his servant of its dangerous character, will be liable for an injury resulting therefrom. (N. J.) 569

Where a conductor was injured by insufficient side tracks,—*Held*, the company was liable. (N. J.) 569

A teamster injured by the negligence of a railroad superintendent may recover against the company. (N. J.) 569

A master must see that his building and machinery are kept in repair, and the repairer's neglect is his; he is liable, no matter who may be the agent through whom he acts. (Pa.) 650

Assumption of risks by servant. (N. J.) 569; (Pa.) 649

An employee attempting to couple cars by getting inside the rails while the train is in motion, and continuing to move with the train after he has ascertained that the pin would not pull, is guilty of contributory negligence. (N. Y.) 519

It is not contributory negligence for a railroad employee to attempt to uncouple while a train is in motion. (N. Y.) 520

When the servant, in obedience to the master, incurs the risk of machinery, which, although dangerous, is not so much so as to threaten immediate injury, or if it is reasonably probable that it may be used safely by extraordinary caution, the master is liable for an injury resulting. (N. J.) 569

Whether or not a servant, when injured, was in the course of his employment, is to be inferred from the circumstances and is for the jury. (N. J.) 570

Where an employee, contrary to the rules of his employer, is in a part of the mine where he is injured by unsafe machinery, this is no defense for the negligence of the master. (Pa.) 901

Where there is any doubt whether the employee was acquainted, or ought to have been acquainted, with the risks, the determination of the question is for the jury. (Pa.) 914

A brakeman assumes the risk of low bridges. (Pa.) 914

Fellow servants must be in the employ of the common master and engaged in a common business. (Pa.) 650

Where an injury results from the negligence of the employer, he is not exonerated from liability because the negligence of the co-servant has also contributed to the accident. (N. Y.) 392

When a servant receives an injury in part by the negligence of his master, and in part by that of a fellow servant, he cannot maintain an action against the master for such injury. (N. J.) 569

An employer is not generally liable for injuries received by a subemployee hired by the employee, when the negligence of any of the workmen engaged in the common task is the cause of the injuries. (Pa.) 649

A brakeman and car inspector held fellow servants. (Pa.) 900

A brakeman and the mechanics in a repair shop held fellow servants. (Pa.) 900

A conductor and a brakeman on another train held fellow servants. (Pa.) 900

A railroad company will be liable to an engineer for negligence of the conductor of the train. (N. J.) 569

A conductor and the servants working upon his train held fellow servants. (Pa.) 900

C. R., v. IV.

A conductor and station baggage master held fellow servants. (Pa.) 900

Where a common laborer was injured by the negligence of the conductor, held the company liable. (N. J.) 569

An engineer of the switch engine and the car repairer held fellow servants. (Pa.) 900

An engineer and the servants of a contractor engaged in furnishing wood to a railroad under a contract, being on the same train, held fellow servants. (Pa.) 900

An engineer and telegraph operator held fellow servants. (Pa.) 900

Car repairer of cars on track in yard and car dropper held fellow servants. (Pa.) 900

A carpenter or other employees of a railroad, and the men in charge of the train on which they are carried to their work, held fellow servants. (Pa.) 900

Liability of master for negligent acts of his servant. (N. Y.) 891

Liability of master for malicious acts of servants; exemplary damages. (Pa.) 719

The general rule is that where a servant in the employ of his master does an act which he is not employed to do, the master is not responsible. (Pa.) 900

MAXIMS.

He who seeks equity must do equity. (Md.) 155

He who comes into equity must come with clean hands. (Md.) 155

Whatever is agreed to be done is considered in equity as done. (Pa.) 490

Expressum facit cessare tacitum. (Pa.) 104

Nemo tenetur seipsum accusare. (N. Y.) 167

Sic utere tuo ut alienum non lædas. (Pa.) 476, 477

MERGER. See MORTGAGE.

MILLS AND DAMS.

Right to recover damages up to day of trial, under Act May 2, 1876. (Pa.) 686

MINES AND MINING.

Act of June 29, 1881, regulating payment of persons engaged in mining coal, ore, etc., is void. (N. J.) 888

Custom cannot control a statute (April 15, 1884), making 2,000 pounds a ton of coal. (Pa.) 868

Where an employee, contrary to the rules of his employer, is in a part of the mine where he is injured by unsafe machinery, this is no defense for the negligence of the master. (Pa.) 901

Flowage from superior to inferior mine. (Pa.) 477

Surface water; rights and liabilities of superior and inferior owners. (Pa.) 476

MINOR. See INFANTS.

MISTAKE. See EQUITY.

MORTGAGE. See DEED; HUSBAND AND WIFE; RAILROAD COMPANIES.

Validity or effect of mortgage made by several joint tenants to secure the debt of one. (N. J.) 244

Avoidance, for duress, of imprisonment. (N. J.) 428
To show by parol that a deed absolute upon its face is a mortgage, the proof must be clear, explicit, and unequivocal. (Pa.) 928
Conveyance absolute on its face may be shown to be a security for money loaned, by oral testimony. (Pa.) 922
Notice of improperly registered mortgage given to secure purchase money is sufficient notice. (N. J.) 899
A mortgagee has no right to make one a party defendant who claims adversely to the title of the mortgagor and prior to the mortgage. (N. Y.) 238
Possession of the bond and mortgage is sufficient evidence of the authority of the holder thereof to receive payment, both of the interest and principal. (N. Y.) 880
An insurance company which has insured the mortgagee's interest is liable for an injury to the property, although the remaining land is ample security. (Pa.) 652
An assignee of a bond and mortgage takes subject to equities. (N. J.) 244
The assignee of a mortgage takes it subject to all equities and defenses existing between the original parties at the time of the assignment, whether they be latent or not. (N. J.) 899
Vendor's lien for purchase money, as against subsequent transferee or mortgagee of the vendee. (N. J.) 899
Parol evidence is admissible to rebut the presumption of a merger upon conveyance of the mortgaged premises to the mortgagee. (Pa.) 627
Foreclosure. Parties; terre-tenants. (Pa.) 767
Those only are terre-tenants who claim by a conveyance subsequent to a mortgage. (Pa.) 767
Although it is not necessary to make the terre-tenants parties to the *scire facias*, yet it is the better practice to do so. (Pa.) 768
The only effect of aiming to make a terre-tenant a party is that he will be permitted to make any available defense against the purchaser at sheriff's sale that he might have set up on the trial of the *scire facias* in case it had been served upon him. (Pa.) 768
Jurisdiction in New York of proceedings for foreclosure and sale of mortgaged premises both in Pennsylvania and New York. (Pa.) 112
Validity of Act of 1880, P. L. p. 255, abolishing decrees for deficiency in foreclosure suits. (N. J.) 868
The rule that a purchaser on foreclosure sale may acquire a perfect title has no application where he purchases only a limited interest that is apparent. (N. Y.) 198
A purchaser on foreclosure obtains the title which the mortgagor had before he gave the mortgage. (N. Y.) 224
Chattel mortgage not filed, and without immediate and continued change of possession, is fraudulent. (N. Y.) 187, 188
There is no distinction between bills of sale, given as security, and chattel mortgages. (N. Y.) 188
In a chattel mortgage the legal title to the property mortgaged passes to the mortgagee. C. R., V. IV.

and becomes in condition. (N. J.)
Words create a chattel thereby. (N. J.)

MUNICIPAL BRIBERY; POLICE DE LAWS; W.

The power subject to legis
A municipal instituted by the carrying out of government. (Pa.)

A quasi municipal powers which acts done by the void. (Pa.)

A township The doctrine of ratifications. (D. C. Act 1880, p. 100)
ments in title special and un-

Act of May 1880, p. 100
tion public provision and providing shall be taxab
waterworks (Pa.)

Private proposition of supply water. (Pa.)

Assessments must be equal
Validity of a rate per line benefits; assess-

Right to improvements the laying gas pipe work. (N. Y.)

Claims for pphias; frontage
Parties in assessments a (N. Y.)

Officers. (Laws 1879, c. 100)
board of charity overseers of the ties for violation commissioners 109. (N. Y.)

Implied power charge must be taint; all fact must appear; in favor of judgments. (N. J.)

Duty of condition to warrant

Duty of magistrates; right to (N. J.)

The mayor, counsel to defend (N. J.)

Liability for expenses incurred in suits by officers in official capacity. *Notes.* 248

Defective. An excavation in a road or street made for a lawful purpose must be fenced and lighted. (Pa.) 511

A municipality is not liable for injuries which are the result of nothing more than the ordinary slipperiness caused by recent snow and ice. (Pa.) 700

A traveler may presume all parts of the highway safe, and even when he may have notice of a defect he is not chargeable with negligence, because he fails to have it at all times in mind. (N. Y.) 786

Particular charters. Bayonne; lien of assessment for opening streets; reassessment relates back to lien of original assessment. (N. J.) 810

Camden; power to grant licenses. (N. J.) 84

Elizabeth; power to grant licenses. (N. J.) 84

Erie; exemption of waterworks from taxation; property from which income or revenue is derived; Act of May 14, 1874. (Pa.) 800

Jersey City; licenses. (N. J.) 84

Newark; licenses. (N. J.) 84

New Brunswick; power to grant licenses. (N. J.) 84

New York; assessments for repaving; petition of a majority of property-holders required. (N. Y.) 781

Bribery by member of common council punishable under Penal Code. (N. Y.) 165-168

Paterson; power to grant licenses. (N. J.) 84

Philadelphia; duty of city controller in relation to warrants. (Pa.) 754-757

Claims for paving and curbing; frontage rule; rural property. (Pa.) 675

South Orange; form of assessments for street improvements, under Laws 1875, p. 896, § 5. (N. J.) 426

Trenton; power to grant licenses. (N. J.) 84

Prior to Act 1880, p. 190, common council had exclusive right to grant licenses. (N. J.) 88

MURDER. See HOMICIDE.

NEGLIGENCE. See CARRIERS; MASTER AND SERVANT.

What is. Negligence in law is when the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstances; or where the precise measure of duty is determinate and the same under all circumstances; or the violation of a fixed rule, the same under all circumstances. (Pa.) 699

Negligence may consist either in the careless performance of obligations assumed, or in neglecting to undertake the performance of obligations imposed by law. (N. Y.) 205

Whether gross negligence is known to or defined in the law is seriously doubted. (N. Y.) 205

Mere evidence of the explosion of a boiler is not evidence of negligence. (N. Y.) 893

Proximate cause is to be decided by the jury. (Pa.) 719

Where several proximate causes contribute to an accident, and each is a sufficient cause, without which the accident would not have happened, it may be attributed to all or any of them. (N. Y.) 391

Where the injury is the result of two con-

curring causes, one party in fault is not exempted from liability for an injury, although another party may be equally culpable. (Pa.) 511

The mere existence of a defect, occurrence of an accident, or omission of a duty, is not sufficient to create liability, without evidence that the defect or omission caused the accident. (N. Y.) 519

If one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence. (N. Y.) 205

The question in each case as to the degree of care which should be exercised depends upon the particular circumstances. (Pa.) 641

When a person employs others, not as servants, but as mechanics or contractors, in an independent business, and they are of good character, if there is no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill. (Pa.) 649

The owner employing a contractor may in a measure have some personal control of the work in hand, without subjecting himself to liability for its faulty performance. (Pa.) 649

When the owner has done all in his power to erect a proper structure, he is not liable to others for its occult defects, if he had no knowledge of them and no reason to believe in their existence. (Pa.) 649

The lessee of a grand stand at the races, receiving a compensation for admission to the stand, was held liable to the same extent as a carrier of passengers. (Pa.) 649

A person who is injured by the negligence of another servant cannot be a fellow servant with the servant whose neglect caused the injury, unless he is under the control and orders of the same master. (Pa.) 650

Liability of landlord, making excavation on premises, for injury resulting to members of the family and visitors of the tenant. (Pa.) 506

Where persons are in the habit of crossing a railroad in a particular place, although there is no right of way there, it throws upon the company the responsibility of taking reasonable precautions in the use of such places. (Pa.) 630

The erection of an obstruction to the view at a crossing, while not negligence *per se*, should be left to the jury to say whether, under the circumstances, it was negligence. (Pa.) 630

A railroad company has a right to a clear track at all points upon the road except at public crossings. (Pa.) 631

At public crossings the rights of railroad companies are concurrent with those of the public. (Pa.) 631

Duty of railroad to maintain flagman at crossing; liability for omission. (Pa.) 631

Railroad companies running their trains through cities or populous towns are held to a degree of care commensurate with the danger involved. (Pa.) 631

Proof of the violation of a city ordinance, in the running of trains, does not establish negligence *per se*. (Pa.) 631

What is a reasonable rate of speed for a railroad train at a crossing is a question for the jury. (Pa.) 631

A railroad company is not liable for an injury resulting from breaking or failure of machinery, unless it is shown that the corporation has been guilty of negligence in regard thereto. (N. Y.) 519

Where a passenger on a carrying vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and of another party, the carrier alone is liable for the injury. (Pa.) 510

Question for jury. (Pa.) 700

Where the evidence is conflicting, or, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and as to which reasonable men might differ, it is for the jury to decide. (N. Y.) 519

Negligence is a question for the jury only if there be reasonable doubt as to the facts tending to prove it, or as to the just inferences to be drawn therefrom. (Pa.) 640

If there is no sufficient proof of negligence, the court must take the case away from the jury. (Pa.) 681

Pleading; evidence. The right of recovery must be confined to the particular negligence charged in the declaration. (Pa.) 718

The negligence alleged must be the proximate cause of the injury complained of. (Pa.) 681

To sustain a recovery, it must appear that there was no negligence on the part of the plaintiff that in the slightest degree contributed to the injury. (N. Y.) 786

Negligence is an affirmative fact, and must be proved by the plaintiff. (N. Y.) 786

The burden of proof rests upon the plaintiff to show the damages sustained, and to distinguish them from damages for which defendant was not responsible. (N. Y.) 205

Where the person injured is not a passenger, the burden of proving negligence rests upon him. (Pa.) 681

The fact of the explosion of a boiler is presumptive evidence of negligence, and the burden is cast upon the owner of removing the presumption. (N. Y.) 891

Contributory; in general; effect. The doctrine of contributory negligence ceases when the person inflicting the injury was guilty of gross negligence. (Pa.) 901

No matter how negligent one may have been in putting himself in a particular position, he can recover for injuries inflicted by one who could have avoided the injury by the exercise of the ordinary care which is usual with prudent persons under the circumstances. (Pa.) 901

To defeat recovery, the negligence of the party injured must have been of such a character as to draw on him the injury. (Pa.) 901

The negligence of plaintiff which will defeat his recovery must be an approximate cause of the injury. (N. J.) 569

Where one has been placed in a perilous situation by his own negligence, and yet ordinary care on defendant's part in furnishing suitable machinery would have prevented the injury, the latter is liable. (N. Y.) 519

If an injury is occasioned in any degree by plaintiff's own negligence, he is without redress, unless the act of the defendant amounted to a willful trespass or an intentional wrong. (N. J.) 825

Contributory negligence is not imputable to a person for failing to look out for danger when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended. (N. J.) 569

The age, intelligence, and experience of one who has suffered from an injury held to determine whether he was guilty of contributory negligence. (N. J.) 569

It is not necessary that plaintiff's negligence should directly contribute to the injury; if it approximately (that is, in the order of causation) so contributes, there can be no recovery. (N. Y.) 205

Whenever the facts are undisputed, and it appears that the party has been guilty of contributory negligence, it is the duty of the court to take the case from the jury. (Pa.) 914

Where the admitted facts clearly show contributory negligence, it is the duty of the court to direct a verdict. (Pa.) 641

If it appears by plaintiff's own evidence that his own negligence contributed to the injury, it is the duty of the court to nonsuit, and a writ of error will lie for a refusal to grant a nonsuit. (N. J.) 825

To justify a nonsuit on the ground of contributory negligence, it must appear that no construction of the evidence or inference from the facts would have warranted a contrary conclusion, and that a verdict the other way would have been set aside as against the evidence. (N. Y.) 800

A nonsuit should not be granted upon the ground of contributory negligence, unless the undisputed facts show the omission or commission of some act the law adjudges negligence. (N. Y.) 891

Nonsuits are rarely permissible in actions for negligence. (N. Y.) 519

Contributory; passengers, etc. It is the general American rule that there is no privity in negligence between a passenger and his carrier; the contributory negligence of the carrier is not to be imputed to the passenger. (Pa.) 510

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence. (Pa.) 510

Contributory negligence not imputable to passenger who alights from a train, on the instruction of the conductor, at an unsafe place. (Md.) 254

It is not negligence *per se* to stand on the step of the front platform of a street car, with the implied consent of the conductor and driver. (Pa.) 642

Where a traveler voluntarily puts his arm out of the window, it must be regarded as negligence *per se*. (Pa.) 900

Riding upon a railroad engine, even with the consent of the engineer, has been held negligence *per se*. (Pa.) 899

Travelers must stop, look, and listen before crossing the track, and failure to do so is negligence *per se*. (Pa.) 681, 641

If obstacles obstruct the view of the crossing, a traveler must use increased vigilance. (Pa.) 682

It is contributory negligence to attempt to

cross a railroad track immediately in front of an approaching engine. (Pa.) 641

Where a railroad has a right to a clear track, all persons not in the employ of the company going upon such track are trespassers, and there is no difference in the rule between children and adults. (Pa.) 682

Where a person crosses a railroad track by a common and well-known foot path, used by the public for many years without let or hindrance on the part of the employees of the railroad company, he cannot be regarded as a trespasser. (Pa.) 680

Infants; contributory. Negligence of parents. *Note.* 919

Infants, when negligence of parents imputed to. (Pa.) 920

Contributory negligence in children of tender years. (Pa.) 680

It is negligence in a parent to permit a child to trespass on a railroad track, or a child of tender years to run at large in a city, or to engage in a dangerous employment. (Pa.) 641

A child crossing a railroad track is responsible only for the exercise of the caution and discretion of which children of its age are supposed to be capable. (Pa.) 681

NEGOTIABLE INSTRUMENTS. See **BILLS AND NOTES.**

NEW TRIAL. See **CRIMINAL LAW.**

Where the charge of the court is erroneous in some part, but the result of the charge is correct, such error furnishes no ground for a new trial. (N. J.) 825

NEXT OF KIN. See **DESCENT AND DISTRIBUTION.**

NONRESIDENTS. See **EXECUTORS AND ADMINISTRATORS.**

NONSUIT. See **NEGLIGENCE.**

Nonsuits are rarely permissible in actions for negligence. (N. Y.) 519

Where the evidence is conflicting, or, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and as to which reasonable men might differ, it is for the jury to decide. (N. Y.) 519

The power to nonsuit results from the principle that the court is a judge of the law where there is no dispute about facts. (N. Y.) 581

A mere scintilla of evidence is not sufficient to send the case to the jury. (N. Y.) 581

It is error to submit a question to the jury when there is no fact for them to consider. (Pa.) 269

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted to the jury; if not it should be withdrawn. (Pa.) 659

In determining the correctness of a nonsuit, the following rules are to be observed: 1. Plaintiff is entitled to the most favorable inferences from the evidence, and all contested facts are to be deemed established in his favor. 2. Where, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, or as to which persons might differ, it is for the jury to decide. (N. Y.) 890

C. R., V. IV.

NOTES. See **BILLS AND NOTES.**

NOTICE. See **DEED; VENDOR AND PURCHASER.**

Whatever puts a party upon inquiry amounts in judgment of law to notice. (Pa.) 917

NUISANCE.

A man has no right to abate any more of the nuisance than is necessary to secure his rights. (N. Y.) 205

If one abating a nuisance do more injury to another than was necessary to effect the legitimate object, he is liable to an action. (N. Y.) 205

A legislative grant does not exempt corporations from liability for injury caused by noise in the erection of workshops near dwellings and places of business, disturbing the enjoyment thereof and injuring property by casting smoke, fumes, dust, etc., upon dwellings and grounds. (N. Y.) 236

Maintaining chimneys of a lower height than surrounding dwellings, necessarily causing smoke to enter windows, is sufficient ground on which to maintain an action. (N. Y.) 236

An injury is sufficient to sustain an action for nuisance for damages, if it produces that which is offensive to the senses, injurious to the health, or renders the enjoyment of life in the use of property uncomfortable. (N. Y.) 236

The mere existence of a steam railroad, together with the passing of trains thereon, is not *per se* a nuisance. (Pa.) 277

OBSTRUCTIONS. See **WAYS.**

OFFICE AND OFFICER. See **ATTORNEY-GENERAL; BRIBERY; MUNICIPAL CORPORATIONS; POLICE AND POLICE DEPARTMENTS; QUO WARRANTO; RECEIVER; SHERIFF; STATE AND STATE OFFICER.**

Eligibility to office belongs equally to all persons whomsoever, not excluded by the Constitution. (N. J.) 571

There can be no recovery if no services have been performed by the officer. (Pa.) 320

Right of officer to salary while physically disabled from performing duties. (Pa.) 321

Compensation paid to sheriff for board of prisoners is an emolument of his office. (Pa.) 87

Mandamus will not lie to compel act by public officer in regard to which he may exercise his judgment or discretion. (N. Y.) 184

Public officers necessarily possess a capacity to sue, commensurate with their public trusts and duties. (N. Y.) 235

Liability of municipal corporation for expenses incurred in suits by officers in official capacity. *Note.* 248

ORPHANS' COURT. See **COURTS.**

OYSTERS. See **FISH AND FISHERIES.**

PARENT AND CHILD. See **BASTARDY; GUARDIAN AND WARD; INFANTS; NEGLIGENCE.**

A voluntary conveyance by a father to a son is presumptively intended as an advancement. (N. Y.) 513

Right of after-born child to take against will; Act April 8, 1883; child legitimated after the making of the will. (Pa.) 470

It is negligence in a parent to permit a child to trespass on a railroad track, or a child of tender years to run at large in a city, or to engage in a dangerous employment. (Pa.) 641

PAROL EVIDENCE. See EVIDENCE.

PARTIES. See ACTION OR SUIT; MORTGAGE.

PARTITION.

Upon a sale in partition the character of the cotenants' interest as land is not changed. A mortgage of his share is discharged from the ground, but adheres as a lien to the cotenant's share, whatever new form it may actually assume. (Pa.) 768

Liens against shares of cotenants are by proceedings in partition, discharged from the corpus of the estate, and attached to the individual shares. (Pa.) 768

Where proceedings result in a suit, the parties, the court, and the sheriff are bound, in apportioning and distributing the fund, to regard the lien creditors of the cotenants. (Pa.) 765

In partition founded on legal or equitable title joint possession is not essential. (Pa.) 98

Equity will not interfere if complainant's title be denied, until he has vindicated it at law. (Pa.) 98

What adverse possession will defeat action. (Pa.) 98

In partition in equity, a tenant in common is entitled to improvements made by him which are reasonably necessary for the proper enjoyment of the land and not injurious to the estate of the other cotenant. (Pa.) 99

A husband who thus improves property in which his wife has an undivided interest is not a stranger or volunteer. *Id.*

PARTNERSHIP.

Representations, conduct, and circumstances calculated to induce the belief that parties are partners will render them liable to creditors doing business with them under the impression so created. (N. Y.) 870

Sufficiency of evidence of holding out as partners. (N. Y.) 870

Division of profits is evidence of partnership. (N. Y.) 870

Sufficiency of evidence of partnership. (N. Y.) 870

Where credit is given by third persons on the faith of an apparent partnership, the law will not permit them to become losers on account of a secret agreement or understanding of the apparent partners. (N. Y.) 870

The existence of a partnership is a question of fact triable by a jury. (N. Y.) 870

An action for damages for the breach of an express agreement entered into by one partner with another will lie, if the damages when recovered will belong to the plaintiff alone. (Pa.) 274

One partner cannot sue his copartners in an action at law, except in account rendered, for or about a partnership adventure, unless they

a. R., v. IV.

have settled their accounts and struck a balance, or the partnership was limited to a single transaction. (Pa.) 275

If a person agrees to become a partner with others and furnish a certain amount of capital, and makes default, they can sue him at law for damages. (Pa.) 275

Whether taking the separate note of one of the partners amounts to an extinguishment or satisfaction of the debt depends upon the intention of the parties. (Pa.) 260

PASSENGERS. See CARRIERS.

PATENT.

No warranty of validity of letters patent is implied in any license given thereunder, and proof of invalidity is, therefore, no defense to any suit for promised royalties. (Pa.) 45

PAUPERS. See POOR AND POOR LAWS.

PAYMENT. See JUDGMENT; LIMITATION OF ACTIONS.

There is no implication that the creditor agrees to give time for the payment of the original debt, arising out of the fact that he takes a note at a future day on account of it. (Pa.) 645

The receipt of the debtor's note does not discharge the debt unless it is so agreed. It is a mere concurrent security. (Pa.) 645

A note for a less sum than the debt will discharge the debt. (Pa.) 260

The acceptance, by the creditor, from the debtor, of bank notes, will be presumed to be a discharge and satisfaction of the debt, although the bank had failed at the time. (Pa.) 260

Payment by check, presumption of conditional payment. (Pa.) 260

Whether taking the separate note of one of the partners amounts to an extinguishment or satisfaction of the joint debt depends upon the intention of the parties. (Pa.) 260

Where the securities held by the creditor are surrendered at the time a new instrument is delivered and accepted, the inference will be strong, if not irresistible, that the debt is satisfied. (Pa.) 260

The presumption of payment from the lapse of time is not conclusive, but casts the burden of rebutting it upon the creditor. (Pa.) 458

Recognizance is subject to the legal presumption of payment after twenty years. (Pa.) 458

One attempting to defraud another in payment cannot ask repayment of part consideration from him. (Pa.) 87

Right to recover back money paid under mistake. (N. Y.) 181, 182

PENALTIES. See SUNDAY.

Penal statutes must not be so strictly construed as to defeat the obvious intention of the Legislature. (Pa.) 271

PERJURY.

Definition, Rev. Stat. § 5298. (D. C.) 151
Cannot be assigned upon answer in equity, unless bill calls for answer under oath. (D. C.) 151

PHOTOGRAPHS. See EVIDENCE.

PHRASES. See DEFINITIONS.**PLEADING.** See AFFIDAVIT OF DEFENSE;
CRIMINAL LAW; EQUITY; NEGLIGENCE;
REFLEVIN; SET-OFF AND COUNTER-
CLAIM.

If a pleader needlessly describes the tort and the means effecting it, with particularity, the proof must sustain the allegations. (Pa.) 718

The statement of claim at the conclusion of the narr. is equivalent to a bill of particulars, and nothing can be recovered thereunder that is not included in the narr. and bill. (Pa.) 645

When the want of capacity to sue appears on the face of the complaint, the objection must be taken by demurrer; Code Civ. Proc. § 488. (N. Y.) 286

When want of capacity to sue does not appear on the face of the complaint, the objection must be taken by answer. Code Civ. Proc. § 498. (N. Y.) 286

Variance. (Md.) 162

Failure of proof. (N. Y.) 190

PLEDGE AND COLLATERAL SECURITY.

Deposit of negotiable bonds with bank as collateral security; right of action. (Pa.) 106

It will not be presumed, for the purpose of relieving a pledgor from the Statute of Limitations, that there was an agreement between the parties that the pledgee should keep the stock until he should have repaid himself out of the dividends and proceeds. (N. Y.) 798

Whether there has been an actual purchase or not, equity will presume one after the lapse of twenty years; a presumption based not on fact, but in the face of evidence to the contrary. (N. Y.) 794

POLICE AND POLICE DEPARTMENTS.

Right of officer to salary while physically disabled from performing duties. (Pa.) 821

Implied power of municipality to remove; charge must be stated with substantial certainty; all facts must be alleged; jurisdiction must appear; no intendments are indulged in favor of jurisdiction or regularity of proceedings. (N. J.) 82, 88

Causes for removal, under statute May 2, 1885. (N. J.) 871

POLICE POWERS. See CONSTITUTIONAL LAW.**POLICY.** See INSURANCE.**POOR AND POOR LAWS.**

Continuous residence necessary to gain settlement, under Rev. 834. (N. J.) 424

A person cannot have two or more inchoate settlements at one and the same time, either of which, at his option, may be ripened into a perfect settlement. (N. J.) 425

POWER OF SALE. See DEVISE AND LEGACY.**POWERS.** See DEVISE AND LEGACY.**PRACTICE.** See ACTION OR SUIT; APPEAL; EQUITY; JUDGMENT; WAYS.

C. R., V. IV.

PRESUMPTION. See APPEAL; CRIMINAL LAW; EVIDENCE; FRAUD AND FRAUDULENT CONVEYANCE; LIMITATION OF ACTIONS.**PRINCIPAL AND AGENT.** See BAWDY AND DISORDERLY HOUSES.

Where some evidence of agency has been given; it is competent to give in evidence the acts and declaration of the alleged agent respecting the subject-matter of his authority. (Pa.) 286

Whenever an agent is estopped from disputing his principal's title to a fund held by him, then the agent cannot be compelled to pay it back to a third party. (N. J.) 819

Where contract was executed by agent for principal, and latter has ratified it by accepting its benefits, a seal may be rejected as surplusage, and recovery had against principal in assumpsit, as if it were a simple contract. (N. Y.) 161

Agent's mistake of fact is mistake of principal. (N. Y.) 162

A creditor is not bound to give notice of the withdrawal of authority from his agent, but the debtor must see that the agent has the securities at each payment. (N. Y.) 830

Lien of broker for services upon moneys belonging to his principal. (N. J.) 819

Commissions of a broker for sale of real estate are not proper subjects for a book charge. (Pa.) 269

Right to compensation for procuring sale; fraud. (N. Y.) 129, 130

PRINCIPAL AND SURETY.

Judgment against principal is only *prima facie* evidence against surety. (Md.) 155

Discharge by material alteration. (Pa.) 461

Release by alteration of contract. (Pa.) 633

PRISON. See JAIL AND JAILER.**PROBABLE CAUSE.** See MALICIOUS PROSECUTION.**PROBATE.** See WILL.**PROCESS.** See WRIT AND PROCESS.**PROMISSORY NOTES.** See BILLS AND NOTES.**PROSTITUTION, HOUSES OF.** See BAWDY AND DISORDERLY HOUSES.**PUBLIC OFFICER.** See OFFICE AND OFFICER.**PUBLIC POLICY.** See CONTRACT.**PUBLIC ROADS.** See WAYS.**PUBLIC WAREHOUSES.** See WAREHOUSES.**PUBLIC WORKS.** See MUNICIPAL CORPORATIONS.**QUIETING TITLE.** See CLOUD ON TITLE.**QUI TAM AND PENAL ACTIONS.** See PENALTIES.

QUO WARRANTO.

Lies where any new jurisdiction or public trust is executed without authority. (N. J.) 85
 Attorney-general has right to present information, without leave asked of any one. (N. J.) 85
 The name of a relator in an information is, so far as the court is concerned, "to be considered surplusage." (N. J.) 85
 An information for usurping a franchise need show no title in the people to the franchise; but it lies with defendant to show his warrant for exercising it. (N. J.) 85

RAILROAD COMPANIES. See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS.

Charter of Pennsylvania Railroad Company; how affected by new Constitution. (Pa.) 501

Locating road, etc. Power of railroad company to condemn land owned by the State for terminal facilities. (N. Y.) 515

Power of railroad company to condemn land dedicated to public use, as land under water dedicated to purposes of commerce. (N. Y.) 515

The tunneling in a street, by a railroad company, is not considered as a departure from the original public use, entitling the abutting property-owners to damages. (Pa.) 277

The mere existence of a steam railroad, together with the passing of trains thereon, is not *per se* a nuisance. (Pa.) 277

A general grant of power to take lands for railroad purposes does not include the power to take a street. (Pa.) 266

Right to occupy land will not imply the right to occupy streets. (Pa.) 278

Right of a railroad company to occupy streets will not extend to road leased by the company. (Pa.) 278

Right of adjacent landowner to enjoin unlawful occupation of street by railroad. (Pa.) 277, 278

When public or private rights are invaded, and an injunction is asked, no question of the amount of damages is raised, but merely one of the invasion of a right. When railroad companies exceed their statutory powers in dealing with other people's property, this principle may be invoked. (Pa.) 278

The appropriation of land by a railroad is completed upon the location of the road; after the assessment of damages, though the report has not been affirmed, the right of the landowner to damages is vested, and cannot be defeated by an abandonment of the original location. (Pa.) 298

The owner of property along which a railroad has been built at an elevation can use the spaces under the trestle or arches, provided such use does not interfere with the use of the road. (Pa.) 668

The owner of land does not lose his right thereto because it is occupied and used by a railroad, even though by the consent of the owner. (N. J.) 417

The words in a charter, "from a town or city," have been taken inclusively and to permit the company to enter the town or city. (N. Y.) 200

The words "to" or "at" have been construed to include a city or town. (N. Y.) 200

The location of buildings and structures of the company is within the reasonable discretion of its managers. (N. Y.) 226

Under the statutes of New York, railroad companies may properly acquire land for engine houses, shops, yards, turnouts, and side-tracks, as necessarily incident to the operation of the road. (N. Y.) 226

It is incident to the grant of a railroad that it may lay down as many sidings as are necessary to accommodate its business. (Pa.) 278

Where the duty to build or operate a railroad is not made imperative by the charter or laws of the State, *mandamus* will not lie. (N. Y.) 200

Mandamus will lie to compel a public corporation to perform its contracts and charter obligations, as the completion or operation of a railroad, the running of trains and maintenance of stations, the construction of bridges, the receipt and transportation of freight, the keeping of the records and registers, and generally the performance of any duty toward the public. (N. Y.) 201

Right of one railroad company to take land appropriated by another. (Pa.) 265

One railroad company cannot take land occupied by another company for any purpose connected with the operation of the road. (Pa.) 266

Lands or the right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings; and then only for crossing purposes, and not for exclusive occupancy. (Pa.) 265

A foreign railroad corporation has no power to condemn lands in the State of New York. (N. Y.) 516

A foreign corporation can only acquire and hold lands by comity. (N. Y.) 226

Power of domestic railroad company to condemn land for use, on contract with and for the benefit of a foreign corporation. (N. Y.) 516

At public crossings the rights of railroad companies are concurrent with those of the public. (Pa.) 681

A railroad company owes no duty to trespassers, either to give signals or use ordinary care, and it is only liable for gross or wanton injury. (Pa.) 682

The affairs of a railroad corporation must be managed by its board of directors. (N. Y.) 192

Insolvent railroad; lien and priority for wages of employees. (N. Y.) 365, 366

Lien of contractors and laborers for work done in the construction of a road. (Pa.) 457

Materialmen who suffer their property to go into and become a part of a railroad consent to its being covered by a mortgage, and acquire no lien to the prejudice thereof. (N. Y.) 365

Under a charter or franchise to make a road only, a lease cannot be made of a road already built. (Pa.) 500

A railroad mortgage executed at the inception of the undertaking, but to procure funds for the construction of the road, is intended to cover titles and rights as they are

procured, and as they are procured they become subject to the mortgage. (N. Y.) 108
 Issue of bonds; amount of indebtedness; ratification; corporate seal affixed to bonds was ratification. (Pa.) 112

Organization of new company by purchasers under foreclosure; Laws of 1857, chap. 444. (N. Y.) 191

Consolidation of competing lines of railroad; Constitution of 1874, art. 17. (Pa.) 499
 500, 501, 503, 504

The public policy of the Commonwealth is to encourage the consolidation of management and interests of railroad companies. (Pa.) 503

Effect of Constitution of 1874, prohibiting any railroad from consolidating with or acquiring a parallel or competing line, upon companies having charters before the adoption of of the Constitution. (Pa.) 499

RECEIVER.

Power to appoint a receiver has been classed under the head of the *quia timet* jurisdiction of chancery; the remedy is a provisional or auxiliary one, exercised as an adjunct to the principal relief sought for in the case. (N. Y.) 865

In the United States the power of the court of chancery to appoint a receiver has been exercised as an inherent authority, without legislative aid. (N. Y.) 865

In England the power to appoint receivers exists only by virtue of statute, the equity courts having declined to exercise it before authority to do so was expressly conferred. (N. Y.) 865

Debts for betterments, improvements; priority over rights of bondholders and mortgagees. (N. Y.) 870

Insolvent railroad; lien and priority for wages of employees. (N. Y.) 865, 866

Right of receiver to sue in foreign jurisdiction. (D. C.) 610

RECITALS. See DEED.

RECOGNIZANCE. See BAIL AND RECOGNIZANCE.

RECORD. See DEED; MORTGAGE.

An exemplification of a record is not evidence of a secondary quality, but stands upon an equality with the original. (Pa.) 468

REFERENCE. See ARBITRATION AND REFERENCE.

REFORMATION. See CONTRACT; DEED.

RELEASE AND DISCHARGE. See PRINCIPAL AND SURETY.

RELIGIOUS SOCIETIES.

The locking of the door of a pew, thereby preventing one who had right to use it, is equivalent to an eviction. (Pa.) 701

REMAINDER. See DEVISE AND LEGACY.

RENT. See LANDLORD AND TENANT.

REPEAL. See STATUTES.

O. R., V. IV.

REPLEVIN.

To entitle defendant to plead title in third person, he must connect himself therewith. (Pa.) 106

Evidence that another has a right superior to plaintiff will defeat action. (Pa.) 106

In an action on a replevin bond, with warrant to confess judgment, a *scire facias quare executio non* must be issued. (Pa.) 926

REPORT AND CASE MADE.

A case stated is like a special verdict and subject to the same rules. (Pa.) 261

RESCISSION. See CONTRACT; SALE.

RES GESTÆ. See EVIDENCE.

RES JUDICATA. See JUDGMENT.

RESTRAINT OF TRADE. See CONTRACT.

RIVERS. See WATERS AND WATERCOURSES.

ROADS. See WAYS.

RULE OF COURT. See TRIAL.

SALE. See INTOXICATING LIQUORS; TAXES; VENDOR AND PURCHASER.

There is no distinction between bills of sale, given as security, and chattel mortgages. (N. Y.) 186

Bill of sale not filed, and without immediate and continued change of possession, is void. (N. Y.) 189

Devisee of income of fund during life has no interest in the *corpus* subject to gift, sale, or attachment. (Pa.) 84

In a sale for cash, payment should be made to pass property. (Pa.) 86

Where no time is fixed, the law implies the terms are cash on delivery. (Pa.) 86

Reconveyance or return of property. (Pa.) 87

Effect of earnest money in changing title of property. (Pa.) 86

Trover for value of horses sold, by vendor refusing to receive his own note in payment. (Pa.) 87

Waiver of right to rescind for fraud. (N. Y.) 190

SCHOOLS AND SCHOOL DISTRICTS.

Proceedings for taking lands for school purposes, under Act of April 9, 1867. (Pa.) 298, 299

No classification of school districts has as yet been attempted, and until they are classified, any Act affecting them must affect all or none. (Pa.) 811

SEAL. See CANALS; CORPORATIONS.

SECONDARY EVIDENCE. See EVIDENCE.

SECOND JEOPARDY. See CRIMINAL LAW.

SELF-DEFENSE. See HOMICIDE.

SERVANT. See MASTER AND SERVANT.

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM.

A demand, to be set-off, must be a subsisting cause of action at the time of the commencement of the suit. (Pa.) 678

Set-off is inadmissible, unless it be between the same parties. (Pa.) 262

The party whose debt is not due has no equitable claim to have it set-off against a debt of his own already due in the hands of the party who is insolvent. (Pa.) 262

SEWERS. See DRAINS AND SEWERS.

SHERIFF. See WRIT AND PROCESS.

Authority, under Act of April 10, 1873 (P. L. 666), to increase or decrease compensation of sheriff for board of prisoners in county jail. (Pa.) 88

Compensation paid to sheriff for board of prisoners is an emolument of his office. (Pa.) 88

SHERIFF'S SALE. See EXECUTION.

SLANDER. See LIBEL AND SLANDER.

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW.

STATE AND STATE OFFICERS.
See ATTORNEY-GENERAL; QUO WARRANTO.

State can no more be sued in equity than at law. (N. Y.) 184

Seal of canal commissioners is not seal of State. (N. Y.) 181

No implied contract on part of State to pay for work voluntarily done. (N. Y.) 182

Mandamus to compel State comptroller to cancel sale. (N. Y.) 184

Certiorari is the proper remedy to review comptroller's decision for refusing to cancel tax sale. (N. Y.) 185

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES. See CONSTITUTIONAL LAW; FRAUDS, STATUTE OF; INTOXICATING LIQUORS; LIMITATION OF ACTIONS; SUNDAY; TAXES.

Construction. Intention will control the letter. (Pa.) 912

When acts can be construed by a fair and liberal construction, it must be done. (N. Y.) 286

Where one statute is repealed, and a more comprehensive one enacted relating to the same subject, in construing the latter, resort may be had to the former. (N. Y.) 285

When a statute is made in addition to another on the same subject, without repealing it, the provisions of both must be construed together. (N. Y.) 235

A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. (N. Y.) 235

Whenever a power is given by statute, everything to make it effectual, or requisite to attain the end in view, is implied. (N. Y.) 235

Remedial statutes are to be liberally construed. (Pa.) 912

Effect of New York City Consolidation Act of 1883 upon Penal Code. (N. Y.) 165-168

Repeal by implication. (N. Y.) 167

Repeals by implication are not favored. (N. Y.) 286

A statute will not be deemed repealed by implication, unless there is a clear and strong inconsistency between the two enactments. (Pa.) 804

A construction which repeals a part of the statute and seriously impairs the harmony of the system should be very clear, before it is adopted by the court. (N. Y.) 285

Posterior general law does not repeal prior local or special Act, unless such intent appear. (N. Y.) 166

Later affirmative statute shall not take away former Act, if the former is particular and the latter general. (N. Y.) 166

A local statute providing a remedy in a particular class of cases is not repealed by a subsequent statute, general in its application, although the terms of the subsequent statute are broad enough to include the cases embraced in the special law, unless the intention to repeal is manifest. (N. Y.) 286

General legislation on a particular subject gives way to special. (N. Y.) 166

STOCKS. See CORPORATIONS.

STREAMS. See WATER AND WATER-COURSES.

STREET RAILWAYS.

Application of art. 17 of the Constitution, prohibiting acquisition or control of property and competing roads, to passenger railways. (Pa.) 501

It is not contributory negligence *per se* for a passenger to ride on the front platform of a crowded street car. (Pa.) 901

It is not negligence *per se* to stand on the step of the front platform of a street car, with the implied assent of the conductor and driver. (Pa.) 643

STREETS. See WAYS.

SUIT. See ACTION OR SUIT.

SUNDAY.

Laws requiring the observance of the Sabbath are constitutional. (N. Y.) 544

One penalty covers the combined infractions of a whole day. (Pa.) 271

SUPREME COURTS. See COURTS.

SURETY. See PRINCIPAL AND SURETY

TAXES.

Power of taxation. (N. J.) 189

The sovereign power of the State in respect to taxation may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Federal Constitution. (N. J.) 189

Taxation is not a judicial but a legislative function, and courts cannot interfere therewith or revise it, except when clearly warranted by the Constitution. (Pa.) 488

Uniformity. (N. J.) 140, 427; (Pa.) 488

All taxes shall be uniform upon the same class of subjects. (Pa.) 806

Taxes must be equal and uniform. (N. J.) 247

A tax which is not uniform is in conflict with the Fourteenth Amendment of the Federal Constitution, which requires that no statute shall deny to any person within its jurisdiction the equal protection of the laws. (N. J.) 427

Independently of constitutional restriction, it has been held to be a fundamental condition of legal taxation that there shall be equality and uniformity in the distribution of public burdens. (N. J.) 428

A tax is uniform when it is equal upon all persons belonging to a prescribed class upon which it is imposed. (N. J.) 140

The test, whether a tax in any given case is a franchise, as distinguished from a property tax, is that a tax according to a valuation is a tax on property; whereas a tax imposed according to nominal value, or measured by some standard of mere calculation, may be a franchise tax. (N. J.) 141

Franchises. (N. J.) 428

Property taxable; exemptions. Power to impose taxes upon corporations. (N. J.) 189-141

A tax may be imposed upon the business of a corporation, graduated by a percentage of the business done. (N. J.) 189

Classification of railroad and canal property. (N. J.) 427

State right to tax business or profession; Legislature has power to impose such burden by way of tax or license fee. (N. J.) 189

Assessment and sale of unseated lands. (Pa.) 753

A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent use; and that occupation may be said to commence with the moment of entry for the purpose of clearing the land. (Pa.) 753

Exemption. *Notes.* 800

Exemptions are strictly construed. (Pa.) 488

Exemption of public property. (Pa.) 806

Act of May 14, 1874, exempting from taxation public property used for public purposes, and providing that property producing revenue shall be taxable; construction as applied to waterworks of the city producing revenue. (Pa.) 808

Assessors of taxes have much larger powers than those assessing for improvements; they may be liable for misconduct, but their conduct cannot prevent recovery of taxes. (N. Y.) 115

Assessment. Harmless defects. (N. J.) 141

Assessments for local improvements must be equal and uniform. (N. J.) 247

Omission of part of property liable makes tax invalid. (N. Y.) 115

Assessors have no discretion to omit taxable property. (N. Y.) 115

Act of April 30, 1885, making valid all ordinances levying taxes in cities of the third, fourth, and fifth classes, in amount not exceeding twenty mills in any one year, considered. (Pa.) 488

C. B., V. IV.

Rate of taxation of rural property; Act of February 25, 1870. (Pa.) 486

Failure of assessor to make affidavit to roll. (N. Y.) 113

No tax shall be set aside for any irregularity or defect in form or illegality in assessing, if the person against whom or the property upon which tax is assessed is, in fact, liable to taxation. (N. J.) 141

Sale discharges lien of other taxes. (D. C.) 621

Validity of sales, by the city of Elizabeth, for nonpayment of taxes, for a term of nine hundred years. (N. J.) 823

Duty of comptroller, on discovering invalidity of sale, to cancel same. (N. Y.) 184

Mandamus to compel State comptroller to cancel sale. (N. Y.) 184

Certiorari is the proper remedy to review comptroller's decision for refusing to cancel tax sale. (N. Y.) 185

An action cannot be maintained to recover back money paid for an illegal assessment, not void upon its face, so long as the assessment remains unvacated and unreversed. (N. Y.) 783

An action at law may be maintained to recover back money paid for an assessment or tax which is void upon its face, after having first set aside the tax or assessment. (N. Y.) 783

TENANT. See LANDLORD AND TENANT.

TENANTS IN COMMON. See JOINT TENANTS AND TENANTS IN COMMON.

TENDER.

Tender of money paid on account must be made before replevin brought on failure to pay full purchase price. (Pa.) 93

TERRE-TENANTS. See MORTGAGE.

TOWNS. See MUNICIPAL CORPORATIONS.

TOWNSHIPS. See MUNICIPAL CORPORATIONS.

TRESPASS.

Whenever a man does an act which in law and in fact is a wrongful act, an action on the case will lie for damages. (Pa.) 494

The owner of wild and uncultivated land is deemed in possession so as to maintain trespass, until an adverse possession is clearly made out. (Pa.) 490, 917

Private convenience is no excuse for infringing upon the rights of another under the plea of necessity. (N. Y.) 226

Liability of landlord, making excavation on premises, for injury resulting to members of the family and visitors of the tenant. (Pa.) 506

TRIAL. See DEPOSITION; DISCONTINUANCE; EVIDENCE; EXCEPTIONS; JURY; NEW TRIAL; NONSUIT; PLEADING; REPORT AND CASE MADE; WITNESS.

Construction of rule of court by the trial court should be accepted by the higher court as conclusive. (Pa.) 897

Where a party suppresses evidence in his power, the presumption is that, if produced, it would make against him. (Pa.) 897

Plaintiff is bound to offer all the evidence pertinent to maintain the issue on his part. (Md.) 349

Notice to produce original receipt. (Md.) 163

It is error to blend questions of law and fact and submit the whole to the jury. (Pa.) 269

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted to the jury; if not it should be withdrawn. (Pa.) 659

To permit a jury to pass upon a fact admitted or unquestioned is to permit it to find a fact not admitted, and therefore to find a condition which is denied by both parties. (Pa.) 718

Where the charge of the court is erroneous in some particular, but the result of the charge is correct, such error furnishes no ground for a new trial. (N. J.) 825

When disputed facts are assumed in the point propounded to the court, the refusal to charge as requested is not error. (Pa.) 269

TROVER AND CONVERSION.

Trover for value of horses sold, by vendor refusing to receive his own note in payment. (Pa.) 87

Sufficiency of possession to maintain action. (N. Y.) 187, 188

TRUSTS. See LIMITATION OF ACTIONS.

Trustees can only be allowed for necessary expenditures. (Pa.) 101

In equity, executor is trustee of all assets. (Md.) 160

The trust being an active one, the legal estate for life is in the trustee, to perform the duties imposed by donor, and cannot coalesce with any subsequent estate. (Pa.) 34

A contract in violation of a fiduciary relation is not void, but voidable only at the election of the fiduciary. (N. H.) 191

A *feme covert* may become a trustee. (Pa.) 323

A married woman acting as trustee will be liable for waste committed during coverture. (Pa.) 323

A trustee is liable only for his own acts and defaults, not for those of his cotrustee, nor for funds collected by his cotrustee. (N. Y.) 526

A voluntary grantee from a trustee will hold subject to the trust. (Pa.) 323

Cestui que trust has option to take or refuse benefit or loss of unauthorized act of trustee. (Pa.) 101

ULTRA VIRES. See CORPORATIONS.

USAGE. See CUSTOM AND USAGE.

VACATION. See WAYS.

VARIANCE. See PLEADING.

VENDOR AND PURCHASER. See DEED; EASEMENT; FRAUD AND FRAUDULENT CONVEYANCE; SALE.

Parol contract to convey land must be clearly proven. (Pa.) 490

Parol declarations made by the parties, after

the sale of land by written agreement, are admissible in corroboration of the agreement. (Pa.) 463

The vendor has no right to take possession as against his vendee, and cut timber, and set off its value against the unpaid purchase price. (Pa.) 917

Covenant to purchase and pay over purchase money upon delivery of deed; upon tender, vendor may recover purchase money. (N. J.) 78

Vendee failing to pay purchase price cannot maintain trespass against vendor. (Pa.) 917

After a contract for the sale of land, equity considers the purchaser as a trustee to the vendor for the purchase money. The vendee is seized of the estate, and must bear any loss and will be entitled to any benefits affecting the land. (Pa.) 917

A purchaser having paid part of the purchase money, and refusing to comply, cannot recover back what he has advanced, the vendor being willing to do his part. (Pa.) 890

Vendor's lien for purchase money. (N. J.) 899

Vendor's lien for purchase money as against subsequent transferee or mortgagee of the vendee. (N. J.) 899

To constitute a lien, as against a purchaser under the original vendee, there must be notice of the indebtedness, and that the indebtedness arose upon the purchase money. (N. J.) 899

The burden of proof is upon the purchaser to establish that, in a particular case, lien for unpaid purchase money has been intentionally displaced or waived by the consent of the parties. (N. J.) 899

The taking of the purchaser's note or bond for unpaid purchase money, and a recovery of a judgment thereon, will not impair the vendor's lien. (N. J.) 899

The Statute of Limitations does not affect the lien of the vendor for purchase money, because the vendee or the purchaser from him, with notice, stands in the relation of a trustee or mortgagor for the unpaid purchase money. (N. J.) 899

Bona fide purchaser. Notice. (Md.) 156

Equity will not relieve against *bona fide* purchaser for valuable consideration. (Md.) 156

A purchaser for value is protected against prior equities of which he has no notice. (Pa.) 740

Extinguishment of valid debt against vendor constitutes vendee purchaser for value. (N. Y.) 185

Notice of improperly registered mortgage, given to secure purchase money, is sufficient notice. (N. J.) 899

Notice is a question of fact for the jury. (Pa.) 463

Possession or occupancy, to be equivalent to constructive notice of title, must be clear, open, and notorious, and unequivocal at the time of the purchase. (Pa.) 463

Whatever is sufficient to put the purchaser upon inquiry which would have necessarily led him to the discovery of an adverse claim to the land, affects him with notice thereof. (Pa.) 463

A subsequent purchaser for valuable consideration, with notice, actual or constructive,

of prior rights, takes subject to those rights. (Pa.) 463

Where one has sold the same land to different persons, his declarations before the second sale are evidence against his second vendee. (Pa.) 468

VESTED REMAINDER. See DEVISE AND LEGACY.

VILLAGES. See MUNICIPAL CORPORATIONS.

WAGER. See GAMING; INSURANCE.

WAGES. See MASTER AND SERVANT; RAILROAD COMPANIES.

WARD. See GUARDIAN AND WARD.

WAREHOUSES.

It is within the power of the Legislature to regulate public warehouses. (N. Y.) 544

WARRANTY. See INSURANCE.

WATER COMPANIES.

Private property may be taken for the purpose of supplying the inhabitants with pure water. (Pa.) 802

The Legislature may fix the price of water and gas, and grant exclusive privileges to supply the same to villages and cities. (N. Y.) 544

Act of May 14, 1874, exempting from taxation public property used for public purposes, and providing that property producing revenue shall be taxable; construction as applied to waterworks of the city producing revenue. (Pa.) 808

WATER AND WATERCOURSES.
See MILLS AND DAMS.

The State owns the bed of navigable streams to high-water mark, and may grant them or any interest in them to an individual. (N. Y.) 221

An action may be maintained for the diversion of a watercourse, although no actual damage is occasioned, upon the ground of the injury done to the riparian proprietors, and the acquisition of an adverse right by an uninterrupted enjoyment for twenty years. (N. Y.) 224

Liability for water escaping from mine. (Pa.) 477, 478

WAYS. See MUNICIPAL CORPORATIONS.

Requisites of dedication. (N. Y.) 209

The removal of a fence and substituting a row of trees will not warrant the inference of an intention to dedicate the land as a street. (N. Y.) 209

Right to acquire title by adverse possession. (N. Y.) 238

Laying out. Without an order of the court of sessions, supervisors have no authority to open a new road, or to correct errors in the opening of an old one. (Pa.) 928

Power of supervisor to contract for use of canal towpath as public road. (Pa.) 928

Presumption is in favor of legality of proceeding. (Pa.) 40

Effect of entertaining viewers by parties. (Pa.) 89, 40

C. R., V. IV.

The action of a jury of view is merely advisory, subject to approval or disapproval of court. (Pa.) 40

Viewers are not required to report elevation of road. (Pa.) 40

Payment of costs, on part of petitioners for review, depends upon their success. (Pa.) 89

Form of assessments and reassessments after partial vacation, under Laws 1875, p. 896, § 5. (N. J.) 426

Defects. An excavation in a road or street, made for a lawful purpose, must be fenced and lighted. (Pa.) 511

Obstruction; public; private; right of abutting landowner. *Notes.* 253

Proceedings to remove obstructions are statutory; no jurisdiction in equity. (N. Y.) 209

Right of adjacent landowner to enjoin unlawful occupation of street by railroad. (Pa.) 277, 278

The right of the railroad company to occupy lands will not imply the right to occupy streets. (Pa.) 278

WIDOW. See DOWER.

WIFE. See HUSBAND AND WIFE.

WILL. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS.

A substantial observance of the statute relating to execution of wills will be regarded as sufficient. (N. Y.) 883

It is not necessary that witnesses should subscribe in the presence of each other; it is enough that each subscribe in the presence of the testator. (N. Y.) 883

A codicil referring to a will operates as a republication, and the two are to be regarded as one instrument, speaking from the date of the codicil. (N. Y.) 881

Capacity of proponent as a witness in proceedings to establish a will. (N. Y.) 769

Due execution may be established by the testimony of one or either of the witnesses or against their testimony. (N. Y.) 883

Burden on proponent to establish due execution of will. (N. Y.) 769

Lapse of time is not a bar to the filing of a caveat to test the validity of a will. (D. C.) 606

Unsuccessful contestants of will; liability to costs. (N. Y.) 769

A probate of a will is a proceeding *in rem*, and is notice to all the world. (D. C.) 607

Power of register to admit wills to probate. (D. C.) 606

Decrees of probate as to personality are final and can be reviewed only on appeal. (D. C.) 607

Notice of probate. (D. C.) 606

Proof of publication. (N. Y.) 881, 883

Right of after-born child to take against will; Act April 8, 1883; child legitimated after making of the will. (Pa.) 470

WITNESS. See EVIDENCE; HUSBAND AND WIFE; PERJURY.

The competency of a witness disqualified by interest may always be restored by a release. (N. Y.) 769

The interest of a witness must be affirmatively shown. (Pa.) 463

Persons collaterally interested may transfer and release such interest and become competent witnesses. (Pa.) 922

Transactions relating to decedents. (Md.) 162; (N. Y.) 769

Actions against decedents' estates; a witness is incompetent if the effect of his testimony may be to preserve a fund for the payment of the debt due to himself. (Pa.) 928

Capacity of proponent as a witness in proceedings to establish a will. (N. Y.) 769

Competency of husband and wife. (Md.) 162

A wife is a competent witness to prove a marriage contract between herself and deceased husband in a contest where the legality of the marriage is in question. (Pa.) 679

C. R., V. IV.

When objection to the competency of evidence arises upon the examination of a witness, the objector has the right to interpose with a cross examination upon the facts material to the question of competency. (N. Y.) 790

Corroboration. (N. Y.) 167

WORDS AND PHRASES. See DEFINITIONS.

WRIT AND PROCESS.

A statute may authorize service of process out of the county in which the action is pending. (Pa.) 284

An erroneous process is good until set aside, and a protection for all acts done under it. (N. Y.) 217

Void process protects no one. (N. Y.) 217

Conclusiveness of sheriff's return. (Pa.) 907

Ex. J. M.

